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IN THE

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[1] Died November 1, 1901.
[2] Appointed to succeed John Paul, November 12, 1901.
[3] Died October 1, 1901.
[4] Appointed to succeed John Bruce, October 7, 1901.

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CASES

ARGUED AND DETERMINED

IN THE

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

AMSDEN v. UNITED STATES.

(District Court, D. Vermont. October 7, 1901.)

COURTS—JURISDICTION OF SUITS AGAINST UNITED STATES—EFFECT OF ACT WITHDRAWING JURISDICTION ON PENDING SUITS.

Act June 27, 1898 (30 Stat. 495), taking away the jurisdiction conferred upon the circuit and district courts of suits against the United States by Act March 3, 1887 (24 Stat. 505) § 2, so far as relates to suits brought by officers to recover fees or salaries, contains no saving clause, and applies to suits pending at the time of its passage.

At Law. On motion to dismiss.

Frank Plumley, for plaintiff.
James L. Martin, U. S. Atty.

WHEELER, District Judge. This suit was brought to recover fees for official services, jurisdiction of which was taken away by the act of June 27, 1898, without saving pending cases. 30 Stat. 495. It must therefore be dismissed for want of jurisdiction.[1]

Dismissed for want of jurisdiction.

INDEPENDENT SCHOOL DIST. OF SIOUX CITY, IOWA, v. REW.

(Circuit Court of Appeals, Eighth Circuit. September 23, 1901.)

No. 1,525.

1. JURISDICTION—JOINDER OF JURISDICTIONAL AND NONJURISDICTIONAL CAUSES—FEDERAL COURTS.

A national court is not deprived of jurisdiction of causes of action of which it is authorized to take cognizance by the fact that the plaintiff joins with them in the same action and petition other causes of which it can take no jurisdiction.

2. SAME.

A national court may have jurisdiction of causes of action upon coupons made by a municipal corporation and payable to bearer, although

[1] Jurisdiction as to pending cases restored. 31 Stat. 33.

the original holders could not have maintained actions upon them; and the fact that causes of action upon bonds payable to the order of an individual, of which the court cannot take jurisdiction, are joined with them in the same petition or action, does not deprive the court of jurisdiction.

3. ESTOPPEL — BASIS OF NOT CONFINED TO CONTENTS OF WRITING SUED ON.
An estoppel is as conclusive and fatal when founded on statements or representations without, as when it is founded upon those within, a negotiable instrument which is the subject of the action. A corporation may be estopped from defeating an action upon coupons by its recitals in the bonds.

4. MUNICIPAL BONDS—ESTOPPEL BY RECITALS.
If the laws are such that there might under any state of facts or circumstances be lawful power in a municipality or quasi municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances existed, unless the constitution or the act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances.

5. SAME—WHEN CERTIFICATE OF OFFICERS EFFECTS.
When a municipal body has lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to, and imposes the duty upon, its officers to ascertain, determine, and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity to defeat them.

6. SAME—FUNDING BONDS—RECITAL ESTOPS FROM DENYING VALIDITY OF DEBT FUNDED.
A municipal corporation is estopped from defeating an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the judgments, bonds, warrants, or floating debt of the corporation on the ground that the apparent debt they were issued to satisfy was invalid or fictitious.

7. SAME—RECITALS ESTOP FROM DENYING PROPER APPLICATION OF PROCEEDS.
A municipal corporation is estopped from defeating an action upon its negotiable securities by an innocent purchaser on the ground that, while they appear on their face to have been issued for a lawful purpose, their proceeds were diverted by its officers to an unlawful purpose.

8. FUNDING BONDS CREATE NO DEBT.
Funding bonds neither create nor increase the indebtedness of a municipality, but merely change its form.

9. CERTIFICATE OF ISSUE OF FUNDING BONDS IN PURSUANCE OF LEGISLATIVE AUTHORITY—EFFECT.
The certificate upon the face of municipal bonds that they have been issued in pursuance of legislative authority for the purpose of funding the indebtedness of the municipality is a declaration that they have been issued for the purpose of funding a valid debt in the method prescribed by the law, and that they neither create nor increase any indebtedness of the municipality; and, as against a bona fide purchaser, they estop the municipality from denying this declaration.

10. EXCESSIVE INDEBTEDNESS IMMATERIAL TO PURCHASER OF FUNDING BONDS.
When an innocent purchaser buys of others than the municipality and its agents its negotiable bonds, which recite that they were issued to fund the debt of the municipality, the question of excessive indebtedness does not arise, and the purchaser is not required to consider or inquire concerning it.

11. QUESTIONS OF GENERAL AND COMMERCIAL LAW—DECISIONS OF STATE COURTS NOT CONTROLLING.
The decisions of state courts upon questions of commercial law are not controlling in the federal courts. It is a duty of those courts, which they may not renounce or disregard, to consider and decide for them-

selves questions of general and commercial law presented to them in cases within their jurisdiction.

(Syllabus by the Court.)

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

The defendant in error, Robert Rew, brought an action against the independent school district of Sioux City, Iowa, the plaintiff in error, upon 10 school district bonds, of $1,000 each, and the coupons thereto attached. The bonds were payable to Ogilvie C. Tredway or order, but the coupons were payable to bearer. The court below held that it had no jurisdiction of the causes of action upon the bonds under the act of congress of August 13, 1888 (25 Stat. 434), because the court would not have had jurisdiction of those causes of action if no assignment or transfer of the bonds had been made, for the reason that both the parties to the action would have been citizens of the same state. But it sustained its jurisdiction of the causes of action based upon the coupons because they were issued by a corporation and payable to bearer, and thus were excepted from the prohibition of jurisdiction contained in the statute. The result was a judgment on the coupons for $2,600.28, interest thereon, and costs. The court tried the case without a jury, and made a special finding of facts. It found that the bonds and coupons were issued by the district township of Sioux City, Iowa, a municipal corporation created under the laws of the state of Iowa; that the plaintiff in error succeeded in the year 1890 to the territorial jurisdiction, the assets, and the liabilities of that township; that the bonds and coupons were issued on November 1, 1880, under chapter 51 of the Laws of Iowa of 1880, which provided that any district township against which unsatisfied judgments had been rendered prior to the passage of that act might issue negotiable bonds for the purpose of paying off such judgment indebtedness, upon a resolution of the board of directors of the district township; that these bonds should be in the name of the district township, should be signed by the president of the township, and countersigned by the secretary; that they should be in substantially the same form as was by law prescribed for county bonds, and the form prescribed for county bonds contained a certificate that they were issued by the board of supervisors of the county pursuant to the provisions of the law authorizing their issue, and in conformity to a resolution of the board; that these bonds and coupons were issued pursuant to a resolution of the board of directors of the district township of Sioux City passed on October 27, 1880, which recited that judgments had been rendered against the township prior to March 16, 1880, which were embraced within the provisions of chapter 51 of the Laws of the 18th General Assembly of the State of Iowa, and which resolved "that all judgments rendered against the district of Sioux City prior to March 16, 1880, be bonded or paid off by the issue of negotiable bonds of the district township of Sioux City as provided in said chapter fifty-one aforesaid," that each bond contained this recital: "This bond is issued by the board of directors of said district township under the provisions of chapter fifty-one of the Acts of the Eighteenth General Assembly of the State of Iowa, and in conformity with a resolution of said board dated the thirtieth day of October, 1880;" that after the issue of the bonds and coupons, and before their maturity, they were bought by bona fide purchasers, without notice of any defect or invalidity therein, and the defendant in error subsequently took the title and rights of these purchasers, but that at the time they were issued the indebtedness of the township exceeded its constitutional limitation, and the unsatisfied judgments against the township amounted to only $983.65, while bonds to the amount of $10,000 were issued. The plaintiff in error attacks the judgment against it on the grounds that the court below had no jurisdiction of the causes of action upon the coupons, and that they were void because the constitutional limitation of the indebtedness of the township had been exceeded before they were issued.

David Mould (C. R. Marks, on the brief), for plaintiff in error.

H. J. Taylor (E. A. Burgess, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

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

The act of congress of August 13, 1888 (25 Stat. 434), contains this provision:

"Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

Under this statute an action cannot be maintained in the circuit court upon an assigned instrument made by a corporation, which is not payable to bearer, unless such an action could have been maintained by the assignor. If, however, the assigned instrument is payable to the bearer, the assignee may recover in the federal court, whether his assignor could have done so or not. Lyon Co. v. Keene Five Cent Sav. Bank, 100 Fed. 337, 338, 40 C. C. A. 391, 392; Newgass v. City of New Orleans (C. C.) 33 Fed. 196; Rollins v. Chaffee Co. (C. C.) 34 Fed. 91; Wilson v. Knox Co. (C. C.) 43 Fed. 481; Cloud v. City of Sumas (C. C.) 52 Fed. 177; Benjamin v. City of New Orleans (C. C.) 71 Fed. 758. In the case now in hand the bonds were payable to the order of a citizen of the state of the defendant, and, because he could not have maintained an action in the federal court, no subsequent holder could do so. But the coupons, on the other hand, were payable to bearer, and were made by a municipal corporation, so that they fell within the express terms of the exception to the prohibition of the statute; and any holder of them who was a citizen of a different state from that of the plaintiff in error could lawfully maintain his action upon them in the national courts.

In this state of the case, counsel for the plaintiff in error contend that the defendant in error deprived the court below of its jurisdiction because he pleaded the cause of action on the coupons in the same counts with those upon the bonds. His petition consisted of 10 counts. In each of these counts he pleaded a bond, the recitals therein, and all the unpaid coupons originally attached to it, and alleged that the bond and the coupons had been sold and transferred together to the same parties at the same times and under the same circumstances. It is difficult to conceive how this pleading could have deprived the circuit court of jurisdiction over the causes of action upon the coupons. Each coupon was a separable promise, distinct from the promises to pay the bonds and the promises to pay the other coupons, and it gave rise to a separate cause of action. Nor was this cause of action accessory to the demand on the bond to which the coupon was attached. It was not only a separate cause of action, but a principal and primary one. City of Aurora v. West, 7 Wall. 82, 19 L. Ed. 42; Amy v. City of Dubuque, 98 U. S. 470, 473, 25 L. Ed. 228; Nesbit v. Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; Edwards v. Bates Co., 163 U. S. 269, 273, 16 Sup. Ct. 967, 41 L. Ed. 155. The amount claimed upon the

causes of action upon the coupons was sufficient to give the court jurisdiction, regardless of the claims upon the bonds. The defendant in error therefore presented to the court below, by his causes of action upon his coupons alone, controversies between citizens of different states which involved more than the jurisdictional amount. The circuit court could not lawfully disregard these causes of action of which it had plenary jurisdiction because the defendant in error pleaded other causes of which it could not lawfully take cognizance. A federal court is not deprived of jurisdiction of causes of action of which it is authorized and required to take cognizance by the fact that the plaintiff has joined with them in the same action and petition other causes of which it has no jurisdiction. The objection to the jurisdiction of the court was properly overruled.

The chief complaint concerning the action of the court below, however, is that it held that the independent school district was estopped by the recitals in the bonds and in the resolution of the board of directors of the district township from defeating the coupons in the hands of an innocent purchaser either on the ground that neither the bonds nor their proceeds were used to pay judgments, or on the ground that the debt of the township exceeded the constitutional limitation when the bonds were issued. Many objections to this ruling have been presented. One of them is that the recitals in the bonds are not available to the plaintiff in an action on the coupons, and that the municipality can be estopped by them only in an action on the instruments which contain the recitals; that is to say, on the bonds themselves. But it is not indispensable to the effectiveness of an estoppel that the acts, words, or deeds which work it shall be contained in a negotiable instrument or in any written contract which is the basis of the action. They are as fatal when found in instruments not negotiable, in writings which are not the basis of the action, when they are mere spoken words, and when they are silent and deceitful acts, as they are when they are contained in a bond or note which is the subject of the action. In Southern Minnesota Ry. Extension Co. v. St. Paul & S. C. R. Co., 55 Fed. 690, 696, 5 C. C. A. 249, 255, 12 U. S. App. 320, 331, and in Board v. Platt, 79 Fed. 567, 573, 25 C. C. A. 87, 93, 49 U. S. App. 216, 224, judgments which were not the bases of the actions were held to constitute estoppels. In Union Pac. R. Co. v. U. S., 67 Fed. 975, 15 C. C. A. 123, 32 U. S. App. 311; Naddo v. Bardon, 51 Fed. 493, 2 C. C. A. 335, 4 U. S. App. 642; Commission Co. v. Patillo, 90 Fed. 628, 631, 33 C. C. A. 194, 197, 61 U. S. App. 94, 100; and in the Omaha Bridge Cases, 51 Fed. 309, 327, 2 C. C. A. 174, 241, 10 U. S. App. 98, 188,—silence and acquiescence wrought fatal estoppels. In Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 294, 22 C. C. A. 171, 194, 40 U. S. App. 257, 296, 34 L. R. A. 518, the acts of the city dehors the contract upon which the action was founded worked a fatal estoppel against it. And in City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 30 C. C. A. 38, 57 U. S. App. 593, 49 L. R. A. 534; Hughes Co. v. Livingston, 104 Fed. 306, 43 C. C. A. 541; Grattan Tp. v. Chilton, 97 Fed. 145, 38 C. C. A. 84; Board v. Sutliff, 97 Fed. 270, 38 C. C. A. 167; and City of South St. Paul v. Lamprecht Bros.

Co., 88 Fed. 449, 31 C. C. A. 585, 60 U. S. App. 78,—the recitals in municipal bonds were held to conclusively estop the defendants in suits upon the coupons from maintaining defenses inconsistent with the statements contained in the recitals. The principle of estoppel is broad and universal. It is that one who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped from interposing such denial. It is as fatal when the deceitful acts or silence are without, as when they are within, the contract counted upon. The recitals in the bonds and in the resolution of the board were as available to the defendant in error to raise an estoppel against the district in an action upon the coupons as they would have been in an action upon the bonds.

It is said that the recitals in the bonds are ineffectual to create an estoppel because, while they declare that they were issued under the provisions of chapter 51, they show on their face that they were not so issued, because those provisions require the bonds to be payable to the holders of the unsatisfied judgments at the office of the treasurer of the county issuing them, while these bonds are payable to one who held no judgments at Sioux City, Iowa,—a city without the limits of the district township,—and the coupons are payable at the office of Weare & Allison, in Sioux City, Iowa. The objection is too technical and hypercritical for serious consideration. The statute does not require the bonds to be payable to the judgment creditors, and there is no evidence that the plaintiff in error has been deprived of an opportunity to pay either the bonds or the coupons by the fact that the place of their payment was the principal city in its county, instead of at the office of its treasurer. This immaterial variance from the form prescribed by the statute neither destroys nor weakens the plain declaration in the bonds that they were issued under the provisions of chapter 51, nor the conclusive estoppel which that recital produces.

Finally the old objections that neither the district township nor the officers had any power to issue the bonds or to make the recitals, that the recitals do not estop the township from defeating the coupons on the grounds that there were no judgments, and that the proceeds of the bonds were not applied to the payment of the judgments, which have been so many times urged upon and discussed by this court, are again rehearsed. To discuss them would be but to repeat former opinions of this court which have been again and again affirmed, and it would seem to be sufficient here to briefly state the propositions long since established by the decisions of the supreme court and of this court which render these objections of counsel for the plaintiff in error untenable. The affairs of the district township were intrusted to its board of directors to manage, direct, and control. Code Iowa 1897, § 2745. It was the duty of one of the members of this board (its president) to appear in behalf of the corporation in all actions brought against it, and to sign all warrants, orders,

drafts, and contracts made by it (section 2759), so that the financial status of the corporation and the number and amount of the judgments against it were necessarily within the knowledge of the members of this board. Chapter 51 of the Acts of the 18th General Assembly of Iowa empowered the board to adopt a resolution that its district township should issue bonds to pay any unsatisfied judgments rendered against it before the passage of the act, and authorized the president and secretary of the board to sign and issue these bonds upon the adoption of such a resolution. Laws Iowa 1880, c. 51. This chapter also authorized and directed these officers to issue these bonds in substantially the same form as was by law prescribed for county bonds, and that law provided that such bonds should contain a certificate or recital that they were issued under the provisions of the legislative act authorizing their issue, and in conformity with the resolution of the board which directed it. Laws Iowa 1878, c. 58. Now, it is well settled that, if the laws are such that there might under any state of facts or circumstances be lawful power in a municipality or quasi municipality to issue its bonds, it may by recitals therein estop itself from denying that those facts or circumstances exist, unless the constitution or the act under which the bonds are issued prescribes some public record as the test of the existence of some of those facts or circumstances. Hughes Co. v. Livingston, 104 Fed. 306, 311, 43 C. C. A. 541, 547; Board v. Sutliff, 97 Fed. 270, 277, 38 C. C. A. 167, 173; National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778, 789, 792, 10 C. C. A. 637, 648, 651, 27 U. S. App. 244, 262, 265; Chaffee Co. v. Potter, 142 U. S. 355, 364, 12 Sup. Ct. 216, 35 L. Ed. 1040; City of Evansville v. Dennett, 161 U. S. 434, 443, 446, 16 Sup. Ct. 613, 40 L. Ed. 760; E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 80 Fed. 692, 699, 26 C. C. A. 91, 98, 49 U. S. App. 399, 412; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 57 U. S. App. 593, 606, 49 L. R. A. 534; City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449, 453, 31 C. C. A. 585, 589, 60 U. S. App. 78, 85. In this case there might have been a state of facts under which the district township would have had the power to issue these bonds notwithstanding the fact that the constitutional limit of its indebtedness had been passed when they were issued. There might have been unsatisfied judgments rendered before the passage of chapter 51 which evidenced unimpeachable obligations of the district township incurred before its indebtedness reached its constitutional limitation. Neither the constitution nor the act under which the bonds were issued pointed out any public record as the test of the existence of this state of facts. The district township therefore had the power to issue the bonds, if such judgments existed, when they were issued; and it had the power to estop itself from denying their existence by reciting in the face of the bonds the fact that they did exist. The officers of the district township were expressly authorized to ascertain and certify the existence of these facts. They were empowered by chapter 51 to pass a resolution for the issue of the bonds for the purpose of paying such judgments, and such judgments only, and to certify in the face of the bonds that they were issued under the provisions of the act.

The legislature thereby intrusted to them the power, and imposed upon them the duty, to ascertain, determine, and certify whether or not every act had been done and every fact existed which conditioned a lawful issue of the bonds before they sent them forth. The existence of judgments fundable under chapter 51 was the primary fact intrusted to them to ascertain, determine, and certify, without which no bond could be lawfully issued; and, when they certified that these bonds were issued under the provisions of that chapter, they acted far within the limits of the power and in the discharge of the duty thrust upon them by the legislature of the state, and the necessary effect of their certificate was to conclusively estop the township from denying its truth for the purpose of defeating its coupons in the hands of a bona fide purchaser. When a municipal body has lawful authority to issue bonds on the condition that certain facts exist or certain acts have been done, and the law intrusts the power to and imposes the duty upon its officers to ascertain, determine, and certify the existence of these facts at the time of issuing the bonds, their certificate will estop the municipality, as against a bona fide holder of the bonds, from proving its falsity to defeat them. Hughes Co. v. Livingston, 104 Fed. 306, 313, 43 C. C. A. 541, 548; National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778, 792, 793, 10 C. C. A. 637, 651, 652, 27 U. S. App. 244, 266, 268; West Plains Tp. v. Sage, 69 Fed. 943, 948, 16 C. C. A. 553, 558, 32 U. S. App. 725, 736; E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 80 Fed. 692, 699, 26 C. C. A. 91, 98, 49 U. S. App. 399, 412; Rathbone v. Board, 83 Fed. 125, 131, 27 C. C. A. 477, 483, 49 U. S. App. 577, 589; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 279, 30 C. C. A. 38, 45, 57 U. S. App. 593, 606, 49 L. R. A. 534; Brown v. Ingalls Tp., 86 Fed. 261, 263, 30 C. C. A. 27, 29, 57 U. S. App. 611, 615, 616; City of South St. Paul v. Lamprecht Bros. Co., 88 Fed. 449, 453, 31 C. C. A. 585, 589, 60 U. S. App. 78, 85; Grattan Tp. v. Chilton, 97 Fed. 145, 148, 38 C. C. A. 84, 87; Commissioners v. Aspinwall, 21 How. 539, 16 L. Ed. 208; Bissell v. City of Jeffersonville, 24 How. 287, 16 L. Ed. 664; Moran v. Commissioners, 2 Black, 722, 17 L. Ed. 342; Meyer v. City of Muscatine, 1 Wall. 384, 393, 17 L. Ed. 564; Lee Co. v. Rogers, 7 Wall. 181, 19 L. Ed. 160; Pendleton Co. v. Amy, 13 Wall. 297, 305, 20 L. Ed. 579; City of Lexington v. Butler, 14 Wall. 282, 20 L. Ed. 809; Grand Chute v. Winegar, 15 Wall. 355, 21 L. Ed. 170; Lynde v. Winnebago Co., 16 Wall. 6, 21 L. Ed. 272; Marcy v. Oswego Tp., 92 U. S. 637, 23 L. Ed. 748; Town of Coloma v. Eaves, 92 U. S. 484, 23 L. Ed. 579; Moultrie Co. v. Rockingham Ten Cent Sav. Bank, 92 U. S. 631, 23 L. Ed. 631; Commissioners v. Bolles, 94 U. S. 104, 24 L. Ed. 46; Commissioners v. Clark, 94 U. S. 278, 24 L. Ed. 59; Commissioners v. January, 94 U. S. 202, 24 L. Ed. 110; Warren Co. v. Marcy, 97 U. S. 96, 24 L. Ed. 977; Town of Pana v. Bowler, 107 U. S. 529, 2 Sup. Ct. 704, 27 L. Ed. 424; Town of Oregon v. Jennings, 119 U. S. 74, 7 Sup. Ct. 124, 30 L. Ed. 323; Chaffee Co. v. Potter, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040.

Notwithstanding all this, counsel for the plaintiff in error earnestly argue that this district is not estopped from proving that the issue

of these bonds increased the debt of the district township after its constitutional limitation had been reached, because the bonds contain no express recital that the debt they evidenced is not in excess of that limitation, and because the facts were that bonds to the amount of $10,000 were issued, when the fundable debt was less than $1,000, and when the debt of the county already exceeded its constitutional limit; and they cite the cases of Lake Co. v. Graham, 130 U. S. 674, 680, 9 Sup. Ct. 654, 32 L. Ed. 1065; Sutliff v. Commissioners, 147 U. S. 230, 235, 13 Sup. Ct. 318, 37 L. Ed. 145; Doon Dist. Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. Ed. 1044; and Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689,—in support of their contention. The opinions of the supreme court in these cases have been repeatedly reviewed by this court in the decisions which have already been cited. The reasons why they are inapplicable to a case like that now in hand, and why the position of the counsel for the plaintiff in error here cannot be sustained, were stated with some care in City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 278, 30 C. C. A. 38, 45, 57 U. S. App. 593, 607, 49 L. R. A. 534, and in City of Pierre v. Dunscomb, 45 C. C. A. 499, 106 Fed. 611, 617, which was decided at the last term of this court, and the opinion in which has since received the sanction of the supreme court by the dismissal of a writ of certiorari to review it 181 U. S 621, 21 Sup. Ct. 925, 45 L. Ed. 1032. They are briefly these: The fact that the debt of the township was in excess of the constitutional limitation when the bonds were issued is not material in this case, because, if the excess existed, the bonds were still valid if the recitals in them were true, and the township is estopped from denying their truth. The bonds could have been lawfully issued only to refund just debts of the district township evidenced by unsatisfied judgments. The recitals in the bonds that they were issued under the provisions of chapter 51 estopped the district township from denying (1) that there were just debts of the township, evidenced by unsatisfied judgments against it rendered before chapter 51 was enacted, which warranted the issue of the bonds, because a municipal corporation is estopped from defeating an action by an innocent purchaser to collect its negotiable bonds, which recite that they were issued for the purpose of funding the judgments, bonds, warrants, or floating debt of the corporation, on the ground that the apparent debt they were issued to satisfy was invalid or fictitious (Hughes Co. v. Livingston, 104 Fed. 306, 315, 43 C. C. A. 541, 550; City of Pierre v. Dunscomb, 45 C. C. A. 499, 106 Fed. 611, 616; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 277, 30 C. C. A. 38, 43, 57 U. S. App. 593, 603, 49 L. R. A. 534; Ashley v. Board, 60 Fed. 55, 66, 8 C. C. A. 455, 466, 16 U. S. App. 656, 675, 709; Meyer v. Brown, 65 Cal. 583, 26 Pac. 281; Moran v. Commissioners, 2 Black, 722, 17 L. Ed. 342; Hackett v. City of Ottawa, 99 U. S. 86, 96, 25 L. Ed. 363; City of Ottawa v. First Nat. Bank of Portsmouth, 105 U. S. 342, 343, 26 L. Ed. 1127); (2) that the corporation and its officers have applied the bonds to the lawful purpose for which they appear on their face to have been issued (City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 277, 30 C. C. A. 38, 43, 57

U. S. App. 593, 603, 49 L. R. A. 534; National Life Ins. Co. v. Board of Education of City of Huron, 62 Fed. 778, 784, 10 C. C. A. 637, 644, 27 U. S. App. 244, 255; West Plains Tp. v. Sage, 69 Fed. 943, 946, 16 C. C. A. 553, 556, 32 U. S. App. 725, 733; Commissioners v. Beal, 113 U. S. 227, 240, 5 Sup. Ct. 433, 28 L. Ed. 966; City of Cairo v. Zane, 149 U. S. 122, 137, 13 Sup. Ct. 803, 37 L. Ed. 673; Maxcy v. Williamson Co. Ct., 72 Ill. 207); and (3) that the bonds were exchanged for the fundable debt in the method prescribed by the law, so that they neither increased nor diminished the indebtedness of the municipality (City of Pierre v. Dunscomb, 45 C. C. A. 499, 106 Fed. 611, 617; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 278, 30 C. C. A. 38, 44, 57 U. S. App. 593, 604, 49 L. R. A. 534; Board v. Platt, 79 Fed. 567, 569, 25 C. C. A. 87, 89, 49 U. S. App. 216; E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 80 Fed. 692, 698, 26 C. C. A. 91, 98, 49 U. S. App. 399; In re State Bonds [Me.] 18 Atl. 291; Powell v. City of Madison, 107 Ind. 110, 8 N. E. 31; City of Los Angeles v. Teed [Cal.] 44 Pac. 580; Board of Com'rs of Marion Co. v. Board of Com'rs of Harvey Co., 26 Kan. 181, 201; Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 821; Miller v. School Dist. [Wyo.] 39 Pac. 879). In other words, the plaintiff in error is conclusively estopped by the recitals in the bonds from denying that they neither created nor increased the indebtedness of the district township, and that the judgment debts for which they were exchanged were just debts of the township incurred before its indebtedness reached the constitutional limit. City of Pierre v. Dunscomb, 45 C. C. A. 409, 106 Fed. 611, 617; Hughes Co. v. Livingston, 104 Fed. 306, 317, 43 C. C. A. 541, 552; Board v. Platt, 79 Fed. 567, 569, 25 C. C. A. 87, 89, 49 U. S. App. 216, 220; E. H. Rollins & Sons v. Board of Com'rs of Gunnison Co., 80 Fed. 692, 698, 26 C. C. A. 91, 98, 49 U. S. App. 399, 411; City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 278, 30 C. C. A. 38, 44, 57 U. S. App. 593, 605, 49 L. R. A. 534; Lyon Co. v. Keene Five Cent Sav. Bank, 100 Fed. 337, 339, 40 C. C. A. 391, 393. The truth is that when an innocent purchaser buys of others than the municipality or its agents municipal bonds, or the coupons of such bonds, which recite that they were issued to fund the debt of the municipality, the question of excessive indebtedness does not arise, and the purchaser is not required to consider or inquire concerning it. City of Pierre v. Dunscomb, 45 C. C. A. 499, 106 Fed. 611; City of Huron v. Second Ward Sav. Bank, 30 C. C. A. 38, 86 Fed. 272, 280, 49 L. R. A. 534.

Counsel for plaintiff in error have invoked the conceded rule that the national courts uniformly follow the construction of the constitution and statutes of a state adopted by its highest judicial tribunal in all cases that involve no question of general or commercial law and no question of right under the constitution and laws of the nation (Madden v. Lancaster Co., 65 Fed. 188, 192, 12 C. C. A. 566, 573, 27 U. S. App. 528, 535, 536), have cited the opinions of the supreme court of Iowa in Holliday v. Hilderbrandt, 97 Iowa, 177, 66 N. W. 89; Independent Dist. of Rock Rapids v. Society for Savings, 98 Iowa, 581, 67 N. W. 370; First Nat. Bank of Decorah v. Doon Dist. Tp., 86 Iowa, 330, 53 N. W. 301, 41 Am. St. Rep. 489; Mosher v.

School Dist., 44 Iowa, 122; McPherson v. Foster, 43 Iowa, 48, 22 Am. Rep. 215; and French v. City of Burlington, 42 Iowa, 614,—some of which are not in accord with the views which have now been expressed, and have claimed that the question here at issue is one of constitutional construction, and that the federal courts should follow the decisions of the supreme court of Iowa. But the question that has been under consideration here is not one of the construction of the constitution or of the statutes of the state of Iowa. It simply involves the construction and effect of recitals in negotiable instruments. It is a question of commercial, and not of constitutional, law, upon which the decisions of the state courts are not controlling in the federal tribunals. It is not only the privilege, but the duty, of the federal courts, imposed upon them by the constitution and statutes of the United States, to consider for themselves, and to form their independent opinions and decisions upon, questions of commercial or general law presented in cases in which they have jurisdiction, and it is a duty which they cannot justly renounce or disregard. Jurisdiction of such cases was conferred upon them for the express purpose of securing their independent opinions upon the questions arising in the litigation remitted to them. And a citizen of the United States who has the right to prosecute his suit in the national courts has also the right to the opinions and decisions of those courts upon every crucial question of general or commercial law or of right under the constitution or statutes of the nation which he presents. Speer v. Board, 88 Fed. 749, 762, 32 C. C. A. 101, 114, 60 U. S. App. 38, 59; Hartford Fire Ins. Co. v. Chicago, M. & St. P. R. Co., 70 Fed. 201, 203, 17 C. C. A. 62, 65, 36 U. S. App. 152, 156, 30 L. R. A. 193; Railroad Co. v. Lockwood, 17 Wall. 357, 368, 21 L. Ed. 627; Myrick v. Railroad Co., 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; Carpenter v. Insurance Co., 16 Pet. 495, 511, 10 L. Ed. 1044; Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Brooklyn City & N. R. Co. v. National Bank of the Republic of New York, 102 U. S. 14, 26 L. Ed. 61; Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; Smith v. Alabama, 124 U. S. 465, 478, 8 Sup. Ct. 564, 31 L. Ed. 508; Bucher v. Railroad Co., 125 U. S. 555, 583, 8 Sup. Ct. 974, 31 L. Ed. 795; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443, 9 Sup. Ct. 469, 32 L. Ed. 788. While the opinions of the supreme court of Iowa are entitled to and have received grave consideration in this case and in the earlier case of City of Huron v. Second Ward Sav. Bank, 86 Fed. 272, 280, 30 C. C. A. 38, 46, 57 U. S. App. 593, 607, 49 L. R. A. 534, the conclusions which were reached in that case and which are affirmed in this case are in accord with the established rules of decision which have been adopted by the supreme court and by this court, they commend themselves to our reason and judgment, and they must be adhered to.

The judgment below is affirmed.

MA-KA-TA-WAH-QUA-TWA v. REBOK.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. October 24, 1901.)

No. 115.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
An action by a tribal Indian against the agent of his tribe for causing plaintiff's arrest upon a false charge of violating the laws of the United States and for fraudulently securing his conviction, the issue being whether plaintiff was in fact guilty of the offense charged, is one arising under the laws of the United States, of which a federal court has jurisdiction.[1]

2. LIMITATION—ACTION FOR MALICIOUS PROSECUTION.
Plaintiff brought an action for damages, alleging in his petition that defendant caused his arrest and indictment on a false charge of violating the laws of the United States, and by misrepresenting the facts to the court, and by his representations to plaintiff, who was a tribal Indian, and could not read or speak the English language, procured the entry of a plea of guilty on which plaintiff was sentenced to the penitentiary. The court had jurisdiction of the crime charged and of the defendant in the indictment, and its sentence was lawful on the plea entered. *Held*, that the action was not one for false imprisonment, but in effect one for malicious prosecution, against which limitation ran from the date of the arrest, and not from the expiration of the term of imprisonment.

At Law. On demurrer to petition.

J. W. Lamb and Wm. G. Clark, for plaintiff.
Caldwell & Walters and Struble & Stiger, for defendant.

SHIRAS, District Judge. It is averred in the petition filed in this case that the plaintiff is a tribal Indian, being a member of that portion of the confederated tribe of Sacs and Foxes who reside on a reservation in Tama county, Iowa. It is further averred that during the years 1895, 1896, and 1897 the defendant was the agent appointed by the United States and placed in charge of the Indians in Tama county; that the defendant wrongfully charged the plaintiff with making a false declaration to secure the payment of a double annuity for his son, in fraud of the United States, and caused his arrest and indictment by the grand jury of the United States district court at Ft. Dodge, Iowa, at the November term, 1897; that the plaintiff cannot read or speak the English language; that the defendant, by certain alleged false representations, and in violation of his duty as agent for said tribe, brought about the entering of a plea of guilty to the indictment by the plaintiff, upon which plea he was sentenced by the court to imprisonment in the penitentiary at Anamosa for the period of two years; that plaintiff was so imprisoned until April 4, 1899, when he was released under a pardon granted him by the president of the United States. On the 1st day of April, 1901, plaintiff brought this action to recover damages for the wrongs alleged to have been suffered at the hands of the defendant. To this petition

[1] Federal question as ground of jurisdiction, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

the defendant demurs on the grounds that the court is without jurisdiction, and that the action is barred by the statute of limitation. Upon the question of the jurisdiction it appears on the face of the petition that the plaintiff is a tribal Indian, and that the defendant, when the acts complained of were done, was the agent in charge of the tribe, and the question presented is whether the plaintiff, in the action taken by him in connection with the annuities paid to his son, violated the laws of the United States in such sense that he was chargeable with a crime by reason thereof, and it is apparent that this question is dependent upon the laws and treaties of the United States, and their applicability to the plaintiff as a tribal Indian; and therefore it is made plain that this case arises out of the laws of the United States in such sense as to confer jurisdiction upon the court. This being an action brought for injuries to the person and reputation of the plaintiff, it falls within that clause of the state statute that prescribes two years as the limit of time within which the action can be brought. The facts averred in the petition do not show that the plaintiff was sentenced and imprisoned by a court that was without jurisdiction in the premises. The crime charged in the indictment was for a violation of a law of the United States committed within the limits of the Northern district of Iowa, and therefore jurisdiction over the case and the defendant therein was in the court that heard the matter and imposed the sentence. The gravamen of the complaint against the defendant in the present suit is that he falsely represented the facts to the court, and by his representations to the defendant prevented him from making a defense to the indictment, and wrongfully procured the entry of a plea of guilty on behalf of the present plaintiff, upon which the sentence of the court was based. The imprisonment suffered by the plaintiff was in pursuance of a sentence imposed by a court of competent authority, and possessed of jurisdiction over the crime charged and over the person of the defendant in the indictment. The judgment of the court upon the plea of guilty has never been questioned or set aside, nor did the present plaintiff ever appeal to the court for relief on the ground that he had been misled with respect to the plea entered by him.

Under these circumstances the cause of action set forth in the petition cannot be construed to be an action for false imprisonment. It is in fact a suit for malicious prosecution in form and in substance. Thus, in 12 Am. & Eng. Enc. Law (2d Ed.) p. 739, it is said:

"The second, and no less essential, requisite to the constitution of a false imprisonment is that the detention or restraint should be unlawful. It is a rule of law, in this connection, which admits of no exception, that where there is an arrest on a valid warrant,—one neither void nor voidable,—it is not a false imprisonment, and no liability is incurred by any person whomsoever, whether immediately or only remotely connected therewith; and the rule applies no matter how corrupt or unfounded or mistaken the motives which induced the issuance or execution of the warrant may have been."

With respect to actions for malicious prosecution, the statute of limitations begins to run from the date the process is served or the arrest is made, whereas in actions for false imprisonment it begins to run at the termination of the false imprisonment. Wood, Lim. p.

369, § 178. The petition in this case clearly shows that the arrest of the plaintiff and all acts done by the defendant in connection therewith took place more than two years before the present action was begun, and therefore the bar of the statute is complete. Upon this ground, therefore, the demurrer is sustained, and the suit is dismissed.

UNITED STATES v. PEDROLI.

(Circuit Court, D. Nevada. September 2, 1901.)

No. 714.

UNITED STATES—ACTIONS—SUBMITTING TO JURISDICTION OF STATE COURT.

When the United States enters its voluntary appearance in a state court in a civil suit involving property rights, it submits to the jurisdiction of such court, and is bound by the rules governing other litigants. It cannot resort to a federal court for an injunction against a violation of the decree of the state court, against which that court has full power to grant adequate relief.

In Equity. On motion for preliminary injunction.

This suit is brought to enjoin defendant from a violation of a decree entered in the state district court of Ormsby county, Nev., in the suit of Dangberg and others against Ross and others. That suit was instituted on June 21, 1871, to determine the rights of the several parties in that action to the waters of Clear creek. On August 24, 1871, a decree was rendered in said suit which, among other things, declared that Henry Ross was entitled to $^{19}/_{100}$ of the waters of said stream during the irrigating season, and that Roland Varnum was entitled to $^{25}/_{1000}$ of said stream. This decree has never been appealed from, modified, or reversed. The complaint shows that the rights of Ross under that decree were acquired by the complainant on the 31st day of January, A. D. 1889, and that defendant, Pedroli, is entitled to the rights decreed to Roland Varnum, and has been entitled thereto ever since the 8th day of January, 1889. It is alleged in the complaint that the defendant, during the months of June and July, 1901, unlawfully and intentionally diverted the waters of Clear creek in quantities largely in excess of the quantities authorized or permitted to be used by him by said decree, and threatens to continue the diversion thereof in quantities in excess of $^{25}/_{1000}$ parts of said stream; that owing to the irregular and uncertain times of holding court of the First judicial district court of the state of Nevada and enforcing the decree against the defendant, and the consequent delay in the protection of the rights of the complainant, and the irreparable injury which will be occasioned by the delay, complainant is compelled to seek relief and invoke the jurisdiction of this court. The answer admits the existence of the decree and the rights of complainant and defendant thereunder, and alleges, among other things, that the state court has jurisdiction of both the property and person of the complainant and the defendant, and that on the 21st day of July, 1898, upon the application of complainant, the state court took jurisdiction of the person of this defendant in a contempt proceeding, and fined defendant for a violation of the decree, but denies that the times of holding the state courts are irregular or uncertain, and avers that the second and fourth Saturdays of each month are the regular and certain law days of said court. There is no replication to the averments in the answer, and no denial of the averment as to the time of holding the state court.

Sardis Summerfield, U. S. Atty., and J. D. Torreyson, for the United States.

James G. Sweeney, for defendant.

HAWLEY, District Judge (after stating the facts). Should the complainant, after voluntarily appearing in the state court, and asking for and obtaining relief under the decree of the state court, by an order punishing the defendant for contempt, be permitted to come into the United States court and bring an independent suit upon the decree, asking for precisely the same relief it could obtain by a motion and showing in the state court? Having sought the jurisdiction of the state court, should it not apply to that forum for relief or give some legal reason why it could not there obtain full relief? Does not the comity existing between the national and state courts demand that this court should not interfere with the enforcement of the decree by the state court, even if it could be held that this court has jurisdiction in the premises? When the United States voluntarily appeared in the suit in the state court, it at the same time voluntarily submitted to the jurisdiction of that court; and in such a suit, it not being of a purely governmental matter, it stands upon an equality with, and is bound by, the same rules that govern other litigants. From the averments in the answer as to the sessions of the state court, it affirmatively appears that there is no necessity to bring a new suit in this court, for the sole and only purpose of obtaining the same relief which can be speedily obtained in the state court. It does not appear that there is any legal impediment in promptly securing the relief to which the complainant is entitled by an application to the state court to have the defendant punished for contempt for a violation of the decree. The court which allowed the injunction and entered the decree has inherent jurisdiction to punish the defendant for a violation of its provisions in a summary way, by motion and hearing. This remedy is practical, efficient, adequate, and complete. In Garrett v. Terminal Co. (C. C.) 36 Fed. 513, a similar case was presented. Lacombe, J., said:

"Upon the argument of this motion for a preliminary injunction, counsel for the complainant conceded that there was no act which, being committed by the defendants, would be a contempt of the temporary injunction now asked for, that would not also be a contempt of the decree of the state court. It is also practically conceded that the process of this court is sought only as ancillary to that of the state court. * * * Under these circumstances, the complainants should be left to their remedy in the state courts; and their motion for a temporary injunction must be denied."

The temporary injunction is denied, and the case dismissed, without prejudice.

BROWN et al. v. GRUNDY et al.

(Circuit Court, E. D. Arkansas, E. D. October 8, 1901.)

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—USURY.
   Upon the question of usury, which is statutory, the federal courts follow the decisions of the state courts.[1]

2. USURY—INTENTION—ARKANSAS STATUTE.
   Under the usury laws of Arkansas, as construed by the supreme court of the state, a mutual agreement to give and receive unlawful interest

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[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; Hill v. Hite, 29 C. C. A. 553.

is not necessary, to constitute usury, but there must have been an intention on the part of the lender to take or receive more than the legal rate of interest. That the contract requires the payment of a sum in excess of the principal of the debt and legal interest thereon, through a mistake of fact or an error in calculation, will not render it usurious.

In Equity.

This is a bill to foreclose two deeds of trust in the nature of mortgages on real estate and some personalty, all lying and situated in this state. The defendants, the mortgagors, deny the validity of the mortgage and indebtedness, setting up the plea of usury. They also filed a cross bill setting up the fact that the debt secured by the mortgage is usurious and void, and they ask that the mortgage be canceled as a cloud on their title, in conformity with the statutes of the state of Arkansas hereinafter set out. The facts, as they appear from the testimony, which is practically undisputed, are that the complainants are commission merchants in the city of Memphis, Tenn., and the defendant Henderson Grundy a farmer in the state of Arkansas. In April, 1897, the defendant applied to the complainants for money to enable him to pay off his mortgage indebtedness to another commission house, and also to supply him such goods, wares, merchandise, and money as would be necessary to enable him to raise a crop on his farm the ensuing year. It was estimated that $1,200 would be sufficient to do that, whereupon he executed a note for $1,200 to complainants, and, to secure the same, executed one of the mortgages now sought to be foreclosed. The rate of interest was agreed on in writing to be 10 per cent. per annum. The account was kept on the books of complainants as if no note had been executed, which, it appears, is usual and customary in dealings of this kind. On December 3, 1897, defendant applied to the complainants for another loan of $1,200, with which to purchase another tract of land, for which he also executed a note secured by a trust deed on the land so purchased, to bear 10 per cent. interest per annum; but this $1,200 was again charged on the books of complainants as the money was furnished, regardless of the note. In March, 1898, a settlement was had between the parties, and it appeared that the defendant owed the complainants the sum of $3,383.41, and it was estimated that it would require further advances to the extent of about $500 to enable him to raise a crop that year. Thereupon the parties agreed that the first $1,200 note and mortgage should remain as it was, and for the balance, including the $500 to be advanced, he was to execute a new note amounting to $2,683.41, and, to secure it, a mortgage on all the lands. On one of the tracts mortgaged to complainants there was an indebtedness of $500 due for the purchase money, which was a prior lien to the mortgage, and which at maturity was paid off by complainants. The debt not having been paid, these proceedings were instituted; and the sole issue is whether the note executed in March, 1898, when the settlement was had, was not usurious by reason of including interest which exceeded 10 per cent. per annum.

The laws of Arkansas relating to usury, published in Sandels & Hill's Digest of the Statutes of Arkansas, are as follows:

"Sec. 5084. All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest, and the general assembly shall prohibit the same by law. Const. art. 19, § 13.

"Sec. 5085. All bonds, bills, notes, assurances, conveyances, and all other contracts or securities whatever, whereupon or whereby there shall be reserved, taken or secured, or agreed to be taken or reserved, any greater sum or greater value for the loan or forbearance of any money, goods, things in action, or any other valuable thing, than is prescribed in this act shall be void.

"Sec. 5086. Every lien created or arising by mortgage, deed of trust or otherwise, on real or personal property, to secure the payment of a contract for a greater rate of interest than ten per centum per annum, either directly or indirectly, and every conveyance made in furtherance of any such lien is void; and every such lien or conveyance may be cancelled and annulled at the suit of the maker of such usurious contract, or his vendees,

assigns or creditors. The maker of a usurious contract may by suit in equity against all parties asserting rights under the same, have such contract and any mortgage, pledge or other lien, or conveyance executed to secure the performance of the same, annulled and cancelled, and any property, real or personal, embraced within the terms of said lien or conveyance, delivered up if in possession of any of the defendants in the action, and if the same be in the possession of the plaintiff, provision shall be made in the decree in the case removing the cloud of such usurious lien and conveyance made in furtherance thereof, from the title to such property. And any person who may have acquired the title to, or an interest in, or lien upon such property by purchase from the makers of such usurious contract, or by assignment or by sale under judicial process, mortgage or otherwise, either before or after the making of the usurious contract, may bring his suit in equity against the parties to such usurious contract, and any one claiming title to such property by virtue of usurious contract, or may intervene in any suit brought to enforce such lien, or to obtain possession of such property under any title growing out of such usurious contract, and shall by proper decree have such mortgage, pledge or other lien, or conveyance made in furtherance thereof, canceled and annulled in so far as the same is in conflict with the rights of the plaintiff in the action."

The undisputed evidence shows (and the court so finds the facts) that, at the time the settlement was had and the new note executed, the interest actually due, and computed at 10 per cent. per annum, from the respective dates the moneys and supplies were furnished, allowing to the defendant interest at the same rate on all payments made by him, or by stopping the interest on the debt on the amounts thus paid, was $528.16, while the complainants included in the note for interest the sum of $619.04,—a difference of $90.88. This the evidence clearly shows was not intentional on the part of complainants, but was owing to a mistake made by the bookkeeper in calculating the interest. There was no intention on the part of complainants to charge a greater rate of interest than 10 per cent., nor on the part of defendant any agreement to pay the same, except such as arises from the execution of the note and mortgage.

McFarland & Neblett and John J. & E. C. Hornor, for complainants.

John B. Jones and H. G. Chambers, for defendants.

TRIEBER, District Judge (after stating the facts). Usury being merely a statutory offense, federal courts in dealing with such a question must look to the laws of the state where the transaction took place, and follow the construction put upon such laws by the state courts. De Wolf v. Johnson, 10 Wheat. 367, 6 L. Ed. 343; Scudder v. Bank, 91 U. S. 406, 23 L. Ed. 245; Trust Co. v. Krumseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474. It is claimed on behalf of the complainants that the plea of usury cannot be sustained, for two reasons: First, that in order to constitute usury there must be a concurrence of intent of both parties (that is to say, on the part of the borrower to pay and the lender to receive); and, second, that there must be an intent on the part of the lender to take unlawful interest. As to the necessity of consent of both parties, the rule established by the supreme court of Arkansas is that no such consent is necessary. In Garvin v. Linton, 62 Ark. 370, 35 S. W. 430, 37 S. W. 569, Mr. Justice Battle, in delivering the opinion of the court in that case, says:

"Many authorities hold that 'it is not enough that the borrower intended to make a usurious agreement, but the intention to take the usury must have been in full contemplation of the parties—not of one party, but of

both—to the transaction. There must be an aggregatio mentium.' [Citing authorities to sustain that view.] While others say that, if the lender knowingly contracts for an illegal rate of interest, the contract is usurious, although the borrower is ignorant of the facts. [Citing authorities to sustain that view.]"

After reviewing the authorities on both sides, he states the conclusion of the court to be:

"According to those decisions, there need not be, under our statute, a mutual agreement to give and receive unlawful interest, to constitute usury. If it be actually 'reserved, taken, or secured, or agreed to be taken or reserved,' the contract is void for usury. As it may be reserved, taken, or secured by contract without the knowledge of both parties, a concurrence of the intent of both of them is not an essential element of usury, under the statute."

This is conclusive on this court that the statutes of Arkansas do not require, in order to constitute usury, that there should be a concurrence of intent of the borrower and lender.

As to the second proposition, that there must be an intention to take or receive more than 10 per cent. interest per annum, the decisions of the supreme court of Arkansas are equally conclusive. This question first came before the supreme court in Moody v. Hawkins, 25 Ark. 191. In that case, which was an action on a note, the defendant pleaded usury, but failed to allege that the usurious interest was charged by the lender intentionally. In sustaining a demurrer to this plea, the court say:

"The intention to take or reserve more than the legal rate of interest is an essential ingredient in all usurious contracts, and must always be averred in a plea of usury. Where the contract by its terms does not import usury, as by an express reservation of more than legal interest, and is on its face for legal interest only, 'it must,' as Judge Story remarked in the case of Bank v. Waggener, 9 Pet. 378, 9 L. Ed. 163, 'be proved that there was some corrupt agreement or device or shift to cover usury; and that it was in full contemplation of the parties.' The writings obligatory declared upon do not reserve more than legal interest, and appear upon their face to be valid contracts. The defendant attempts to invalidate them by setting up in their stead other corrupt and illegal contracts. * * * The court of appeals of Virginia, in the case of Brockenbrough's Ex'rs v. Spindle's Adm'rs, 17 Grat. 21, say: 'A man must knowingly and intentionally commit the acts which constitute the usury, but the law presumes that he intended the necessary consequences of these acts, and presumes, even in opposition to the fact, that he knew those acts were usurious and unlawful.' The allegation that more than the legal rate of interest was reserved may be true, yet, unless the plaintiff intended to do so, the contracts are not usurious, and the allegation that the contracts were 'corrupt, usurious, and void' is but a conclusion drawn from facts that do not support it."

The same question came before the court in Garvin v. Linton, supra, and the court, after reviewing the authorities, say:

"There must be an intent to take unlawful interest, to constitute usury. There can be no usury when the amount taken in the contract for interest in excess of ten per cent. per annum was reserved through a mistake or ignorance of the fact that it was in such excess. If the lender, by mistake of fact, by error in calculation, or by inadvertence in the insertion of a date, contracts to receive an illegal rate of interest, 'such mistake, error, or inadvertence will not stamp the taint of usury on such engagement, nor cause to be visited upon him, who did not knowingly and intentionally disregard the law in this behalf, the highly-penal consequences of an usurious offense.'" 62 Ark. 380, 35 S. W. 433.

Of course, these decisions do not go to the extent that there must be an actual intent to violate the statute. Where parties to a contract for a loan knowingly agree to pay and receive more than 10 per cent. per annum for the use of the money borrowed, this, in the sense of the law, is a corrupt agreement. If it be the real intention of the parties to receive or reserve a given rate of interest, and that rate prove to be usurious, the contract will be void for usury, whether the parties knew the interest to be usurious or not. Ignorance or mistake in relation to the law in such a case will and does not afford protection against the consequences of usury. Bank v. De Shon, 41 Ark. 331–339. As the evidence in this case shows that the excessive interest charge was not intentional, for the purpose of securing a higher rate of interest than 10 per cent. per annum, but a mere mistake in the calculation, it is clear that such an error does not constitute usury, within the meaning of the Arkansas statutes, as construed by the supreme court of the state.

The mistake in the calculation of the interest at the time the settlement was had and the last mortgage executed amounts to $90.88, and defendants are entitled to have that sum deducted from the amount of the second note. Deducting this amount, and adding interest at 10 per cent. per annum on the first note and the corrected note, there is now due to the complainants from the defendant, interest calculated to this date, the sum of $4,416.02, for which amount a decree will be entered and a foreclosure ordered. The clerical error in describing one of the tracts of land in the mortgage not being denied, the deed will be reformed so as to describe this tract in accordance with the intention of the parties. The cross bill will be dismissed, and the defendants taxed with the costs of the entire proceeding.

CABLE v. UNITED STATES LIFE INS. CO. IN CITY OF NEW YORK.

UNITED STATES LIFE INS. CO. IN CITY OF NEW YORK v. CABLE.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1901.)

Nos. 762, 775.

1. APPEAL—ASSIGNMENTS OF ERROR.

Where a master to whom a cause was referred to take and report the testimony exceeded his authority by reporting findings of fact and conclusions of law, to which the court entertained exceptions, some of which it sustained, and modified and adopted the findings, they must be regarded as the findings of the court, and an appellant may assign errors thereon in the appellate court, although he took no exceptions to the report of the master.

2. LIFE INSURANCE—STATEMENTS IN APPLICATION—CHANGE OF CONDITION BEFORE DELIVERY OF POLICY.

A statement made in an application for life insurance, whether a warranty or only a representation, speaks from the time of the delivery of the policy, and if, after the statement is made, a material change occurs in the condition of the applicant, covered by such statement, before the contract is consummated, an absolute duty rests upon the applicant to make disclosure of the fact.

3. SAME—DELIVERY PROCURED BY FRAUD—CONCEALMENT OF FACTS.

C. made application to complainant for a policy of life insurance. Among the statements in the application which were made warranties was one that the applicant had never had pneumonia, and it also contained a covenant that the policy should take effect only "upon payment of the first premium and delivery of the policy during my lifetime, sound health, and insurable condition." The policy was issued and tendered to C., who declined to accept it at the time on the ground that he had not sufficient time to examine it, and also wished to consult L., an intimate friend, who had made a similar application. C. shortly after became ill with acute pneumonia. Three days later the solicitor who had taken the applications called upon L., with whom he had left his policy for examination, and L. accepted the policy, and also offered to accept that of C., and to pay the premium thereon. The solicitor obtained the policy, and delivered it to L., receiving the premium thereon, which was forwarded to, and accepted by, complainant. In answer to an inquiry by the solicitor at the time of the delivery if C. was all right, L. replied that he had been sick two or three days, but was no worse than he had been for the past 48 hours. No further inquiry was made nor information given, although L. knew the serious nature of C.'s illness, and that he was not at the time in an insurable condition. Neither complainant nor its general agent had any actual knowledge or notice of C.'s illness until after his death, which occurred five days later. *Held*, that it was the duty of L. as C.'s agent to fully disclose his condition; that his partial statement was misleading, and not such as to put the agent on inquiry; and that the delivery of the policy under such circumstances did not create a contract binding on complainant, even though L. was guilty of no intentional fraud.

4. SAME—WAIVER.

The delivery of a life insurance policy, with notice that the insured is ill, will not operate as a waiver or create an estoppel which will preclude the company from asserting the invalidity of the policy under its terms, because the insured was not in an insurable condition, where material facts in regard to his condition were concealed from it which were of such nature as to make it clear that the policy would not have been delivered if they had been known.

5. APPEAL—LAW OF CASE—DECISION ON FORMER APPEAL.

A judgment on appeal sustaining the jurisdiction of the circuit court over the cause becomes the law of the case, and the question cannot be reconsidered on a second appeal.

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

The United States Life Insurance Company in the City of New York filed its bill in equity against Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased, for the cancellation upon the ground of fraud of a policy written by the company upon the life of the defendant's intestate. A demurrer to the bill was sustained, and upon appeal to this court the judgment of the court below was reversed, and the demurrer directed to be overruled. Insurance Co. v. Cable, 39 C. C. A. 264, 98 Fed. 761, to which reference is made for a statement of the allegations of the bill. Upon the filing of the mandate in the court below, an answer was filed to the bill admitting the fact of the application and of the policy as stated in the bill, but denying the fraud, and containing the following admissions and allegations: "Defendant, further answering, admits that said policy on the life of said Herman D. Cable was, after its execution, sent to the city of Chicago, but to which particular agent of the complainant in said city this defendant is not advised, except as she is informed by the bill of complaint filed herein; and defendant further admits that on or about the 21st day of February, 1899, said policy was tendered by the said James F. McCabe, as agent of the complainant, to said Herman D. Cable, and that at this particular time said Cable declined to take up the matter of said policy with said McCabe and pay the premium thereon, for the reason that he was then

too busy to examine the policy, and see whether it was the same in its terms and conditions as represented when his application was taken, and for the further reason that he desired to confer with his close and intimate friend, Mr. George S. Lord, who had made an application for insurance through the same agent in the same company, and to whom a policy had also been issued, but had not yet been delivered. Defendant, further answering, says that said Lord and said Cable were connected together by the closest ties of friendship, and were also interested together in various business enterprises, and were in almost daily communication with each other, and had been such friends and so interested in various business enterprises for many years prior to February, 1899, and that each was in the habit of acting for the other in matters in which they were mutually interested. Defendant, further answering, admits that upon the evening of the 24th day of February, 1899, said Cable became ill, and that upon the following day his illness was diagnosed as a slight attack of pneumonia, but denies that upon the 26th day of February the life of said Cable was despaired of by his physicians and family, or that any such report was in circulation, but says, on the contrary, that on the 26th and on the 27th days of February, 1899, his illness was not considered as at all dangerous, but a speedy recovery of said Cable was confidently expected by his said family and said Lord, and that no danger of death from said illness was at all apprehended by them or either of them. Defendant, further answering, admits that the said Lord was in daily communication with said Cable and his family during said illness, as had been his custom for many years prior thereto, but denies that he was informed that said Cable was in serious physical condition, and that his death was expected from the disease which he then had, but says that, on the contrary said Lord believed and was informed by the family of said Cable that he was not considered to be in a dangerous condition. Defendant, further answering, admits that on the 27th day of February, 1899, said McCabe went to the office of said Lord for the purpose of ascertaining whether said Lord and said Cable would take said policies, and that he was then informed by said Lord that he, said Lord, was willing to take both of the policies, but that said Cable was then ill at his home in Evanston, and if said McCabe, with knowledge of this fact, desired to deliver said policies he would receive and pay for the same; that said McCabe then went from said office, and shortly after returned with the policy issued in favor of said Cable, and delivered the same to said Lord, well knowing and being informed of the true condition of said Cable, and that with such knowledge he received from said Lord the premiums upon both of said policies for the first year of the life of the same,—that is, from the 6th day of February, 1899, until the 6th day of February, 1900. Defendant further expressly denies that the illness of said Cable was not made known to the complainant, but was purposely and willfully concealed from it, but, on the other hand, defendant alleges that the true condition of said Cable was fully told and made known to the complainant prior to the delivery of said policy and the payment of the premium thereon. Defendant further denies that said Lord was not authorized by said Cable to accept said policy and pay the premiums thereon, but, on the contrary, alleges that he was requested by the said Cable to so receive said policy and pay the first premium thereon when he, the said Lord, should take his policy. Defendant, further answering, admits that the said Cable did on Thursday, March 2, 1899, depart this life, but denies that such death was occasioned by pneumonia, but was occasioned by heart failure, the result of sudden complications which arose a few hours before his said death, and which were not expected or apprehended by his family or physicians until a short time before they occurred."

On March 21, 1900, an order was entered that the cause be referred to a master "to take the evidence in said cause and report the same to this court." The master on October 5, 1900, filed his report, returning the evidence adduced before him, and reported 15 findings of fact, reference being here made to the following:

"(1) That the complainant is a corporation, duly organized under the laws of the state of New York, and a citizen of the state of New York, and has been for many years last past, and is now, engaged in the business of insur-

ing lives throughout the United States, and has been for many years, and is now, lawfully engaged in carrying on said business in the state of Illinois, under proper license, and that the defendant Alice A. Cable is a citizen of the state of Illinois, residing in the Northern district thereof. The business of the complainant in Chicago is in charge of a general manager for the states of Illinois and Wisconsin, who has supervision of the company's business, procuring applications, or seeing that they are procured, collecting premiums, attending to the detail work, looking after disbursements, looking after losses and furnishing proofs, and who is the supreme authority in the state of Illinois in said company's business in all cases in the agency work, and is hereinafter called 'general agent.'

"(2) That on or about the 16th day of January, 1899, Herman D. Cable, then a resident of Evanston, in the state of Illinois, made application in writing to the complainant, through one James F. McCabe, for insurance upon his life in the sum of fifty thousand dollars, which application was forwarded to the New York office of the complainant, and in consideration thereof the complainant, on or about the 6th day of February, 1899, executed its policy, numbered 94,082, upon the life of the said Herman D. Cable, which policy agreed, in further consideration of the sum of $848.50, to be paid on the delivery thereof, and a like sum to be paid on the 6th day of February in each and every year thereafter, until ten (10) years' premiums should have been paid, and upon the acceptance of satisfactory proofs of the death of the said Herman D. Cable within ten (10) years ending on the 6th day of February, 1909, that the complainant would pay fifty thousand dollars ($50,000) in thirty (30) consecutive annual installments, of one thousand six hundred sixty-six and sixty-six hundredths dollars ($1,666.66) each, to the estate of the said Herman D. Cable. The written application for the said policy was by the terms of the policy made a part of the policy itself, and was signed by the said Herman D. Cable, and one of the provisions of the said application was as follows, viz.: 'It is hereby declared and agreed * * * that the policy to be issued hereon shall take effect only upon payment of the first premium and delivery of the policy during my lifetime, sound health, and insurable condition;' and another provision thereof was as follows, viz.: 'That only the president, together with the secretary or the actuary, shall have the power to alter or waive the policy or any condition thereof.'

"(3) At the same time when Cable applied for the above policy, a similar application was made to the complainant for a similar $50,000 policy by George S. Lord, who was a neighbor and intimate friend of Cable, and interested with him in numerous business transactions, both being directors of the Bankers' National Bank and members of the Evanston school board. Both of the said policies were issued at about the same time, and both were forwarded from the New York office of the complainant to its Chicago office, and were received at the latter office on or before the 20th day of February, 1899, and on the last named day they were turned over by the complainant's general agent at Chicago to one T. J. Finney.

"(4) The said T. J. Finney was a life insurance broker, who was not regularly employed by the complainant or by any other company, but who had done business with the complainant through the said general agent, among other companies, for the past seven years, and had during the year 1898 procured other insurance on the life of the said Herman D. Cable in another company, which had lapsed in November, 1898. One James F. McCabe was also a life insurance agent or broker, who in January, 1899, had a contract of employment with the Equitable Insurance Company of New York, and who had no connection or business arrangement with the complainant, except through the said Finney, and was not known to the general agent of the complainant at Chicago in connection with the Cable policy until about the time when the application therefor was delivered to the complainant's general agent in Chicago, and was not personally known to said general agent until March 5, 1899. Upon the delivery of the said two policies to Finney, the gross amounts of the premiums due were charged against him by the complainant's general agent, and he subsequently paid to such general agent the amount due to the complainant out of such premiums.

"(5) The applications of both George S. Lord and Herman D. Cable for insurance were obtained from them by the said McCabe, under an agreement with the said Finney, and when procured were delivered by him to Finney. After the two policies had been received by the complainant's general agent in Chicago, and had been turned over by him to Finney as aforesaid, the latter in turn delivered them to the said McCabe, on the 21st day of February, 1899. Thereupon, on the same day, McCabe called first at the office of Herman D. Cable, having both of the said policies with him, but the said Cable refused to accept his policy at that time, stating that he did not have time to look into the matter at the moment, but that he would be guided a good deal by what Mr. Lord said and did in the matter. Afterwards, on the same day, McCabe called at Mr. Lord's office, found Mr. Lord very busy, and left his (Lord's) policy with him, together with a financial statement of the company, and told him that he might send him (McCabe) a check for it. On the same day McCabe returned the Cable policy to Finney.

"(6) On the 27th day of February, 1899, McCabe again called upon George S. Lord, and asked for payment of the premium on his policy. Mr. Lord thereupon asked him if he also had the Cable policy with him. McCabe stated that he had not, but that he could get it in a few minutes; whereupon Mr. Lord told him to get it, and he (Lord) would pay him the amount of both premiums. McCabe then went at once to Finney's office, procured the Cable policy from Mr. Finney, and returned with it to Mr. Lord's office, and handed it to Mr. Lord, saying as he did so, 'Is Mr. Cable all right?' or words substantially to that effect. There was a conflict as to what Mr. Lord said in reply, but the master is of the opinion that the reply was substantially as Mr. Lord stated in his testimony, viz.: 'No; Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours.' Thereupon McCabe left the Cable policy with Mr. Lord, who already had his own policy, and Mr. Lord paid the premiums on both policies in currency, the premium on the Cable policy being eight hundred and forty-eight dollars and fifty cents ($848.50), and McCabe took the money to Mr. Finney, who subsequently paid to the complainant the amount due to it. Mr. Lord then took the Cable policy to Evanston, and delivered it to a member of Mr. Cable's family at the latter's house, in the evening of the same day. The master finds that Lord had been authorized in advance by Herman D. Cable to accept and pay for the latter's policy, in case he (the said Lord) decided to accept and pay for his own policy, and that the premium advanced by him was repaid to him after Cable's death by one of the relatives of the said Cable.

"(7) Immediately after delivering the said two policies to Lord, McCabe went to Cleveland, Ohio, and while there he received, on March 2, 1899, a telegram from Finney, reading as follows: 'Cable died this morning. Was sick when policy delivered. Company want policy back. Am noncommittal pending hearing from you. Have you any advice?' (See Complainant's Exhibit 3.) McCabe thereupon returned to Chicago on March 3, 1899, and on that day informed Mr. Lord, and also the latter's attorney, Mr. H. H. C. Miller, that the complainant company demanded the return of the Cable policy.

"(8) The master finds that on the 21st day of February, 1899, when the policy in question was first presented to Herman D. Cable and he refused to receive it, he was in sound health and insurable condition; that on the 24th day of February, 1899, he was taken ill with incipient pneumonia, and was attended by a physician in the early evening of that day, and was put under the care of a trained nurse the same evening; that his disease developed into a case of acute pneumonia, and that he was seriously ill with that disease and confined to his bed from the evening of the 24th day of February, 1899, until March 2, 1899, when he died; that on the 27th day of February, 1899, the said Herman D. Cable was seriously ill with acute pneumonia, and was not in good health, and was not in insurable condition, and that this was well known to the said George S. Lord when he procured the delivery to himself of the Cable policy, and paid the premium thereon, but that he did not communicate such knowledge to the said McCabe any further than by making the statement to him which has been set forth

heretofore in finding 6; and the master finds that the said Lord's statement that Cable had been sick for two or three days, but was no worse than he had been the last forty-eight hours, while it was substantially true at the time when it was made, was deceptive in its nature, and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or to lead him to suspect it.

"(9) The master further finds that up to the last day of said Cable's illness the said illness was not such as to be regarded by his physician and friends as necessarily fatal; that up to the day before his death his attending physician expected him to recover, and so informed his family; that the immediate cause of his death was heart failure, or collapse, which was the result of his illness, and which is one of the common features of pneumonia.

"(10) The master further finds that none of the general officers of the complainant company residing in New York City had any personal knowledge that the said Herman D. Cable was taken ill at any time after the application for the policy in controversy was made, and that none of them had any personal knowledge until after his death that he was ill at any time between the date of the application and the date of his death, and that neither the said Finney nor the said McCabe (excepting the statement made to him by Lord on the delivery of the policy), nor the general agent of the complainant at Chicago, nor the complainant itself, had any knowledge or information as to the said Cable's condition of health at any time between the date of the application for the policy in question and March 2, 1899, but in making this and all other findings the master expressly reserves the question as to whether the information conveyed by George S. Lord to McCabe was or was not, such notice as to bind the complainant company and its representatives.

"(11) That on or about the 16th day of March, 1899, the defendant, Alice A. Cable, was by the probate court of Cook county duly appointed as administratrix of the estate of the said Herman D. Cable, deceased, and qualified, and took upon herself the duties of such trust, and that as such administratrix she took possession of the said policy in controversy, and has ever since been in possession of the same; that as such administratrix she filed with the complainant proof of the death of the said Herman D. Cable, and requested payment to her of the commuted value of the unpaid installments of $1,666.66 each, specified in the said policy, being the lump sum of thirty thousand dollars ($30,000), and that the complainant refused to pay the same, and that the defendant herein brought her action at law against the complainant in the superior court of Cook county, Illinois, on May 11, 1899, to recover $30,000 upon the policy offered in evidence in this case, as the commuted value of such policy; that such action was begun by the filing of a præcipe and the issuance of a summons on said day, about an hour prior to the filing of the original bill herein; that such summons was placed in the hands of the sheriff of Cook county for service upon the defendant immediately upon its issuance, and prior to the filing of the original bill herein, but was not served upon the complainant herein until May 15, 1899, and that no direction to the sheriff to delay the service of summons was given by the plaintiff in said action at law, or her attorney, which action at law is still pending and has never been called for trial, but now stands number 148 upon the new calendar of Judge Chytraus, which said judge began to call September 15, 1900.

"(12) The master further finds that before the filing of the bill herein the complainant offered to pay to the defendant herein the amount of the first premium upon the policy in controversy, together with interest thereon, but the offer was refused by the said defendant, Alice A. Cable, administratrix of the estate of Herman D. Cable, deceased.

"(13) The master finds that there has been no evidence adduced before him showing or tending to show that any of the conditions of the policy in controversy have been waived by the president and secretary or actuary of the complainant, or any or either of them, and also finds that the general agent of complainant in Chicago never authorized either said McCabe or said Finney to waive any of the conditions thereof, and never waived any of them himself.

"(14) That the said Herman D. Cable and George S. Lord, in the making of the application to the complainant and in the delivery of the policies and payment of the premiums thereon, had no dealings with any person other than the said James F. McCabe."

Before the filing of the report Alice A. Cable, administratrix, filed with the master certain objections to his report, which were apparently returned to the court by the master with his report and read as follows: "First, for that the master has erroneously found that the statement made by George S. Lord to James F. McCabe as to the illness of Herman D. Cable was deceptive in its nature, and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it; second, for that the said master has omitted to find that on the 27th day of February, 1899, it was the full belief of George S. Lord that said Cable was not dangerously sick, and that he would shortly recover from his then illness; third, for that the said master has omitted to find that the information conveyed by the said George S. Lord to said James F. McCabe was sufficient notice of the illness of Herman D. Cable at and before the time of the delivery of the policy and the payment of the premium thereon; in all of which particulars the said defendant objects to the said report, and submits that the same ought to be varied and altered."

On October 23, 1900, the court ordered that the objections referred to stand as exceptions to the report, and thereupon the cause was heard before the court. Afterwards, on December 21, 1900, the court rendered a decree sustaining the first exception, and disapproving of the second sentence in paragraph 8 of the master's report, and made the following finding of fact in lieu thereof: "That on the 27th day of February, 1899, the said Herman D. Cable was seriously ill with acute pneumonia, and was not in good health, and was not in insurable condition, and that the said George S. Lord when the Cable policy was delivered to him and the premium paid thereon was aware of such fact; that when said Lord was asked by McCabe, as the agent of the complainant, as to the then condition of Herman D. Cable, he in good faith, and without any intent to defraud the complainant or conceal the real condition of the health of said Cable, stated that Cable had been sick for two or three days, but was no worse than he had been during the last forty-eight hours, as heretofore found in finding 6, but that said Lord did not make any further statement in regard to the condition of said Cable, nor were any further inquiries made by said McCabe in regard thereto."

The decree overruled the second and third exceptions to the master's report, and decreed that the policy in question "was procured on behalf of the said deceased by constructive fraud, and that no actual fraud was intended or practiced in the delivery of the same, and that the complainant is entitled to the relief prayed for," and thereupon decreed that the policy be annulled and canceled and declared to be of no force and effect as an obligation; that it be forthwith surrendered and delivered; and reserved jurisdiction to make such further order as might be necessary to secure the full and effectual execution of the decree, including power and jurisdiction to prevent the defendant from prosecuting any suit or action upon the policy. From this decree the defendant below appealed.

The complainant below also filed an assignment of errors, as follows:

"(1) That the circuit court erred in and by said decree in finding that the master's report was made pursuant to the order of reference to said master, and in entertaining and acting upon exceptions thereto; (2) that the circuit court erred in and by said decree in sustaining the following exception filed by the defendant to the master's report: 'First, for that the master has erroneously found that the statement made by George S. Lord to James F. McCabe as to the illness of Herman D. Cable was deceptive in its nature, and not calculated or intended to inform McCabe as to the serious condition of Cable's health, or lead him to suspect it.' (3) That the circuit court erred in and by said decree in finding that, at the time Lord procured from McCabe the Cable policy, Lord told McCabe that Herman D. Cable had been sick for two or three days, but was no worse than he had been for the last forty-eight hours. (4) Assuming that Lord made said statement as

found, the circuit court erred in and by said decree in further finding that it was made by Lord in good faith, and without any intent to defraud the complainant, or to conceal the real condition of the health of said Cable. (5) That the circuit court erred in and by said decree in finding that no actual fraud was intended or practiced in the delivery of the policy of insurance mentioned in said decree. (6) The circuit court erred in not finding that the delivery of the policy in controversy was procured by actual fraud. Wherefore the said complainant prays that the parts of said decree upon which error is above assigned may be changed and modified, and that as a basis for the relief granted by said decree a finding of fact be made that the delivery of the policy in controversy was procured from the complainant by actual fraud."

On the back of the policy, under the title "Notice," it is provided: "Agents have no power to modify or change this contract, nor extend time for premium payment, nor waive forfeiture."

William G. Beale, for Insurance Co.

W. S. Oppenheim, for Cable.

Before WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

The action of the master in reporting his findings of fact and his conclusions of law upon the evidence was without authority, the order of reference only providing for the taking and return of testimony. The court, however, modified and adopted the findings, and they must be regarded as the findings of the court. An assignment of error to the decree gives the right to a hearing here upon an error well assigned, although no exception was filed to the master's report.

It is a general rule that meditated silence, there being no duty to speak, will not avail to avoid a contract. There being no duty to communicate intelligence, the one party is not bound to speak although he may know that the other party lies under a mistake. This is because the parties are dealing with each other at arm's length. But even in such case the suppressio veri must rest in silence, not in partial and misleading statement. The latter amounts to suggestio falsi; for, as it has well been said, "a half truth is often the greatest of lies." If one would deal at arm's length, he must remain silent. He may not speak that which is certain to deceive and suppress that which would challenge attention, disclosing the truth. If the matter be with respect to a material fact which, if known to the one party and not to the other, would, if disclosed, induce that other to refrain from contracting, either wholly or upon the terms proposed, the one having knowledge of the fact, if under no duty to disclose, may not by a partial statement throw the other party off his guard, when disclosure of the truth and the whole truth would have prevented his action.

There is, however, a class of contracts, not arising in confidential relation, where there is a duty to speak, where silence is tantamount to fraud, because "the silence goes to the very essence of the transaction, preventing the existence of any contract, when the transaction takes the form of contract, for want of union of minds between the parties." Bigelow, Frauds, 594. This class of contracts comprehends many subjects, and especially the subject of insurance.

Thus, in marine insurance, the applicant owes the duty of disclosure. If he conceals a material fact, whether or not he be inquired of concerning it, the policy is void, even though his silence arose from error of judgment, and not from fraudulent intent. This is sometimes rested upon the ground that the silence is a breach of the condition precedent of every contract of marine insurance, "that the insured shall make full disclosure of all facts materially affecting the risk, which are within his personal knowledge at the time when the contract is made." Blackburn v. Vigors, 12 App. Cas. 531; Arn. Ins. (4 Eng. Ed.) 512. Thus, where insurance was applied for upon a vessel "lost or not lost," the applicant knowing of its loss, but concealing his knowledge from the insurer, the court held the concealment to be a fraud destroying the validity of the contract, remarking (page 670, 15 Wall., and page 247, 21 L. Ed.): "When the company came to make this instrument, they were entitled to the information which the plaintiffs had of the loss of the vessel." Insurance Co. v. Lyman, 15 Wall. 664, 21 L. Ed. 246. So, also, with respect to fire insurance, it has been held that if one knowing of a conflagration near his property, without disclosing the fact, procure insurance of an underwriter ignorant of the fact, the contract is void. Bufe v. Turner, 6 Taunt. 338. A well-considered case upon the subject of disclosure with respect to fire insurance is Insurance Co. v. Harmer, 2 Ohio St. 452, in which it is held by Ranney, J., that the doctrine of concealment as understood in marine insurance is not applicable in its full extent to fire policies, because the corpus is subject to inspection by either party, but that the assured must not misrepresent or designedly conceal a fact of unusual peril to the property not with reasonable diligence discoverable by the insurer, or anticipated as a foundation for specific inquiry.

In respect of marine insurance, one reason for the requirement of disclosure is that the corpus is often not accessible to the insurer, and reliance must be placed upon the good faith of the insured. In this respect life insurance is more nearly allied to marine than to fire insurance. It is true that a medical examination will ascertain many things necessary to be known; but there is a large field of inquiry which cannot be so disclosed, and which may be essential to the risk to be assumed. The past history of the insured, the diseases with which he had been afflicted, the duration of life of his ancestors, and their diseases, are all matters which go to the question of the assumption of the risk, and of which the insurer would naturally desire information. So, also, in the interval between the medical examination and the execution and delivery of the policy, a serious change in the health of the assured may have occurred, of which the insurer might be, and probably would be, wholly ignorant. The insurer has therefore a right to rely upon the utmost good faith upon the part of the assured, and though the latter may not be bound to communicate, if uninquired of, all the details of his life which might affect the judgment of the insurer with respect to the assumption of the risk, he is certainly bound to disclose any impending peril to life not known to the insurer, and of which the latter cannot reasonably be said to be put upon inquiry. It is the custom of insurance companies

to act upon written or printed applications signed by the applicant containing answers to questions propounded. Generally, as is the fact here, by the terms of the contract the application is made part of and attached to the policy of insurance. In such case the answers to the questions are warranties, and no suggestion of immateriality of the question and answer can be entertained, because it is for the insurer to judge of the materiality of the information demanded and of the reasons that shall determine the assumption of the risk.

In the case at bar, Cable in the application was inquired of whether he had ever been subject to or had pneumonia, to which he gave a negative answer. This application being made part of the contract, the statement is a warranty, and is so declared to be by the application. This statement, in the law, refers not merely to the date of the application, but to the time of the completion and delivery of the contract. And if, after the statement is made, a material change occur before the contract is consummated, the duty of disclosure on the part of the assured, or the one receiving delivery of the policy for him, is absolute. The application of Cable covenanted that the policy should take effect only "upon payment of the first premium, and delivery of the policy during my lifetime, sound health, and insurable condition." The statements in the application of good health and freedom from disease, and specifically from pneumonia, constitute a warranty of the contract as though declared simultaneously with the delivery of the policy. If there had been a change in health between the date of the application and the delivery of the policy, the company was entitled to know of it, and to be fully informed concerning it, that it might determine whether, notwithstanding such change, it would consummate the agreement and deliver its policy; for, as stated in Traill v. Baring, 33 Law J. Ch. 521, 9 Law T. (N. S.) 708, on appeal 10 Law T. (N. S.) 215, if a person make a representation which is calculated to induce another to assume a particular liability, and the circumstances are afterwards, before the liability is assumed, so altered to the knowledge of the person making the representation that the alteration might affect the course of conduct of the person to whom the representation was made, it is the imperative duty of the person who made the representation to communicate to the person to whom he made it the alteration in these circumstances, and a court of equity will not hold the person to whom he made the representation to be bound by any contract entered into upon the faith thereof, unless such communication has been made. In British Equitable Ins. Co. v. Great Western Ry. Co., 38 Law J. Ch. 132, 19 Law T. (N. S.) 476, in July, a declaration was signed for insurance upon life containing reference to the usual medical attendance of the proposed assured, who certified that the proposed assured was in good health. The assured was also required to state who was "his latest, if other than his usual, medical attendant." It was provided in the letter accepting the proposal and in the receipt for the first premium that if any change had taken place in the health of the assured since the date of the medical examination it would render the policy void. In August the assured consulted another physician, who discovered his patient to be suffering from disease

of the kidneys. This fact was not communicated to the company, and the policy was delivered in September. Eight months afterwards the assured died of disease of the kidneys. It was held that the requirement to disclose his last medical attendant was a continuous one up to the date of the completion of the contract; that the noncommunication of his visit to the physician in the interval between the signing of the application and the taking of the policy voided the policy. This decree was affirmed upon appeal. 38 Law J. Ch. 314, 20 Law T. (N. S.) 422. In Morrison v. Muspratt, 4 Bing. 60, one was represented to the insurers in December of a certain year by a physician as enjoying ordinarily a good state of health. This representation was repeated in March following, and the insurance was effected in April. Between December and March the person had been ill with a pulmonary attack, and was attended by a physician other than the one who had made the representations to the insurance company, but no disclosure of the circumstance was made to the insurer. In April, a year after the issuance of the policy, the assured died of pulmonary disease. This was a case of mere representation, not of warranty, and the court held that the facts of the illness and of the attendance of the other physician should have been disclosed. See, also, Rose v. Society, 11 Ct. Sess. Cas. (2d Series) 345; Society v. McElroy, 49 U. S. App. 548, 28 C. C. A. 365, 83 Fed. 631 In Insurance Co. v. Ewing, 92 U. S. 377, 23 L. Ed. 610, the applicant being in extremis, a friend paid the premium, but concealed from the agent the condition of the applicant. The agent delivered the policy in ignorance of the facts. The court held there was no valid contract, saying (page 380, 92 U. S., and page 612, 23 L. Ed.): "It cannot for a moment be contended that while parties are still in negotiation as to the terms of a contract, one of them, learning of a total change in the condition of the subject-matter of the contract of which the other is ignorant, can at that moment accept terms which he has refused before, and by so doing bind the party who has offered those terms when the condition of affairs was wholly different;" and at page 381, 92 U. S., and page 613, 23 L. Ed.: "To hold that when he was in extremis, an hour or two before he breathed his last, a friend should pay this small sum to an agent of the company, without the agent of the company having any idea of the condition of the dying man, and thus secure an obligation to pay his administrator $5,000 within sixty or ninety days, is to affirm that one party to a negotiation can delay his assent to the terms of the contract until the changes of fortune enable him to reap all the benefits, and throw all the losses on the other side, and then, for the first time, do what was necessary on his part to make the contract obligatory." There was therefore here both a warranty of good health and insurable condition at the time of the delivery of the policy, and, whether the statements of the application be treated as warranty or as representations, they were continuing up to and were effective as representations or warranties at the time of the delivery of the policy. 1 May, Ins. (4th Ed.) § 190. Independent of these considerations, and growing out of the very nature of the subject-matter, there was the legal obligation resting upon Cable,

and upon those acting for him, to disclose any material change in his condition of health between the time of the application and the time of the delivery of the policy.

Was there such a change of health, and was the duty of disclosure performed? The application is dated January 16, 1899, and by the contract is made a warranty, and, as we have sought to show, that warranty speaks from the date of the delivery of the policy. That warranty was broken as soon as made, for at the time of the delivery of the policy he had pneumonia, and that fact was not disclosed to the company, or to the one who for the company delivered the policy to Lord, the latter knowing of the fact.

It is, however, urged that sufficient information was disclosed by Lord to McCabe to put the company upon inquiry, and that, with such notice, McCabe delivered the policy and received the premium; that McCabe was the agent of the company, and notice to him was notice to the company, and the delivery of the policy constituted a waiver of the condition and warranty. Upon the assumption that McCabe was such agent of the company, and that his action must be treated as the action of the company,—questions which we do not determine,—it becomes us to inquire of the sufficiency of the notice given, and whether the act of delivery of the policy involved a waiver of the warranty.

On February 21, 1899, Cable had tentatively declined to accept the policy, desiring to be guided in his judgment by the action of his intimate friend Lord, who had made a like application upon his own life to the same company. The policy was thereupon returned by McCabe to Finney, the broker from whom he received it. The policy on Lord's life was on the same day left with him, and he was requested to send a check for the premium. Six days afterwards, and on the 27th of that month, McCabe called upon Lord and asked for the payment of the premium upon his policy. Lord asked him if he had the Cable policy, to which McCabe answered "No," but that he could get it in a few minutes; whereupon Lord told him to get it, and that he (Lord) would pay him the amount of both premiums. McCabe procured the Cable policy, returned with it to Lord's office, and handed it to the latter, saying as he did so, "Cable is all right, isn't he?" Here occurs somewhat of a conflict in the evidence. McCabe says that Lord, in a very low voice, without looking at him and in a casual manner, answered, "The same as he has been for forty-eight hours;" conveying to McCabe's mind the meaning that Cable was all right. Lord says that he answered: "No; Mr. Cable has been sick for two or three days, but he is no worse than he has been for the last forty-eight hours." The master and the court below found the fact to be as stated by Lord, and, while there is much in the testimony throwing doubt upon the correctness of this conclusion, we are content to take the fact as found by the master and adopted by the court. Lord at this time knew that Cable was seriously ill with acute pneumonia, that he was not in good health, and that he was not in insurable condition. Lord was a man of affairs, actively interested in many important business adventures. He must have known—he was bound to know—that no sane man, fully

informed of Cable's condition, would accept insurance and deliver a policy upon such a life. It was his duty to have disclosed the facts, and whether failure so to do arose from design or forgetfulness the fraud upon the company was none the less. The wrong that was effected cannot be excused upon the ground that Lord did not intend to commit the wrong. Those whom he represented cannot be permitted to take the fruit of the wrong upon the ground that Lord was innocent of wrongful intent. In Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 510, 1 Sup. Ct. 582, 599, 27 L. Ed. 337, 345, the court, speaking of the duty of disclosure in respect of insurance, says: "The duty of communication, indeed, is independent of the intention, and is violated by the fact of concealment, even where there is no design to deceive."

Nor do we think that the statement was such that a reasonable man would have been put upon inquiry. It was a casual statement, partial and misleading, and the manner of its delivery was, in our judgment, such as to ward off rather than to invite inquiry, and to convey to McCabe the impression that Cable was, if at all, but slightly indisposed. In order to preclude the insurance company by the action of McCabe, the latter should have been fully informed of the situation; for a waiver cannot be predicated upon a partial and a misleading statement. It was held in Sun Mut. Ins. Co. v. Ocean Ins. Co., 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337, that it was the duty of the assured to communicate all material facts, and he cannot allege as an excuse for his omission to do so that they were actually known to the underwriter, unless the knowledge of the latter was as full and particular as his own information. A waiver is an intentional relinquishment of a known right,—an election by one to dispense with something of value, or to forego some advantage that might be insisted upon. A waiver exists only where one with full knowledge of a material fact does or forbears to do something inconsistent with the existence of the right, or of his intention to rely upon that right. Bish. Cont. § 792. Waiver is but another name for estoppel. "It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts, of those which create the forfeiture, and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the assured being in extremis, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policy holder, instead of protecting him against the commission of one by the company." Insurance Co. v. Wolff, 95 U. S. 326, 333, 24 L. Ed. 387, 390.

It cannot here be doubted that if the insurance company, or McCabe as its agent, had been informed of the fact, within the personal knowledge of Lord, that Cable was seriously ill with acute pneumonia, the policy would not have been delivered. It is difficult for us to believe that Lord, with that knowledge, could think he had a right to accept this policy; but, whether so or not, the concealment of the fact was a fraud upon the company. The statement made was deceptive and misleading, whatever were the intentions of Lord, and a court of equity ought not to permit the completion of the wrong. Courts of equity cannot sustain an insurance upon the life of a dying man, when the nature of his malady and the seriousness of his illness are concealed from the insurer.

It was suggested that in view of the decision of the supreme court in Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, we should reconsider our former judgment in this case, and dismiss the bill for want of jurisdiction. We are unable to see that the decision referred to is in conflict, but whether so or not the previous judgment of this court is res judicata between these parties, and we are without authority to disturb it. In this connection, and upon the question of jurisdiction, the case of Ogden City v. Weaver (C. C. A.) 108 Fed. 564, 567, may prove of interest.

GROSSCUP, Circuit Judge. The jurisdictional question was settled on the former appeal. Under our ruling in Supreme Lodge v. Lloyd (C. C. A.) 107 Fed. 70, that decision becomes a part of the law of this case. With the jurisdictional question thus out of the way, I concur in the foregoing opinion.

The decree is affirmed.

WOODS, Circuit Judge, sat at the hearing of this cause, and concurred in the conclusion reached, but departed this life before the preparation of this opinion.

MASONIC MUT. LIFE ASS'N v. PAISLEY.

(Circuit Court, W. D. Pennsylvania. September 14, 1901.)

No. 16.

LIFE INSURANCE—RIGHTS OF CREDITORS—INSOLVENCY OF INSURED.

The fact that a married man was insolvent at the time he effected insurance on his life in favor of his wife and children, in a mutual association which was authorized only to issue certificates in favor of the family or heirs of its deceased members, and that he remained insolvent until his death, where the amount paid in premiums was moderate, and there was no actual fraud, does not entitle his creditors, under the principles of the common law, to claim the proceeds of his certificate, or any part thereof, as against the widow and children; and such case also comes within Act Pa. April 15, 1868 (P. L. 103; Purd. Dig. p. 1048), which provides that all policies of life insurance taken out for the benefit of, or bona fide assigned to, the wife or children of the insured, or any dependent relative, shall be vested in such wife or children, or other relative, free and clear from the claims of his creditors.

In Equity. Sur examiner's certificate in interpleader proceeding.

Morton Hunter, for Carrie Graff and S. T. Paisley, Jr.
Murphy & Hosack, for Emma D. Paisley.
J. P. Hunter, for Emma D. Paisley, administratrix.

ACHESON, Circuit Judge. The Masonic Mutual Life Asociation is a corporation chartered under the laws of the state of Ohio. Its object, as declared in the articles of association, is to insure the lives of members upon the plan of mutual insurance protection and the relief of their families and heirs. The third section of article 1 of its constitution (which constitution was expressly made a part of the contract between the association and Samuel T. Paisley) declares that, "The object of this association shall be to render financial aid to the widow or heirs of deceased members, according to the regulations and provisions hereinafter specified in the by-laws, and for no other purpose whatever." The contract of insurance here in question is in the form of a certificate of membership, dated January 22, 1887, issued on that day to Samuel T. Paisley; and thereby the association covenanted to pay the sum of $5,000 "to the heirs of the assured," the instrument stipulating "that unless claim is made for benefits under this certificate by the widow or heirs of said member within six months after the death of said member, then, and in that case, all claims for benefits under this certificate shall be forfeited, and this association shall be released from all liability for such benefits." Section 2 of article 6 of the constitution provides that, "within sixty days after due notice and satisfactory proof of death of a member of the association, the board of trustees shall cause to be paid to the family or heirs of the deceased member an amount according to his certificate." On January 22, 1887, when the certificate of membership in the Masonic Mutual Life Association was issued to Samuel T. Paisley, he paid to the association the sum or premium of $14.25, and thereafter until his death, on July 5, 1900, he paid to the association from time to time, as deaths among the members occurred, assessments ranging from $3.25 to $12, in all aggregating the sum of $838.35. The rival claimants to the insurance fund, which has been paid into court, on the one hand, are the creditors of Samuel T. Paisley, here represented by his administratrix, and, on the other hand, are his widow and children, who are the "heirs of the assured," under the legal interpretation of the contract of insurance. Association v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810. The widow and children gave due notice, and furnished satisfactory proof of death to the association. The ground, as presented by the offers of evidence certified to the court, upon which the creditors claim the insurance fund, is that Samuel T. Paisley, the insured, was insolvent on the 22d day of January, 1887, the date of the issuing of the certificate or policy of insurance, and also at the time of his application for the same; that he was insolvent at the dates of his several payments of premiums or assessments, and was also insolvent at the time of his death, on July 5, 1900. Now there is a well-recognized distinction between the assign-

ment by an insolvent to his wife and children of insurance on his life, effected in his own name and payable to himself or his personal representatives, and the effecting of insurance on his life by an insolvent directly in favor of his wife and children, and payable to them. Thus, in the Appeal of Elliott's Ex'rs, 50 Pa. 75, 88 Am. Dec. 525, although it was held that the assignment of policies of life insurance by an insolvent debtor who was insolvent when insured to a trustee for the benefit of his wife was fraudulent and void as against creditors, yet the supreme court of Pennsylvania, in announcing the decision, declared as follows:

"We are to be understood, in thus deciding this case, that we do not mean to extend it to policies effected without fraud, directly and on their face for the benefit of the wife, and payable to her. Such policies are not fraudulent as to creditors, and are not touched by this decision."

By the words "without fraud," as here used, the court undoubtedly meant actual fraud, and not fraud inferable from mere insolvency. Such was the interpretation of this language by the supreme court of the United States in Bank v. Hume, 128 U. S. 195, 208, 9 Sup. Ct. 41, 32 L. Ed. 370. And it was there held by the supreme court of the United States that a married man, although insolvent, may rightfully devote a moderate portion of his earnings to insure his life for the benefit of his wife and children, and thus make reasonable provision for his family after his decease, without being thereby held to intend to hinder, delay, or defraud his creditors, provided no such fraudulent intent is shown to exist or must necessarily be inferred from the surrounding circumstances. It is settled by the decisions of the supreme court of Ohio that such corporations as the Masonic Mutual Life Association have no power to provide for the payment of a sum of money to persons other than the family or heirs of a deceased member. State v. Standard Life Ass'n, 38 Ohio St. 281; State v. People's Mut. Ben. Ass'n, 42 Ohio St. 579; Association v. Gonser, 43 Ohio St. 1, 1 N. E. 11. Under these decisions, the executor or administrator of a deceased member has no claim to the insurance fund under such a certificate of membership as is involved here. And to this effect are the decisions of the supreme court of Pennsylvania. Northwestern Masonic Aid Ass'n v. Jones, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; Masonic Mut. Ass'n v. Same, 154 Pa. 107, 26 Atl. 255. It is clear, I think, as well from the terms of his certificate of membership as by the law of Ohio under which it was issued, that Samuel T. Paisley never had any property in the insurance fund here in controversy. In re Morrell's Estate, 8 Wkly. Notes Cas. 183; Association v. Jones, 154 Pa. 99, 105, 26 Atl. 253, 35 Am. St. Rep. 810.

Upon the authority of the foregoing decisions I feel fully justified in holding that the mere insolvency of Samuel T. Paisley, as stated in the offers of evidence, affords no ground upon which his creditors can successfully attack the title of his widow and children to this insurance fund. The decision of the supreme court of the United States in Bank v. Hume, supra, I think, is conclusive against the claim of the creditors, both in respect to the principal of the insurance fund and the premiums or assessments paid by Paisley.

Thus far the case has been considered solely with reference to the statute of 13th Eliz. and the principle of that statute. I ought not to conclude, however, without referring to the Pennsylvania act of April 15, 1868 (P. L. 103, Purd. Dig. p. 1048, pl. 71):

"All policies of life insurance, or annuities upon the life of any person, which may hereafter mature, and which have been or shall be taken out for the benefit of, or bona fide assigned to, the wife or children or any relative dependent upon such person, shall be vested in such wife or children or other relative, full (free) and clear from all claims of the creditors of such person."

In McCutcheon's Appeal, 99 Pa. 133, it was declared that where the policy is originally issued for the benefit of the persons mentioned in the act the question of fraud arising from the claims of creditors is entirely eliminated. The court there said that:

"The very object and purpose of the act was to enable insolvent persons to make provision in this way for their families or dependent relatives which should be good and effective against, and free and clear of, all claims of creditors."

It seems to me that the instrument issued by the Masonic Mutual Life Association to Samuel T. Paisley is fairly within the terms of this act of 1868. That association may not be a life insurance company, within the meaning of some of the statutes of Pennsylvania, but the instrument in question is in substance a policy of life insurance. The act embraces "all" policies of life insurance, without regard to the form thereof. In State v. Standard Life Ass'n, 38 Ohio St. 281, 287, the supreme court of Ohio, speaking of such instruments as the one here involved, said, "It has issued what are called certificates of membership, but the real nature of the contract is that of insurance."

I may say in conclusion that, whether regard is had to general principles or to the act of 1868, the objections to the offers of evidence were well taken, in my judgment.

And now, September 14, 1901, the objections to the offers of evidence are sustained.

HALSTEAD et al. v. JOHN C. WINSTON CO. et al.

(Circuit Court, E. D. Pennsylvania. October 21, 1901.)

INJUNCTION—TEMPORARY RESTRAINING ORDER—GROUNDS.

A temporary restraining order will not be granted to prevent the issuance by defendants of circulars describing a book published by them which is written by the same author and upon the same subject as a book previously published by complainant, where such circulars contain no legally objectionable statements, and no fraudulent conduct on the part of defendants is shown, merely because such circulars may possibly confuse the public and cause some injury to complainant.

In Equity. On motion for restraining order.

Hector T. Fenton, for complainants.

Jos. T. Bunting and Wm. C. Hannis, for respondents.

J. B. McPHERSON, District Judge. It is, no doubt, possible that the circulars described in the bill may do the complainants some

harm. The public may confuse the book referred to by the circulars with the book published by the complainants, and the sale of the latter may thereby be injured. But the possibility of confusion is due to the fact that Mr. Halstead is the author of both these books, which are on the same subject,—the life and public career of President McKinley; and since the circulars, which refer to the first book written by Mr. Halstead, and not to the book published by the complainants, contain no legally objectionable statement, and since no evidence of fraudulent conduct on the part of the defendants has thus far been made to appear, I see no sufficient reason for interference by the court at this stage of the proceeding. For the present, the complainants must themselves take the trouble to set right such confusion as may exist, and to explain clearly to the public that the defendants' circulars do not refer to Mr. Halstead's second book, but to the book which was first issued in 1896. No question of copyright or unfair competition is involved.

The restraining order is refused.

BIBBER-WHITE CO. v. WHITE RIVER VAL. ELECTRIC R. CO.

(Circuit Court, D. Vermont. September 26, 1901.)

1. EMINENT DOMAIN—RAILROAD RIGHT OF WAY—VERMONT STATUTE.
Under the laws of Vermont (V. S. §§ 3814, 3826) a landowner who permits a railroad company to enter upon his land to construct its road without requiring the prepayment or deposit of the damages waives the right to exclude the company from the land for nonpayment of the damages, and the company has two years within which to have the damages appraised and pay the same, after which, if not paid, the landowner may sue. *Held*, that where the question of damages was submitted to arbitration, an award was made, and the company took possession and constructed its road, but did not pay the damages, the remedy of the landowner was limited to an action upon the award.

2. SAME—RIGHT OF ACTION OF LANDOWNER.
Under such statute, where a company has entered upon and used land, either under an agreement with the owner, which it has failed to keep, or without any agreement, the landowner cannot maintain a suit or proceeding in equity to enforce a lien upon the road for the damages before the expiration of two years.

In Equity. Intervening petitions by landowners for damages by the construction of the railroad, now in the hands of the receivers.

M. M. Wilson, for petitioner.
Chas. M. Bruce, for petitionee.

WHEELER, District Judge. According to the railroad laws of the state, the payment or deposit of the amount of the land damages assessed or agreed upon is a condition precedent to the vesting of the title, or of any right to construct the road; and when land is taken for a railroad, and the company has not paid therefor, nor within two years had the damages appraised, and an award made and delivered, the landowners may sue. V. S. §§ 3814, 3826. But if the landowner waives the condition, and lets the company take the land

for its road and work without payment or deposit for damages, the right to exclude the company from the road for nonpayment is lost. Chief Justice Redfield, in McAulay v. Railroad Co., 33 Vt. 311, 78 Am. Dec. 627, on this subject, said:

"In these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire important interests in its continuance. The party does not, of course, lose his claim, or the right to enforce it in all proper modes."

The implied consent is to the taking of the land as it is wanted for the line of road, with all of the consequences; and it cannot be taken back out of the line, nor the right to it narrowed as it is needed for the railroad purposes. Railroad Co. v. Potter, 42 Vt. 272, 1 Am. Rep. 325; Austin v. Railroad Co., 45 Vt. 215.

In the case of the intervening petition of Lattimer there was an award by arbitrators of $175. A deed was to be given on payment, and the work went on without objection. The deed would be immaterial. Payment of the award without it would complete the right of the company to the roadway. Permitting the taking of the land without payment waived the right to prepayment, and thereafter the right of this petitioner appears to have consisted in the cause of action that accrued upon the award for the amount awarded. This petition must therefore be dismissed.

In the case of the intervening petition of Morse and Harding there was a parol agreement for the purchase of the whole farm at $2,000. Work began, and was proceeded with, but the agreement was not carried out. The right to the damages has sprung up from the failure to carry out the agreement which was void by the statute of frauds. There has been no payment or appraisal, but the two years given by the statute to the company within which to procure an award and make payment of damages to prevent suit have not elapsed. This case is like that of Austin v. Railroad Co., 45 Vt. 215, which was ejectment by a reversioner after a life estate whose remainder had sprung up, and had not been paid for or appraised, and who was held not to be entitled to maintain ejectment then. A lien upon the land, and an injunction against operating the road across the land to enforce the lien, is claimed,—that which would, in effect, be equivalent to an ejectment. This case is not like Kittell v. Railroad Co., 56 Vt. 96, much relied upon for the petitioner, in this respect, for there the two years had long before elapsed.

In the case of the intervening petition of the Taggarts, Mrs. Taggart seems to have been a life tenant and her daughter a reversioner, and their rights do not appear to have been noticed by the company, nor acted upon by them, when their land was taken. The husband of the mother had been a joint life tenant with her, and had died shortly before. There may have been some arrangement made or attempted with him about the right of way, but, if so, it has not been shown, and his right terminated before the work began; and as to the rights of the petitioners, the taking, as the case

stands upon the proofs, was, but for the laying out of the road, a mere trespass. In several such cases, brought long after the expiration of the two years allowed by statute for appraisal, the state supreme court has held that the court of chancery had jurisdiction to assess the damages and stay the operation of the road across the land till payment should be made. Kendall v. Railroad Co., 55 Vt. 438; Kittell v. Railroad Co., 56 Vt. 96. But in no case noticed has it been held that such a suit could be brought within the two years, and be maintained. The company has "entered upon and used" this land, and this petition and that of Morse and Harding come exactly within the provisions of section 3826, giving the company two years for appraisals. These intervening petitions are as much suits as actions of ejectment or trespass would be, and are no more maintainable yet by the landowners than such actions would be, which, according to McAulay v. Railroad Co. and Austin v. Railroad Co., before cited, could not be within the two years at all. An appraisal and payment within the two years will, of course, end the rights of the petitioners in the Morse and Harding and the Taggart petitions, and failure thereof will leave them to their rights to sue under the statute. These two petitions must therefore be dismissed, but without prejudice to those rights.

Petition of Lattimer dismissed; petitions of Morse and Harding and of Taggarts dismissed, without prejudice to the right to sue after two years from the taking.

GREAT WESTERN MIN. & MFG. CO. v. HARRIS' ESTATE et al.

(Circuit Court, D. Vermont. October 17, 1901.)

1. CORPORATIONS—LIABILITY OF OFFICERS—EFFECT OF STATE STATUTES.
State statutes imposing liabilities upon officers and directors of corporations do not exclude their common-law liability for misfeasance and negligence in the performance of their duties as such officers or directors.

2. LIMITATION—LAW GOVERNING—ACTIONS AGAINST OFFICERS OF CORPORATION.
An action to charge the defendant, as an officer and director of a corporation, for acts of misfeasance in the management of the affairs of the corporation, being for the enforcement of a common-law liability, is governed as to limitation by the law of the forum, and not by that of the domicile of the corporation.

3. CORPORATIONS—INCREASE OF STOCK.
The issuance by a corporation of additional stock, within its powers, and its distribution pro rata among its then stockholders, although without receiving payment therefor, is an act which is not in itself injurious to the corporation or its creditors, and of which the latter cannot complain.

4. SAME—RIGHTS OF CREDITORS—WRONGFUL DIVERSION OF ASSETS.
A corporation issued 500 shares of additional stock, which it distributed pro rata among its stockholders as a stock dividend. It afterwards desired to sell an issue of bonds, and offered the same at 60 per cent. of their par value, but was unable to sell them. It received an offer, however, of 85 per cent. for the bonds, provided it would also issue to the purchasers one-half the same amount of its capital stock, which would amount to 1,500 shares. It accepted such offer, making an agreement with its stockholders that they should furnish the stock pro rata, and receive 25 cents out of every 85 received for the bonds and stock,

and at the same time it issued to such stockholders 1,000 shares additional stock, reciting as the consideration therefor the making of permanent betterments on its property from its net profits. This arrangement was not stated to the purchasers, and the indebtedness created by the bonds was as large as the company's assets, including the proceeds of the bonds and stock, could pay. *Held*, that the portion of such proceeds received by the stockholders on account of the 500 shares of stock previously issued and owned by them could not be considered as having been paid by the corporation, or as depleting its assets, but that the transaction as to the 1,000 shares issued at the time the loan was made was the same in effect as though they had been issued directly to the purchasers, and their proceeds became assets of the corporation, and were wrongfully diverted by their payment to the stockholders as against the bondholders, who were entitled to recover them back on a deficiency of assets to pay the bonds.

5. SAME—JOINT LIABILITY OF DIRECTORS—FUNDS WRONGFULLY DIVERTED.
Directors of a corporation, while they may be held jointly liable for misfeasance or neglect of duty in permitting the wrongful diversion of funds of the corporation to themselves and the other stockholders, are not jointly liable for the sums so received by each of them separately as stockholders.

6. ABATEMENT AND REVIVAL—SUIT AGAINST DIRECTOR OF CORPORATION.
On general principles an action to charge the defendant with liability for misfeasance as a director of a corporation in permitting the wrongful diversion of its funds does not survive, and a suit in equity to enforce such liability, and also to recover from defendant sums so diverted and received by himself, on his death, and in the absence of a state statute permitting it, can only be revived and prosecuted against his executors for the latter purpose, to recover such sums as went to benefit his estate.

In Equity. Suit by the receiver of a corporation to charge defendant with liability as a director and stockholder. Defendant having died pending the suit, it was revived against his executors.

See 96 Fed. 503.

Cleveland & Bowler and Dillingham, Huse & Howland, for plaintiff.

Waterman & Martin and John Seymour Wood, for defendants.

WHEELER, District Judge. The Great Western Mining & Manufacturing Company was a corporation of Kentucky, with a capital stock of $200,000, in shares of $100 each, of which the defendant's testator, a citizen of Vermont, held 600, and a brother of the testator 600,—bought in 1883, at $30 per share,—another person 440, another 300, another 52, and two others 4 each. The five largest stockholders were the directors, and the testator was the president. It had lands, mines, and transportation facilities in Kentucky, and largely produced and sold coal. It issued $50,000 of new stock ratably to the stockholders in January, 1888, and it owed $131,585.03 December 31, 1888. Negotiations for placing $300,000 of mortgage bonds had been going on, and offers had been made for the sale of them at 60 per cent., without finding purchasers. A proposition was made by brokers to the directors April 18, 1889, for putting them on sale at 85 per cent., with a bonus of half as much stock as of bonds. At the annual meeting April 22d—

"The attention of the stockholders being called to the large amount of net earnings being used for construction and betterments, the following res-

olution was presented, and, after consideration, was adopted, to wit: Whereas, there have been expended for permanent improvements and betterments, including machinery, barges, flats, etc., during the years 1884, 1885, 1886, 1887, and 1888, more than $160,000.00, all of which sum has been furnished from the net earnings of the company and fairly belongs to the stockholders of the company: Therefore, resolved, that the directors of this company be, and hereby are, authorized and requested to direct the president and secretary of the company to issue one thousand shares of the capital stock of the company, to be divided pro rata among the present stockholders of this company, as follows: To B. D. Harris, 300 shares; G. D. Harris, 300 shares; John Carlisle, 220 shares; G. W. Carlisle, 150 shares; George S. Richardson, 26 shares; James C. Holden, 2 shares; L. Hinsdale, 2 shares. The matter of negotiating a loan for the benefit of the company was also taken up, and a resolution authorizing the loan to the amount of $300,000.00, for which bonds were to be issued, was approved."

On the same day the directors voted:

"That the president and secretary of the company shall arrange for the sale of the $300,000.00 bonds aforesaid, in their discretion, at the best price obtainable, and the proceeds thereof shall be applied to the cancellation and retirement of $60,000.00 first mortgage 7% bonds dated January 1, 1884, now outstanding, also to the payment of all floating indebtedness incurred up to the date hereof for material and construction, and the balance shall be used by the directors for the best interests of the company."

They also passed the following resolutions:

"Whereas, at the annual meeting of the stockholders of this company a resolution was adopted requesting the directors to issue additional capital stock of this company to the amount of $100,000.00, to be divided pro rata among the present stockholders, and based upon the fact that during the last five years more than $160,000.00 of the net earnings of the company have been expended for permanent improvements and betterments, thereby adding that amount to the assets of the company which belong to the stockholders of the company: Therefore, resolved, that the president and secretary of this company are hereby directed to issue one thousand shares of the capital stock of the company to the present stockholders in proportion to the amount of stock already owned by them, respectively."

A transaction took place among the stockholders as such and the directors as such, as shown by the following extracts from the records of the company:

"Proposition of Stockholders of the Great Western Mining and Manufacturing Company to the Directors of said Company.

"Whereas, the directors of the Great Western Mining and Manufacturing Company have taken steps to borrow the sum of $300,000.00, to be used in payment of existing indebtedness of the company and to provide additional working capital, etc., and have authorized the president and secretary to execute bonds for said amount, and to negotiate the same at the best price obtainable; and whereas, we are informed that it will probably be possible to find purchasers for said bonds at the price of eighty-five per cent. of the par value thereof, provided that stock of the company to the extent of fifty per cent. of the par value of the said bonds shall also be transferred to the several purchasers of said bonds; and whereas, it is deemed to be inexpedient to issue any new stock of the company for such purpose, and desiring to do all we can to assist the directors in procuring said loan and the sale of said bonds: We therefore make this proposition to the directors of the company in reference to the sale of stock held by us in said company to the purchasers of the said bonds, to wit: We will sell to the several purchasers of said bonds of the company stock of the company belonging to us in the amounts set opposite to our names, respectively, and will furnish to the secretary of the company certificates of said stock, assigned in blank, to be by him delivered to said purchasers of said bonds, upon the understanding

and agreement that we are to receive the sum of $50.00 for each share of stock so sold by us out of the money paid for said bonds, and said secretary shall act as our agent in receiving said amounts, and shall pay us the same before the company shall be entitled to have the remainder of the money paid for said bonds by the purchasers thereof. This action is not to be construed as a proposition to sell said stock to the company, but it is to be treated and regarded as a sale of stock directly to the purchasers of said bonds, to be paid for by them to us, and the payment by them to the secretary of this company for said bonds shall be regarded as a payment to us for said stock to the extent necessary to pay us therefor upon the terms above stated. In testimony whereof we have hereunto set our hands on this third day of May, 1889.

B. D. Harris,	450 shares.
"G. D. Harris,	450 shares.
"John Carlisle,	336 shares.
"Geo. S. Richardson,	39 shares.
"G. W. Carlisle,	225 shares.
"Total,	1,500 shares.

"After full consideration of the proposition, the same was accepted, and the secretary was authorized to act as the agent for said stockholders in the proposed sale of their stock and the collection of the purchase money therefor, and directed to turn over the net proceeds of the sale of bonds into the treasury of the company."

A mortgage was made, and $300,000 of bonds bearing 6 per cent. semiannual interest were issued, dated June 1, 1889, and sold in several various amounts, with half as much stock transferred in blank, and deposited ratably by the stockholders with the treasurer, who delivered it with the bonds to the takers of them respectively. The stock of the testator was transferred at various times between September 7, 1887, and March 7, 1890. Of the money received by the treasurer for the bonds and stock, 25 per cent., being 50 per cent. of the stock, was paid by the treasurer to the several stockholders furnishing the stock. The testator furnished 450 shares of the stock, and received $22,500 of the proceeds of the bonds and stock in that manner; all the stockholders received $75,000, and the corporation retained $180,000. The avails of the loan, $255,000, were entered as such on the books of the corporation, and the $75,000 paid to the stockholders was entered as an expense of the loan. The $22,500 was sent to and received by the testator, and this bond transaction was closed in 1890. The business of the corporation was continued, debts were created, dividends were declared and paid to those holding the stock that went with the bonds, but none to the testator upon his original stock after January 1, 1891, and interest coupons from the bonds were paid till 1892, when the receiver was appointed, on a creditors' bill, by the circuit court of the United States for the district of Kentucky. The mortgage was foreclosed by intervention in that suit, and the property covered by the mortgage was sold for $70,000, and the other property for $5,666.67. The avails of the mortgaged property, after deducting expenses, were applied on the mortgage debt, leaving the remainder thereof amounting to more than the face of the bonds still due. The other debts amounted to $122,221.32. This suit was brought by direction of that court in July, 1895, to charge the testator with the $75,000 paid to him and the other stockholders, and for other losses of the corporation alleged to have been caused by mismanagement and negligence

of the directors; but all claims except as to the issues of $50,000 of stock in 1888, and of $100,000 of stock in 1889, and the $75,000 received by the stockholders from the bond and stock transaction have, on the argument, been waived.

The defenses set up to this claim for money withdrawn from the corporation and relied upon are principally that the corporation was solvent at the time of the respective increases and distributions of the stock, and that they were, therefore, lawful and proper; that the stock was sold by the stockholders directly to the bondholders, wherefore the money received for it was not withdrawn from the corporation; that all debts existing at the time of either of the increases of stock have been fully paid, and that the future creditors have no cause to complain; that the statutes of Kentucky on this subject have not been pleaded, proved, or followed; laches; and the statutes of limitations of Kentucky. This suit is not brought upon any statute of Kentucky, but, like Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, is founded upon the common-law liability for misfeasance and negligence in the performance by the testator of his duties as a director and president of the corporation about withdrawing and allowing the withdrawal of these moneys from the corporation, and statutes of that state providing other liabilities would not exclude these any more than the provision of other liabilities of directors by the national bank act excluded such common-law liability in that case. No statute of limitations is set up, and, if any was to be, that of Vermont, with the courts of which state this court has concurrent jurisdiction, would govern. Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316. The limitation of the state statutes applicable is six years. V. S. § 1199. This suit was brought within that time after the withdrawal and receipt of the money by the testator.

That the assets of an insolvent corporation are impressed with a trust for the payment of its debts, and cannot be withdrawn by the stockholders without providing for the debts, does not here appear to be, and could not well be, disputed. Graham v. Railroad Co., 102 U. S. 148, 26 L. Ed. 406; Railroad Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081, 29 L. Ed. 235; Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 35 L. Ed. 516. The substance of the plaintiff's claim is for the withdrawal of the money received for the mortgage bonds, and not for the increases of stock, and the question of solvency would refer to the situation at the time of the withdrawal. The prior debts had then been, or soon were, paid, but the mortgage bonds were outstanding, and the avails of them were what paid the prior debts. They were debts of the corporation, and in view of the whole situation as shown by the evidence they amounted to as much at least as the corporation could at most pay, and the depletion of any part of the $75,000 that came from the corporation would be more than it could spare. The increases of stock were far within the limits of the power of the corporation, and these issues of it ratably to the stockholders would in themselves work no harm. The stockholders would, as between themselves, own the corporate property in the same proportions as before. Outsiders would not be affected till

reached. Then they would be entitled to stand upon their rights to protect themselves. The first increase of stock was made more than a year before there appears to have been any suggestion of using stock to effect a loan, and to have been entirely separate from the bond transaction. When made, and ratably divided, it would not of itself affect at all the stockholders as between themselves or outsiders. If sold to others, whether it was valuable or not, or at a fair or unfair price, the corporation would not be pecuniarily affected. If it brought 25 cents of the 85 cents on the dollar of the face of the bonds that the stock and bonds brought, that part would belong to the stockholder furnishing the stock, and not to the corporation; and the receiving of that by the stockholders would not be depleting the assets of the corporation. The bonds would not float at 60. The bonds and stock would at 85. The inference follows that the bonds brought 60 and the stock 25. The stockholders and directors agreed to this among themselves each with the others, and that would confirm the division, for, although directors may not contract away to any of themselves more than to others the property of the corporation to the detriment of creditors, they are not precluded from dealing fairly with any of their number in respect to what is his own. This deal may not have been fair to the takers of the bonds and stock for want of value to the stock, but the point here is whether there was a fair division between the corporation and the stockholders of the avails of the transaction as it was, fair or unfair, according to the proportion of the consideration furnished by each. The amount received for this issue of stock, in this view, was $25,000, of which the defendants' testator received $7,500 as the price of the stock furnished by him that did not come from the last issue, but had been divided to and become his before any negotiation of the bonds as well as any of his prior stock had. The last issue of stock was concurrent with the issue and negotiation of the bonds and stock, and that stock moved as much from the corporation to the new bondholders as if it had been issued directly to them, instead of through the prior stockholders to the bondholders. Neither the statement in the vote of this stock that it was based upon the expenditure of net earnings for permanent improvements, nor the provision in the proposal of the stockholders that the secretary should act as their agent in transferring the stock and receiving the money, nor the protest that the action should not be construed as a sale of the stock to the company, but should be regarded as a sale to the purchasers of the bonds, could alter the nature of the transaction, or its source or its place, as a part of the consideration for the money received from the bondholders. The whole moved from the corporation, and the transaction wrought a depletion of assets of the corporation needed to make the bonds good, and to which the bondholders were entitled, if necessary, for the payment or security of the bonds. There was no agreement between the stockholders and the bondholders as to the price of the stock, nor otherwise except among the stockholders themselves. As to the bondholders, according to the evidence, it was a mere bonus to float the bonds. The stockholders receiving the money took it with the risk of its being required to

make the bonds good. It is so required, and the plaintiff, as receiver, represents the rights of the bondholders as creditors in respect to it. Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. The avails of this increase were $50,000, of which the testator received $15,000.

The plaintiff claims that the testator is liable not only for what he drew out of the assets and received himself, but for what the others drew out and received, amounting to the whole $75,000, and inclusively the whole $50,000 which all drew out and received in connection with the last increase of stock. They did not, however, become liable jointly because they constituted a board, and are sometimes called trustees. They are not invested with title as a joint board, but are rather managing agents, whose relations to the property are several and personal, and not those of a joint trust estate. Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662. If it had all been received by the directors together, and divided among themselves, all would probably have been liable together, and each for the whole, till all should be recovered; but each received his share separately, without connection with the others, from the avails of the sale of the bonds that his stock went with. Each may have been liable for the whole loss for neglect of personal duty in not preventing it, but not for the money itself. An action on the case might have lain against all, but, if one had been brought, it could not have been revived against the executors of the testator, and prosecuted, but would have survived only against the others, and the executors could not have been proceeded against but by a new suit on what would survive. Seaman v. Slater (C. C.) 18 Fed. 485. This suit has been and could be revived only as to and for what would survive, and can be prosecuted only for that. This is governed wholly by the laws of the state where the suit is brought and being proceeded with. Railroad Co. v. Joy, 173 U. S. 226, 19 Sup. Ct. 387, 46 L. Ed. 677. General principles derived from similar laws elsewhere are, of course, applicable. U. S. v. Daniel, 6 How. 11, 12 L. Ed. 323, was an action on the case against a marshal for neglect of a deputy. Mr. Justice McLean said:

"If the person charged has secured no benefit to himself at the expense of the sufferer, the cause of action is said not to survive; but where, by means of the offense, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor."

The statute of North Carolina upon which the question arose, and which provided that actions on the case should not abate by death, was held not to vary this principle. Upon the same principle an action for causing a pauper to become chargeable upon the town was held not to survive. Town of Winhall v. Sawyer's Estate, 45 Vt. 466. And in this court an action against a director of a national bank for personal neglect of duty has been held not to survive. Witters v. Foster (C. C.) 26 Fed. 737. In Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, which was Movius v. Lee in the circuit court (30 Fed. 298), there was a decree against executors for defaults of directors of a national bank, but it was rendered without question upon the bill taken pro confesso, and not upon the

consideration or judgment of either court. That case is therefore not understood to be an authority for the survival of a suit against directors for mere neglect or misfeasance not affecting the estate of the testator.

The result of these views is that the plaintiff is entitled to a decree for the amount received by the testator through the last issue of stock.

Decree for plaintiff for $15,000.

BARRETT v. TWIN CITY POWER CO. et al.

(Circuit Court, D. South Carolina. October 16, 1901.)

1. EQUITY PLEADING—EXCEPTIONS TO ANSWER.
   The only mode of taking advantage of defects in an answer is by written exceptions on the grounds that it contains matter which is either scandalous or impertinent, or of its insufficiency in not answering fully the statements and allegations of the bill.

2. SAME—LEGAL SUFFICIENCY OF ANSWER.
   A demurrer to an answer in equity is unknown, nor can exceptions serve the office of a demurrer by presenting the question of its legal sufficiency, but, if it is desired to submit a case on the questions of law arising on the answer, the only method is by setting it down for hearing on bill and answer.

3. SAME—IMPERTINENCE.
   The court will not order matter in an answer alleged to be impertinent to be struck out on exceptions unless the impertinence is fully and clearly made out.

4. SAME—OFFICE OF EXCEPTIONS FOR INSUFFICIENCY.
   Where the matter of the bill is fully answered, the plaintiff cannot except to the answer for insufficiency because of new matter which is irrelevant, and states no sufficient grounds of defense, the principal object of exceptions for insufficiency being to obtain more perfect discovery from defendant under oath. In some jurisdictions such exceptions do not lie where the bill expressly waives answer under oath.

5. SAME—LIBERAL CONSTRUCTION OF PLEADINGS.
   It is not in accordance with the principles of equity to strictly and inflexibly enforce its rules as to pleading, or dispose of a question on purely technical grounds; and a court may look into the substance of exceptions, and determine them on their merits, although they are taken for insufficiency, when they should properly have been for impertinence.

6. SAME—ANSWER—IMPERTINENCE.
   Where a bill alleges that complainant had secured options on property, which he transferred to defendants under a contract for the enforcement of which the bill was filed, an averment in the answer, which admitted the contract, that complainant had expended but little time or money in procuring such options, is impertinent, the subsequent contract having precluded any inquiry into such question.

7. SAME.
   Averments in an answer to a bill filed for the purpose of obtaining a strict and literal enforcement of a contract, including a forfeiture, stating facts tending to show that the contract was a hard one for defendants, and that they had endeavored in good faith to carry it out, and had substantially complied with its terms, although stating no legal defense, are proper as considerations addressed to the discretion of the court for the purpose of avoiding a harsh and literal enforcement of the contract, and are not subject to exception for impertinence.

In Equity. On exceptions to answer.

Frank H. Miller, Wm. K. Miller, and Messrs. Hendersons, for complainant.

B. L. Abney and J. S. Muller, for defendants.

SIMONTON, Circuit Judge. This case now comes up on exceptions to the answer for insufficiency. As these exceptions involve the practice in equity pleading, the discussion of the questions involved therein will be more elaborate than usual. The only mode of taking advantage of defects in an answer is by written exceptions. 1 Daniell, Ch. Pl. & Prac. (Perkins' Ed.) p. 770, note 1. Demurrer to an answer is unknown in equity pleading. Banks v. Manchester, 128 U. S. 250, 9 Sup. Ct. 36, 32 L. Ed. 425; Grether v. Wright, 23 C. C. A. 500, 75 Fed. 742. Nor can exceptions serve the office of a demurrer. Shiras, Eq. Prac. U. S. Courts, 59; Walker v. Jack, 31 C. C. A. 462, 88 Fed. 576. If such exceptions be sustained, the only course is leave to amend the answer. There are three grounds of exception to an answer: It may contain matter which is scandalous; it may contain matter which is impertinent,—that is to say, it may go outside of the bill to state some matter not material to the case of the defendant; it may be objectionable on the ground of insufficiency in not answering fully the statements and allegations of the bill. Story, Eq. Pl. §§ 861, 863. In cases of alleged impertinence the court will not order the matter alleged to be impertinent to be struck out unless in cases in which the impertinence is very fully and clearly made out, for, if it is erroneously struck out, the error is irremediable; if it is not struck out, the court may set the matter right in point of costs. Story, Eq. Pl. § 267; Davis v. Cripps, 2 Young & C. Ch. 443. Under the rule the exception as to scandal and impertinence in an answer must be disposed of before its sufficiency can be considered (Story, Eq. Pl. § 867); and, if a reference for insufficiency is ordered before this is done, the right of exception for scandal and impertinence is waived (Id.). Exceptions to an answer for insufficiency can only be sustained when some material allegation, charge, or interrogatory in the bill is not fully answered. When the matter of the bill is fully answered, and the defendant sets up new matter, which is irrelevant, and forms no sufficient grounds of defense, the plaintiff may except to the answer for impertinence. He cannot except to its insufficiency. Stafford v. Brown, 4 Paige, 88. The principal object of exceptions to an answer for insufficiency is to obtain more perfect discovery from defendant under oath. Stafford v. Brown, supra. So exceptions do not lie in New York to an answer for insufficiency when the bill waives the oath of the defendant, because such answers are not evidence (McCormick v. Chamberlin, 11 Paige, 543); and the same rule prevails in Massachusetts and in New Hampshire (1 Daniell, Ch. Prac. 770, notes 1, 3, and 771. In the case at bar an answer under oath is expressly waived.

Such are the strict rules of equity pleading. But the inflexible enforcement of these rules and the dismissal of a question upon

grounds purely technical are abhorent to the broad principles of equity. So we find that in the practice in New York when its court of equity flourished the strict rule was not adhered to. Livingston v. Livingston, 4 Paige, 111; Woods v. Morrell, Johns. Ch. 103. And in the case quoted supra from 128 U. S., 9 Sup. Ct., 32 L. Ed., where the complainant demurred to the answer, the court, while condemning that course, proceeded to decide the case on bill and answer. At the hearing of these exceptions the defendant relied upon the rule in equity pleading, insisting that many of the exceptions were addressed, not to the insufficiency of the answer, but to matters which could only come under the head of impertinence. Strictly, the objection is well taken. But it is preferred to look into the substance, instead of the form, of the objection, and to treat the formal exceptions to the answer as if they were addressed to matters impertinent, as well as to its insufficiency. The exceptions are eight in number.

1. To an allegation in paragraph 2 of the answer in these words: "That but little time and money were ever actually spent and expended by said Thomas Barrett, Jr., [the complainant], in procuring said option, or in an effort to utilize the same." The objection is that this allegation is not responsive to the bill, for all such matters were anterior to and merged in a written contract recognized and adopted by the defendant company. The scope of this bill is this: The complainant alleges that he had contemplated the organization of a company for the purpose of utilizing the water power of Savannah river at or near Ring Jaw shoals; that to this end he has been procuring options of land from landowners on both sides of the river, and had caused surveys to be made, employed and paid engineers, and had paid frequent visits to the locus in quo, when he discovered that other parties were engaged in the same enterprise; that he entered into negotiations with these parties; that these negotiations resulted in a written agreement whereby he was to transfer all his options to them, and to receive therefor $5,000 in cash and $15,000 in bonds secured by a first mortgage on the property of the corporation, deliverable on 1st January, 1901, or $15,000 in cash, time being of the essence of the contract. The bill then alleges the breach of this contract, and prays the appointment of a receiver to take charge of the property, the placing of the options in the hands of this receiver, or the payment of the $15,000 cash. It is clear that this statement in the answer comes within the definition of impertinence; that is, the statement of some matter not material to the case of defendants. The paragraph of the bill to which the answer is addressed does not state what time and money complainant expended. The formal agreement thereafter entered into precludes any inquiry into this matter. This exception is well taken.

2. The second exception is to paragraph 3 of the answer, in which defendants admit the making of the contract, and say, "But allege that said contract was unreasonable, the price to be paid for said options being grossly excessive, and the bargain being a hard one in other respects; but these defendants say that, the contract having been entered into by the said Chew [their agent], these defendants

have been endeavoring to carry out the same in good faith, and allege that they have substantially complied with the terms of the contract." The bill claims the literal enforcement of this contract in amount of money and in the time specified, one of the consequences of this literal enforcement being the forfeiture of $5,000 already paid in cash. This part of the answer is a portion of the defense seeking to avoid this forfeiture and the consequences of such literal enforcement; and, as one of the considerations addressed to the discretion of the court, they call its attention to the hard bargain made by them, not by avoiding it, but in order to escape rigor in its enforcement. This exception is not well taken.

3. The third exception is to an averment in the seventh paragraph of the answer. By the contract the defendants were bound to deliver to complainant $15,000 in first mortgage bonds of the corporation. The answer alleges that an order for these bonds upon the treasurer of the corporation was given to the complainant, and retained by him for some weeks without objection, and after that it was accepted by him. The clause in the answer excepted to is in these words: "These defendants assumed, and had a right to assume, that the said accepted order was satisfactory to complainant, and, so assuming, these defendants proceeded as rapidly as possible in carrying out the enterprise and in arranging for the execution of the mortgage and the issue of the bonds." This is a matter of defense. It must be sustained by evidence, and raises a distinct issue responsive to the bill. When the evidence is taken, it must appear that an order was given, that it was actually or constructively accepted, and that it covered the bonds for which the contract made provision. This exception is not well taken.

4. The fourth exception is to the ninth paragraph of the answer, wherein it is averred that 20 per cent. of the capital stock of the corporation was paid in in money, in labor, and in property. The law allowed this mode of payment. The essential averment was that 20 per cent. of the capital stock was paid in. What proportion the money bore to the property or labor, and what proportion each of these bore to the other, is not important. This is a matter of evidence, not of pleading. The fourth exception is not well taken.

5. So, also, with regard to the fifth exception to the tenth paragraph of the answer replying to the fourteenth paragraph of the bill. The answer sets up a defense to the allegations of the bill in the paragraph, and this defense involves the construction of the contract. It raises a clear and well-defined issue, and is neither impertinent nor not responsive to the bill.

6. The sixth exception is to the fifteenth paragraph of the answer, intended to reply to the twenty-sixth paragraph of the bill. The twenty-sixth paragraph of the bill is in these words: "That it was the complainant's original purpose to purchase all the said lands from the original owners thereof, and he would have done so if he had not been diverted by the said Chew, and induced by him to enter into the said contract of 1st June, 1900." This averment the complainant evidently deems pertinent and material to his case. To it the defendants say: "That, as regards the allegations of paragraph

26 of the complaint, these defendants do not know what complainant's original purpose may have been, but upon information and belief they allege that at the time he made the contract with Chew of June 1, 1900, he was ready to abandon the whole enterprise, and had already suffered to lapse one or more options which he acquired with others." The complainant having introduced into the case his original purpose, the defendants had the right to traverse and explain it.

7. The seventh exception is not well taken, because the decision upon it would involve a decision of the case on its merits.

8. And the same objection lies to the eighth exception. Exceptions to the answer do not perform the office of a demurrer in presenting the question whether the facts averred in the answer constitute a defense to the case made by the bill. As it is not permissible to file a demurrer to an answer, if it be desired to submit a case on the questions of law arising in the answer, the only method is by setting down the case for hearing on bill and answer. See Shiras, Eq. Prac. U. S. Courts, 59; Grether v. Wright, 23 C. C. A. 500, 75 Fed. 742; Walker v. Jack, 31 C. C. A. 462, 88 Fed. 576.

SOUTHERN RY. CO. v. MACHINISTS' LOCAL UNION NO. 14 et al.

(Circuit Court, W. D. Tennessee. October 1, 1901.)

1. INJUNCTION—LABOR STRIKES—GROUNDS OF EQUITY JURISDICTION.

The remedy in equity by injunction to restrain striking workmen from unlawfully interfering with the rights of nonunion workmen and their employers is an entirely independent one, arising out of the conditions of inadequacy of the other independent remedy by an action at law for damages, neither having any relation to the remedy by criminal prosecution, except that the criminal laws may be so effectively enforced that there will be no occasion to resort to them; and the inadequacy of the protection afforded under such laws, from whatever cause, affords the occasion and necessity for a resort to equity.

2. SAME.

A labor union conducting a strike, which maintains pickets and guards around the works of the former employer for the avowed purpose of preventing nonunion workmen from working therein, cannot avoid responsibility for personal assaults on such workmen, and other unlawful acts committed in direct furtherance of such purpose, because such acts were not committed by its orders, and perhaps not by its members, nor because it passed a resolution, not made public, counseling that peaceable methods alone be used, where it did not in any public way protest against or disown such acts, or take any measures to assist in preventing or punishing them. In such case the action of the union in attempting to enforce its unauthorized edict that no others should work for the employer by a display of force and the menace of its pickets must be held, for the purpose of an application for an injunction, to have been the direct inciting cause of whatever acts were committed by its own members or others in violation of the personal liberty of other workmen and for its benefit.

3. SAME—ACTS IN VIOLATION OF PERSONAL LIBERTY.

The members of a labor union, in obedience to orders from the central organization, went on a strike against their employer. The union established and maintained pickets around the shops of such employer, and its members climbed telegraph poles and fences to watch such shops, and gathered in numbers at the entrances, and sent violent abusive and threatening messages to workmen inside. They thrust themselves on unwilling workmen to argue and persuade, and in some instances personal assaults were made upon such workmen by strikers or their

friends. The effect was to drive away a number of the workmen through fear for their personal safety, while those who remained for the most part stayed inside the works, where they ate and were lodged. *Held*, that such acts were not within the right of peaceable and lawful persuasion, but were acts of menace and besieging, in violation of the personal rights of the workmen and their employer, which entitled the latter to an injunction.

4. SAME—ENTICING AWAY APPRENTICES—TENNESSEE STATUTE.
A statute of Tennessee (Acts 1875, c. 93) provides "that hereafter it shall not be lawful for any person in this state knowingly to hire, contract with, decoy or entice away, directly or indirectly, any one, male or female, who is at the time under contract or employ of another." *Held*, that under such statute, as well as by the common law, it was unlawful for a labor union whose members were on a strike to endeavor, through a committee appointed for the purpose, to persuade apprentices under contract to work for their employer for a term of years to violate such contract and leave their employment, and that such attempts should be enjoined as an unlawful conspiracy where, if successful, the injury to the employer would be irremediable.

5. STATUTES—RULES OF CONSTRUCTION.
Where the language of a statute is unambiguous, and by its plain terms it applies to all persons, the courts are not authorized to limit it by construction to a particular class of persons upon some outside consideration, as of the supposed policy or reason which led to its enactment.

In Equity. Suit to enjoin the continuance by defendant labor union and its members of alleged unlawful acts. On motion for preliminary injunction.

F. P. Poston, for plaintiff.

A. B. Pittman, for defendants.

HAMMOND, J. Adhering as I do to the opinion expressed in the case of American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 and 3 (C. C.) 90 Fed. 598, and believing that this case, like that, is to be governed by the case of In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, nothing further need be said as to the law of this case. And it only requires that we shall give attention to the facts proven, in order to determine if they justify the same judgment as in those cases. But before doing this I wish to cite for our instruction an article which has fallen under my notice since the argument in this case began. It is entitled "Personal Liberty and Labor Strikes," and appears in the current October number of the North American Review (volume 173, p. 445). It is written by the Most Reverend Archbishop Ireland, and presents the law governing this case so accurately and tersely that I desire to adopt it as my own judgment, and to quote from it certain passages pertinent to this case. No lawyer or judge, within my reading, has stated the principles of judgment controlling the courts in these cases more aptly, though untechnically, than this learned prelate. Quoting, for illustration, from an English statute of 1875, passed for the aid and enlargement of the rights of the labor unions in conducting strikes, he calls attention to the prohibitions of that act defining what the strikers may not do. Now we have no act of congress or of the Tennessee legislature similar to that act of parliament, which was passed to confer upon labor unions larger powers because under the common law of conspiracy and the like

they could not do what the act permits, and it is this more restrictive common law which governs this and other American courts where no legislation has been had in aid of the strikers. Indeed, in Tennessee, as we shall see presently, what legislation we have is hostile to the strikers, and possibly more restrictive on them than the common law of the state otherwise would be. But the prohibitions of the English act formulate those of our own law and those which existed in England before their act, and they were only inserted lest the act itself might have been taken to abolish those prohibitions. This statement is supported by the Debs Case, and those which before or since have enunciated the same doctrine. For this court it is a closed question, by the authority of the supreme court of the United States, and no longer open for debate. We are not now concerned with what the strikers properly may do in furtherance of their strike, but only with what our law forbids them to do. It forbids, without statute, precisely the same things this English act forbids, and punishes criminally; and by the authority of the Debs Case a court of equity will, in a proper case, restrain by injunction the doing of those same things. These, as quoted by Archbishop Ireland, and approved by him as expressing the moral and Christian as well as the municipal law, are as follows:

"Every person who, with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do, or abstain from doing, wrongfully and without legal authority uses violence or intimidates such other person, or his wife, or children, or injures property; or persistently follows such other person about from place to place; or hides any tools, clothes, or other property, owned or used by such other person, or deprives him of, or hinders him in the use thereof; or watches or besets the house or other place where such other person resides or works, or carries on business or happens to be, or the approach to such house or place; or follows such person with two or more other persons in a disorderly manner or through any street or road, shall on conviction be punished as provided," etc.

The proof before us shows that the defendant strikers have violated every one of these prohibitions of our law, so conveniently formulated by this English statute, except hiding tools and intimidating the wives and children of the "scabs." Quoting from a South Carolina case in 1894, this distinguished priest, who lends his influence to correct the evil of unlawful violence in conducting strikes, again states the categories of unlawful acts thus:

"By threats, menace, intimidations, and opprobrious epithets addressed to plaintiff company's officers and workmen, and by gathering in crowds about the company's place of business and at the boarding places of their workmen, and by following said workmen to and from their work, stopping them on the highways, interfering with them in their work, and by holding them up to ridicule and contempt of bystanders."

Here again is a list of acts which is almost the same as in the above-quoted English statute that are not permitted to strikers, and the American cases could be cited in considerable numbers to the same effect; but, as before stated, it is no longer an open question since the decision of the Debs Case, and it is unnecessary to cite them here. This extract is made to say that the proof here shows that quite every one of the acts mentioned in the South Caro-

lina case above quoted has been committed by the defendant strikers in this case.

Archbishop Ireland also abstracts from a Massachusetts case the principle which forbids such conduct in the management of strikes. It finds expression in the title of his article, as it finds the most able exposition in his argument; and I wish I might quote the whole of it, but abstain, though the article is comparatively brief, considering the importance of the subject in the law of our social order. It is the principle of personal liberty so guarantied by our constitution that it is altogether doubtful if any kind of legislation could change the law so as to favor the labor unions by permitting them to secure their strikes by doing any of the now prohibited acts. The English parliament might do this, but it is not certain that any American legislature, state or national, could. Says the Massachusetts case quoted by the archbishop:

"Freedom is the policy of this country. But freedom does not imply a right in one person, either alone or in combination with others, to disturb or annoy another, either directly or indirectly, in his lawful business or occupation, for the sake of compelling him to buy his peace."

He states that the acts of violence and intimidation covered by the quoted statutes and decisions are less detrimental to personal liberty than those that happen under our own eyes, and expresses wonder that in America, where personal liberty is best safeguarded, "such things are tolerated by state authorities who are either unwilling or unable to repress them," which is really the chief reason why resort must be had to the courts of equity; ordinary police protection being ineffective in fact, whatever cause may produce that inefficiency, as to which cause it is not necessary that the court of equity should inquire, the condition of nonprotection in fact being all with which it is concerned.

The suggestion that the same constitution which safeguards the personal liberty of the "scab" and his employer guaranties to its violators trial by jury for their crimes or offenses arising out of the violation is not an answer to the fact that prosecutions and consequent convictions are either wholly wanting or ineffective for the protection of the "scabs" and their employers. The Debs Case settles that the same constitution also guaranties the equitable remedy. It is not, indeed, as the able counsel of defendants argued that it is not, a concurrent remedy with that afforded by criminal prosecution; and it is one dependent, as he says, upon conditions among which mere police failure is not included, but that failure is none the less the occasion of the resort to equity,—the paramount necessity for it. The equitable remedy is a wholly independent one, arising out of conditions of inadequacy of that other likewise wholly independent remedy of an action at law for damages; and upon neither of these does the remedy of criminal prosecution have the least bearing, except that, if the criminal law be so thoroughly executed that there could be no violations of or offenses against the personal liberty of the "scabs" and their employers, there would then be no occasion for actions at law for damages or bills in equity for injunction. That is all the relation that the criminal law has to

such suits as this. In re Debs, 158 U. S. 564, 594, 15 Sup. Ct. 900, 39 L. Ed. 1092. On this view it may be conceded, also, that while in the Cleveland Strike Case, cited in the beginning of this opinion, as counsel says, there was sympathy with the striking violators of the law and helpful abstention by the police from all interference, here the proof shows that the mayor and chief of police allowed the special policemen selected and paid by the plaintiff company to guard the workshop, and refused the demand of the strikers that they should be removed. Still this was not effective to stop the unlawful conduct of the strikers, and, in any event, has no bearing on the right of the plaintiff company to the relief asked, as we have endeavored to show.

Returning to the article already quoted, I may adopt from it the answer it makes to another argument made in this case,—that the labor union here impleaded is not responsible for the disorders proven, and that it set out to conduct the strike peaceably and according to lawful restraints. The writer says:

"And, indeed, acts of violence do occur in connection with strikes, which the labor unions do not approve, and for which they cannot be held responsible. Is it not, however, true that much at least of the interference with personal liberty of which we complain is the direct act of the unions? Are not the pickets of the unions usually the first to have recourse to threats and violence? And, even where mobs are the guilty party, are not the unions indirectly responsible? Should they not have foreseen the acts to which the mobs so easily resort, and should they not have taken measures to obviate such acts? Should they not at least protest when such acts have unfortunately taken place?"

So it was here. There was no protest by this labor union, No. 14, when Williams was assaulted, beaten, locked in a box car, and shipped out of town on another railroad, nor when Ridge was assaulted and beaten. No steps were taken to expel from the union these violators of the law and of the personal liberty of the "scabs" and their employers, nor to censure them, nor to discover them to the police. Absolutely nothing was done in this way to disown these acts, and now the only reliance is that the original minutes of the union counseled and directed there should be no violence, of which it is not shown that the "scabs" ever had any notice. How could they know that the union repudiated these assaults which deterred them and kept them besieged in their workshops? The union, conducting the strike on orders from Toronto, Canada, a foreign country, by the way, got the benefit of whatever force lay in these assaults as an example of what could be done if the edict of the union that none should work for the plaintiff company were not obeyed. It was an ever-present force, and, under the circumstances of picketing and beleaguerment, had all the effect of an army with banners, as a force threatening and deterrent; and I have no doubt it was so intended by the strikers who used it, whether the union approved it or not. Its effect on the "scabs" was instantaneous, and it seriously injured the plaintiff company's efforts to supply laborers. Forty or fifty left and refused to work. Some, no doubt, through "persuasion" and voluntarily, but, equally without doubt, some through fear of this and other threats of violence; and as to these last the right of per-

sonal liberty to work, if one wishes, without fear, was violated. And it is "a right of which no men can with any shadow of equity deprive another." North Am. Rev. vol. 173, p. 448. If it be said that a striking workman "has a sort of proprietary interest in his place, and that when another steps into it he is an unjust aggressor, who deserves to be summarily dealt with; that strikes must fail if employers are allowed to fill the places of strikers; and that compulsion brought to bear on nonunion men to prevent them from working is necessary as a measure of war; and therefore justifiable,"—the reply is that "statements of this kind, however, are social sophistries, which, if put into practice, would speedily undermine the structure of civil society." And "if strikes necessarily require, as a condition of success, the violation of personal liberty and the subversion of social order, then strikes stand self-condemned." Id.

Enough has been said to show that the court is of the opinion that the defendants are responsible for the assaults upon and the beating of Williams and Ridge, the ugly details of which need not be given. If we were trying the defendants upon indictments or as a police magistrate, possibly the proof would fall short of conviction, upon the ground of a reasonable doubt, though even that may be questionable. But, whether any of the named defendants made those assaults or not, they were made in their behalf and for their benefit, and in aid of their strike. That is sufficient. If the picketing, the climbing of the adjacent telephone poles, the climbing upon the fences, the watching of the shops, the assemblies in the streets and at the entrances and the constant and unceasing surveillance had been confined to obtaining information and to unobjectionable social intercourse, for the purpose of begging and entreating not to work, there could be no injunction. But the thrusting themselves upon unwilling "scabs" to "argue"; "persuading," picketing, climbing poles and fences, as an exhibition of force and threats, accompanied by such assaults as have been mentioned; violent, abusive, and threatening messages sent to "scabs" inside, and the like, as shown in this proof,—come clearly within the decisions against such conduct. The character of these acts is conclusively shown by the fact that many, if not all, who left were made afraid, and by the fact that those who remain and are at work feel the necessity of keeping inside the plaintiff's yards, lodging and eating there in places provided for them by the plaintiff. In fact, they are besieged, and act wisely to keep inside, in view of what has been done and may yet be done if not enjoined. The proof convinces me of this. These defendants and other strikers similarly situated, in effect and by their conduct, have assumed that "scabbing" is as much an offense against municipal and social law as it is against the law of their labor unions, and therefore that all nonunion laborers are bound by their law, and may be made to respect it. Not being able to use the ordinary processes of the law of the land to enforce obedience to their strike law, they proceed to use such other force as they may command, it being such as they used in this case. It only requires a moment's reflection to see that this is an unjustifiable assumption, and imposes upon nonunion laborers and all employers of labor, and indeed upon all other people, the most detestable of

all tyrannies,—laws made without representation in the law-making body. The assumption and insistence on obedience to it are of themselves unlawful whenever the insistence takes the form of compulsion, be the force used what it may. And, if there be the elements of compulsion in fact, it is idle to call it "persuasion" and "argument," and expect such a designation to relieve it of unlawfulness. Compulsion with a club is not "persuasion," even if the victim of the club be another man selected as an example of what a club may do. And so of any less violent force, if it be in fact a compulsory force. If I may be permitted to borrow the thought from Archbishop Ireland, the condemnation of these abuses against personal liberty, and the maintenance of the freedom to work and contract for work without any man's hindrance, "is to serve the cause of labor and labor unions."

The labor unions have gained the victory in the struggle which denied their own freedom to combine together to quit work collectively, and use such peaceable means as the law allows to promote their strikes. It took an act of parliament in England to enlarge this right against the common-law prohibitions of conspiracy and combinations to incite others to quit work. But our courts in America generally have yielded the enlarged right without a statute. So much gained for the sake of personal liberty by the strikers should induce them to yield the same rights of liberty to the "scabs"—a word I use because it is the technical word of the labor unions and the strikers—and their employers. The strikers cannot have, under the law of equal rights, a liberty of contracting as they please, working when they please, and quitting when they please, which does not belong alike to the "scabs" and their employers. And it is this right the courts of equity enforce by injunction. The supreme court of the United States has established that as the law of this case.

Attention has been called to an act of the Tennessee legislature (Acts 1875, c. 93, p. 168) entitled "An act to regulate contracts between employer and employé, and to impose a penalty for the violation thereof." It reads as follows:

"Section 1. That hereafter it shall not be lawful for any person in this state knowingly to hire, contract with, decoy or entice away, directly or indirectly, any one, male or female, who is at the time under contract or employ of another; and any person so under contract or in the employ of another leaving their employ without good and sufficient cause, before the expiration of the time for which they were employed, shall forfeit to the employer all sums due for service already rendered, and be liable for such other damages the employer may reasonably sustain by such violation of the contract."

The second section imposes a liability for damages against any one violating the provisions of the first section by hiring, whether he knew of the prior contract or not, if, being notified, he does not discharge the laborer, etc. And the third section repeals all laws or parts of laws in conflict. Shannon's Code, § 4337 et seq. This act is perhaps only declaratory of the common law as against the laborer breaking his contract of service, and possibly as against one who "decoys" or "entices" him away and employs him for himself. Certainly it is against the common law for two or more to conspire to decoy or en-

tice him away with intent to injure the employer, if he be under a contract of service which he may not terminate without the consent of the employer. Arthur v. Oakes, 11 C. C. A. 209, 63 Fed. 310, 321, 25 L. R. A. 414. The statute, however, does not deal with such conspiracies directly, and can only be held to include them upon the theory that "any person" includes more than one, and that it is as much a violation of the statute for two or more to do the prohibited thing as it is for a single individual to so act. In this view the statute undoubtedly strengthens the plaintiff's case where a conspiracy is shown, as here, although it does only declare what, in respect of that, the law otherwise would be. For it is a legislative command that supersedes the old law, which is not repealed, however, where there is not a conflict. Also, in the same way, it strengthens the right to an injunction by a court of equity, which undoubtedly restrains such conspiracies, "in a proper case, if the injury threatened would be irremediable at law," says Justice Harlan in Arthur v. Oakes, 11 C. C. A. 220, 63 Fed. 321, 25 L. R. A. 429. This statute enlarges the remedy at law, possibly, as to single individuals, but not so, possibly, in equity, because "a court of equity," says the same high authority, "without exception, will not compel the actual, affirmative performance by an employé of merely personal services," even under a contract. Id., 11 C. C. A. 217, 63 Fed. 318, 25 L. R. A. 425. Nor does the injunction against conspiracies compel such performance, but only forbids others to incite or entice the employé to break his contract, with intent on the part of those others to injure the employer. Id. These considerations would be unimportant here if the proof did not show that there are employed by the plaintiff company "apprentices" under contract for a term of four years each to learn his trade in the machine shops of the plaintiff. The defendant union appointed a committee to see these "apprentices" and induce them to leave the service of the plaintiff company, and this the committee of strikers did, but without success, they being still in that service. That this was a violation of this statute, and of the common law as well, I have no doubt, and that its recurrence should be enjoined there can be no question. As to the other employés, there is no proof that they were under any time or other contract limiting their right to quit work at will, and as to them the case stands upon the other footing of this opinion already set out. The only cases where the supreme court of Tennessee has considered this statute, so far as counsel or the court are advised, are those of McCutchin v. Taylor, 11 Lea, 259, and Morris v. Neville, Id. 271. By these cases the statute was most rigidly enforced against those who had decoyed and enticed away the laborers. They were negro farm laborers in both cases,—certainly in one case, and presumably in the other; and I have no doubt, as counsel argue, that this statute was intended solely for that class of laborers,—agricultural farm hands,—and possibly to prevent housewives from decoying or enticing away each other's cooks or other servants. But this nowhere appears on the face of the statute, or otherwise in any other way than as an inference to be drawn from what counsel and the court

know of the political and industrial conditions of this section of the country. It may be conceded that it is not at all likely that a Tennessee legislature intended to make by this statute a law against strikes and strikers and the labor unions. See Acts Tenn. 1901, p. 146, c. 104. But this consideration cannot control the courts in the construction of the statute, if it be broad enough in the language used to cover the case of strikes and the labor unions. If a legislature intends to limit its enactment, they must do so by the terms of the act itself, and no other limitation is authoritative where the language is unambiguous and construes itself. It is not permissible to go outside a statute plain in its words, as covering all labor contracts and laborers, and to say, on any consideration whatever, that there was an intention to limit it to a particular class of laborers, white or black, or however else such classification may be made, as of agricultural or industrial workmen; not when the subject-matter and the language used comprehend both these and all other classes. Particularly is this so under constitutions forbidding race and class distinctions. If the legislature intended to limit this act to farm laborers, they should have said so, if they have the constitutional power to so limit such an act, as to which I express no opinion, because the act expresses no such limitation, and we cannot add it to the words of the act. Mr. Justice Lamar makes this familiar principle so plain by his statement of the reasons for it that any other citation is scarcely necessary than the case of Lake Co. v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060. There are cases where the political and industrial conditions might interpret a statute, but, as Mr. Justice Lamar says of governmental policy, it is only in cases where the statute is dubious, and open, on the face of it, to differing interpretations. Railroad Co. v. Phelps, 137 U. S. 528, 11 Sup. Ct. 168, 34 L. Ed. 767. In the latest case on the subject Mr. Justice Harlan says:

"Our province is to declare what the law is, and not, under guise of interpretation, or under the influence of what may be surmised to be the policy of the government, so to depart from sound rules of construction as in effect to adjudge that to be law which congress has not enacted as such. Here the language used by congress is unambiguous. It is so clear that the mind at once recognizes the intent of congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of congress, as thus plainly expressed." Dewey v. U. S., 78 U. S. 510, 521, 20 Sup. Ct. 981, 985, 44 L. Ed. 1170, 1174.

See, also, U. S. v. Fisher, 2 Cranch, 358, 399, 2 L. Ed. 304, where Mr. Justice Washington considers the subject with his unfailing accuracy of statement and ability. Mr. Justice Brown reviews the cases most instructively in Hamilton v. Rathbone, 175 U. S. 414, 419, 20 Sup. Ct. 157, 44 L. Ed. 221, and thus enunciates the universal rule of the courts:

"The general rule is perfectly well settled that where a statute is of doubtful meaning, and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reason which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its

face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."

On this rule it is impossible for us to go outside the statute of 1875 and say that the Tennessee legislature only intended it to apply to "farm hands." It must be taken to mean what it says, "that it shall not be lawful for any person in this state, knowingly, to hire, contract with, decoy or entice any one, male or female, who is at the time under contract or in the employ of another," etc. Laws 1875, c. 93, § 1. This statute may impose a servitude upon freemen that they shall not, at will, break their contracts of labor, or hire to others, nor shall others be free to hire them; but if so, the fault is not that of the courts called upon to construe its plain words that have no ambiguity or limitation, and here they include these defendants, so far as the statute is applicable as above indicated.

Injunction granted upon bond of $1,000, and on condition that plaintiff shall immediately pay the reasonable compensation of the special examiner and the stenographer. This condition is attached because the technical judgment for costs cannot be now given, and it is only on a final hearing that the court can adjust them as between the parties, which matter is reserved. Meantime it is just that the plaintiff inaugurating this litigation should provide this extraordinary expense, so that the examiner and stenographer shall not wait for their fair compensation. But, the court being now advised that the parties have each paid one-half these expenses, the question of costs is reserved for final hearing as between the parties. So ordered.

NOTE.

When the reading of the opinion had been finished, Judge HAMMOND said he would order the decree submitted by Mr. Poston, counsel for the railroad company, to issue against the defendants, with one important change. He had read it very carefully, he said, and almost microscopically. As drawn by Mr. Poston, it was a general, sweeping decree, whereas he thought the relief sought should be from the commission of specific acts charged in the bill, and changed it accordingly.

The order as entered by the court was as follows:

"It is hereby ordered, adjudged, and decreed that the Machinists' Local Union No. 14, of Memphis, Tennessee, and W. J. Adams, as president, and F. W. Borsch, as secretary thereof, and F. Baker, G. W. Buckalew, W. M. Cooper, D. J. Farrell, W. S. Griswold, F. Henze, F. B. Hazlewood, T. T. Kearney, J. Williamson, J. Mommens, J. P. Stanton, Charles Wise, C. P. Marshall, Jr., L. E. Turner, Sam Turner, C. D. Bailey, C. F. Bailey, George West, and John Boschart, as individuals and as members of said Machinists' Local Union No. 14, and any and all other persons associated with them in committing the acts of grievances complained of in said bill, be, and they are hereby, ordered and commanded to desist and refrain from in any manner interfering with, hindering, obstructing, or delaying any of the business of the Southern Railway Company, or its agents, servants, or employés in the discharge of their duties as such, in the operation of said railway and in the machine shops of said company at Memphis or elsewhere by trespassing on or entering upon the grounds and premises of said company, or within its yards or depots, for the purpose of interfering therewith, or hindering or obstructing its business in any manner whatsoever, or with the purpose of compelling or inducing, by threats, force, intimidation, violence, violent or abusive language, or persuasion, any of the employés of said Southern Railway Company to refuse or fail to perform their duties

as such employés; also from compelling or inducing or attempting to compel or induce, by threats, intimidation, force, or violence, or abusive or violent language, any of the employés of said company to leave its service or fail or refuse to perform their duties as such employés, or to compel or attempt to compel, by threats, intimidation, force, violent or abusive language, any person desiring to seek employment in said shops from so accepting employment therein; also from entering upon or establishing a picket or pickets of men on or patrolling its trains entering or about to enter or leaving or about to leave the city of Memphis, for the purpose of inducing or compelling, by threats, intimidation, violence, violent or abusive language or persuasion, any employé of said company to fail or refuse to perform his duties as such, or for the purpose of interviewing or talking to any person or persons on said train or trains coming to Memphis to accept employment with said company, for the purpose and with the intention of inducing or compelling them, by threats, violence, intimidation, violent or abusive language, persuasion, or in any other manner whatsoever, to refuse or fail to accept service with said company; also from compelling or inducing or attempting to compel or induce by threats, force, intimidation or violent or abusive language, any employé of said Southern Railway Company to refuse or fail to perform their duties as such employé, and from compelling or attempting to compel or induce, by threats, intimidation, force, or violence, or abusive or violent language, any such employé to leave the service of the complainant, and, by like methods, to prevent or attempt to prevent any person desiring to accept employment with said Southern Railway Company in its shops at Memphis or elsewhere from doing so by threats, violence, force, intimidation, or violent or abusive language; also from piling brick or other objects against or on the fences of said Southern Railway Company inclosing its said yards and shops in the city of Memphis, and from climbing or attempting to climb on, upon, or over said fences, or from looking through the cracks or holes in said fences, for the purpose of interviewing or talking to employés of said company working in said yards and shops, in order to induce them to leave the service of said company; also from climbing telegraph, telephone, or other poles in or on the sidewalk and near to or adjoining said fences inclosing complainant's yards and shops, for the purpose of halloaing or beckoning to said employés whilst in or at work in said yards or shops to come to the fence to be talked to by them, in order to induce said employés to leave the service of the complainant; also from sending or carrying into said yards or shops hostile, threatening, or abusive language or messages to and of the employés working therein, for the purpose of forcing or inducing or attempting to force or induce said employés or any of them to leave the service of said company, or to fail or refuse to perform their duties as such; also from interfering in any manner whatsoever, either by threats, violence, intimidation, persuasion or entreaty with the apprentices now at work in the shops of said railway company, in order to entice or induce them, or either of them, to quit the service of said company, or to fail or refuse to perform their duties as such apprentices, and from ordering, aiding, directing, assisting, or abetting in any manner whatsoever any person or persons to commit any or either of the acts aforesaid; and the said defendants, and each of them, are forbidden and restrained from congregating at or near the premises of the said Southern Railway Company in the city of Memphis, and from picketing or patrolling said premises, for the purpose of intimidating its employés or coercing them by threats, intimidation, violence, abusive or violent language, or preventing them, in the manner aforesaid, from rendering their service to said company, and, in like manner, from inducing or coercing them to leave the employment of said Southern Railway Company, and from in any manner so interfering with said company in carrying on its business in its usual and ordinary way, and from interfering, by threats, intimidation, violence, violent or abusive language, any person or persons who may be employed or seeking employment by said Southern Railway Company in the operation of said railway and shops; and the said defendants, and each and all of them, are hereby restrained and forbidden, either singly or in combination with others, from collecting in and about the ap-

proaches to said depot and yards for the purpose of picketing or patrolling or guarding the streets, avenues, gates, and approaches to the property of said company for the purpose of intimidating, threatening, or coercing any of the employés of said company from work in said shops, or any persons seeking employment therein from entering into such employment, and from so interfering with said employés in going to and from their daily work in the yards and shops of said company; and defendants, and each and all of them, are enjoined and restrained from going, either singly or collectively, to the homes or boarding houses of complainant's employés, or any of them, for the purpose of intimidating or coercing any or all of them to leave the employment of complainant. It is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon each of said defendants, and all of them, so named in said bill, from and after service upon them severally of a copy of this order by delivering to them a copy thereof, or by reading or offering to read the same to them, and shall be binding upon each and every member of said Machinists' Local Union No. 14 of Memphis, Tenn., from the time of notice or service of a copy of this order upon said W. J. Adams, president, and F. W. Borsch, secretary thereof, and other members of said union, parties defendant hereto, and shall be binding upon said defendants whose names are alleged to be unknown, from and after the service of a copy of this order upon them respectively by the reading of the same to them or by publication thereof, or by posting, and shall be binding upon said defendants and all other persons whomsoever who are not named herein, from and after the time when they severally have knowledge, by actual service, of publication of the entry of this order and of the existence of this injunction; this order to continue in effect until the further orders of this court, and conditioned on complainant first entering into bond in the sum of $1,000, conditioned for the payment of costs and moneys adjudged against them in case this injunction shall be dissolved; said bond to be approved by the clerk of this court."

BENDER v. KING et al.

(Circuit Court, D. Montana. September 4, 1901.)

No. 96.

1. JUDICIAL SALES—RIGHT OF REDEMPTION—MONTANA STATUTE.

Code Civ. Proc. Mont. § 702, provides that, where the answer of a defendant admits a part of the claim sued on to be just, the action may be severed on plaintiff's motion, and judgment rendered on the part so admitted. A plaintiff sued on two distinct causes of action, and procured an attachment on both, which was levied on real estate. The action was subsequently severed under such statute, and judgment rendered on one of the causes of action, under which the attached property was sold to a third person; the action upon the remaining cause having been continued. *Held*, that the attachment as to such part still remained a lien upon the property, subject to the sale made under the judgment, and constituted a "subsequent lien," which entitled the plaintiff, under the statutes of the state, to redeem from the sale.

2. SAME—SUCCESSIVE REDEMPTIONS.

Redemption statutes are to be liberally construed, and where a subsequent lienholder, entitled to redeem from a sale of real estate under execution, from which previous redemptions have been made or attempted, pays to the sheriff the amount which the original purchaser is entitled to receive, together with the amount of the claims of the prior redemptioners, the money paid in will be treated in equity as having been paid for the benefit of the original purchaser to the extent of his claim, and a redemption will be effected, even though for any reason the prior redemptions were not effective.

3. SAME—PAYMENT NECESSARY TO REDEEM—TAX-SALE CERTIFICATES.
Code Civ. Proc. Mont. § 1235, requires one redeeming from a judicial sale to pay to the purchaser the amount of his purchase, with interest, "together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase," with interest. *Held*, that a purchase of the property at a sale for delinquent taxes, and the taking of a certificate of purchase therefor by the purchaser at the judicial sale, was not a payment of taxes on the property within the meaning of such provision, and that a redemptioner was not required to pay to the sheriff the amount of such certificate, since such payment, if made, would not operate to redeem from the tax sale and extinguish the lien, which could only be effected in the statutory manner by payment to the county or municipal treasurer.

4. SAME.
A purchaser of real estate at execution sale, who afterwards and while he holds the certificate buys the same at tax sale, does not thereby become a creditor of the judgment debtor, so as to bring him within the provision of Code Civ. Proc. Mont. § 1235, requiring a redemptioner from the execution sale, "if the purchaser be also a creditor having a prior lien to that of the redemptioner," to pay the amount of such lien in addition to the amount of the purchase in order to effect a redemption.

5. FIXTURES—THEATER FURNISHINGS AND CHAIRS.
A building was erected, arranged, fitted, and at all times used as an opera house for public entertainments, being incapable of use for other purposes without considerable alterations. It was fitted with a stage and stage fixtures, and appliances to facilitate the handling of scenery during theatrical performances, and a drop curtain. It also contained a large quantity of theatrical scenery, and was furnished with opera house chairs, such as are usually used in similar buildings, which were fastened to the floor with screws and nails. Such chairs were placed in the building by one who was at the time the owner, and who subsequently freed them from liens. *Held*, that all of such property, except the scenery, which was in no way attached to the building and was shown to be capable of being used as well in other theaters, constituted fixtures which were essential to the use of the building for the sole purpose to which it was devoted, and which passed to a purchaser of the building at a sale under execution.

In Equity. Suit to compel a conveyance of real estate and to recover rents and profits.

Forbis & Evans, for plaintiff.
J. K. Macdonald, for defendant King.
Roote & Clark, for defendant McFarland.
McHatton & Cotter, for defendant Murray.
Chas. O'Donnell, for defendant Grand Opera House Co.

KNOWLES, District Judge. The complainant is a citizen of the state of Washington, and the defendants are all of them citizens of the state of Montana. The matter in controversy exceeds in value the sum of $2,000, exclusive of interest, and involves certain real property situated in Butte, Silver Bow county, Mont., commonly designated and known as the "Grand Opera House," and is described as follows:

"The west 14 feet of lot No. 14, all of lot No. 15, and the east 17½ feet of lot No. 16, all in block No. 29, of the original townsite of Butte, according to the plat of the official survey thereof on file in the office of the county clerk and recorder of Silver Bow county, Mont., together with the tenements, hereditaments, and appurtenances."

The object of the suit is to have the defendant King declared to hold the legal title to said property in trust for the use and benefit of the complainant, and that he may be required to make, execute, and deliver a proper deed conveying to complainant said real property, together with the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining. As against Murray and the other defendants, it is to recover the rents, issues, and profits of the property, and certain stage scenery and appliances, drop curtains, and opera chairs and seats in said building contained, alleged to be fixtures attached to and forming a part of the realty, but which said Murray claims is property personal in its nature, and not fixtures attached to and forming a part of the realty, and that the same belongs to him. During the pendency of the suit a receiver was appointed to take charge of the property and collect the rents, issues, and profits thereof.

The evidence shows that on and prior to the 27th day of December, 1897, the defendant Grand Opera House Company was the owner of the real property in controversy, and that on said 27th day of December, 1897, said property was sold to the defendant King at sheriff's sale under an execution issued upon a judgment made and given in the district court of the Second judicial district of the state of Montana, in and for the county of Silver Bow, in a certain suit wherein one John O'Rourke was plaintiff and the Grand Opera House Company was defendant. O'Rourke's suit against the opera house company was upon two separate and distinct causes of action, and an attachment had been issued thereon and levied upon the property of the opera house company to secure the amount named in both causes of action set up in the complaint. Afterwards the two causes of action set out in O'Rourke's complaint were severed under the provisions of section 702 of the Code of Civil Procedure of Montana, and O'Rourke obtained a judgment against the opera house company upon one of his causes of action (being the one upon which execution was issued and under which the property was sold to King), and as to the other cause of action the suit was continued and is still pending in said court. Before the sale of the property to King as aforesaid, the complainant Bender and one John F. Forbis had begun suits against the opera house company, and at the time of the several redemptions hereinafter mentioned and referred to they were attachment and judgment creditors of the opera house company; said attachment and judgment liens being subsequent and subject to the prior lien of O'Rourke's judgment and his attachment lien. Within one year after the date of sale of the property to King, said O'Rourke, for the purpose of saving and protecting the lien of attachment still subsisting against the property under his cause of action, still pending and undetermined in his suit against the opera house company, gave notice of redemption, and paid to the then sheriff of Silver Bow county the amount due King on his certificate of purchase under the aforesaid execution sale, together with the proper amount of interest thereon by the statutes of Montana required to be paid on the redemption of real property from sales under execution. The complainant,

Bender, thereupon and within the time allowed by law gave notice of redemption to King and O'Rourke, and paid to the sheriff of said county, for said King and said O'Rourke, the amount of money required to pay said King and said O'Rourke the sums due on the sale under execution to King and on the redemption made by O'Rourke, together with the proper interest by law required to be paid in the premises. Thereupon, and still within the time allowed by law for a redemption, said Forbis gave notice of redemption to said King, O'Rourke, and Bender, and paid to said sheriff the amount required to reimburse King on his purchase at the aforesaid sheriff's sale; also the amounts due O'Rourke and Bender upon their several redemptions, together with proper interest. No other or further redemptions of said property were made or attempted to be made within the time allowed by law therefor, or at any other time prior to the bringing of this suit. Thereafter, said Forbis, in writing and for a valuable consideration, sold, assigned, transferred, and set over unto said Bender all the right, title, and interest which he (said Forbis) had acquired to said property under his said redemption, together with other liens against the opera house property which he then had and held. On January 19, 1899, notwithstanding the several redemptions effected from said sale under execution, the defendant King procured for himself a deed from the sheriff of Silver Bow county, in which said property was conveyed to him by said sheriff as the holder of the certificate of purchase under the execution sale made on the O'Rourke judgment, and said deed was filed in the office of the county clerk and recorder of Silver Bow county for record. Thereafter the complainant, Bender, gave notice of his rights in the premises to all of the defendants herein and demanded possession of the premises and the rents, issues, and profits thereof. The defendant Murray received and had notice, as well as the others. Notwithstanding the same, he negotiated a lease of the property to McFarland in the name of the opera house company, including therein, as the property of the opera house company, the very same property of which he claims to be the owner in this suit, and has collected, received, and has in his possession or under his control, about the sum of $6,000 of rents collected under said lease; said King never having collected or received any of said rents, issues, and profits.

It was sought to be shown on behalf of defendant King that said O'Rourke had failed to pay, in addition to the sum paid to the sheriff on redemption, the amount specified in certain certificates of sale to King of said property for delinquent state, county, and city taxes which had been assessed against the property, and that, as the purchaser of the property under these tax sales, said King had become and was a creditor of said opera house company, having a prior lien to that extent against its property, and over the O'Rourke, Bender, and Forbis judgments and redemptions, and that the payment of the amounts specified in these certificates of delinquent tax sales, with interest thereon, was a condition precedent without which a lawful and valid redemption of the opera house property could not be and was not effected by said redemptioners, O'Rourke,

Bender, and Forbis. It was also contended on behalf of said King that the attachment lien upon which said O'Rourke sought to redeem said property from said execution sale was not a subsequent lien to that under which the property was originally sold to said King; that the attachment lien of said O'Rourke, if any he had at all, had been abrogated and extinguished by reason of the judgment which he had obtained against the opera house company in the suit hereinbefore referred to, and that therefore he was not in fact a redemptioner at all under the statute; that the redemptions of said Bender and said Forbis were in fact merely redemptions from the redemption of O'Rourke, and were not redemptions from the sale to King; that said several notices of redemption on the part of said Bender and said Forbis were not addressed to King at all; and that they, like said O'Rourke, having failed or neglected to pay, or tender to him (King) the amounts specified in the certificates of sale for delinquent state, county, and city taxes, together with the proper interest thereon, they, too, had failed to effect a lawful and valid redemption of said property from him.

The first question presented is: Was O'Rourke a redemptioner under the statute, and entitled to redeem the property from the execution sale made to King? The complaint filed by O'Rourke in his suit against the opera house company was upon two separate and distinct causes of action. A writ of attachment had been issued and levied upon the property, and thereby created a lien upon the same to secure the amounts claimed and sued for in both causes of action. Under section 702, Code Civ. Proc. Mont., it is provided:

"Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court upon the plaintiff's motion may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part so admitted; and, if the plaintiff so elects, that the action be continued, with the like effect as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim."

In following the provisions of this section, a plaintiff who elects to take judgment upon an admitted cause of action does not thereby abrogate or extinguish the lien of his attachment secured in the suit as originally commenced.

But it is claimed, however, that this attachment is not a subsequent lien to that upon which the property was sold. The sale made under the execution issued upon the judgment in favor of O'Rourke upon the admitted cause of action alleged in his complaint conveyed all the right, title, and interest of the opera house company to the property in dispute, subject, however, to the liens existing against the same. The sale was made at the instance of O'Rourke, and the certificate of sale issued to King recited such a sale. O'Rourke could in no way invalidate that sale. But, as I have indicated, O'Rourke's attachment lien was not wholly extinguished by the sale. His lien remained in force to the extent of the amount still claimed to be due him in his suit as originally brought. Under these circumstances, I hold that O'Rourke's attachment lien for the balance of his claim against the opera house company was made subject to the rights acquired under the sale, and hence was a subsequent lien, and this lien

gave him the right to redeem. Duboise v. Hepburn, 10 Pet. 1, 9 L. Ed. 325; Corbett v. Nutt, 10 Wall. 464, 19 L. Ed. 976; Schuch v. Gerlach, 101 Ill. 338. In Schuch v. Gerlach, supra, it is said:

"Redemptions are looked upon with favor, and, when no injury is to follow, a liberal construction will be given to our redemption laws, to the end that the property of the debtor may pay as many of the debtor's liabilities as possible."

This view would seem to be applicable to the redemption laws of Montana. Under it the opera house company was enabled to pay, not only the judgment obtained against it by O'Rourke on one of his causes of action, but also the amount claimed to be due under the remaining one. If, however, this position should not be sustained, it is evident that both Bender and Forbis intended to redeem from the sale to King, if the redemption of O'Rourke was ineffectual. Their notices of redemption are addressed to Silas F. King, as well as the opera house company and O'Rourke. In said Bender's notice it is recited:

"That he is entitled to redeem said property from said sale [that is, from the sale to King], and from said redemptioner John O'Rourke, and in accordance therewith, within one year after said sale, and within sixty days after said redemption by said John O'Rourke, upon the 27th day of December, 1898, has paid to P. H. Regan, sheriff of Silver Bow county, for said redemptioner John O'Rourke, the sum of $1,201.12, the amount paid or to be paid to said Silas F. King."

The notice of redemption of the redemptioner Forbis is also addressed to the opera house company, Silas F. King, P. H. Regan, sheriff, John O'Rourke, and J. O. Bender. In this notice it is claimed that he has a right to redeem from the sale made to King and from the redemptions of O'Rourke and Bender, and that he has paid to the sheriff the sum of $2,669.59, making a total of $1,201.12, the amount to be paid to said King, purchaser, together with $585 claimed by said O'Rourke as an attachment creditor, together with 2 per cent on both of said sums, together with $795.40 claimed by Bender as a judgment creditor, together with 2 per cent. As it will be seen, the money paid by all of these parties, claiming to be redemptioners, was to the sheriff, and all recite that $1,201.12 is to be paid to King, and seek to protect him to the full extent of his legal rights. Under the doctrine announced in Perkins v. Center, 35 Cal. 713, a court of equity would treat the money paid to the sheriff to have been paid for the benefit of King. It was undoubtedly the intention of all of the parties that the amount due King should be paid to and remain in the hands of the sheriff for said King. I therefore have come to the conclusion that there was a proper and valid redemption made from the sale to King, unless the amount paid in was insufficient by reason of the failure to pay the amounts claimed by King on account of tax-sale certificates. To hold otherwise would require the strictest construction of the proceedings for redemption in such cases.

Prior to the redemptions hereinbefore referred to, the property in controversy had been assessed for certain state, county, and city taxes. The taxes became due and were delinquent. Not having been paid, the property was advertised for sale in pursuance of law,

and sold for said delinquent taxes assessed against the same. At these sales said King became the purchaser, and certificates of sale were executed and delivered to him. It is contended for said King that as the holder of these certificates of sale for delinquent taxes he became and was a creditor of said opera house company, having a prior lien, and that in order to effect a valid and legal redemption it was necessary for and said redemptioners were required to pay to him the amount named in these certificates of sale, in addition to the amounts due him on account of his purchase of the property under the sale under execution, and, having failed or neglected to pay or tender said additional amounts so claimed to be due him, no valid redemption of said property from said sale under execution was effected. It therefore becomes an important question for the consideration of the court. Were the redemptioners required to pay, as a part of the redemption money, the amounts claimed to be due King on his certificates of purchase of the property under these tax sales? For a solution of this question resort must be had to section 1235 of the Code of Civil Procedure of Montana, which reads as follows:

"The judgment debtor, or redemptioner, may redeem the property from the purchaser any time within one year after the sale, on paying the purchaser the amount of his purchase, with 1 per cent. per month thereon in addition up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount, and if the purchaser be also a creditor having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien, with interest."

It will be observed that the amounts named in these certificates were not the amounts paid by King when these taxes became due, but upon a sale of the property at a delinquent tax sale. These certificates of sale created a lien upon the property, which lien, under the provisions of the statutes of Montana, could only be discharged in a particular way. In sections 3890 and 4871 of the Political Code it is provided:

"Sec. 3890. Redemption must be made in lawful money, and when paid to the county treasurer he must credit the amount paid to the person named in the county treasurer's certificate, and pay it on demand to the person or his assignees."

"Sec. 4871. The city or town treasurer has the same power to collect municipal taxes as the county treasurer has to collect state and county taxes, and has the same right to give notices, add penalties, seize and sell property for delinquent taxes, to give deeds to purchasers, and to do everything that a county treasurer might do in the premises, as provided in chapter 7, tit. 10, pt. 3, of this Code, except that he must make settlements with the city or town council, and all property sold for delinquent taxes must be bid in for the city or town."

For property sold for state and county taxes, and for property sold for city taxes, the money is to be paid to the county or city treasurer, as the case may be. A payment to the sheriff would not be a compliance with this statute. In a redemption from a tax sale, the statute must be strictly pursued, or no redemption will be effected. It cannot, therefore, be maintained that a requirement to repay the taxes paid by a purchaser under an execution sale and holding the certificate of sale applies to a case where the property

has been sold at public sale for delinquent taxes. It appears from the evidence that the complainant, Bender, subsequently and within the time allowed by law for the redemption of property sold for delinquent taxes, paid to the proper officials the money required to redeem this property from these tax sales; but the purchase of the property at these delinquent tax sales was not a payment of the taxes under most of the authorities. Such a purchase is not a payment of taxes, but a purchase of a new lien, independent of the estate acquired in the property under a sheriff's sale under execution. 2 Jones, Mortg. pp. 36, 37, § 1080; Cooley, Tax'n, pp. 500–509; 2 Desty, Tax'n, p. 932; Ror. Jud. Sales, § 1162; Williams v. Townsend, 31 N. Y. 411; Sidenberg v. Ely, 90 N. Y. 264, 43 Am. Rep. 163; Jones v. Wells, 31 Mich. 170; Insurance Co. v. Bulte, 45 Mich. 113, 7 N. W. 707; Waterson v. Devoe, 18 Kan. 232; Kelsey v. Abbott, 13 Cal. 619; Allison v. Corson (C. C.) 83 Fed. 752; Society v. Davidson, 38 C. C. A. 365, 97 Fed. 716; Kofoed v. Cosbey (Cal.) 54 Pac. 1115. The conclusion reached is that the redemptioners were not required to pay to the sheriff, for said King, the amounts named in the several certificates of sale for delinquent taxes, with interest thereon, in order to effect a legal and valid redemption of the property under the statute.

It was also contended that the defendant King was a "creditor" of the opera house company, having a lien prior to that of the redemptioners; that he became a creditor of said opera house company by the purchase of its property at said delinquent tax sales, which sales are specified in the certificates heretofore referred to. Was he a "creditor," within the meaning of this section of the statute, by reason of having purchased said property at tax sales? I hold that he was not, and this view is supported by the following authorities: Iowa Homestead Co. v. Des Moines Val. R. Co., 17 Wall. 1153, 21 L. Ed. 622; Osterberg v. Trust Co., 93 U. S. 424, 23 L. Ed. 964; Abidie v. Lobero, 36 Cal. 398; Trust Co. v. Weiss, 118 Cal. 489, 50 Pac. 697; Williams v. Townsend, supra; Raynsford v. Phelps, 43 Mich. 342, 5 N. W. 403, 38 Am. Rep. 189. A purchaser of property at an execution sale does not become, by this act, a creditor of the defendant in the cause in which the execution was issued. A purchaser at a tax sale can have no greater right to claim that he is a creditor of the defaulting taxpayer than a purchaser at an execution sale as above described. The purchaser at a tax sale obtains the lien of the state as against the particular property sold, and does not obtain the assignment of a personal debt.

The complainant being a redemptioner under the statute, and having effected a valid and legal redemption of the property of the opera house company from the execution sale to King, and being entitled to the conveyance to him of the legal title therein, the question arises as to what was embraced within that redemption that would pass to him as a part and parcel of the realty upon a conveyance of the legal title. The evidence shows that the building erected upon this land was erected, constructed, and used as an opera house from the very beginning, and that it is still used for that purpose; that it is suitable and adapted for and to such purposes, and could not well be

used for other purposes without considerable changes and alterations in its interior arrangement and condition as it now stands and is used; that it contains a stage and stage fixtures, and appliances to facilitate the expeditious handling of scenery during theatrical performances, a large amount of theatrical scenery, a drop curtain, and also a number of opera chairs and seats attached to the floor by means of screws and nails. The scenery in question was attached to the stage only as needed, and is capable of being moved about without injury to the stage and stage fixtures or to itself, and for the most part was lodged or stored in certain storerooms in the basement of said building. The defendant Murray claims that all of these articles were and are personal property, and owned by him. In his testimony he claims to have acquired a title to the chairs above mentioned by a purchase thereof from one John Maguire, who prior to such purchase owned the same. He fixes the time at which he made this purchase at a date in 1893, and asserts that at that time he paid off and discharged a chattel mortgage upon the same held by one John O'Rourke. The evidence shows, however, that said O'Rourke, under a contract with said Maguire, canceled his chattel mortgage upon said chairs some time in the early part of the year 1891, and that said Murray had no connection with this transaction. Giving the testimony of said Murray all the credit it would be legally entitled to, still, taking into consideration the facts, as disclosed by the evidence of said Murray, that he made a redemption from the judgment owned by the First National Bank of Butte in order to protect a small judgment which had been assigned to him, and that he never did actually pay any money or other valuable thing to said Maguire by means of this redemption from the said bank, as a consideration for the alleged sale of these chairs, and that said Maguire retained the possession of the same for a long time after the alleged sale, I do not feet warranted in adjudging him to be the owner of said chairs.

True, there is a disclaimer of ownership of the chairs on the part of the opera house company, and an averment that said Murray is the owner of them. There was also introduced in evidence the resolution of the board of trustees or directors of the opera house company to the effect that Murray be allowed a monthly rental for these chairs, etc. But, after a consideration of all the evidence as a whole, it definitely appears that this was all done at a time when said Murray, by purchase or otherwise, had obtained control of a majority of the stock of the corporation; that he elected a majority or all of the trustees or directors of said corporation; that the trustees acting at the time said resolution was adopted were all of them in some way identified with Murray's interest and subject to his control. Maguire was his agent, Chapman was a clerk in his bank, and O'Donnell was his attorney. So far as the record shows, none of the minority stockholders of the corporation were present, or represented in this transaction, and their rights do not appear to have been considered or deemed worthy of consideration. The corporation was heavily involved in debt. The transaction as a whole appears to have been colorable and suspicious, and I am unwilling

to consider it as a corroboration of Murray's claim of ownership by purchase of the property. It does not commend itself as entitled to much weight, and is not conclusive as evidence of Murray's ownership. Then there is the further uncontradicted evidence that a lease in which this very same property is described was negotiated by said Murray with the defendant McFarland. This lease was executed by and in the name of the Grand Opera House Company. Murray was cognizant of the fact that the opera house company was being held out to said McFarland as the owner of this property. He stood by and helped to clothe the opera house company with the apparent ownership and title to this very property to a stranger to its title. It seems to me that, if said Murray is not precluded from repudiating the good faith of his acts and conduct in the premises, it goes far to weaken his claim of ownership to the property. The same may be said with reference to the answer and disclaimer of the opera house company in the premises. It executed a lease of this property to McFarland. Presumably lessor and lessee acted in good faith at the time, and both ought in equity and good conscience to be bound by it; but notwithstanding it executed the lease in due form and in writing, and held itself out to a stranger as the owner of the property, it comes into a court of equity and solemnly denies that it is now or ever was the owner of the property now claimed by said Murray. This is remarkable, to say the least. Then, again, we have the remarkable circumstance of Murray, having negotiated this lease for the Opera House Company as the owner of the property, repudiating the whole transaction by notifying the receiver that he (Murray) is the owner and entitled to the possession of this property, and must either pay rent therefor or surrender its possession, and threatening its removal in default thereof; and all this in the face of the fact that the tenant under the lease was in good faith complying with the terms and conditions of his lease, and had not made default in any of its covenants. If it was the property of the opera house company for the purposes of a lease thereof to McFarland, and that lease in full force at the time, why should it change its character of title and ownership so soon after the receiver was appointed? These facts are all of them inconsistent with Murray's testimony as to his claim of ownership. I find, therefore, that said Murray never purchased said chairs as he claims, and that he is not the owner thereof.

At the time said chairs were placed in said opera house, Maguire owned said house and purchased said chairs for use in the same. For a time O'Rourke held a chattel mortgage upon the same; but when this mortgage was canceled the full legal title to the chairs passed to Maguire. They then undoubtedly became fixtures in said building. It is clear from the evidence that the Grand Opera House would have been incomplete as an opera house without these chairs; and these chairs, or similar chairs, were absolutely necessary in its use and occupation for theatrical performances; and said chairs, affixed as they were, became and were a part of the building itself, and passed to King in virtue of the sheriff's deed to the premises. The case of Insurance Co. v. Allison (C. C. A.) 107 Fed. 179, is direct-

ly in point with the case at bar. Judge Wallace, speaking for the circuit court of appeals for the Second circuit, referring to chairs attached to the floor by screws and nails, as these were, said:

"The auditorium chairs were turn-over chairs, upholstered in plush, and of the mechanical construction adapting them to be placed in rows and secured to the floor. They were placed over the carpets in rows, and fastened to the floor by screws. * * * It would seem that chairs attached and arranged substantially as these were are essential to the uses to which an auditorium is appropriated. We think he should have instructed them [the jury] that, attached as they were, if they were, as to size, upholstering, mechanical construction, and general arrangement, adapted to conform to the auditorium, that fact would indicate an intention that they were to be regarded as fixtures. * * * If they were arranged as they generally are in such rooms, occupying the whole area of the auditorium when divided into the necessary aisles, we think, in view of the other evidence, that it should have been ruled as a matter of law that they were fixtures. An auditorium without seating capacity would be incomplete, and the chairs as generally arranged and constructed in such a room are essential to the use to which that part of the building is appropriated."

See, also, Oliver v. Lansing (Neb.) 80 N. W. 829.

The stage, stage fixtures, and drop curtain attached thereto fall within the same rule. They are fixtures. In regard to the scenery, however, it does not appear that it was substantially affixed to the building, or that it was specially designed, constructed, and fitted for the building. It appears from the uncontradicted testimony of Mr. Maguire that this scenery might be used in any other theater, and that he had at times used portions thereof in other playhouses in the state of Montana. Mr. McFarland testified that this scenery, when used, was lashed to or on the stage in some way. The precise manner in which this was done is not disclosed. Taking the general knowledge possessed by the court of stage scenery, it must infer that it was only lashed temporarily, and not permanently affixed to the building. Under this evidence the court cannot hold that it is a part of the building. This view is also supported by the circuit court of appeals in Insurance Co. v. Allison, supra. In the case of Oliver v. Lansing (Neb.) 80 N. W. 829, it was held that certain theatrical scenery used in a building was a part of the same. In that case the evidence showed that the scenery was specially constructed for and fitted to this building. In that particular the case differs from the one at bar. While the court finds that this theatrical scenery is not a part of the building in question, I do not recall any evidence that would justify the court in holding that the defendant Murray is the owner of the same. It is not necessary to decide who is the owner thereof. As far as the pianos are concerned, these certainly cannot be classed as a part of the building. From their very nature they are personal property, and cannot pass to the complainant under a deed to the realty.

It is therefore ordered that a decree be entered in this cause requiring defendant Silas F. King to convey to the complainant, John O. Bender, all his right, title, and interest of, in, and to the real property described in the bill, with the appurtenances. Among these are embraced the stage, stage fixtures, and appliances attached to the stage, the drop curtain attached thereto, and the chairs, attached

and fastened to the floor by screws and nails. The court also finds that said complainant is entitled to the rents, issues, and profits derived from the property described in the bill from the 11th day of March, 1899, the date on which said complainant was entitled to a sheriff's deed thereof, and that, defendant Murray having received said rents, issues, and profits with full knowledge and notice of the complainant's rights in the premises from said date down to the 1st day of February, 1900, he is required to account to the complainant therefor, and make restitution thereof and pay the same, with legal interest. Complainant is also entitled to his proper costs incurred in this suit.

CENTRAL PAC. RY. CO. v. EVANS et al.

(Circuit Court, D. Nevada. August 12, 1901.)

No. 712.

1. EQUITY JURISDICTION—ENJOINING ILLEGAL ASSESSMENT—ADEQUATE REMEDY AT LAW.

   A court of equity has jurisdiction of a suit to enjoin the assessment of complainant's property for taxation in a manner not authorized by the laws of the state, such remedy being the only one which affords adequate and appropriate relief by requiring the assessment to be made in a lawful manner.

2. TAXATION—LEGALITY OF ASSESSMENT—POWERS OF SPECIAL TRIBUNAL.

   Const. Nev. art. 10, § 1, requires the legislature to provide by law "for a uniform and equal rate of assessment and taxation," and the statute enacted in pursuance of such requirement (Cutting's Comp. Laws, § 1084) provides that each county assessor shall ascertain by diligent inquiry and examination all property in his county, real and personal, subject to taxation, and shall "determine the true cash value of all such property." By Act March 16, 1901, it was provided that the county assessors of the state shall meet at the capital each year, "and shall at such meetings establish throughout the state a uniform valuation of all classes of property which, by their character, will admit of such uniform valuation." Such act requires each county assessor to fix the valuation of property assessed by him at the valuation "placed on the same class of property" at the annual meeting, and imposes a penalty for a violation of such requirement, but provides that property not designated at the annual meeting shall be valued under the existing provisions of law. *Held*, that the board of assessors so created was a special tribunal, whose powers were strictly limited to those expressly conferred by the act, which were to fix the valuation of property by classification upon some reasonable basis, where it admitted of such classification; that such board had no power, without making a classification of railroad property, to designate a railroad company by name, and by a vote of its members fix the valuation per mile of its railroad throughout the state; and that its action in so doing was void, and did not affect the right and duty of each county assessor to determine for himself the "true cash value" of the property of such railroad company within his county.

In Equity. Suit for injunction.

W. F. Herrin, John Garber, and M. A. Murphy, for complainant.

William Woodburn, Atty. Gen., James R. Judge, Alfred Chartz, and Trenmor Coffin, for defendants.

A. E. Cheney, for defendants Alphonso A. Evans and Joseph W. Guthrie.

HAWLEY, District Judge. This is a suit in equity, brought by complainant, who is the owner of a franchise for a railroad, granted by the laws of the United States, extending from the city of Oakland, in the state of California, to the city of Ogden, in the state of Utah, known as and called the Central Pacific Railroad, which extends across the state of Nevada, and through the counties of Washoe, Lyon, Churchill, Humboldt, Lander, Eureka, and Elko, and is not situate in any other county in this state, against all the county assessors in this state, to enjoin and restrain the assessors of the particular counties through which the Central Pacific Railroad is built "from adopting, or being controlled in their action by, the said valuation of said meeting of assessors, in valuing and assessing said Central Pacific Railroad in their respective counties, and from proceeding to value and assess such portion thereof as lies in the county of each, respectively, otherwise than in the exercise of his own official judgment and discretion, and according to the said laws of the state of Nevada for the assessment of railroads." Upon the filing of the bill an order was made requiring the defendants to show cause, if any they had, why the relief asked for should not be granted, and in the meantime a restraining order was issued. The rule to show cause was heard upon the complaint and answer, and upon various affidavits and documents presented by the respective parties. The real object of the suit is to test the validity of the law entitled "An act to provide for a more uniform valuation and assessment of property in this state," approved March 16, 1901 (St. 1901, p. 61), and the validity of the proceedings had thereunder by the state board of assessors at its meeting held in Carson City, Nev., from April 1 to 4, 1901, inclusive. These are the main questions involved herein, but, as incidental thereto, it is alleged in the bill of complaint:

"That the valuation so assumed to be fixed by the said majority of said assessors upon said Central Pacific Railroad was and is arbitrary, unjust, oppressive, and greatly disproportionate to the fair value thereof, and to the value fixed by said board of assessors upon other similar property, and to the systematic valuation of other real property in said state, which is systematically undervalued by the assessors defendants herein throughout said state of Nevada, and is valued by them at not more than one-half of the market value thereof; that the fair value of said Central Pacific Railroad in the state of Nevada for the purposes of assessment and taxation does not exceed an amount greater than from $8,000 to $12,000 per mile of said Central Pacific Railroad, in different parts of said state, in respect of its main road, and an amount not greater than $3,500 per mile in respect of its side tracks in said state; * * * that the said valuation of said Central Pacific Railroad by said board of assessors at their said meeting held under said statute constituted, on the part of the majority of said board, a denial to this complainant of the equal protection of the law, and that such denial is in contravention of the 14th amendment to the constitution of the United States."

The affidavits and documents introduced upon this hearing principally relate to the value of the road. The answer was filed on behalf of each and all of the defendants, but at the hearing the defendant Evans, the assessor of Washoe county, and the defendant Guthrie, the assessor of Humboldt county, appeared separately, and took issue as to the value placed upon the railroad by the state board of assessors. Defendants claim that they are entitled to have the re-

straining order dissolved upon the principles announced by the supreme court of this state in Wells, Fargo & Co. v. Dayton, 11 Nev. 161. In that case it was held that the complainant was not entitled to an injunction, because it had a plain, speedy, and adequate remedy at law. It was stated by counsel for defendants that the case is identical with the one under consideration. That case was brought to enjoin the collection of a tax upon personal property. It was averred, among other things, in the complaint, that the defendant, who was the county assessor, "threatens to sell, and, unless restrained and enjoined, will sell, the office fixtures of complainant for the taxes assessed and levied by him to complainant; * * * that complainant has no speedy or adequate remedy at law; that, should defendant sell said fixtures, complainant will be greatly and irreparably damaged and injured; and that said defendant is wholly unable to respond in damages." It appeared in that case that the assessor, in assessing and attempting to enforce the payment of the taxes, was pursuing the identical course indicated by the statutes of this state, and all his acts were within the line of his official duties as prescribed by law. Upon those facts the chief justice, speaking for the court, said:

"There must, in every case, be some special circumstances attending a threatened injury of this kind, which distinguishes it from a common trespass, and brings the case under some recognized head of equity jurisdiction, before the extraordinary and preventive remedy of injunction can be invoked. The necessity of strictly adhering to this rule is obvious. The legislature is invested with the sole power of providing the modes by which state and county taxes shall be levied, assessed, and collected, and it is essential that the modes prescribed, if within constitutional limits, should be faithfully carried out by the officers to whom is intrusted the duty of their enforcement. The state and county government are dependent for their support upon the taxes imposed upon the property of their citizens, and experience and observation teaches us that the payment of taxes has very often to be enforced by summary and stringent means against the adverse sentiment and persistent resistance of the taxpayer. * * * With such collections courts of equity ought never to interfere, unless the bill clearly shows that complainant is likely to suffer some great or irreparable injury from the acts of the officer, and further shows that he has no plain, speedy, or adequate remedy at law."

See, also, Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65; Pittsburgh, C., C. & St. L. Ry. Co. v. Board of Public Works of West Virginia, 172 U. S. 32, 37, 19 Sup. Ct. 90, 43 L. Ed. 354, and authorities there cited.

The present suit is not brought to enjoin the collection of a tax. It is not brought to enjoin or restrain defendants, or either of them, from assessing the property of the complainant under the laws of this state; but is brought to compel the defendants to proceed according to law in making the assessments, the contention of the complainant being that by the law of the state of Nevada, regulating the assessment of railroads in said state, it is made the official duty of each of said assessors that he shall value and assess that portion of the Central Pacific Railroad which lies in the county of which he is the assessor according to his official judgment, and that in ascertaining, assessing, and fixing the value of said portion of the railroad for taxation he shall assess it the same as other property, and

shall consider, treat, and assess such portion thereof at its value within his county as an integral part of a complete, continuous, and operated line of railroad, and not as so much land covered by the right of way merely, nor as so many miles of track consisting of iron rails, ties, and couplings, as prescribed by section 1238, Cutting's Comp. Laws. The injunction is asked for to prevent any assessor from assessing the property in any other manner. If the contention of complainant as to the law is correct, irreparable injury might follow, not only to the complainant, but also to the state and counties which are entitled to the tax to be collected from the complainant by a legal assessment of its property. If the contemplated and threatened assessment by the various county assessors is, as claimed by complainant, without authority of law, it would necessarily follow that complainant has no plain, speedy, or adequate remedy at law; and in this respect the case in hand stands entirely upon a different footing from the facts presented in the case of Wells, Fargo & Co. v. Dayton. Where there is an unlawful departure from the provisions of the law relating to assessment, or any violation of the fundamental law, it is the duty of the court to enjoin the proposed invalid assessment. Railroad & Telephone Cos. v. Board of Equalizers of Tennessee (C. C.) 85 Fed. 302, 308; Crim v. Town of Philippi, 38 W. Va. 122, 18 S. E. 466. In Cooley, Tax'n, 760, the author says:

"There are certain cases with which the courts of law cannot adequately deal. Their preventive remedies are few, and of narrow scope; and where the case is such that, if threatened action is allowed to be taken, the mischief will be irremediable, equity, under old and well-established principles, will interfere, because equity alone can do complete justice under such circumstances. * * * The available remedy in equity, when any is admissible, is commonly that by injunction."

This principle was recognized and clearly stated in Wells, Fargo & Co. v. Dayton, supra. See, also, City of Ogden City v. Armstrong, 168 U. S. 224, 237, 18 Sup. Ct. 98, 42 L. Ed. 444; Wilson v. Lambert, 168 U. S. 611, 18 Sup. Ct. 217, 42 L. Ed. 599.

It is contended by complainant that the act of the legislature is invalid for many reasons: (1) That the act embraces more than one subject, and that but one subject is embraced in the title, contrary to and in violation of section 17, art. 4, of the constitution; (2) that it is a local or special law "for the assessment and collection of taxes" for state and county purposes, and violates section 20, art. 4, of the constitution; (3) that it discriminates against the complainant, and deprives it of its right, under the existing laws of the state of Nevada, to have its property equalized before the county commissioners of each county sitting as a board of equalization; (4) that it improperly delegates to the annual meeting of the various county assessors the power of the state of Nevada to classify property for the purpose of taxation, and improperly authorizes said assessors to establish a law throughout the state of Nevada; (5) that the proceedings had by the state board of assessors, in so far as they relate to the valuation of the Central Pacific Railroad, are absolutely null and void for want of jurisdiction, power, or authority. Can these contentions, or either of them, be sustained? Article 10, § 1, of the constitution of the state of Nevada, provides that "the legislature shall provide by law

for a uniform and equal rate of assessment and taxation." The legislature, in pursuance of this provision, passed a law requiring the county assessor to ascertain by diligent inquiry and examination all property in his county, real or personal, subject to taxation, and to "determine the true cash value of all such property." Cutting's Comp. Laws, § 1084. The statute of March 16, 1901, provides, among other things:

"Section 1. The county assessors of the several counties of this state shall meet for a period not exceeding ten days, in the office of the governor, at Carson City, Nevada, on the first Monday of April in the year A. D. 1901, and on the second Monday in January of each and every succeeding year, and shall, at such meetings, establish throughout the state a uniform valuation of all classes of property which, by their character, will admit of such uniform valuation: provided, that in fixing such valuation the location and situation of such property shall be considered: and provided further, that nothing herein shall be so construed as to impair the right of the board of equalization of any county to equalize taxes on all property, the valuation of which has not been fixed at the annual meeting of county assessors as provided in this section: provided, any taxpayer under the provisions of this act shall not be deprived of any remedy or redress in a court of law relating to the payment of taxes."

"Sec. 5. The valuation fixed at such annual meetings shall be uniform on all such property as may be designated, except in cases where the valuation is affected by its locality; and the assessors of the several counties of the state shall fix values on all property not so designated at said meeting, in the manner now provided by law."

"Sec. 11. It shall be the duty of each county assessor to fix the valuation of property which may be assessed by him at the valuation placed on the same class of property at the regular annual meeting of assessors for the state."

"Sec. 13. Should any assessor in the state neglect or refuse to assess property in accordance with the provisions of this act, or laws now in force and effect, or place a less valuation on any property than has been fixed at said meeting of assessors, the governor, state controller or attorney general shall, upon due notification, instruct the district attorney of said assessor's county to bring suit against such assessor and his bondsmen for the full amount of taxes liable to be lost to the state and county by reason of such failure or neglect to properly assess such property. The suit shall be tried in the district court having jurisdiction in the county where the property is situated."

"Sec. 18. All acts and parts of acts, in so far as they conflict with the provisions of this act, are hereby repealed."

The various objections urged against this act present several questions of grave importance. The provisions of the act constitute a departure from the usual modes of assessment of property hitherto existing in this state. It will be noticed that section 1 provides that nothing contained in the act "shall be so construed as to impair the right of the board of equalization of any county to equalize taxes on all property, the valuation of which has not been fixed at the annual meeting of county assessors as provided in this section"; thus discriminating, in this respect, against the rights of the owners of property the assessment of which is fixed by the board of assessors. It is a mooted question, upon which there is ample room for a wide difference of opinion, as to whether or not it will accomplish the beneficial purposes expressed in the title "for a more uniform valuation and assessment of property in this state." It does not require a valuation of all property under its provisions, or of any particular

species of property, but leaves this matter to the discretion of the state board of assessors. The provisions of section 1 recognize the fact that there is property within this state which cannot be designated into "classes of property," and hence cannot be valued by the state board. Who is to determine this matter? Is it not left to the board, at its option, to decide this question? It may divide one or more species of property into "classes of property," and be of opinion that the other property will not admit of a uniform value if divided into classes. Its power in this respect is unlimited. The act contemplates that the board may do this, and in section 5 provides that "the assessors of the several counties of the state shall fix values on all property not so designated at said meeting, in the manner now provided by law." It will thus be seen that the present act, instead of closing the gates against injustice, leaves the door wide open for all sorts of discrimination. The present act is, perhaps, as open to criticism as were the defects in the former law, which it is claimed this act was intended to avoid. But with these matters courts have nothing to do. It is simply the question of power that we are called upon to discuss and determine. Whether the power of the legislature was reasonably or unreasonably exercised; whether it was wise or unwise, expedient or inexpedient, to enact the law,—are questions left exclusively to the legislative department of the state government to decide, and their judgment must necessarily be decisive upon these questions. Ex parte Spinney, 10 Nev. 323, 337; Mining Co. v. Seawell, 11 Nev. 394, 400. As was said by Beatty, J., in Ex parte Spinney, supra:

"To superintend the conscience and intelligence of legislators, and see that they pay a due regard to considerations of justice and expediency in the enactment of laws, is the business of the people. The sooner this truth is recognized the better."

It will be assumed, for the purposes of this opinion, without deciding it, that the act is constitutional. And it will be admitted, for the purposes of this discussion, that the legislature has the unquestioned power, within constitutional limits, to prescribe different means and methods of assessment and of ascertaining values of railroad property for the purposes of taxation from the means and methods applied to other property. State v. Railroad Co., 21 Nev. 260, 264, 30 Pac. 689, and authorities there cited. It was so expressly held in Sawyer v. Dooley, 21 Nev. 390, 32 Pac. 437. The different nature and uses of this character of property may sanction and justify such a discrimination in this respect. Of course, the means and methods must be applied impartially to all, so that the law shall operate equally and uniformly upon all persons and property under similar circumstances. And it is also proper to state that the national courts have uniformly been disposed to sustain the legislative acts concerning the means and manner of assessment and taxation, which is so essential to the existence of the government; and it is only in cases where the law enacted by the legislature violates the plain provisions of the constitution that such acts are set aside. Within these limits, as before stated, the legislative power is supreme. State Railroad Tax Cases, 92 U. S. 575, 23 L. Ed. 669; Kentucky Railroad Tax Cases, 115

U. S. 321, 337, 29 L. Ed. 414; Railroad Co. v. Backus, 154 U. S. 421, 425, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Adams Exp. Co. v. Ohio State Auditors, 165 U. S. 194, 228, 17 Sup. Ct. 305, 41 L. Ed. 683; Magoun v. Bank, 170 U. S. 283, 293, 18 Sup. Ct. 594, 42 L. Ed. 1037.

The most serious question involved in this case is that heretofore specified as point 5 in the contention of complainant's counsel, and relates solely to the power given by the act to the state board of assessors: Did this board act beyond its jurisdiction? Pursuant to the provisions of this statute, the assessors met and organized, and remained in session four days. During the session they took up "the question of the valuation of the Central Pacific Railroad," which was stated by the chairman of the meeting to be the "valuation upon the main track, exclusive of everything else"; and the valuation was fixed, by a vote of nine to five, at $20,000 per mile. The side tracks of the Central Pacific were fixed at $7,000 per mile throughout the state. On motion, "the assessment of the rolling stock" was left to the individual judgment of the assessors. It will be observed by a careful reading of the minutes of the state board of assessors that there were no "classes of property" named by the board, so far as railroads were concerned. It is true that the state controller, in addressing the board, said: "The various railroads doing business in this state can be very easily classified. * * * While you are the sole judges of the methods by which you classify them, with your permission I will venture to suggest a classification." The classification suggested fell far short of what the act requires, but even this classification was not adopted in terms, and the board valued the railroads by names, without any attempt to make "classes of property." The power given to the board by the statute in this respect is limited to the fixing of values on "classes of property." No power is given by any of the provisions of the statute which authorized the board to fix values upon the property of any individual taxpayer. The act says that the county assessors shall "establish throughout the state a uniform value of all classes of property which, by their character, will admit of such uniform valuation." This is clear, plain, unequivocal, direct, and positive. In order to distribute property into classes, it was essential to arrange or classify the same according to some common properties, characters, or values pertaining to the classes designated. No power is given by the act to the board to fix a value on all cattle, horses, or sheep in the state at so much per head, or all lands in the state at so much per acre, or all railroads at so much per mile, without reference to the character or value based upon a sensible basis. The means prescribed by the act must be followed by the board. No departure therefrom is permissible. "Classes of property" had to be made by the board with reference to the values of the property in the particular class. It must be presumed that the object and intent of the act was to secure, as near as may be, a uniform valuation. It was not intended to compel the board to adopt an ironclad rule of absolutely equal valuation. That is impracticable and impossible. But, in order to accomplish the duty delegated to the assessors by the act, they were required to use their best judgment in that direction, and could not arbitrarily act

otherwise. In State v. Fogus, 19 Nev. 247, 249, 9 Pac. 123, 124, speaking for the court, I said:

"Taxation is a tribute for the support of the government, imposed on property in return for the protection and advantages which the government affords to the owner. It is an essential and fundamental requisite in the exercise of the power of taxation that the burden should be imposed or apportioned, with all practicable equality and justice, upon a uniform rule."

The designation of "classes of property" for the purposes of taxation based on values bears close analogy to the classification of counties and cities based on population for the purpose of making improvements, regulating salaries of officers, etc. In State v. Boyd, 19 Nev. 43, 5 Pac. 735, the supreme court had under consideration a statute attempting to regulate salaries, etc. Section 10 provides that the act "shall apply to all counties in this state in which there were cast more than eleven hundred and fifty votes, and less than thirteen hundred and fifty votes, at the general election held in eighteen hundred and eighty-two, in this state." In discussing this act, the court, among other things, said:

"It is apparent from an inspection of the statute that even this classification is illusory, because some of the provisions of the act are expressly applicable only to Washoe county, and others only to Esmeralda county. The statute does not, therefore, apply uniformly, even within the limited classification named. But the basis of classification cannot be sustained. Abstractly considered, the language of the section appears to contemplate a class of counties, but in its practicable operation the law is applicable to Washoe and Esmeralda counties only, and can never affect any other county. The legislature could, with equal right, designate these counties by name, as by the total vote cast at a past election. * * * In order to observe the uniformity required by the constitution, classification, if made, must be based upon reasonable and actual differences; the legislation must be appropriate to the classification, and embrace all within the class."

There is no doubt of the right of the legislature to limit the operation of statutes by classification to communities of a certain number of inhabitants, even though there should be only one such place within the state, for all have the possibility of reaching the number designated. State v. Donovan, 20 Nev. 75, 79, 15 Pac. 783. But, as was said by the court in Re Hennenberger (Sup.) 49 N. Y. Supp. 230:

"When the legislature goes beyond this, describing a local condition so accurately that it would be beyond a reasonable probability that it would become generally operative, it exceeds the authority delegated by the people, and its enactment becomes a nullity."

This opinion was affirmed in 155 N. Y. 420, 50 N. E. 61. In Com. v. Patton, 88 Pa. 258, the court, in referring to an act of like character, said:

"This is classification run mad. Why not say all counties named 'Crawford,' with a population exceeding sixty thousand, that contain a city named 'Titusville,' with a population of over eight thousand, and situated twenty-seven miles from the county seat? Or all counties with a population of over sixty thousand watered by a certain river, or bounded by a certain mountain? There can be no proper classification of cities or counties except by population. The moment we enter geographical distinctions, we enter the domain of special legislation, for the reason that such classification operates on certain cities or counties to the perpetual exclusion of all others."

Every law of this character concerning the valuation and assessment of property must be construed in the light of reason, common sense, and knowledge as to the values of the different classes of property. It was the duty of the state board of assessors to comply strictly with the letter and the spirit of the law. It could not make a law of its own. It could not depart from the authority delegated to it. It could not, as before stated, fix a value on the property of an individual taxpayer, because no such authority was given to it. It had no jurisdiction to fix the value except on "classes of property." And these classes should be constituted of property which has such attributes as would necessarily bring it within a well-defined class, and readily differentiate it from the other classes of property belonging to the same general species. The state board of assessors, created by the law, like a board of equalization or a board of county commissioners, is of special and limited jurisdiction, and, like all inferior tribunals, has only such powers as are specially conferred upon it. It is always essential to the validity of its acts that they should be authorized by some express provision of the statute, otherwise they are absolutely null and void. These general principles are elementary in their character, and have been frequently announced by the supreme court of this state, as well as others. In State v. Central Pac. R. Co., 9 Nev. 79, 88, which was a suit to recover delinquent taxes for the years 1869, 1870, and 1871, the board of county commissioners of Washoe county accepted payment of the sum of $22,355 in settlement of the sum of $74,000, which was the full amount of the taxes delinquent on the property of the corporation. The principal question discussed was whether or not the commissioners had any authority to make the compromise. It was held that the action of the board was without authority of law and void. In the course of the opinion, the court said:

"The board of county commissioners is an inferior tribunal of special and limited jurisdiction. It must affirmatively appear that the action of the board in compromising with the defendant was in conformity to some provision of the statute giving to it that power, else its order was without authority of law, and void. State v. Washoe Co. Board of Com'rs, 5 Nev. 319; State v. Ormsby Co. Com'rs, 6 Nev. 97; State v. Washoe Co. Com'rs, 6 Nev. 108. * * * The only authority giving to the commissioners any power to reduce or in any manner change the taxes as assessed is vested in them as a board of equalization, and while acting in that capacity it was held in State v. Washoe Co. Com'rs that they must literally comply with the plain provisions of the statute."

The same views were expressed by the court in State v. Central Pac. R. Co., 21 Nev. 172, 176, 26 Pac. 225, 1109, in relation to the power of the board of equalization. The statute there under consideration provided that the board should have the power to determine all complaints made in regard to the assessed value of any property. Bigelow, J., in delivering the opinion of the court, said:

"Without a complaint is made, it has no jurisdiction to act in the premises. People v. Goldtree, 44 Cal. 323; State v. Northern Belle Mill & Mining Co., 12 Nev. 89. And, after a complaint is once heard and determined, there is no provision for a new trial, a rehearing, or any further consideration of the matter. It follows from the principles already stated that the power to

reconsider, not being expressly given, does not exist. This statement of the law is fully borne out by the adjudicated cases."

Numerous authorities are cited in support of these views.

From the views herein expressed, does it not necessarily follow that the state board of assessors could not value any particular species of property without dividing the same into classes having reference to their character and value on some sensible basis? The "classes of property" which the board was authorized to make could not be founded upon odious, absurd, or unreasonable distinctions. The classes adopted "must be based upon reasonable and actual differences," otherwise the provisions of the constitution requiring "a uniform and equal rate of assessment and taxation" would be violated, and the action of the board would be null and void. The board had no power to make "classes of property" concerning lots in towns and cities upon which are erected two-story brick or frame buildings of certain dimensions at so much per front foot, without reference to their utility, business purposes, occupancy, or cash value. Such a classification would exhibit a greater dementia than the one referred to as "being run mad" in Com. v. Patton, 88 Pa. 258. The board grasped the thought that it had no authority to value all horses in the state at so much per head, and divided them into classes of property with reference to their value as work horses and stock horses, etc. It could not say "that all gray horses shall be valued at $100 each, and all sorrel horses at $75." Hawkins v. Mangrum (Miss.) 28 South. 872, 874. In fixing a valuation for cattle the board also divided them into classes of property to which they belonged, with reference to their value, as beef cattle, milch cows, etc., and did not put the "registered thoroughbred" in the same class as "stock cattle." The board could not value all cattle belonging to A., in Eagle Valley, at so much per head, and in Carson Valley, belonging to B., at so much per head. The board, if it had attempted to value land in this state, would, in the first instance, have been compelled to divide the same into classes, such as cultivated lands, unimproved lands, grazing lands, barren lands, etc., at so much per acre. This does not mean that each acre of land must be of the same value. This would, in most instances, if not in all, be impossible. But it does mean that the classes adopted by the board must be selected with reference to the value attaching to the particular property belonging to this class of property. So of railroads. The board had no jurisdiction, power, or authority to value any railroad at so much per mile without first selecting the classes of property to which it belonged, and the selection of the classes must have been made with reference to the constituents attaching to that particular class. It had no power to assess a railroad, or any other kind of property, to the individual owner thereof by name, or with sole reference to the number of miles, without definitely placing it within classes of property having reference to the value of all property within that class. This the board failed to do. There has been much discussion, in the opinions of the supreme court of this state, as to the proper method of arriving at the value of railroads for the purpose of assessment. It would serve no useful purpose to review these cases. They all deal with cases of

alleged excessive taxation, a subject not here necessary to be discussed. If I were to venture a suggestion on this subject, it would be to the effect that uniformity in the assessment of property can only be secured by the election of intelligent, impartial, and honest men to office, who will strictly adhere to the provisions of the constitution of this state, and assess all property of every kind at its true cash value. Railroads are of a more complex character than the other species of property above named, and it is argued by complainant that it cannot be divided into "classes of property," under the present act. But, be that as it may, it is apparent that the attempted valuation in this case cannot, either upon reason or authority, be sustained, because the action taken by the state board of assessors in valuing the Central Pacific Railroad by name, without making any class of property of railroads, was not within the power granted by the act under consideration; and upon that ground alone, without passing upon the other points, my conclusion is that complainant is entitled to the injunction prayed for. Let a decree be entered accordingly.

HOOVEN OWENS & RENTSCHLER CO. v. JOHN FEATHERSTONE'S SONS et al. (two cases).

(Circuit Court of Appeals, Eighth Circuit. September 23, 1901.)

Nos. 1,470, 1,471.

1. APPEAL—DECREE FINAL—RIGHTS OF NOMINAL PARTIES UNDETERMINED.
   A decision which renders all the questions between the parties served or appearing in the suit res adjudicata between themselves is a final judgment, and reviewable by appeal in the circuit court of appeals, although the rights of such parties against strangers to the suit, who were named as parties in some of the papers, remain undetermined.

2. SAME—NECESSARY PARTIES.
   A decree in a suit to enforce a mechanic's lien that a complainant shall take nothing by its action, and that it is entitled to no lien against a certain defendant named, is a final decision reviewable by the sole appeal of the complainant, although another necessary party, who was never served with process, and never appeared in the action, was named in the petition and summons as a defendant.

3. GENERAL DECREE THAT COMPLAINANT TAKE NOTHING BY THE ACTION NOT SUSTAINABLE BY MATTER IN ABATEMENT.
   A general decree that the complainant take nothing by the suit, which does not clearly show that it rests upon some matter in abatement which prevents it from barring future actions upon the same cause, cannot be sustained by the sufficiency of the proof of such matter in abatement where there are pleas in bar in the answer, because the legal effect of such a plea is to sustain the latter pleas, and to work a complete estoppel of subsequent suits upon the same cause of action.

4. FACTS SPECIALLY FOUND—SUFFICIENCY TO WARRANT JUDGMENT REVIEWABLE WITHOUT OBJECTION.
   Where the court makes a special finding of facts in an action at law, the question whether or not these facts warrant the judgment rendered thereon is always open for consideration by the appellate court on a writ of error without any objection or exception taken at the time of the entry of the judgment.

5. WRIT OF ERROR AND APPEAL PERMISSIBLE.
   In cases of doubt a party may take an appeal and sue out a writ of error, and the appellate court will review the proceedings below in ac-

cordance with the rules of that method of review applicable to the nature of the case.

6. MECHANIC'S LIEN—SUIT IN EQUITY—REVIEWABLE BY APPEAL ONLY.
A suit to enforce and foreclose a mechanic's lien is a suit in equity, and the decree rendered upon it is reviewable by appeal, and not by writ of error.

7. METHODS OF REVIEW JURISDICTIONAL AND UNAFFECTED BY STATE PRACTICE.
The methods of review of proceedings in the federal courts fix their power and jurisdiction, and are not affected by the act of conformity, or by the practice or legislation of the states.

8. METHOD OF TRIAL MAY BE WAIVED.
One who consents to the hearing in equity of a legal cause of action or to the trial of an equitable cause of action at law is thereby estopped from successfully objecting to the method of trial in an appellate court.

9. RIGHT TO REVIEW NOT AFFECTED BY WAIVER OF METHOD OF TRIAL.
Consent to try a law suit in equity or an equitable cause of action at law constitutes no waiver of the right to review the proceedings by appeal or writ of error, as the nature of the case may demand, and the appellate court will be governed in its action by the rules applicable to the proper method of review.

10. MECHANIC'S LIEN LAWS SHOULD BE LIBERALLY CONSTRUED.
Statutes giving liens to laborers and material men should be liberally construed, because they cannot recover back their labor or material, and the improvements upon which they are placed are ordinarily enhanced by their value.

11. SAME—CLAIM—DESCRIPTION OF PROPERTY.
Any description which will enable one familiar with the locality to identify the property upon which the lien is intended to be claimed with reasonable certainty is sufficient in a claim for a lien under Rev. St. Mo. 1899, § 4203.

12. SAME—CONTIGUOUS CITY LOTS COVERED BY SINGLE PLANT SUBJECT TO SINGLE LIEN.
Where one has constructed an improvement consisting of several buildings on adjoining city blocks or lots regardless of the lines, streets and alleys among them, and has intended to use, and is actually using, the buildings as part of a single plant, so that neither the city lots nor the buildings are adapted to separate uses, all the buildings so constructed may constitute a single improvement, and the tract on which they stand may be a single lot of land, subject to a single lien under the mechanic's lien laws of Missouri (sections 4203, 4204, 4207, Rev. St. 1899).

13. SAME—CLAIM—DIFFERENT CONTRACTS.
A claim for a lien for an aggregate amount of materials furnished under contracts between different parties, and mingled together in one account, is void.

14. SAME.
A single notice or claim of lien for materials furnished to the same property under different contracts between the same parties is sufficient, and valid.

15. SAME.
A claim of a lien for an excessive amount may be sustained pro tanto if the true amount for which the lien is maintainable can be segregated from the aggregate amount claimed.

16. SAME—FIXTURES BETWEEN LIENOR AND LIENEE.
In a controversy between the claimant of a mechanic's lien and the owner of real estate upon which the property of the lienor has been placed, or between vendor and vendee, or between mortgagor and mortgagee, engines, machinery, houses, buildings, and every other thing which is essential to the particular use to which the realty is applied, or between which and the balance of the realty there is a manifest and necessary dependence, or which is intended to be and is permanently

and habitually used as a part of the property constituting the real estate of the owner upon which it was placed, becomes a part of that realty, whether it can be removed without physical injury to the realty or not, however slight its physical connection with the real estate, and even when there is no actual fastening of the one to the other.

17. SAME—RETENTION OF TITLE AS SECURITY NOT FATAL TO.
The retention by contract of title to materials furnished as security for the purchase price by the claimant of a mechanic's lien is not inconsistent with, and will not estop the vendor from enforcing, his statutory lien.

18. SALE—DELIVERY—DESIGNATION OF PLACE NOT ACCEPTANCE NOR INCEPTION OF NEW JOURNEY.
Where an engine was to be delivered by the shipper at the city of the vendee, and when it arrived at the station there the vendee, in answer to the question of the railroad agent, "What disposition?" answered, "Send it to our plant," and it was so sent without extra charge for freight, *held*, that the direction of the vendee was a mere designation of the place of delivery within the original destination, and not the starting of the engine on an additional journey, and that delivery was not made until it was received at the plant.

19. MECHANIC'S LIEN NOT LOST BY DESTRUCTION OF IMPROVEMENT.
A mechanic's lien attaches to the real estate upon which the material or labor is bestowed at the time it is furnished, and is not devested or lost by the subsequent destruction of the improvement.

(Syllabus by the Court.)

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

This is a suit to enforce a mechanic's lien for the balance of the purchase price of an engine. The Jacob Dold Packing Company, the respondent, was a corporation which owned and operated a packing plant in Kansas City, in the state of Missouri. On December 16, 1897, John Featherstone's Sons, a corporation, contracted to furnish to the Dold Company at Kansas City a refrigerating plant consisting of an engine and other machinery, for the sum of $18,750. The Hooven, Owens & Rentschler Company, another corporation, and the appellant here, agreed with Featherstone's Sons that it would furnish the engine for $6,001.28. It did so. The engine was incorporated with the plant of the Dold Company, and the appellant was paid $1,499.90, while a balance of $4,501.38 of the purchase price remained unpaid. The Rentschler Company filed a claim of a mechanic's lien for this balance, under the statutes of Missouri, upon certain property of the Dold Company at Kansas City in which the engine had been embodied, and brought this suit to enforce its lien. There was a decree that it was entitled to no relief, and this decree is challenged by the appeal before us. (C. C.) 99 Fed. 180.

Edwin C. Meservey (Charles W. German, on the brief), for plaintiff in error and appellant.

Samuel W. Moore (Gardiner Lathrop and Oramel W. Pratt, on the brief), for defendants in error and appellees.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

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

The court specifically found the facts in this case, and then held as conclusions of law that the claim of lien which the appellant filed did not contain a sufficient description of the property sought to be charged to identify it, and that it contained one item, amounting to

$74.35, which was furnished under a different contract from that under which the engine was provided, and for these reasons it rendered a decree that "the plaintiff is not entitled to the enforcement of its alleged mechanic's lien as against the defendant Jacob Dold Packing Company, and that the plaintiff take nothing by its action herein, and that the defendant Jacob Dold Packing Company go hence without day, and have and recover of the plaintiff its costs." The appellant avers that these conclusions of law are erroneous, and that on this account the decree should be reversed. The Dold Company maintains the correctness of these rulings of the court, and also insists that they are not here for our consideration, because: (1) The decree is not final; (2) the suit was tried below as an action at law, no objections were made to the evidence, and its sufficiency to sustain the decree was not challenged by a request that the court should hold it insufficient; and (3) the assignment of errors is alleged to be defective.

The argument in support of the position that the decree is not final runs in this way: This was a suit by the subcontractor, the Rentschler Company, against its debtor, Featherstone's Sons, and the owner of the packing plant, the Dold Company, to enforce a mechanic's lien upon the property of the respondent. The debtor, Featherstone's Sons, was named as a defendant in the petition and summons, but was never properly served with process, and never appeared in the action. It was, however, under the practice in Missouri, a necessary party to the suit, and no final decree for the complainant could be lawfully rendered without its actual or constructive presence in the proceeding. Rev. St. Mo. 1899, § 4211. It is therefore contended that the decree rendered is not final, and hence is not reviewable here, because it does not dispose of the right of the complainant to relief against Featherstone's Sons, but simply determines that it has no lien upon the property of the Dold Company. There are two reasons why this conclusion cannot be sustained. In the first place, while Featherstone's Sons is named in the petition and summons as a defendant, it has never been served with process, and has never appeared in the proceeding, so that its rights are not and cannot be affected any more by the decree than if its name had never appeared in any of the papers in the case. The proceeding is in reality up to this time a suit between the appellant and the Dold Company, so far as their rights under the present decree are concerned, as completely as though they had been the only nominal parties to it. Hence the decree which adjudges that the appellant has no lien upon the property of the latter company is a final and conclusive adjudication of that issue between them, and an effectual estoppel of the appellant from again litigating that question with the Dold Company or its successors in interest. In legal effect upon the parties now here, in finality between them, and in right of review the suit stands as if Featherstone's Sons had never been named as parties to it, and its only nominal parties had been its only real parties, the appellant and the Dold Company. In that case the decree would have been final, and the only necessary parties to its review in this court would have

been the Rentschler Company and the respondent; and this is no less true because a third corporation, that was never served with process, that never appeared, and that was never affected by the proceeding, was named as a defendant in some of the papers at the inception of the suit. The case differs from Hohorst v. Packet Co., 148 U. S. 262, 13 Sup. Ct. 590, 37 L. Ed. 443; Bank v. Smith, 156 U. S. 330, 15 Sup. Ct. 358, 39 L. Ed. 441; Baker v. Bank, 91 Fed. 449, 33 C. C. A. 570; and Railroad Co. v. Sweeney, 103 Fed. 342, 43 C. C. A. 255,—cited by counsel for respondent, in that the parties to the suits in those cases whose rights remained undetermined had either been served with process or had appeared in the suits, and had thus become affected by the proceedings; while in the case at bar Featherstone's Sons has not been and cannot be affected by anything that has thus far been said or done in this suit. For that reason that corporation was not a necessary party to the appeal from this decree, and, inasmuch as the decree, if sustained, is a conclusive estoppel of the Rentschler Company from ever maintaining its claim to a lien upon the property of the respondent, it is a final determination of its right to a lien, and a final decree, which the appellant is entitled to present for review by its sole appeal. In the second place, the decree does not adjudge the claim for a lien upon the property of the Dold Company invalid, and retain the rights of the appellant against Featherstone's Sons for further adjudication in this suit. On the other hand, it conclusively determines every question presented in the case upon the merits, and adjudges that the appellant "shall take nothing by its action." While it is true that the rights of the appellant against Featherstone's Sons are left undetermined, that is not because any issue or right involved in this suit as it stands is left undisposed of, but because the rights of the appellant against Featherstone's Sons were not, and never could be, involved in this proceeding while that corporation remained a stranger to it. The decree was therefore final, and it was properly reviewable upon the sole appeal of the Rentschler Company.

Another untenable position of counsel for respondent may be conveniently noticed here while we are considering the form and effect of this decree. It is that, even if the court below was in error in its conclusions of law relative to the validity of the lien, the decree may be sustained because Featherstone's Sons was not made a party to the proceeding, and the court could not lawfully render a decree foreclosing the lien until that corporation was brought in. But the only decree which the mere absence of Featherstone's Sons as a party to the suit would warrant would be a decree dismissing the bill on that account without prejudice to another suit against the necessary parties upon the same cause of action, while the decree actually rendered was upon the merits, rendered all the issues in the case res adjudicata, and constituted a complete bar to all future suits to enforce the lien. A general decree that the complainant take nothing by the suit, which does not clearly show that it rests upon some matter in abatement which prevents it from barring future actions upon the same cause, cannot be sustained by

the sufficiency of the proof of the matter in abatement, where there are pleas in bar, because the legal effect of the decree is to sustain the latter, and to work a complete estoppel of subsequent suits upon the same cause. Speer v. Board, 88 Fed. 749, 752, 32 C. C. A. 101, 105, 60 U. S. App. 38, 45; House v. Mullen, 22 Wall. 42, 46, 22 L. Ed. 838; Four Hundred and Twenty Min. Co. v. Bullion Min. Co., 9 Fed. Cas. 592,599 (No. 4,989), 3 Sawy. 634; Sheldon v. Edwards, 35 N. Y. 279, 287, 288; U. S. v. Pine River Logging & Improvement Co., 78 Fed. 319, 325, 24 C. C. A. 101, 107, 49 U. S. App. 24, 35.

The next objection of the respondent to our consideration of the merits of this case is that it was tried by consent by the court below without a jury as an action at law; that this court can, therefore, review the proceedings below by writ of error only; and that, as there were no objections to the evidence, and there was no request that the court hold that there was no evidence which would warrant a finding for the defendant, no question is presented for our determination. An examination of the record discloses the fact, however, that, if we were limited to a review under the writ of error, every question presented by the appellant would be fairly raised by the special finding of facts which was made by the trial court and by the decree which is based upon it. Where the court makes a special finding of facts in an action at law, the question whether or not these facts support the judgment rendered thereon is always open for consideration by the appellate court on a writ of error, without objection or exception taken at the time of the entry of the judgment. U. S. v. Ady, 76 Fed. 359, 360, 22 C. C. A. 223, 224, 40 U. S. App. 312, 313; National Bank of Commerce v. First Nat. Bank, 61 Fed. 809, 810, 10 C. C. A. 87, 88, 27 U. S. App. 88, 91; Trust Co. v. Wood, 60 Fed. 346, 348, 8 C. C. A. 658, 660, 19 U. S. App. 567, 571. The question whether the judgment is warranted by the findings presents every alleged error urged by the appellant. But we are not limited to, or governed in this case by, the rules applicable to a review by writ of error. Through abundance of caution the appellant has both taken an appeal and sued out a writ of error. In cases of doubt this course is not the subject of any just criticism, and the appellate court will review the proceedings below in accordance with the rules of that method applicable to the nature of the case before it. McFadden v. Milling Co., 97 Fed. 670, 672, 38 C. C. A. 355, 357; Hurt v Hollingsworth, 100 U. S. 100, 102, 25 L. Ed. 569. This was a suit to enforce a mechanic's lien, and to compel the sale of real estate to satisfy the debt secured thereby. It was of the nature of a suit to foreclose a mortgage, and it was a suit in equity, and not an action at law. Davis v. Alvord, 94 U. S. 545, 24 L. Ed. 283; Land Co. v. Bradbury, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433; Furnace Co. v. Witherow, 149 U. S. 574, 578, 579, 13 Sup. Ct. 936, 37 L. Ed. 853. The appropriate method for the review of the decree therein was therefore by appeal, and not by writ of error, and the soundness of the result reached below must be tested by the rules governing reviews by appeal, rather than by those applicable to the procedure by writ of error. Rev. St. § 699.

It is earnestly argued that appellant, by consenting to try its case below at law, has waived its right to a review by appeal. Its waiver, however, does not extend to that length. One who consents to the hearing in equity of a legal cause of action, or to the trial of an equitable cause of action at law, is thereby estopped from successfully objecting for the first time in an appellate court to the method of trial which he has adopted. But this is the extent of the estoppel against him. He does not waive his right to a review of the judgment or decree of the trial court by the only method which can be effectual to obtain such a review; that is to say, by writ of error if the cause of action was legal, and by appeal if it was equitable. Any other rule would deprive the defeated party of the right to any relief whatever in every case in which he permitted the trial of an action at law in equity or of an equitable cause of action at law. He could not review a decree upon an equitable cause of action tried at law by writ of error because the federal appellate courts have no power or jurisdiction to review suits in equity by that method; and he could not review such a decree by appeal because he would have waived his right to treat the proceeding—as it was in fact—as a suit in equity. In the same way he would be deprived of the right to review a judgment upon a legal cause of action which he had consented to try in equity. A result of this character would be contrary to the purpose and intent of the parties to such proceedings, unjust, and unreasonable. The acts of congress give to defeated litigants in the national courts the right to a review of final judgments at law against them by writs of error, and a right to a review of final decrees in equity by appeal. These acts grant the power and fix the jurisdiction of the federal appellate courts. They are not matters of form or practice, but matters of power and jurisdiction. They are not affected by the act of conformity (Rev. St. § 914), nor by the legislation or practice of the states; and courts will not presume that litigants have waived or surrendered their rights under them unless this fact is made clearly to appear. Rev. St. § 699; City of Manning v. German Ins. Co. (C. C. A.) 107 Fed. 52, 57. Consent to try a lawsuit in equity or an equitable cause of action at law constitutes no such waiver or surrender. This suit was therefore properly brought to this court by appeal, and the Rentschler Company is entitled to a hearing and decision of the questions it presents in accordance with the rules applicable to that method of review.

Nor is the objection of counsel for the respondent to the specifications of errors more tenable than those which have been considered. Those specifications state that the court erred in holding that the description of the property in the claim of lien which was filed with the clerk of the circuit court was insufficient to sustain the lien, in holding that the insertion of the item of $74.35 in that claim was fatal to the lien, and in holding that the appellant was not entitled to a lien upon the building and improvements and land upon which it was claimed. The evidence, the special findings of fact, and the decree present the questions suggested by these specifications. They were the principal questions discussed at the argument and in the briefs of counsel in this court, and they are so plainly presented by

the assignment of errors that they cannot be justly ignored. We turn, therefore, to the merits of the case.

The Jacob Dold Packing Company owned and operated a packing plant in Kansas City at the time the contracts for the refrigerating plant and for the engine, which was a part thereof, were made. This plant consisted of 19 buildings, located on blocks 18 and 23 of West Kansas addition No. 1 to the city of Kansas City, and certain buildings and ground on the other side of Liberty street, in said city, located upon other blocks. The 19 buildings did not occupy all of blocks 18 and 23, which comprise about six acres of land. North of the buildings on block 18 were railroad tracks used by the Dold Company, and north of these a strip of ground 67 feet and 2 inches wide and 384 feet long, which constitutes the right of way of the Kansas City, Ft. Scott & Memphis Railroad Company. On the original plat of these blocks there is a street between them running east and west, and alleys through them running in the same direction, and the blocks are divided into lots. But the buildings of the Dold Company have been constructed without reference to this street or these alleys, and without regard to the lines of the lots. Some of the buildings stand on parts of two or more lots, some cover portions of the alleys, and some are upon parts of the street. The Dold Company owns all the land in these two blocks upon which these buildings are situated, except the right of way of the railroad company. Fifteen of these 19 buildings upon this tract of land either adjoin each other or are connected together by covered platforms, so that one may pass through them all without leaving the cover of a roof. The four buildings that are not so connected are a pump house, an oil house, an office building, and a stable. All of these two blocks except the right of way of the railroad company was owned, occupied, and operated by the Dold Company as a portion of a single plant for the purpose of conducting its packing business. Many of the buildings were large and imposing structures. That one in which the engine was placed was a brick building four stories high, 177 feet long, 61 feet wide at one end, and 50 feet wide at the other. Part of this building stood upon the alley, and it was one of the 19 which adjoined each other, or were connected with each other by covered platforms, so that they had all the utility and advantage of a single building under a single roof. Adjoining this building in which the engine was placed, with nothing to separate them from it but a fireproof wall, were two buildings,—one four stories high, with a basement, the first two stories of which were built of stone and the two upper stories of brick; the other, five stories high, built entirely of brick. These three buildings had been erected at different times, but at the time the lien was filed they appeared to the casual observer to be a single building, constructed of brick and stone. In this condition of its plant and business, the Dold Company engaged Featherstone's Sons to furnish it with a refrigerating machine, consisting of this engine, condensers, and other apparatus, which the Dold Company received, connected with, and incorporated into that part of its plant on blocks 18 and 23. When the engine was not paid for, the Rentschler Company filed a claim of lien, in which, after stating

that its claim was for a part of the purchase price of the engine furnished to Featherstone's Sons, it described the property upon which it claimed its lien in this way:

"The four (4) story and basement brick, stone, and frame packing house building with composition roof, and all other buildings and improvements connected therewith, or adjacent, or adjoining, and used and operated by Jacob Dold Packing Company as a packing house plant, and situated on the following described premises, to wit: On blocks numbered eighteen (18) and twenty-three (23) West Kansas addition No. One (1) to the city of Kansas (now Kansas City), Jackson county, state of Missouri; said lots being contiguous, and said buildings and improvements erected under one general contract by said John Featherstone's Sons with Jacob Dold Packing Company; said premises, buildings, and improvements belonging to and being owned by said Jacob Dold Packing Company during all the time of the performance of said work and labor and the sale, delivery, and use of said materials in said buildings, and now belonging to and being owned by said Jacob Dold Packing Company."

The statutes of Missouri provide that one who furnishes an engine for any building, erection, or improvements upon land under a contract with the owner thereof or his contractor shall have a lien upon such building, erection, or improvements, and upon the land upon which the same are situated to the extent of one acre, "or if such building, erection or improvement be upon any lot of land in any town, city or village, then such lien shall be upon such building, erection or improvements, and the lot or land upon which the same are situated, to secure the payment for such work or labor done, or materials, fixtures, engine, boiler or machinery furnished as aforesaid." Rev. St. Mo. 1899, § 4203 They also provide that "the entire land, to the extent aforesaid, upon which any such building, erection or other improvement is situated, including as well that part of said land which is not covered with such building, erection or other improvement as that part thereof which is covered with the same, shall be subject to all liens created by this article, to the extent and only to the extent of all the right, title and interest owned therein by the owner or proprietor of such building, erection or other improvement, for whose immediate use or benefit the labor was done or things were furnished." Section 4204. They require the subcontractor to file with the clerk of the circuit court, within four months after the indebtedness shall have accrued, a true account of his demand, "and a true description of the property, or so near as to identify the same, upon which the lien is intended to apply." Section 4207. It will be noticed that the claimant is not required by this statute to furnish a correct or accurate description of the property upon which he claims his lien, but his full duty is performed when he gives such a description as will identify it. The respondent contended below, and the circuit court held, that the description which has been quoted was insufficient to identify the property upon which the appellant intended its lien to apply. But wherein is it insufficient to indicate its intention? It states with admirable clearness that the lien is claimed upon all the adjoining and adjacent buildings and improvements on blocks 18 and 23 which were owned and operated as a packing house plant by the respondent; and the statute provided that the lien should

extend to the entire lot or land owned by the lienee upon which the building or improvement was situated, whether actually occupied thereby or not. Section 4204. Read in the light of this statute, this description comprises all of blocks 18 and 23 except the strip on block 18 which constitutes the right of way of the railroad company.

It is said that there was no "four (4) story and basement brick, stone, and frame packing house building," and therefore it was impossible to identify the property intended to be claimed by the appellant. But this contention rests upon a too exact and technical interpretation of the description, and upon the fact that the improvement which the lienor thus described consisted of three adjoining buildings separated only by fire walls, one of which was a four-story brick without a basement, one of which was a five-story brick, and one of which was a four-story brick and stone building with a basement, and with a frame covered platform around it. There was no other brick and stone building on the two blocks, and the description was plainly intended to point out the block or improvement which comprised these three buildings, which together formed a solid block, and which was not inaptly, although perhaps it was inaccurately, called a four-story and basement brick, stone, and frame packing house building. This isolated portion of the description, however, is not all the means of identification supplied by the claim of lien. It not only points out this building in the words which have been quoted, but it also adds, "and all other buildings and improvements connected therewith, or adjacent, or adjoining, and used and operated by Jacob Dold Packing Company as a packing house plant, and situated on" blocks 18 and 23. This description certainly points to some building on the lot of land comprised in blocks 18 and 23, and all the buildings on those blocks were adjoining or adjacent to each other, and were used as a part of the packing house plant; so that, whatever building was intended to be first named, they are all equally included in the claim. Any description which will enable one familiar with the locality to identify the property on which the lien is claimed with reasonable certainty, is sufficient to sustain it. De Witt v. Smith, 63 Mo. 263; Bradish v. James, 83 Mo. 313, 318; Drexel v. Richards (Neb.) 70 N. W. 23, 24. When the entire description in the claim is fairly read and construed in the light of the statute and of these decisions, it identifies all the buildings and all the land on blocks 18 and 23 owned and used by the Dold Company as a part of its packing plant as the property upon which the lien was intended to apply so clearly that no one seeking to find it, whether familiar or unacquainted with the locality, could fail to clearly identify it by the description in the claim.

Counsel for respondent maintain, however, that, if this be the true construction of the description, the lien is void, because it is not restricted to the specific building in which the engine was placed and to the lot of land on which it stands; and section 4227, Rev. St. Mo. 1899; Matlack v. Lare, 32 Mo. 262; Fitzgerald v. Thomas, 61 Mo. 499; Fitzpatrick v. Thomas, Id. 512; Lemly v. Steel Co., 65

Mo. 545; and Ranson v. Sheehan, 78 Mo. 668,—are cited in support of this view. In Fitzpatrick v. Thomas, 61 Mo. 512, the supreme court of Missouri held that, where separate and unconnected houses were built on separate city lots respectively, a single lien could not be maintained against all the houses and lots for the aggregate expense of their construction. In Ranson v. Sheehan, 78 Mo. 668, that court decided that a claim of a lien upon 15 acres of land in the country, where the land subject to lien is limited to a tract one acre in extent, was invalid because it did not in any way identify the acre to which the lien was intended to apply. These are, perhaps, the strongest cases cited in support of the contention of the respondent. They illustrate the earlier disposition of the Missouri court to construe the mechanic's lien law strictly as in derogation of the common law,—a disposition happily abandoned in its subsequent opinions, and contrary to the public policy of the state as it is evidenced by its legislation and by the later decisions of its courts. Statutes securing upon buildings and improvements the wages of labor and the value of materials bestowed upon them ought to be liberally construed. The labor and material, once bestowed, lose all their value to the laborer or material man. He cannot take them back. They enhance the value of the property upon which they are placed, and its owner, and those who take under him, receive all the benefits of the labor and of the material. In such circumstances the lien of the laborer or material man should be maintained to the full extent to which the statutes give it. Wisconsin Trust Co. v. Robinson & Cary Co., 68 Fed. 778, 780, 15 C. C. A. 668, 670, 32 U. S. App. 435, 439. This policy has been adopted by the legislature of the state of Missouri. After the supreme court had rendered its decision in Fitzpatrick v. Thomas, that legislature expressly provided that, whenever another case of that character arose in that state, the lien of the claimant should be sustained. It gave a single lien upon all the buildings when the improvement consisted of two or more separate constructions erected under one general contract upon contiguous lots. Section 4227. The case at bar does not fall under the terms of this statute, because the buildings constituting that part of the packing plant on blocks 18 and 23 were not erected under one general contract. The respondent accordingly contends that this case must be governed by the decision in Fitzpatrick v. Thomas. Its counsel argues that, if this is not so, section 4227 was futile, and a single lien upon many buildings on separate lots could have been maintained without it. But this argument overlooks the broad distinction between the facts of this case and those which conditioned the Fitzpatrick Case and others of like character. The statute gives a lien upon "the building, erection or improvements and the lot or land upon which the same are situated." Section 4203. In the Fitzgerald Case each building—each improvement—was situated on a separate city lot according to the plat, was a separate improvement, and was intended to be used and capable of being used for a separate purpose. In this case the lines between the original city lots in blocks 18 and 23, the alleys through them, and the street between them have been disre-

garded, and practically obliterated, by the respondent. The city lots are no longer capable of separate use. The buildings on the blocks were not intended, and are not adapted, for independent service, but they are all parts of a single improvement, constructed and used for a single purpose,—the carrying on of the packing business of the respondent. Why should not the land on which this improvement stands be held to be a single tract of land, and lienable as such under the terms of the statute? There is nothing in the words of the law to forbid it. The lien may attach to the "improvements" and to "the lot or land" on which they are situated. By the very terms of the statute it extends to all the land upon which they are situated held by the owner of the improvements, whether occupied by it or not. Section 4204. Why do not all of blocks 18 and 23 upon which these improvements are situated, which is owned by the Dold Company, constitute a single tract of land? Any other construction of the statute and the lien is illiberal, strict, and injurious to both the debtor and the creditor. It would be as disastrous to the interests of the owner of such a plant as this and to the claimant of the lien to segregate and sell a single building in which an engine or a piece of machinery happened to be placed, thus disrupting the plant, as it would be to sell a few miles of a great railroad, or a small part of any manufactory. The portion sold would bring but a modicum of its value, while its segregation from the plant would entail much greater damage than all it was worth upon the owner. The broad terms of the statute themselves, the liberality with which a sound public policy requires that they should be construed, and the later decisions of the supreme court of Missouri, which are cited below, point unerringly to this conclusion. Where one has constructed an improvement consisting of several buildings on adjoining city lots or blocks, regardless of the lines, streets, and alleys among them, has intended that these improvements should be used and is actually operating them as a part of a single plant, so that neither the city lots nor the buildings are adapted to separate uses, all the buildings so constructed may constitute a single improvement, and the tract on which they stand may be a single lot of land, and subject to a single lien under the mechanic's lien law of Missouri (sections 4203, 4204, 4207, Rev. St. 1899). Progress Press Brick & Machine Co. v. Gratiot Brick & Quarry Co., 151 Mo. 501, 519, 52 S. W. 401, 74 Am. St. Rep. 557; Pullis v. Iron Co., 157 Mo. 565, 593, 57 S. W. 1095; Kelley v. City Mills, 126 Mass. 148; Phil. Mech. Liens, § 376. The description in the claim of lien must, therefore, be held to be sufficient to sustain a lien on all that part of blocks 18 and 23 which constitutes a part of the packing plant of the respondent.

Another error specified is that the circuit court held the lien invalid because the appellant inserted in its claim an item of $74.35 for two rocker plates, which were furnished under another and different contract from that which provided for the engine. Under the practice in Missouri, a lien may not be secured for the aggregate amount of materials furnished under distinct contracts between different parties and mingled in one account. O'Connor v.

Railroad Co., 111 Mo. 185, 194, 20 S. W. 16; Lumber Co. v. Stepp, 157 Mo. 366, 384, 57 S. W. 1059. But neither the statute, the decisions of the courts of Missouri, nor the reason of the case call for more than one notice or statement of lien for materials supplied to the same property under different contracts between the same parties. Kearney v. Wurdeman, 33 Mo. App. 447, 456; Kern v. Pfaff, 44 Mo. App. 29, 35; Grace v. Nesbitt, 109 Mo. 9, 16, 18 S. W. 1118; Minneapolis Trust Co. v. Great Northern R. Co. (Minn.) 76 N. W. 953. Nor does the fact that a lienor demands a larger amount in his claim for a lien under a single contract than he is entitled to receive, or the fact that he demands compensation for materials that were furnished under another contract, invalidate his lien for the amount justly due him under the contract specified, if that amount is capable of ascertainment and segregation. Ittner v. Hughes, 133 Mo. 679, 690, 34 S. W. 1110; Allen v. Smelting Co., 73 Mo. 688, 692; Johnson v. Building Co., 23 Mo. App. 546; Lumber Co. v. Strimple, 33 Mo. App. 154; Bambrick v. Association, 53 Mo. App. 225, 239. The appellant brought this suit to enforce its lien for the amount due it under its contract to furnish the engine, and alleged that the machinery and appliances for which it sought a lien were delivered between January 17, 1898, and April 20, 1898. The item which raises the question under discussion appears in the claim of lien under date of July 13, 1898, as two rocker plates, $74.35, and stands entirely separate from the items furnished under the contract for the engine prior to April 21st of that year. At the trial no claim for this item was urged. Indeed, a stipulation was made that, if a delivery of the engine was completed on April 19, 1898, the claim of lien which was filed on August 20, 1898, was too late by one day; but that, if its delivery was on April 20, 1898, the claim was filed in time. This was, in effect, a withdrawal of all claim to enforce the lien for $74.35. The result is that the appellant simply claimed a lien for $74.35 more than it was entitled to enforce a lien for under the particular contract counted upon in its petition, although it was really entitled to a lien for this excess under another contract, which it failed to plead. There is no more reason why its claim for this excess should destroy its lien for the $4,501.38, which was justly due it under the contract it pleaded, than there is why any litigant should lose his right to recover the amount justly due him because he claims more. The demand of this excess in the claim of lien did not invalidate it, and the holding of the court below to the contrary was erroneous.

Counsel for the respondent are not content to rest their case solely upon their contention that the rulings of the court below were right. They insist that, even if those rulings were erroneous, the decree below must be sustained: (1) Because the engine was personalty, and could not form the basis of a lien; (2) because the claim of lien was not filed in time; and (3) because the building in which it was placed was burned. The contention that the engine could not be the foundation of a lien because it was personalty is untenable for two reasons. In the first place, the statutes of Missouri expressly give to the vendor the right to a lien for the

purchase price of an engine, boiler, or machinery provided for any building, erection, or improvement under a contract with the owner or his contractor. Rev. St. Mo. 1899, § 4203. In the second place, this engine was placed in one of the brick buildings constituting part of the packing plant of the respondent, and it was connected with other machinery therein for the purpose of permanently furnishing power to operate the refrigerator and to cool the air in the buildings. While it was capable of removal without disturbing any part of the building in which it was placed, and while it was secured to its foundation by taps screwed upon anchor bolts, and could be removed by simply unscrewing the taps, it was intended to be and it was permanently incorporated into, and habitually used as a part of, the packing house. The line of demarcation between realty and personalty in cases between landlord and tenant is by no means the same as in cases between vendor and vendee, mortgagor and mortgagee, and lienor and lienee, and this for the very sound reason that the relation of landlord and tenant is transitory,—the use of the property is by one who is to stay for a limited time, and many articles are placed upon the realty by the tenant which both parties intend to have removed at the end of the term; while the things placed upon the realty by the vendor, the mortgagor, and the lienee are put there by one whose term of occupancy is unlimited, generally with the intention that they shall become a part of the real estate, and that they shall be perpetually and habitually used with it. In cases of the latter class, and especially where ponderous machinery, whose weight alone is sufficient to hold it in place, is in question, permanent attachment to the realty is by no means an indispensable attribute of a fixture. The true test is the intent to permanently incorporate the article with the plant or property, and the permanent and habitual use of it as a part of the real estate. And the true rule is that in a controversy between the claimant of a mechanic's lien and the owner of real estate upon which the property of the lienor has been placed, or between vendor and vendee, or between mortgagor and mortgagee, engines, machinery, houses, buildings, and every other thing which is essential to the particular use to which the realty is applied, or between which and the balance of the realty there is a manifest and necessary dependence, or which is intended to be and is permanently and habitually used as a part of the property constituting the real estate of the owner upon which it was placed, becomes a part of that realty, whether it can be removed without physical injury to the realty or not, however slight its physical connection with the real estate, and even when there is no actual fastening of the one to the other. Voorhis v. Freeman, 2 Watts & S. 116, 37 Am. Dec. 490; Oves v. Oglesby, 7 Watts, 106; Winslow v. Insurance Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368; Richardson v. Koch, 81 Mo. 264, 273; Thomas v. Davis, 76 Mo. 72, 79, 43 Am. Rep. 756; Machine Co. v. Cole, 130 Mo. 1, 31 S. W. 922; Progress Press Brick & Machine Co. v. Gratiot Brick & Quarry Co., 151 Mo. 501, 52 S. W. 401, 74 Am. St. Rep. 557; Christian v. Dripps, 28 Pa. 271; Farrar v. Stackpole, 6 Greenl. 154, 157, 19 Am. Dec. 201; Walmsley v. Milne, 7 C. B.

(N. S.) 115; Corliss v. McLagin, 29 Me. 115; Bratton v. Clawson, 2 Strob. 478; Morgan v. Arthurs, 3 Watts, 140; Murdock v. Harris, 20 Barb. 407; Sparks v. Bank, 7 Blackf. 469; Fisher v. Dixon, 12 Clark & F. 312. Under this rule the engine became a part of the realty of the respondent, and that property became subject to the lien for its purchase price.

Nor did the fact that in its contract for the sale of its engine the appellant secured from the contractor, Featherstone's Sons, the stipulation that "the engine," etc., "shall remain our property as security for deferred payments until fully paid for in cash," waive the lien upon the real estate of the respondent granted by the statute, or estop the Rentschler Company from enforcing it. This stipulation is not inconsistent with the grant of the statute. The former retained a lien upon the engine as security for the purchase price; the latter created a lien not only upon the engine, but upon the real estate of the respondent upon which it was placed. The former was a lien by contract, the latter by statute; and neither is destructive of the other. The retention by contract of title to materials furnished as security for the purchase price by the claimant of a mechanic's lien is not inconsistent with, and will not estop the vendor from enforcing, his statutory lien. Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 719, 3 Sup. Ct. 594, 27 L. Ed. 1081; Manufacturing Co. v. Smith (C. C.) 40 Fed. 339, 340, 5 L. R. A. 231; Clark v. Moore, 64 Ill. 279; Anthony v. Smith, 9 Humph. 508; Fogg v. Rogers, 2 Cold. 290.

Was the claim for the lien filed in time? The statute required it to be filed within four months after the indebtedness accrued. It was filed on August 20, 1898. The contract was that the engine should be delivered to the respondent free on board at Kansas City, and at the trial it was stipulated that, if it was not delivered until April 20, 1898, the claim of lien was filed in time. The engine was shipped by way of the Wabash Railroad on April 11, 1898. It arrived at the freight depot of the Wabash Railroad Company at Kansas City on April 19, 1898, whereupon the agent of that company inquired of the respondent by telephone, "What disposition?" and the agent of the latter answered that the car should be sent around by the belt line to the respondent's packing house. It arrived there at 7 a. m. on April 20, 1898, and the Dold Packing Company wired the appellant that the car arrived that day. In our opinion, it made no mistake, and the claim of lien was filed in time. By arrangement between the railroad companies the charge for freight on the belt line, if any, was absorbed in the charge for freight to Kansas City. The carriage by the Wabash Company included delivery, and there could be no delivery except at such a place as was suitable to the delivery of the particular thing carried. Under the arrangement detailed, and in the case of this heavy machinery, that place was the packing house of the Dold Company, and the engine was not delivered to or received by the respondent until it reached its packing house on April 20, 1898. The direction to send it to the packing house was a mere designation of the particular place within the original destination where the property

should be delivered, and not a direction to start it upon an additional journey. Union Trust Co. v. Atchison, T. & S. F. R. Co. (C. C.) 64 Fed. 992, 994; Lewis v. Sharvey, 58 Minn. 464, 59 N. W. 1096.

The suggestion that the lien was lost because the building in which the engine was placed was destroyed by fire in September, 1899, more than a year after it was put in place and in operation, is unworthy of extended discussion. The lien attached to the improvement on blocks 18 and 23, into which it was incorporated, and to the land on which it was situated, in April, 1898, and the subsequent destruction of a part or all of the improvement could not devest the lien upon the real estate and upon every improvement which remained upon it. Linden Steel Co. v. Rough Run Mfg. Co., 158 Pa. 238, 27 Atl. 895; Smith v. Newbaur, 144 Ind. 95, 42 N. E. 40, 1094, 33 L. R. A. 685; Bratton v. Ralph, 14 Ind. App. 153, 42 N. E. 644; Paddock v. Stout, 121 Ill. 571, 581, 13 N. E. 182; State v. Drew, 43 Mo. App. 362; Shine's Ex'x v. Heimburger, 60 Mo. App. 174, 179.

The result of the whole case is that the appellant has a mechanic's lien upon that part of blocks 18 and 23 owned by the respondent; that the decree on the merits against it was erroneous; that this decree was reviewable by appeal, but not by writ of error; and that a decree enforcing the lien cannot be lawfully rendered in the absence of Featherstone's Sons.

The writ of error will accordingly be dismissed, the decree below will be reversed, the case will be remanded to the court below, with instructions to dismiss the petition without prejudice to another suit for the same cause of action within four months after the receipt of the mandate, unless the appellant within that time makes John Featherstone's Sons a party to this suit by proper service of process, or by its answer or appearance, and in that event to render a decree herein not inconsistent with the views expressed in this opinion; and it is so ordered.

CENTRAL COAL & COKE CO. et al. v. HARTMAN.

(Circuit Court of Appeals, Eighth Circuit. September 30, 1901.)

No. 1,490.

1. MONOPOLIES—COMBINATIONS IN RESTRAINT OF TRADE—DAMAGES.
Only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable. Speculative, remote, or contingent damages cannot form the basis of a lawful judgment.

2. SAME—SPECULATIVE DAMAGES—EVIDENCE—SUFFICIENCY.
The estimates, speculations, or conjectures of witnesses unfounded in the knowledge of actual facts from which the amount of the damages could have been inferred with reasonable certainty will no more sustain a judgment than the conjectures of a jury.

3. SAME—ANTICIPATED PROFITS—WHEN RECOVERABLE.
The general rule is that the anticipated profits of a commercial business are too remote, speculative, and dependent upon changing circumstances to warrant a judgment for their loss. There is an exception to

this rule that the loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his actual loss was.

4. SAME—PROFITS OF ESTABLISHED BUSINESS—EVIDENCE—INDISPENSABLE TO RECOVERY.

Proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business.

5. SAME—LOSS OF PROFITS.

The plaintiff testified that the acts of the defendants had greatly diminished his business, prevented him from making contracts for future delivery of coal, and diminished his sales from 15 to 20 carloads per month, on which he would have made a profit of from $12 to $20 per car; that he could not tell what the volume of his business was before or after the acts complained of, and that he had no books or papers which would show this fact. He produced no evidence of the expenses or income of his business before or after the acts complained of. *Held*, that the evidence was insufficient to sustain a verdict for damages for the loss of anticipated profits.

(Syllabus by the Court.)

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

W. C. Perry (Daniel B. Holmes, Adiel Sherwood, and John O'Grady, on the brief), for plaintiffs in error.

Charles H. Nearing (J. S. West and J. B. Campbell, on the brief), for defendant in error.

Before SANBORN, Circuit Judge, and ADAMS and LOCHREN, District Judges.

SANBORN, Circuit Judge. This was an action brought by Samuel Hartman against the Central Coal & Coke Company and several other corporations for three times the damages which he claimed that the defendants had inflicted upon his business by their violation of the inhibitions of the act to protect trade against unlawful combinations and monopolies, commonly called the "Sherman Anti-Trust Law" (26 Stat. 209, c. 647). His complaint was that he had been engaged in the sale of coal in Kansas City, in the state of Kansas, since 1893; that in September, 1896, he and the defendants had formed a coal club to establish and control the prices at which coal should be sold in Kansas City, Kan., and Kansas City, Mo., and to restrain commerce among the states; that they had accomplished their purpose; that he withdrew from the club in 1897; that thereafter the defendants and their associates would not sell him Salt Fork coal or Cherokee coal at any other prices than those which they had established for the sale of coal at retail to consumers; that this action of the defendants caused him a loss of all his trade in Salt Fork coal, of a large portion of his business in Cherokee coal, and made it impossible for him to make contracts for the future delivery of coal, because he was uncertain whether or not he could obtain it; so that he suffered damages in the sum of $2,500. The defendants denied these averments, and at the close of the trial the jury found that the plaintiff's damages were $130, and judgment was thereupon rendered

against the defendants for three times this amount, $500 attorney's fees, and the costs of the action.

The assignment of errors challenges rulings of the court upon the construction of the act of congress upon the nature and extent of interstate commerce, and upon the sufficiency of the evidence of damages to warrant a verdict against the defendants. If no real legal injury was proved in this case, if there was actually no subject of this controversy, if this is really nothing but a moot case, any opinion we might render upon the grave questions relating to the construction of the act of congress and the character and extent of commerce among the states would be mere obiter dicta, and any discussion or decision of these questions in this action would be useless. For this reason the sufficiency of the evidence of damages to sustain the verdict will first be considered. The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and January 25, 1899. Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. Now, the anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. Howard v. Manufacturing Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147; Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co., 152 U. S. 200, 205, 14 Sup. Ct. 523, 38 L. Ed. 411; Trust Co. v. Clark, 92 Fed. 293, 296, 298, 34 C. C. A. 354, 357, 359; Simmer v. City of St. Paul, 23 Minn. 408, 410; Griffin v. Colver, 16 N. Y. 489, 491, 69 Am. Dec. 718. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains. The interest

upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this actual net income, compared with that which the jury infers from the data to which reference has been made the net income would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. One, however, who would avail himself of this exception to the general rule, must bring his proof within the reason which warrants the exception. He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced. 1 Sedg. Dam. § 183; Red v. City Council, 25 Ga. 386; Kenny v. Collier, 79 Ga. 743, 8 S. E. 58; Greene v. Williams, 45 Ill. 206; Hair v. Barnes, 26 Ill. App. 580; Morey v. Light Co., 38 N. Y. Super. Ct. 185. And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation. In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery. In Goebel v. Hough, 26 Minn. 252, 258, 2 N. W. 847, 849, the supreme court of Minnesota said:

"When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are."

The truth is that proof of the expenses and of the income of the business for a reasonable time anterior to and during the interruption charged, or of facts of equivalent import, is indispensable to a lawful judgment for damages for the loss of the anticipated profits of an established business. Goebel v. Hough, 26 Minn. 252, 256, 2 N. W. 847; Chapman v. Kirby, 49 Ill. 211, 219; 1 Sedg. Dam. § 182; Ingram v. Lawson, 6 Bing. N. C. 212; Shafer v. Wilson, 44 Md. 268, 278.

Did the plaintiff make any proof of this character at the trial below? The only evidence he offered relating to the damages which he claimed was his own testimony, and he directed this to four elements of injury which he evidently thought tended to show loss of profits, viz. loss of customers, diminution of supply of coal, decrease of volume of business, and the amount of his anticipated profits on sales that he did not make. According to his testimony, he had been in the business of buying and selling coal at Kansas City since 1893. He became one of the board of control of the coal club in 1896, and

withdrew from it in 1897. After his withdrawal he could not procure two kinds of bituminous coal known as "Salt Fork coal" and "Cherokee coal" unless he paid for it a price only 50 cents a ton less than the price to the consumers, notwithstanding the fact that the retail dealers who were members of the club could buy this coal at a price about $1.25 per ton less than the price to the consumers. The reason why he could not buy this coal at the same rate as the members of the club was that they controlled the coal and its price, and they would not sell it to him at that price. His only testimony as to his loss of customers was that before he left the club he could and did make contracts for the future delivery of this coal; that after he withdrew he did not dare to do so, because he did not know that he could secure it; that there was some trade that would come to him for certain grades of coal; that he could not give these grades to those who came; that they did not want to come back, because they did not know whether they could get the coal or not; that his contract business on car-load lots before he withdrew from the club was one or two car loads a month, and that he did not know what it was on wagon loads. He produced no contracts he had ever made. He named no customer with whom he had ever had a contract, no customer whom he had lost. He did not testify how many customers had left him, nor the amount of coal which any or all of them had been accustomed to buy during the years from 1893 to 1897, when he had beeen receiving all this coal which he wished to procure. Here are no facts—no data—from which the number of customers or the amount of custom which he had lost can be lawfully inferred, none which make the amount of the contracts for future delivery which he did not make either reasonably or unreasonably certain, no basis for even a fair conjecture. He testified that he did not know himself what his customary contract business was and he produced no evidence from which the jury could learn. As to his transactions in Salt Fork and Cherokee coal, he testified that before he left the association he was selling from two to three car loads of Salt Fork coal per week during the winter time, and that this was the biggest part of his business,—nearly half of it. But, when the account books of the corporation from which he bought this coal were produced, they disclosed the fact that he purchased only four car loads during November and December, 1896, and only four car loads between December, 1896, and August, 1897, and he admitted that this might be a true statement of the amount of this coal which he handled during that winter, and he produced no books of account, no bills, no checks, no other evidence to explain the wildness of his conjecture that his business in this coal the winter before its interruption was from 26 to 39 car loads, when in fact it did not exceed 8. He testified that after he left the club he had a hard time to get Cherokee coal, but that he got some through other dealers, and that his business in this coal was two or three cars a week in the winter before he withdrew. But he produced no evidence to verify this statement, and no proof of the amount of the decrease of this business, if any, caused by the action of the club. There is no evidence in the record that the coal club in any way diminished his trade in any other coals

than the Salt Fork and the Cherokee. The plaintiff testified that their action did not disturb his trade in the anthracite and semi-anthracite coals, and that his business in these increased after the interruption of his trade in the Salt Fork and Cherokee. As to the volume of his general business and its decrease he testified that the better grades of coal he handled were in the association, and his failure to get them caused his business to run down so that he had hardly any; that he had only one grade of coal one winter; and that he could not do business after he left the club as he could the winter before. But he produced no evidence of the volume of his business, of its income, or of its expenses before or after the interruption. The only evidence he produced as to his expected profits was his own testimony that his ordinary profit on a car load of coal was from $12 to $20, and that he had his own place of business and his own teams. But the evidence disclosed the fact that this $12 to $20 was the difference between the amount he paid for a car load of coal and the amount which he retailed it for, and that it would be necessary to deduct from this alleged profit the proper proportion of the expenses of hiring the teamsters, maintaining the teams and the office, handling the coal, and operating the business, before the actual profit could be ascertained; and there was no evidence of the amount of these expenses. The plaintiff testified that he kept a ledger, in which he entered the charges of coal sold on credit, and that he had a bank account and a bank book, but he said that he had no books that would show how much coal he handled before or after the interruption, and he did not produce either his ledger or his bank book Here are a few extracts from his testimony on cross-examination:

"Q. Now, you can't give us any details as to the amount your business was damaged, can you? A. Yes, I think I can make an estimate that it was three or four cars a week less during the season. Q. That would be your estimate? A. Yes, sir. Q. But you can't tell these gentlemen how many cars you handled less after that than you did handle while you were a member of the association, or before you were a member? A. Well, it would run between twelve and fifteen cars a month. * * * Q. And you can't tell the jury the number of cars of coal that you handled in 1898? A. No, sir. Q. All that you can say is that you think it is a little less than it was in the year 1896? A. Yes, sir. Q. But how much less you can't tell? A. No, sir. * * * Q. You haven't got any account, or any paper, or any book, or anything on earth to show how much you took in, or how much your expenses were, or how much you had to pay for your coal? A. I haven't got it here, but I expect I could come pretty near telling you what it was. Q. You haven't even got your cash book, to show how much you took in in any given time, have you? A. No, sir. Q. Or your journal to show how much you paid out? A. No, sir. Q. You haven't got any record to show how much coal you bought, or who you got it from, or when it was received? A. No, sir. * * * Q. Then you can't give any information from your books as to the amount of Cherokee coal you handled? A. No, sir. Q. And the same is true as to all other coal you have handled? A. Yes, sir. Q. So we will just have to take your word for it? A. Yes, sir. Q. Haven't you got a bank book? A. Yes, sir. Q. Where is that? A. It is over in my office. Q. Haven't you got the [weigh bills] for your coal? A. I had them, but I destroyed them. Q. Haven't you got those in 1898, when you thought about commencing this suit? A. I may have; but I didn't look after that part of the business. Q. Then the result of it all is that, so far as the extent of your business is concerned at any time, we can't get any light as to that from any books you kept? A. No, sir; not even from my check books and bank books; I don't keep them."

These excerpts from the testimony demonstrate the fact that the basis of this judgment is nothing but the mere guess of an interested witness. Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way. This plaintiff first estimated that he had lost the sale of from 9 to 13 cars of Salt Fork coal per month during the winter season after he withdrew from the club, and the same number of cars of Cherokee coal, or in the aggregate from 18 to 26 cars per month. On cross-examination he guessed again, and estimated that his loss was only from 12 to 15 cars a month. When the books of the Salt Fork Coal Company were produced, and showed that his purchases of that coal in the winter of 1896 had averaged less than 2 cars per month, he conceded that this might be correct, and that he might have overestimated his trade in this coal before he withdrew from the association at least 300 per cent.; that he had guessed 9 to 13 cars per month, when it was only 2. Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts. The plaintiff in this case had his bank account at his command, which would certainly have given him some indication of the volume of his business before and after the interruption of which he complained. He had his ledger, in which he testified that he had entered the charges of the coal which he had sold on credit. The bank account and the ledger account together, if properly kept, would have given at least an approximate statement of the value of the coal which he handled, because one would have shown his cash receipts, the other his charges for coal sold on credit, and the payments he received for that coal, and a careful comparison of the two would have enabled any intelligent bookkeeper to at least approximate the value of his business. These books were not produced. The indispensable facts to warrant a recovery of the expected profits of an established business were not established. There was no evidence of the amount of capital in the business, of its expenses or of its income, either before or after its interruption. There were no data for a rational estimate of the profits at any time during the continuance of the business; nothing from which the jury could reasonably infer that the business was profitable before, less profitable or profitless after, the plaintiff's withdrawal from the club. Much less were there any facts established which made the amount of the expected profits lost reasonably certain. The interested witness who alone estimated this loss himself testified that he knew no facts from which a rational finding could be made, and his testimony shows that his estimates were nothing but the wildest conjecture. The result is that the verdict is a speculation of the jury, based on the conjectures of an interested witness, unsupported by the proof, or the

knowledge of any facts from which the plaintiff's loss, or its amount, could lawfully or rationally be inferred, and it cannot be sustained.

The conclusion which has already been reached upon the sufficiency of the evidence of damages to sustain the verdict renders it both unnecessary and unwise to consider or discuss the other questions in this case. The nature of the evidence of damages introduced and withheld by the plaintiff renders it improbable that it will ever be necessary to consider the other issues of law which counsel have discussed.

The judgment below is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

CLAPP v. VILLAGE OF MARICE CITY, OHIO.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1901.)

No. 940.

1. MUNICIPAL BONDS—RECITALS—REQUIREMENT OF OHIO STATUTE.
   Rev. St. Ohio, § 2703, relating to municipal bonds, requires that "all bonds issued under authority of this chapter shall express upon their face the purpose for which they are issued and under what ordinance." Section 2701 authorizes the issuance of bonds for the purpose of extending the time for the payment of any indebtedness which, from its limits of taxation, the corporation is unable to pay at maturity. *Held*, that bonds of a village containing a statement that they were issued to pay certain indebtedness of the village, incurred in the improvement of said village, and were issued under and pursuant to the provisions of said section 2701, and referring to the ordinance authorizing their issuance by its date and general purport, which also stated that the bonds were issued under authority of said section, sufficiently expressed the purpose for which they were issued, within the requirement of section 2703; there being but one purpose for which they could be issued under section 2701.

2. SAME—REGULARITY OF ISSUANCE—OHIO STATUTE.
   Rev. St. Ohio, § 2702, which provides that no contract or other obligation involving the expenditure of money shall be entered into, nor any ordinance, resolution, or order for the appropriation or expenditure of money be passed, by the board or council of a municipal corporation, unless the auditor shall first certify that the money required for the contract or to pay the appropriation is in the treasury to the credit of the fund from which it is drawn, has no application to an issue of bonds under section 2701 to extend the time for payment of an outstanding indebtedness.

3. SAME—ESTOPPEL BY RECITALS.
   Recitals in bonds of a village that they are issued pursuant to a statute cited, which authorizes the issuance of bonds, and to an ordinance properly referred to by its date and general purport, which conforms to such statute, and that "all the proceedings and steps required either by said statute or ordinance to be had or taken preliminary to the issue hereof have been duly had and taken by said village and its officers and agents," estop the village, as against a bona fide purchaser of such bonds for value and before maturity, to deny their validity on the ground that they were in fact issued for an unauthorized and illegal purpose, or that precedent conditions were not complied with.[1]

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[1] Bona fide purchasers of municipal bonds, see note to Pickens Tp. v. Post, 41 C. C. A. 6.

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

This was an action to recover the contents of certain bonds and coupons purporting to have been issued by the village of Marice City, the defendant in error. The petition alleged the due execution and delivery of seven bonds, in the sum of $500 each, with coupons for interest, by the defendant, the purchase thereof before maturity by the plaintiff for value, and his present holding and ownership of the same. The bonds were in the following form, except in respect to their respective numbers and the maturity thereof:

"United States of America, State of Ohio.

No. 1. Total Issue, $3,500. $500.

Incorporated Village of Marice City, Putnam County, Ohio.

"The incorporated village of Marice City, Ohio, hereby promises to pay the bearer, upon surrender of this bond, the sum of five hundred dollars, at the Third National Bank, in the city of New York, on the first day of November, in the year one thousand eight hundred and ninety-two, with interest at the rate of 6 per cent. per annum, payable annually, at the same place, on the first day of November of each year during the continuance of this loan, on presentation of the respective interest coupons hereto attached. This bond is issued under and pursuant to the provisions of sections 2700 and 2701 of the Revised Statutes of Ohio, and the ordinance of the council of said village entitled 'An ordinance to authorize the issue and sale of bonds to pay certain indebtedness of the village of Marice City, Ohio, incurred in the improvement of said village,' passed on the fifteenth day of October, in the year one thousand eight hundred and eighty-nine, and for the purposes therein set forth; and it is hereby specially declared that all the proceedings and steps required, either by said statutes or ordinance, to be had or taken preliminary to the issue hereof, have been duly had and taken by said village and its officers and agents. In testimony whereof, the said village of Marice City has hereunto caused its corporate name and seal to be set by the mayor and clerk thereof, hereunto duly authorized by said statutes and ordinance, this first day of November, in the year one thousand eight hundred and eighty-nine.

"[Seal of Mayor of Village of Marice City, Ohio.]

"By Polk Burbage, Mayor.

"F. S. Jones, Clerk."

The defense presented by the second amended and final answer of the defendant consisted first in a formal denial of the citizenship of the parties, in that the plaintiff was not, as alleged, a citizen of New York; a denial that the defendant had lawful authority to issue such bonds; a denial that it issued and sold them as alleged; and a denial that the plaintiff ever purchased them. And thereupon the defendant set up its first ground of defense, sections 2700 and 2701 of the Revised Statutes of Ohio, as follows:

"Sec. 2700. Loans may be made by municipal corporations in anticipation of the general revenue fund, but the aggregate amount of such loans in any fiscal year shall not exceed, in a hamlet, one thousand dollars; in a village, fifteen hundred dollars; in a city of the second class, fifty thousand dollars; in a city of the third grade of the first class, one hundred thousand dollars, and in any other city of the first class, two hundred thousand dollars: provided, however, that no new loans shall be made until the loan previously made under this section has been fully paid and canceled: and provided, further, that no loan as aforesaid shall be made during any fiscal year in anticipation of such fund, exceeding the amount of taxes and revenue from other sources due and payable into the fund for the fiscal year.

"Sec. 2701. The trustees or council of any municipal corporation, for the purpose of extending the time for the payment of any indebtedness which, from its limits of taxation, such corporation is unable to pay at maturity, shall have power to issue bonds of such corporation or borrow money so as to change, but not increase, the indebtedness, in such amounts and for such

length of time and at such rate of interest as the council may deem proper, not to exceed the rate of 8 per centum per annum."

And the following ordinance of the village:

"An ordinance to authorize the issue and sale of bonds to pay certain indebtedness of the village of Marice City, Ohio, incurred in the improvement of said village:

"Be it ordained by the council of the village of Marice City, Putnam county, Ohio:

"Section 1. That the bonds of said village be issued in the sum of thirty-five hundred dollars, to pay certain indebtedness to that amount incurred by said village in the drainage of said village.

"Sec. 2. The said bonds shall be issued and dated November 1, A. D. 1889, shall bear interest at the rate of 6 per cent. per annum from that date, and shall have attached thereto interest coupons; said bonds shall be in the sum of five hundred dollars each, numbered from 1 to 7, inclusive. Bond No. 1 shall fall due three years after date, and shall have three interest coupons attached thereto; bond No. 2 shall fall due four years after date, and shall have four interest coupons attached thereto; bond No. 3 shall fall due five years after date, and shall have five interest coupons attached thereto; bond No. 4 shall fall due six years after date, and shall have six interest coupons attached thereto; bond No. 5 shall fall due seven years after date, and shall have seven interest coupons attached thereto; bond No. 6 shall fall due eight years after date, and shall have eight interest coupons thereto attached; bond No. 7 shall fall due nine years after date, and shall have nine interest coupons thereto attached. Each interest coupon being in the sum of thirty dollars, all of which shall be payable to the purchaser thereof, or bearer, and are issued under and by virtue of the authority of section 2701.

"Sec. 3. This ordinance shall go into force and be of effect from and after its publication, according to law. Polk Burbage, Mayor.

"F. S. Jones, Clerk.

"Passed October 15, 1889. Took effect October 25, 1889."

That no loan was made in anticipation of the general revenue. That no ordinance was passed to extend the time of payment of any indebtedness which it could not then pay or could not meet at its maturity, and that the ordinance which was passed was without authority and void. Reference is then made to section 2702, which reads as follows:

"Sec. 2702. No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money be passed by the council, or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded; and the sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force; and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of this section, shall be void."

And it is averred that no certificate by the clerk, such as is required by this section, was ever made, filed, or recorded. Reference is also made to section 2703, which is as follows:

"Sec. 2703. All bonds issued under authority of this chapter shall express upon their face the purpose for which they are issued, and under what ordinance."

And it is thereupon averred that there is no statute of Ohio authorizing the officials to issue bonds containing other recitals than those mentioned in the sections referred to, and for these reasons it is said the bonds are void.

The second ground of defense taken by the answer is, that each and all of the bonds set out in the petition were signed and delivered by the mayor and clerk in furtherance of a scheme to promote a railroad, in violation of section 6 of article 8 of the constitution of Ohio, and further that said railroad was never constructed.

The plaintiff filed a demurrer to these two grounds of defense as stated in the answer. Upon the hearing of argument upon the demurrer the court entered the following order and judgment: "This 17th day of December, A. D. 1900, came the said parties, with their respective attorneys, and thereupon said cause was submitted to the court upon the demurrer of the said plaintiff to the first and second defense of the second amended answer of the said defendant, and the pleadings. Upon consideration thereof, the court do overrule said demurrer to said first and second defense of said second amended answer, and do sustain said demurrer to the petition and the amendment thereto filed herein. To all of which said plaintiff then, and there excepted. Thereupon came the plaintiff and asked leave to file an amended petition, which leave was refused, and to which plaintiff excepted. It is therefore considered that the petition and the amendment thereto of said plaintiff be, and the same is hereby, dismissed, and that the said defendant go hence without day, and recover his costs against the said plaintiff, taxed at $———, and that the plaintiff pay his costs herein, taxed at $———, and in default thereof that execution issue therefor. To all of which said plaintiff then and there excepted." Thereupon the plaintiff brought the record here on writ of error.

J. B. Sizer, for plaintiff in error.
Frank Spurlock, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge, having stated the case as above, delivered the opinion of the court.

Apparently there was an inadvertence in that part of the order which purports to sustain a demurrer of the defendant to the petition, and thereupon dismissing the suit. There was no such demurrer. The case was before the court only upon the demurrer to the first and second special grounds of defense. Another general averment of the answer was that the plaintiff had never purchased, and was not the owner or holder of, the bonds. The demurrer did not reach that part of the answer, and the question whether the plaintiff had purchased and then owned the bonds, as alleged in the petition and denied by the answer, was a question of fact which stood at issue. Whether this fact was as alleged in the petition was a vital one, and it was erroneous to dismiss the case without a solution of that question. If that were found for the plaintiff, he would be entitled, under the repeated decisions of this court in similar cases, to recover; the defendant having admitted the actual, though not the lawful, issue of the bonds by the proper officers. The statute (section 2701) in unmistakable terms authorized the council to issue bonds for the purpose specified. The statement in the bonds is that they were issued pursuant to the provisions of the statute. This is equivalent to a representation that they were issued for the purpose stated in the statute giving the authority, namely, for the purpose of extending the time for the payment of an indebtedness which, from its limits of taxation, such corporation is unable to pay at maturity; for they would not be issued pursuant to the provisions

of the statute if they were issued for a purpose not authorized by it. The representation would be false. Risley v. Village of Howell, 12 C. C. A. 218, 64 Fed. 453, 455. As was said in School Dist. v. Stone, 106 U. S. 183, 1 Sup. Ct. 84, 27 L. Ed. 90:

"Where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers, invested with authority to determine whether such conditions have been performed, the responsibility of issuing them when such conditions have been complied with, recitals by such officers that the bonds have been issued 'in pursuance of' or 'in conformity with' or 'by virtue of' or 'by authority of' the statute have been held, in favor of bona fide purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued."

This statement of the law was repeated in City of Evansville v. Dennett, 161 U. S. 434, 443, 16 Sup. Ct. 613, 40 L. Ed. 760. By section 2703 of the Revised Statutes of Ohio it is provided that the bonds shall express upon their face the purpose for which they are issued, and under what ordinance. These are the only statutory requirements as to what the bonds must show. These bonds state that they were issued "to pay certain indebtedness of the village of Marice City, Ohio, incurred in the improvement of said village." This means an indebtedness already incurred, and not one then about to be incurred. This language is plainly referable to the purpose specified in section 2701. The bonds were payable at dates running from three to ten years after their execution, thus providing for a very considerable extension of the payment of the indebtedness.

The bonds refer to the ordinance, and the ordinance states that the bonds are issued under the authority of section 2701, and only one purpose is authorized by that section. The case differs from that in Barnett v. City of Denison, 145 U. S. 135, 12 Sup. Ct. 819, 36 L. Ed. 652. There no purpose whatever was stated on the face of the bond. We think the purpose for which the bonds here in suit were issued was sufficiently expressed upon the face of the bonds. The ordinance under which they were issued is referred to in the bond by its date and general purport, and this is all that is required. Village of Kent v. Dana, 100 Fed. 56, 63, 40 C. C. A. 281. And the ordinance, when seen, recites a lawful purpose. The power of the council to issue such bonds is denied by the defendant in error for the reason that no certificate of the auditor or clerk was made and filed, stating that the money required for the payment of those obligations was in the treasury, as provided by section 2702, which is as follows:

"No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money be passed by the council or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is drawn, and not appropriated for any other purpose, which certificate shall be filed and immediately recorded; the sum so certified shall not thereafter be considered unappropriated until the corpora-

tion is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force, and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed contrary to the provisions of this section shall be void."

Obviously, this section has no relation to the issue of bonds under section 2701. If the money were already in the treasury, there would be no occasion for the bonds, or for the extension of the time of payment of the indebtedness. The provisions of the section quoted relate to certain methods—not all—by which original indebtedness is to be incurred. Whether the indebtedness for the extension of which the bonds are issued was a valid obligation of the village was one to be settled by the council when they issued the bonds. No other board or officer for this purpose is provided, and that question is necessarily referred to the council, which represents the village in the transaction. City of Cadillac v. Woonsocket Inst. for Savings, 58 Fed. 938, 7 C. C. A. 574. Moreover, the certificate referred to in section 2702 becomes a part of their own records, and is not a record of another office; and when it is recited, as it is in these bonds, that all the preliminary steps required by law had been taken by the village, its officers and agents, the village is estopped from objecting that the certificate of some of its officers, which was by law required to be filed as a preliminary step, was not in fact filed.

These considerations dispose of the case for the present. We think the court erred in overruling the demurrer of the plaintiff to the first and second defenses made by the answer, as well as in dismissing the plaintiff's petition. Neither of them could be sustained if the plaintiff is a bona fide holder of the bonds for value, and this is not negatived by these grounds of defense.

The judgment must be reversed, and the cause remanded, with directions to sustain the demurrer, to grant leave to the defendant to replead if it shall elect to do so, and to proceed with the cause in conformity with law.

FAIRFIELD v. RURAL INDEPENDENT SCHOOL DISTS. OF ALLISON AND JACKSON.

(Circuit Court, W. D. Iowa, N. D. October 14, 1901.)

SCHOOL DISTRICTS—SUITS AGAINST—SUBDIVISION UNDER IOWA STATUTE.

Under the statutes of Iowa authorizing the subdivision of a school-district township or an independent district into two or more independent districts, and the decisions of its supreme court upon such subdivision, the original district passes out of existence and cannot be sued, but the remedy of a creditor is by action against the several new districts, all of which must be joined in the suit. *Held*, that such a suit, brought in a federal court, must be in equity, for the reason that there is no privity of contract between plaintiff and defendants which will support an action at law, and for a further reason, where it is shown as a defense, that the indebtedness sued on, if enforced against any one of the defendants alone, will subject it to a liability far in excess of its constitutional limit of indebtedness; it being the duty of the court in such case, in the exercise of its equitable powers, to prevent such result by apportioning the liability in the first instance by its decree.

At Law. Action on bonds and coupons issued by the independent school district of Riverside. Trial to the court.

The independent school district of Riverside, Lyon county, Iowa, was organized in 1872, and continued in existence until in 1885, when the territory within the district was divided into the independent school district of Allison and the independent school district of Jackson, which are now known as the "Rural Independent School Districts of Allison and Jackson." During the existence of the independent district of Riverside, it became indebted in amounts largely in excess of 5 per cent. upon the taxable property within the district, having outstanding in 1885, bonds and judgments in large amounts, and greatly in excess of 5 per cent. upon the taxable property of the district, and was so indebted when the defendant districts were created. The plaintiff is the owner of three of the bonds of the original district, issued in 1881, amounting to $2,000, without interest; the total sum for which judgment is prayed being $4,000. There are also pending against the defendant districts four other cases brought upon bonds issued by the independent district of Riverside, making the total aggregate of judgments asked against the defendant districts to be the sum of about $30,000. The principal defenses relied on are fraud in the issuance of the bonds, and the provisions of the constitution of the state of Iowa limiting the indebtedness of municipal corporations to 5 per cent. upon the taxable value of the property within the municipality. The taxable value of the property within the district, including exemptions under the tree culture acts (Laws 1878, c. 50; Laws 1880, c. 190), for the year 1881, was $66,527, 5 per cent. of which would be $3,326.35.

Parsons & Riniker and R. H. Brown, for plaintiff.
O. J. Taylor and E. C. Roach, for defendants.

SHIRAS, District Judge (after stating the facts). The first question arising under the facts of the case is whether an action at law can be maintained against the present defendants, the rural independent school districts of Allison and Jackson, upon bonds issued by the independent school district of Riverside, or whether, in view of the facts and the nature of the issues presented by the pleadings, the proceedings should be by a bill in equity. The supreme court of Iowa, in construing the provisions of the Code authorizing the creation of independent districts, holds that when the territory of a district township is divided into several independent districts, or the territory of an independent district is divided into several rural independent districts, the old or original district ceases to exist. Knoxville Dist. Tp. v. Liberty Independent Dist., 36 Iowa, 220; Clay Dist. Tp. v. Buchanan Independent Dist., 63 Iowa, 188, 18 N. W. 859. It is further held that as the original district ceases to exist an action cannot be maintained against the same, but, in order to protect creditors, suit may be brought against all of the independent districts carved out of the original district. Knoxville Nat. Bank v. Washington Independent Dist., 40 Iowa, 612; Kennedy v. Derby Grange Independent School Dist., 48 Iowa, 189. In the latter case it is ruled that:

"While a creditor of the district township should not be allowed to maintain an action against one alone of the independent districts, no one representing in any proper sense the original debtor, yet after the creditor has obtained judgment against them all, and the liability of all has been thus determined, we see no reason why the creditor should not be allowed to collect his judgment from one or all as best he can, leaving the judgment defendants, as the opinion in the case cited suggests, to determine in an

appropriate action their respective obligations among themselves. That a court of equity would have jurisdiction of such an action, we have no doubt."

In the case of White Oak Dist. Tp. v. Oskaloosa Dist. Tp., 52 Iowa, 73, 2 N. W. 965, in commenting on the case last cited it was said:

"It was not intimated in that case that when all the independent districts carved out of a district township are united as defendants a judgment may not be rendered in such form that it may be primarily satisfied out of the property of any one of the independent districts. * * * After the district organization has been abandoned and it has ceased to have any officers, there is no way in which a judgment against it can be enforced, if, indeed, any could be recovered. The district township by its voluntary action ought not to be allowed to embarrass the plaintiff and compel him to resort to as many separate actions as independent districts are carved out of the district township. The plaintiff has a right to enforce his debt against the whole district township. Stevenson v. Summit Dist. Tp., 35 Iowa, 462. When the district township organization has been abandoned, he can do this efficiently only by uniting the several independent districts in an action, and this we hold he may do."

In Stevenson v. Summit Dist. Tp., 35 Iowa, 462, it is said:

"The plaintiff held a valid, subsisting indebtedness against the whole district, which he had the right to enforce against the whole district; and the organization of one of the subdistricts as an independent district did not have the effect to release the district as it existed when the debt was created, or to transfer the debt from the old district to the independent one formed from a part of the old."

The effect of these decisions is to establish the rule that when an original district is divided up into two or more independent districts the original district passes out of existence and cannot be sued, but the remedy of the creditor consists in the right to bring an action against the several new districts, all of which must be united in the suit. None of the cases presented the question of the need of proceeding in equity if the facts of the particular case were such as to demand an apportionment of the liability sought to be enforced against the several independent districts, nor is there to be found in these decisions a ruling to the effect that there exists between the creditors of the original district and the independent districts carved out of the same a contract liability for the debts of the original district. Can it be said, then, that there is such a privity of contract between the plaintiff, as the owner of certain bonds issued by the independent school district of Riverside and the rural independent districts of Allison and Jackson, that the plaintiff can maintain an action at law against the latter, or is not the remedy to be sought in equity? The general rule is well settled that privity of contract is required in order to maintain an action at law. Second Nat. Bank v. Grand Lodge, 98 U. S. 123, 25 L. Ed. 75; Cragin v. Lovell, 109 U. S. 194, 3 Sup. Ct. 132, 27 L. Ed. 903; Keller v. Ashford, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667. In the latter case it is held that where a mortgagor sells the mortgaged property to a third party, who agrees with the mortgagor to pay the mortgage upon the property, the mortgagee cannot maintain an action at law against the purchaser, there being no privity of contract between them, but he can in equity enforce the agreement. In fact, the plaintiff never entered into any

express contract with the defendant districts, and had no part or lot in the division of the original district into independent districts, and it is difficult to see upon what theory it can be said that there exists any such privity of contract between these parties as is necessary to support an action at law.

The more serious question, however, arises out of the nature of the issues which are presented by the pleadings in the case; the defense relied on being that of the limitation imposed by the constitution of Iowa upon the extent of the indebtedness which can be incurred by municipal corporations created under the laws of the state. By section 3, art. 11, of the constitution, it is provided that:

"No county or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount in the aggregate, exceeding five per centum on the value of the taxable property within such county or corporation, to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness."

Is it not clear beyond all question that, in cases like the one now before the court, if the plaintiff is allowed to enter up judgment against the defendant districts and to collect the full amount from either one, according to the ruling in Kennedy v. Derby Grange Independent School Dist., 48 Iowa, 189, it will result in imposing upon the districts a burden of indebtedness far beyond the constitutional limitation? For illustration, suppose a district can create indebtedness up to the sum of $15,000 under the constitutional limitation, and has in fact incurred indebtedness to the amount of $12,000. The original district is then divided into three independent districts, each containing an equal amount of territory and taxable property. If the indebtedness of the original district is equitably divided among the new districts, each will be burdened with $4,000 of inherited debt, but each can create a further indebtedness of $1,000 before passing the 5 per cent. limitation. If, however, under such circumstances, it is open to the creditor of the original district to take judgment in an action at law against the three independent districts for the full sum of $12,000, and collect it from one only, leaving that district to collect back from the other districts if it can, is it not clear that there has been imposed upon the one district a burden of indebtedness far in excess of the constitutional limit? Furthermore, it is well known that the collection of judgments against school districts must be enforced through the process of taxation, as they are not possessed of property subject to the ordinary process of execution, and therefore months and perhaps years must elapse between the rendition of the judgment and its final payment by means of funds raised by the levy and collection of a tax. During this period the judgment for the full amount will be of record against each one of the independent districts, and, being for an amount in excess of the debt-creating power of the several districts, neither district can lawfully create an additional indebtedness so long as the judgment remains unsatisfied upon the record, although, in fact, if the burden of this debt were equitably and properly proportioned among the several new districts, each one, in the supposed case, could lawfully incur an indebtedness to the amount of $1,000 in addi-

tion to its share of the inherited debt. The constitutional provision is intended to protect as far as possible the property within the municipal corporation from a burden of public debt in excess of the limit named. If, however, it is permissible to enter up judgments at law against two or more independent school districts which have been carved out of a pre-existing district for the full amount of the indebtedness of the original district, instead of their proportionate share, in cases wherein this amount exceeds 5 per cent. of the value of the taxable property of the independent districts, and to enforce collection against one only of the districts, the results will be as follows: (1) From the date of the rendition of the judgment the taxable property in each district will be affected by the amount of the judgment. (2) The amount of the judgment, as an enforceable debt against each of the independent districts, will reduce or destroy the debt-creating power of each district, thus materially affecting the rights of the district, and in many cases it will greatly cripple the district in the performance of the purposes of its creation. (3) The enforcement of the judgment against one or more of the independent districts imposes upon the property therein a burden far in excess of the constitutional limitation, and the wrong thus done is not met by the suggestion that, after being subjected to a burden in violation of the constitutional limit, relief may be had by the institution of proceedings in equity to compel contribution from the other independent districts. If the whole judgment is collected from one only of the defendants, the property owners are subjected to the burden which it is the purpose of the constitution to prohibit, and the court is not justified in imposing this burden upon the property and property owners of the one district upon the theory that the other districts may afterwards be required to come in and share the burden. In none of the cited cases decided by the supreme court of Iowa is the question of the proper mode of procedure discussed, when the facts are such that, if a judgment for the full amount of the indebtedness of the original districts is entered against all of the new independent districts, it will result in creating a burden on them in excess of the constitutional limit. Under the provisions of the Code of Iowa, if a case is commenced by ordinary proceedings (that is, at law), in which the facts, when pleaded, present an equitable issue, this issue may be tried by equitable methods; and therefore, under the state practice, it may well be that proceedings to enforce payment of bonds issued by a school district which has been subsequently divided into several independent districts may be properly brought at law, and then, if the issue presented by the defenses interposed are such as to make it a case of equitable cognizance, the suit will be proceeded with in that mode under the provisions of section 3435 of the Code, and the state court can give full protection to the rights of all the parties without requiring the institution of an original proceeding in equity. In the federal practice it is not permitted to entertain an issue in equity and to decree equitable relief in a case at law, and, therefore, when it is made to appear in a given action commenced at law that the rights of the parties require the exercise of equitable jurisdiction for their proper

enforcement and protection, it becomes the duty of the court to require the institution of the proper proceedings in equity, and to refuse to further proceed in the action at law. In Kennedy v. Derby Grange Independent School Dist., 48 Iowa, 189, the supreme court of Iowa held that a court of equity would have jurisdiction of an action brought to settle the respective liability existing between independent districts for the obligations of the original district; and no good reason is perceived why this apportionment of liability should not be first made, before a court is justified in awarding a judgment against the several independent districts, when it is apparent that, if judgment is entered for the whole amount of the indebtedness owing by the original district, it will cast a burden upon the several independent districts far in excess of the constitutional limit. This apportionment cannot be properly made in a trial at law before a jury, but can only be reached through a proceeding in equity wherein the court will ascertain and decree the amount due the creditor from the original district, and will then apportion and decree the parts of this sum that are chargeable against each of the several independent districts.

The conclusion reached in each of the cases before the court is that the action at law cannot be maintained, but that relief must be sought by suits in equity. If the parties desire to take the ruling of the appellate court upon this question before instituting suits in equity, an entry of dismissal can be made in one of the cases, and the others can be continued, awaiting the decision of the court of appeals in the case submitted to it.

MODERN WOODMEN OF AMERICA v. TEVIS et al.

(Circuit Court of Appeals, Eighth Circuit. September 30, 1901.)

No. 1,514.

1. INSURANCE—ESTOPPEL FROM FORFEITING FOR DEFAULT IN PROMPT PAYMENT.
   The habitual acceptance of premiums by an insurance company after they are due estops it from enforcing a forfeiture for default in prompt payment.[1]

2. BENEFICIARY ASSOCIATION—ESTOPPEL BY LIKE COURSE OF ACTION.
   A fraternal beneficiary association, which, by its uniform course of collection, leads its members to believe that the strict terms of their certificates and of its by-laws relative to the prompt payment of assessments and the avoidance of the certificates therefor are not and will not be enforced, is estopped from defeating the claim of beneficiaries upon the certificate of a deceased member for default in prompt payment where he had paid his assessments in due time according to the customary course of collection, but had, without notice of any change in this course, failed to pay some of them according to the strict terms of the by-laws and the certificate.

3. PRINCIPAL AND AGENT—LEGAL RELATION PREVAILS OVER ABANDONED STIPULATIONS.
   The actual legal relation of parties to each other, their acts and transactions, prevail over previous written stipulations, which were subsequently disregarded, and condition their rights.

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[1] Waiver by acceptance of premiums, see note to Clearing Co. v. Bullock, 33 C. C. A. 369.

4. SAME—BENEFICIARY ASSOCIATION—CLERK OF LOCAL CAMP.
Where a beneficiary association empowers the clerk of a local camp to collect, receipt for, remit, and report upon its benefit assessments, and the clerk acts under this authority with the knowledge and consent of all parties, the relation of principal and agent for this purpose exists, and conditions the rights of the parties, notwithstanding the fact that the by-laws and certificates of membership contain a uniformly disregarded stipulation that the clerk of the local camp shall not be the agent of the association, but shall be the agent of the local camp, which has no interest in the benefit assessments, and that the acts or omissions of the clerk shall not affect the liability or waive any of the rights of the association.

5. SAME—CUSTOM OF CLERK.
The habitual collection by the clerk of the local camp of a fraternal beneficiary association of its benefit assessments within 1 month and 20 days after the time when, by the by-laws of the association and the terms of the certificates, the assessments become due, the members become suspended, and their certificates avoided, waives prompt payment thereof, and estops the society from maintaining that the members were suspended, and that their certificates were avoided, within this customary period of extension of the time of payment.

(Syllabus by the Court.)

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

C. G. Laybourn (J. W. White, John Sullivan, and E. C. Ellis, on the brief), for plaintiff in error.

James D. Harkless (John O'Grady and Charles S. Crysler, on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. Does the habitual collection by the clerk of a local lodge of a fraternal beneficiary association of the benefit assessments within 1 month and 20 days after the time when, by the by-laws of the association and the terms of the certificates, they become due, and the members become suspended, and their certificates avoided, waive prompt payment thereof, and estop the society from maintaining that the members were suspended, and that their certificates were avoided, within the customary period of extension of the time of payment? This is the issue presented by the case in hand. The Modern Woodmen of America is a fraternal beneficiary society governed by the head camp, which is a representative body composed of its elective officers, its general attorney, standing committees, and delegates from state camps. It is the law-making body of the organization, and its board of directors and its head consul and head clerk are empowered to levy and collect from its beneficial members the assessments necessary to pay the amounts due to the beneficiaries of its deceased members. The state camps are composed of delegates from the local camps, and the local camps and their officers are the means by which the society secures its members and collects the benefit assessments upon which it relies for existence. These local camps are composed of the individuals upon whose membership and payments the welfare and success of the association depend. Their chief executive officers are consuls

and clerks, and it is one of the duties of these clerks to keep the accounts, collect the benefit assessments, and remit them to the head camp. This is an action by the beneficiaries named in a certificate of this association issued on March 31, 1899, to M. W. Tevis, a member of Poplar Camp, No. 3,794, who died on August 10, 1899. By this certificate the society promised that the defendants in error should, in case of the death of Tevis while in good standing, participate in the benefit fund of the association to the amount of $3,000, on condition, among other things, that the certificate should be subject to forfeiture for any of the causes prescribed in the by-laws, and should be void if Tevis failed to pay to the clerk of his camp every benefit assessment levied upon him on or before the 1st day of the month following the date of the notice of its levy. The by-laws of the society provide that the clerk of the local camp shall collect and receive for the head camp all benefit assessments levied, keep the records and accounts of the local camp, and report to the head camp his collections for it, and the members of his camp that are delinquent in the payment of each assessment (sections 260, 261, 263); that the clerk of the local camp is the agent of such camp, and not the agent of the head camp, and that no act or omission on his part shall have the effect of creating a liability of the society, or of waiving any right or immunity belonging to it (section 271); that no officer of the society or of any local camp can waive any provision of the by-laws which relates to the substance of the contract for the payment of benefits (section 34); that any beneficial member who fails to pay any benefit assessment on or before the 1st day of the month following the date of the notice thereof is thereby ipso facto suspended, and his benefit certificate is "absolutely null and void during such suspension" (section 46); that the clerk of the local camp shall report all members who fail to pay any assessment when due to his camp and to the head camp as delinquent and suspended, and that the head clerk shall immediately notify every such member of his suspension, and inform him of the requirements necessary for his reinstatement (sections 260, 264, 114); and that any suspended member in good health may be reinstated within 60 days from the date of his suspension by paying all arrearages due and furnishing his written warranty that he is in good health (section 49). During all the time that the deceased was a member of this society the local camp to which he belonged and its clerk persistently and uniformly disregarded every provision of these by-laws and of his certificate of membership which relates to the suspension of members for failure to pay the benefit assessments when due. While the by-laws provided that every member who failed to pay on the last day fixed therefor by the notice was thereby suspended, and his certificate was void, so that he could be reinstated only by payment of arrearages and by furnishing a warranty of good health, this local camp enacted and operated a by-law in direct violation of these provisions to the effect that one assessment for each delinquent member should be paid by the local camp, so that his delinquency was never treated as a suspension of his membership, or an avoidance of his certificate, and was never reported to the head clerk. While the by-laws pro-

vided that the local clerk should report as suspended every member who failed to pay an assessment on the last day fixed therefor in the notices of assessment, and that the head clerk should thereupon notify the delinquent of his suspension, and of the necessary requirements for his reinstatement, the clerk of this local camp never reported any one suspended who was delinquent in paying but one assessment on account of the by-law of the local camp, and never reported any one suspended who was delinquent in paying a second assessment if he paid it within 20 days after it was due. The course of collection uniformly pursued by the clerk when Tevis was a member was this: The assessments were due on or before the 1st days of the respective months specified in the notices calling them. The clerk did not send his report of collections under any assessment to the head clerk, or remit the proceeds to the head banker, until the 20th day of the month on the 1st day of which it was due; and he invariably received from any delinquent member, without any warranty of health, the assessment levied upon him if he paid it after the 1st and at any time before the 20th of the month, and he never reported or treated such a delinquent member as either delinquent or suspended.

When tried by this habitual course of business, this invariable custom adopted by this local camp and its clerk, all the assessments of Tevis were paid in due time; but when tried by the literal terms of the by-laws and the certificate he was delinquent in the payment of every assessment but the first, which he paid in March, when he received his certificate. On May 1, 1899, assessment No. 3 fell due, and he did not pay it, but he was not reported suspended, because the local camp paid it for him under its by-law. On June 1, 1899, assessment No. 4 fell due, and he did not pay it; but he was not reported suspended or treated as delinquent, because before the clerk of the local camp sent to the head camp his report and remittance of the collections under this assessment, and on June 2, 1899, he paid, and the clerk accepted, both these assessments without any warranty of good health. Assessment No. 5 fell due on July 1, 1899, and Tevis did not pay it, but he was not reported suspended, because the local camp paid it for him under its by-law to that effect. On August 1, 1899, assessment No. 6 fell due, and he did not pay it, but he was not reported suspended nor treated as delinquent, because it was the invariable custom of the clerk of the local camp to treat no member as delinquent and to report no one suspended who paid before he sent off his report on the 20th of the month. Before that day arrived, and on August 10, 1899, Tevis died. On the morning of the day of his death, and while neither of them knew that he had died, his brother paid, and the clerk of the local camp received, the last two assessments without any warranty of good health. But it is conceived that this payment is immaterial, and that the rights of the parties are the same as they would have been if no such payment had been made. Upon this state of facts the plaintiff in error contended that Tevis was suspended, and that his certificate was void, because he had not paid assessment No. 6 on or before August 1, 1899. The court below instructed the jury that the association was estopped from maintain-

ing this defense, and this is the ruling challenged by the writ of error.

Did not the Modern Woodmen, by its course of action, waive the prompt payment of these assessments, and the stringent provisions of its by-laws relative to the avoidance of the certificate? Usually the basis of waiver is estoppel. One who, by his acts, or by his silence when he ought to speak out, willfully or recklessly induces another, who has a right to rely on his course of action, to believe that certain facts exist, or that a certain course of dealing has been and will be uniformly followed, and to act on that belief, so that he will be injured if it proves false, is estopped from denying its truth. Habitual acceptance of premiums by an insurance company after they are due waives payment on the day. Any course of action by a society which leads one liable to a forfeiture honestly and rightfully to believe that by conformity thereto a forfeiture will not be incurred, followed by conformity, will estop the association from enforcing the forfeiture; and a fraternal beneficiary association, which, by its uniform course of dealing with its members, leads them to believe that the strict terms of their certificates relative to the prompt payment of assessments and the avoidance of the certificates are not and will not be enforced, is thereby estopped from defeating the certificate of a deceased member for default in prompt payment when he has paid his assessments in due time according to the customary course of collection, but, without notice of any change in this course, he has failed to pay some of them according to the strict terms of the by-laws and the contract. Spoeri v. Insurance Co. (C. C.) 39 Fed. 752; Hanley v. Association, 69 Mo. 380; Insurance Co. v. Eggleston, 96 U. S. 577, 24 L. Ed. 841; Thompson v. Insurance Co., 104 U. S. 259, 26 L. Ed. 765; Insurance Co. v. Doster, 106 U. S. 37, 1 Sup. Ct. 18, 27 L. Ed. 65; Insurance Co. v. Wolff, 95 U. S. 333, 24 L. Ed. 387. Under these familiar rules, the uniform practice of this society during all the time the deceased was a member of it to permit the local camp to pay the first delinquent assessment, and to collect the second at any time within 20 days after it fell due, without suggesting or enforcing any suspension or forfeiture, estopped it from changing its course of dealing and defeating this certificate, without previous notice to the deceased member, upon a ground which its customary course of collection must have led him to believe was waived.

It is claimed, however, that this habitual practice of waiving the forfeiture and extending the time of payment of these assessments for a month and 20 days after that specified in the notice was not the act of the Modern Woodmen, but that of the local camp and its clerk, without the knowledge of the society, for which the latter was in no way responsible. In support of this contention attention is sharply called to the provisions of the by-laws that the clerk of the local camp is the agent of that camp, and not of the head camp; that no act or omission on his part shall have the effect of creating a liability of the society, or of waiving any right or immunity belonging to it; and that no officer of the society or of any local camp can waive any provision of the by-laws which relates to the substance of the contract for the payment of benefits; and it is confidently argued that these by-laws, which it is conceded constitute a part of the con-

tract between the association, the deceased, and the beneficiaries, prevented the existence of the relation of principal and agent between the society and the clerk of the local camp, and left the Modern Woodmen unaffected by his knowledge or his acts. Let us see. While this contract was in existence, the Modern Woodmen made the assessments over which this controversy arises, sent notices of them to this local clerk, empowered and required him to collect and receipt for them for it, to pay their proceeds, and to report his action to the head camp. The moneys which this clerk collected on these assessments were not the property of the clerk or of the local camp. They were the moneys of the Modern Woodmen. If the clerk had misappropriated the proceeds of these assessments, the society could have proceeded against him, as its agent, either civilly or criminally. A contract is not perpetual or immutable. Those who make can mar or modify, and their subsequent agreements or their intentional acquiescence in its abandonment or modification have that effect. It follows that, if it could be conceded that the contract evidenced by this certificate deprived the local clerk in its inception of the powers of an agent of the corporation to collect these assessments for it, the subsequent acts of the parties necessarily again conferred them upon him. But did the agreement ever deprive the local clerk of the authority to collect and remit these assessments? The by-laws themselves conferred upon him the power, and imposed upon him the duty, of collecting and receipting for the assessments in the name of the Modern Woodmen, and of remitting the proceeds and reporting the collections, delinquencies, and suspensions to that society. Under this authority the clerk of the local camp of the deceased discharged these duties with the full knowledge and consent of the association and the members. The by-laws which delegated this power were a part of the contract between the beneficiaries, the deceased, and the society from its beginning. They created the relation of principal and agent between the Modern Woodmen and the local clerk, and the parties constantly exercised the powers and discharged the duties of that relation under this delegation. Did the fact that in the same contract which created this relation these parties stipulated that it did not exist destroy it, or relieve any of the parties to it who subsequently acted in that relation from the duties and obligations it imposed? If A. is in fact the lessee of B., and they stipulate with C. that A. is not the lessee of B., but is the lessee of C., and thereafter, with the consent of all parties, A. continues to attorn and pay his rent to B., does the abandoned stipulation change the legal relation? If E. is in fact the vendee of F., and they agree with G. that E. is not the vendee of F., but is the vendee of G., and thereafter, with the knowledge and consent of all parties, E. continues to act as the vendee of F., and pays to him the unpaid purchase price, are the rights of the parties governed by the disregarded stipulation or by their actual legal relation? If one appoints another his agent to collect moneys for him from a third person, and they agree with a fourth person that the appointee is not the agent of him who appoints him, but is the agent of the fourth party, and thereafter all the parties knowingly disregard the stipulation, and the agent collects the

money from the third person, and pays it over to the party who appointed him, are the rights of the parties conditioned by their actual legal relation or by the abandoned stipulation? The answers to these questions are not doubtful, and they conclude discussion of the claim that this clerk of the local camp, who was empowered by the Modern Woodmen to collect and remit to it, and who did collect and remit to it, its beneficial assessments, was not its agent for that purpose, and that he was the agent of the local camp, which never claimed or had any financial or other interest in these assessments, because these parties originally made a stipulation to that effect which they subsequently knowingly and uniformly disregarded. The clerk of the local camp was therefore the agent of this society to collect and remit these assessments, to report the collections, delinquencies, and suspensions. Whatever he did and said in the exercise of this authority was the act of his principal, the Modern Woodmen, and whatever knowledge he obtained in the discharge of this duty which was thus imposed upon him was the knowledge of his principal, the corporation. His habitual disregard of the provisions of the by-laws and of the certificate relating to the prompt payment of the assessments and the suspension of members for nonpayment, and his uniform extension of the time for the payment of the assessments for one month and 20 days after they were due by the terms of the notices, became the customary course of dealing of the society itself, upon which the deceased undoubtedly relied, and which the association cannot now be permitted to repudiate. Supreme Lodge v. Withers, 177 U. S. 260, 264, 265, 268, 275, 20 Sup. Ct. 611, 44 L. Ed. 762; McMahon v. Supreme Tent, 151 Mo. 522, 541, 52 S. W. 384; James v. Association, 148 Mo. 1, 49 S. W. 978; Whiteside v. Supreme Conclave (C. C.) 82 Fed. 275; Knights of Pythias v. Bridges (Tex. Civ. App.) 39 S. W. 333. According to the uniform method of collection pursued by the society and its agent, Tevis paid his assessments in time; and without previous notice to him of a change in this course of dealing the association was estopped from forfeiting his membership for his failure to pay them at the exact time fixed by the notices and the certificate.

There was no dispute concerning the facts in this case, and no facts were proved which would have sustained a verdict for the plaintiff in error upon the defense which has been considered. The court below therefore properly instructed the jury to render a verdict in favor of the defendant in error upon this issue.

The judgment below is affirmed.

TELLER v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. September 30, 1901.)

No. 1,603.

1. APPEAL—TRANSCRIPT—MOVING PARTY RESPONSIBLE FOR.

The party who moves for a review of the action of the trial court is responsible to the appellate court for the insertion in the transcript returned to it by the clerk of the lower court of a copy of all the papers and proceedings necessary to the hearing, under the fourteenth rule

of the circuit courts of appeals (31 C. C. A. cxxv.; 90 Fed. cxxv.), and it is the duty of the clerk of the trial court to follow his præcipe designating the portions of the papers and proceedings to be returned.

2. SAME—CLERK'S DUTY IN ABSENCE OF PRÆCIPE.
Where the moving party files no præcipe it is the duty of the clerk of the trial court to see that the transcript is a true copy of the papers and proceedings necessary to a hearing in this court specified in rule 14 (31 C. C. A. cxxv.; 90 Fed. cxxv.), and it is also his duty to see that his certificate clearly shows this fact.

3. SAME—COPY OF OPINION—CLERK'S DUTY.
It is the duty of the clerk of the trial court to annex to and transmit with the record a copy of any opinion filed in the case relating to any of the rulings assigned as errors, pursuant to the second paragraph of rule 14 (31 C. C. A. cxxv.; 90 Fed. cxxv.), although the moving party fails to designate such opinion in the præcipe which he files for the transcript.

(Syllabus by the Court.)

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

Willard Teller and C. C. Dorsey, for plaintiff in error.
Timothy F. Burke, for the United States.

Before SANBORN, Circuit Judge, and LOCHREN, District Judge.

SANBORN, Circuit Judge. The plaintiff in error has interposed a motion to strike from the record the copy of the opinion of the court below upon the motion for a new trial in this case because the denial of that motion is not reviewable here, because the opinion was not specified in his præcipe designating the parts of the record to be returned to this court, and because the opinion is not properly a part of the record. The ruling of the court upon the motion for a new trial cannot, it is true, be considered in this court; but a comparison of the assignment of errors with the opinion upon that motion discloses the fact that many of the questions presented for the consideration of this court are discussed in that opinion, and that the reasons of the court below for its rulings are there stated, so that the opinion will be of material assistance in obtaining a clear understanding of these issues of law and of the manner in which they arose. The general rule is that the plaintiff in error or appellant is responsible for the condition of the record in the appellate court, and that, when he files a præcipe designating the portion of the proceedings below to be certified, the clerk of the trial court should follow his directions, and leave opposing parties to procure any omitted portions of the proceedings by a writ of certiorari or other permissible proceeding. Where no præcipe is filed the clerk should be careful that the transcript he transmits to the appellate court contains a copy of everything specified in rule 14 of this court (31 C. C. A. cxxv.; 90 Fed. cxxv.) which is necessary to the hearing, and that his certificate shows this fact. Rev. St. §§ 698, 750; rule 14 (31 C. C. A. cxxv.; 90 Fed. cxxv.); Railway Co. v. Stewart, 95 U. S. 279, 284, 24 L. Ed. 431; Pennsylvania Co. v. American Const. Co., 55 Fed. 131, 5 C. C. A. 53, 2 U. S. App. 609; Nashua

& L. R. Corp. v. Boston & L. R. Corp., 61 Fed. 237, 244, 9 C. C. A. 468, 475, 21 U. S. App. 50, 61; Burnham v. Railway Co., 87 Fed. 168, 30 C. C. A. 594, 59 U. S. App. 274; Redfield v. Parks, 130 U. S. 623, 625, 9 Sup. Ct. 642, 32 L. Ed. 1053; Fastener Co. v. Kraetzer, 150 U. S. 111, 118, 14 Sup. Ct. 48, 37 L. Ed. 1019. But the præcipe of the moving party neither repeals, supersedes, nor modifies the express rules of the appellate court, and the fact that counsel for the plaintiff in error in this case filed a præcipe which omitted to specify the opinion of the trial court in the case did not relieve the clerk of that court of his duty "to annex to, and transmit with the record a copy of the opinion or opinions filed in the case, and, in cases at law, a copy of the charge of the court to the jury," pursuant to the second paragraph of rule 14. Nor is the fact that he embodied this opinion in the record, instead of annexing it to and transmitting it with the record, material. His act does not make the opinion a part of the record upon which the case is to be determined (England v. Gebhardt, 112 U. S. 502, 506, 5 Sup. Ct. 287, 28 L. Ed. 811), and the copy of the opinion is as readily accessible for our information as it would have been if it had been annexed to, instead of being embodied in, the record proper. It is an opinion in the case, so that it comes within the literal terms of the rule; and, while it was rendered to state the reasons for an order which this court may not review, it discusses the rulings at the trial which are challenged here, and states the views of the trial court upon them, so that it falls within the purpose and spirit of the rule.

For these reasons, the motion to strike it from the record is denied.

WOODS v. BAILEY.

(Circuit Court, M. D. Pennsylvania. October 7, 1901.)

SECURITY FOR COSTS—AFFIDAVIT OF POVERTY—SUFFICIENCY.

An affidavit of poverty under Act July 20, 1892 (27 Stat. 252), should be so certain in its statements that a charge of perjury could be based thereon if false; and such an affidavit, stating that demand has been made upon plaintiff by defendant to give security for costs in the sum of $1,000, and "that by reason of her poverty she is unable to give security for said costs," is not sufficient, since it might be fairly claimed that the inability had reference to the amount of security demanded, and was relative and not absolute. Quære, whether security for costs is demandable of a nonresident plaintiff, in view of the statutes giving jurisdiction on the ground of diverse citizenship.

At Law. Action by plaintiff, a citizen of Ohio, against defendant, a citizen of Pennsylvania. Rule on plaintiff, as a nonresident of the district, to give security for costs.

The rule of court of the Western district, in which the case was originally brought, provides that "in any action wherein the plaintiff or complainant resides out of the Western district of Pennsylvania, the defendant, on motion, and affidavit of a just defense against the whole demand, may have a rule that the plaintiff give security for costs, and that proceedings on the part of the plaintiff or complainant be stayed until such security be given."

T. M. B. Hicks, for plaintiff.
J. T. Fredericks, for defendant.

ARCHBALD, District Judge. Under the rule of the Western district (to which this case formerly belonged), which, with other rules, has for the time being been made a rule of this court, the plaintiff, as a nonresident, is called upon to give security for costs. This is a practice which obtains in the state courts in Pennsylvania, but whether it has a generally recognized standing in the federal courts throughout the country I do not know. In 2 Abbotts' United States Practice, p. 280, I find a form which would imply that such might be the case. It does not seem altogether consistent with the statutes which give express jurisdiction on the ground of diverse citizenship, but the point is not raised, and I do not pass upon it.

By act of July 20, 1892 (27 Stat. 252), it is provided:

"That any citizen of the United States entitled to commence any suit or action in any court of the United States may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath, in writing, that because of his poverty he is unable to pay the costs of said suit or action which he is about to commence or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought * * * the plaintiff may answer and evade a demand for fees or security for costs by filing a like affidavit, and wilful false swearing in any affidavit provided for in this or the previous section shall be punishable as perjury is in other cases."

Seeking to avail herself of this statute, the plaintiff has filed an affidavit, in which, after setting forth her alleged cause of action, and affirming the belief that she is entitled to the redress she seeks, she goes on to declare "that demand has been made upon her by the defendant to give security in the sum of one thousand dollars for the payment of the costs of said action, and that by reason of her poverty she is unable to give security for said costs." Does this comply with the act cited? At first blush it may seem to do so, but, after due consideration, I do not feel that it does. It will be noted that the plaintiff states that a certain specified amount of bail has been demanded of her, and it is in immediate connection with this that she declares her inability by reason of poverty to secure the costs. The two matters are so linked together in the affidavit that I am warranted in concluding that they were in the mind of the affiant, and that it was only as to the amount mentioned—$1,000—that she intended to speak. To swear falsely—willfully false, of course—in a case of this kind is made perjury by the act, and the affidavit ought, therefore, to be sufficiently certain to found an indictment upon it, with as little chance as possible for evasion of its terms. In a prosecution based on the affidavit which we have here there would be fair ground for the affiant saying, in extenuation of what she swore to, that her assertion of poverty related wholly to the large amount of security demanded, and that it was not absolute, but relative. It was to this that her attention was naturally

directed, and to which we may assume that her statement was addressed. But this does not meet the case before me, nor the act. If I were to fix the security at $1,000, it might. But that is not my intention, nor was that amount contended for at the return of the rule. This affidavit was not presented at that time, although it was stated by counsel that it had been forwarded to his client for execution, and would be handed in later, as it has been. The amount of bail there asked for was $500. This the plaintiff's counsel declared his client could not give, but probably could give $100. If the affidavit be taken as one of absolute poverty, she cannot give any. As already intimated, however, I do not so construe it. It is to be taken merely as an assertion that she cannot furnish $1,000. Whether she could any less sum than that is not stated. Construed in this way, it is not addressed to the case as it stands, and is not sufficient. As to the amount, I consider $500 too much, and $100, on the other hand, too little. The usual amount required in the state courts is $200, which has been found by experience to be generally enough. I will raise this a little, and make it $250, but that is as far as I can go. I am not inclined in this or any other case to make it so large as to have it stand in the way of parties freely availing themselves of the jurisdiction expressly conferred on the court by law.

The rule is made absolute, and the plaintiff is required within 30 days to give bail in the sum of $250, with one or more sufficient sureties, to secure the costs; all proceedings to be stayed in the meantime.

WESTERN DREDGING & IMPROVEMENT CO. v. HELDMAIER.

(Circuit Court of Appeals, Seventh Circuit. October 15, 1901.)

No. 808.

BILL OF EXCEPTIONS—AUTHORITY TO ALLOW—ABSENCE OF TRIAL JUDGE.

In Rev. St. § 953, as amended by Act June 5, 1900 (31 Stat. 270), which permits the allowance and signing of a bill of exceptions by another judge thereafter holding the court, when the judge before whom the cause was tried is, "by reason of death, sickness or other disability," unable to allow and sign the same, the term "other disability" means a physical or mental disability of like character to death or sickness, by which the trial judge is disabled from the performance of judicial functions, and his absence from the district or circuit, merely, does not authorize the allowance and signing of a bill of exceptions by another judge.

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

On motion to strike out bill of exceptions.

The trial of this cause was had before the district judge of the United States for the Eastern district of Wisconsin, presiding by assignment in the court below. Subsequently at the same term of court a bill of exceptions was prepared and presented to the district judge of the United States for the Northern district of Illinois, who signed and attached thereto the following certificate: "And, for as much as the matters above set forth do not fully appear of record, the plaintiff tenders this his abstract of record and bill of exceptions, and prays that the same may be signed and sealed

by the judge of this court pursuant to rules thereof, which certificate is (in the absence of the trial judge, Hon. Wm. H. Seaman, from the circuit) accordingly made and herewith attached this 27 day of June, A. D. 1901." The bill was at no time attested by the judge who tried the cause. The act of June 5, 1900 (31 Stat. 270), amends section 953 of the Revised Statutes so that it reads as follows: "Sec. 953. That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case such judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he cannot fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor." The defendant in error now moves the court to suppress and strike from the abstract of record and return to the writ of error so much thereof as includes the bill of exceptions so signed and filed in the court below.

Ira C. Wood, for the motion.

John M. Duffy, opposed.

Before JENKINS and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts). Before the amendment of section 953, Rev. St., by the act above quoted, it was settled that the allowance and signing of the bill of exceptions can only be done by the judge before whom the case was tried. Malony v. Adsit, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. Ed. 163. The amendment permits such allowance and signing by another judge thereafter holding the court when the judge before whom the cause was tried is, "by reason of sickness, death or other disability," unable to allow and sign the bill of exceptions. Here the signing judge certified that the certificate was made by him and attached "in the absence of the trial judge from the circuit." Is such absence from the circuit a disability, within the meaning of the statute? It is an accepted canon in the construction of statutes that "when particular words are followed by general ones the latter are to be held to apply to persons and things of the same kind as those which precede." Potter, Dwar. St. 236, 292. Thus, in Chegaray v. Jenkins, 3 Sandf. 409, and Same v. Mayor, 13 N. Y. 220–228, the statute in question exempted from taxation "incorporated academy or other seminary of learning," and it was held that the exemption from taxation was limited to incorporated seminaries. In Cleaver v. Cleaver, 39 Wis. 96, 20 Am. Rep. 30, the statute saved a devise or legacy to "any child or other relation of the testator" in case of the death of the devisee or legatee before the testator. It was held in an elaborate opinion by

Chief Justice Ryan that the word "relation" includes only relations by consanguinity. In the case at bar the statute authorizes the allowance and signing of the bill of exceptions by a judge other than the trial judge only in case of "death, sickness or other disability" of the trial judge. Noscitur a sociis. The term "other disability" means disability of like character to death or sickness, not a disability arising from temporary absence from the district or circuit, if, indeed, legal disability could arise by reason of absence from the district. The statute means a physical or mental disability arising from either death, sickness, insanity, or disorder of like character by reason of which the judge was disabled from the performance of judicial function. The mere absence from the district or circuit in which the case was tried is not such a disability. If it be needful that the trial judge should be personally present in the district to allow and sign the bill of exceptions, his presence should be procured. In the district from which this cause comes it is usual to procure the attendance of the district judges from other districts to hold court in aid of the despatch of business. It is not supposable that the statute designed that during the temporary absence of the trial judge from the district the difficult and delicate duty of correctly stating the conduct of trials held by him should be devolved upon a judge wholly uninformed in respect thereto. The statute sought to provide for an emergency where there would be a failure of justice unless the extraordinary remedy could be employed. We are of the opinion that the statute should not be extended to the case before us, and that no legal cause is stated for the allowance and signing of the bill of exceptions by a judge other than the trial judge.

The motion is allowed.

AMERICAN BONDING & TRUST CO. OF BALTIMORE, MD., v. TAKAHASHI et al.

(Circuit Court of Appeals, Ninth Circuit. September 9, 1901.)

No. 690.

1. CONTRACTS—CONSTRUCTION—EXTRINSIC EVIDENCE.

Where contracts require one of the parties to pay money to a person designated as "trustee," but without stating for whom or for what purpose he is trustee, the circumstances and negotiations leading up to and surrounding the transaction constitute its res gestæ, and may be given in evidence in an action to determine which party is responsible for a defalcation of the trustee, not for the purpose of altering the writings of the parties, but to enable the court to correctly construe their agreement.

2. SAME—CREATION OF TRUST—RESPONSIBILITY FOR ACTS OF AGENT AS TRUSTEE.

Plaintiff applied to the general agent, who was also local manager and secretary, of defendant, to furnish a bond to a railway company, to whom plaintiffs had contracted to supply laborers to be paid by them, the company requiring such bond to protect it from claims which the laborers might make against it for wages. The agent, as a condition to the furnishing of the bond, and for the protection of defendant, required the money to become due from the railroad company under the

contract to be paid to him as trustee, to be disbursed by him to the laborers, and the contract and bond accordingly provided that such money should be paid to the agent, designating him merely as trustee, and that he should pay the laborers therefrom, and pay over the remainder to plaintiffs. They also reserved the right to defendant to designate a new trustee at any time on notice to the other parties. These requirements were within the general authority of the agent, and were also expressly approved by defendant, which subsequently exercised the power given it to change the trustee. *Held*, that the agent, in his capacity as trustee, represented defendant, which was responsible for the faithful execution of his trust, and liable to plaintiffs for the sum due them from the trustee on an accounting.

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

Hoyt & Haight, Preston, Carr & Gilman, John P. Hoyt, and L. C. Gilman, for plaintiff in error.

Shank & Smith and Corwin S. Shank, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The plaintiff in error was defendant in the court below to an action brought by the Oriental Trading Company, the amended complaint in which alleged, among other things, that the defendant to the action is a Maryland corporation, and during the times therein mentioned was doing a general bonding business in the state of Washington, having for its general agent and manager in that state one A. L. Campbell; that in February, 1899, the Oriental Trading Company agreed with the Great Northern Railway Company to furnish it with Japanese laborers for extra gang and section work along its road during the remainder of that year, the trading company being thereby required to give the railway company an acceptable bond indemnifying it against all claims for wages of the laborers to be so furnished; that pursuant to that requirement the trading company applied to the defendant to the action, the American Bonding & Trust Company, through its general agent and manager, Campbell, for an indemnity bond in the sum of $25,000, and that the defendant, by its said agent and manager, required, as a condition precedent to the issuance of such bond, and for the purpose of assuring it against loss thereon through failure of the trading company to pay the wages earned by the laborers, that the moneys earned by the trading company under the contract with the railway company should be paid to the said Campbell, and be by him disbursed directly to and in payment of the laborers, and that any sum remaining after such payment to the laborers should be paid over to the trading company; that the defendant bonding and trust company also reserved to itself alone the right to substitute another trustee in the place of Campbell, or to add further trustees, as it might see fit, to act jointly with him; that accordingly, on March 15, 1899, on receipt of a cash premium therefor, the defendant bonding and trust company prepared and executed, as surety, an indemnity bond to the railway company in the sum of $25,000, containing the terms and

conditions above mentioned, which bond was delivered to and accepted by the railway company; that the furnishing of laborers by the trading company to the railway company was continued under a similar agreement for the year 1900, and that the defendant bonding and trust company prepared and executed, on the 1st day of February, 1900, as surety, and delivered to the railway company, for a like further consideration passing to it, a new bond for $25,000, as a renewal of the previous bond of March 15, 1899, the new bond being executed upon the same conditions and containing the same requirements as the first; that for the purposes stated, and in pursuance of its contract, the railway company made payments to Campbell until the defendant bonding and trust company terminated his agency on the 15th day of July, 1900, at which time it appointed in his place John P. Hoyt, its resident vice president, as trustee under the bond; that the sums so paid by the railway company to Campbell, earned by and belonging to the trading company, aggregated $302,439.44, of which sum there was paid over to and on account of the trading company sums aggregating only $292,583.09, and that the remaining sum of $9,856.35 is withheld, which last-mentioned sum so received by the defendant bonding and trust company is long overdue, and which it refused to pay after demand therefor duly made, to plaintiffs' damage in that sum, with interest from July 15, 1900. In addition to the denials contained in the amended answer of the defendant bonding and trust company of certain of the averments of the amended complaint, it set up that on or about the 16th day of February, 1899, the Great Northern Railway Company and two of the plaintiffs, namely, C. T. Takahashi and O. Yamaoka, entered into an agreement, a copy of which is set out in the answer, which is in the form of a letter addressed by the assistant general superintendent of the railway company to the plaintiffs just named, referring to a recent conversation between them in regard to the employing of Japanese laborers on the Western division of the railway company, and stating the willingness of the company to employ such laborers for extra gang and section work on certain terms set out in the letter, and concluding with the statement that, "You will be expected to furnish the railway company with suitable bond indemnifying them from all claims for wages of the men supplied under this agreement"; that thereafter, and on or about the 15th day of March, 1899, the plaintiffs Takahashi and Yamaoka, as principals, and the defendant bonding and trust company, as surety, executed to the railway company their bond, which is set out at large in the answer, and that thereafter, to wit, on or about February 1, 1900, the railway company, as party of the first part, and the plaintiffs composing the Oriental Trading Company, as parties of the second part, entered into another agreement, also set out at large in the answer, by which the trading company agreed to furnish the railway company during the year ending July 31, 1900, as many laborers as the railway company should require, upon certain stated terms and conditions, and upon the agreement "that all pay rolls for laborers employed under this agreement shall be made out in favor of A. L. Campbell, trustee, and all checks shall be sent to said trustee, who shall disburse by

checks drawn in favor of the laborers according to lists and books furnished by the party of the first part (the railway company), or its agents, and said trustee shall pay the balance, after all claims are paid, to the parties of the second part" (the trading company). That contract also contained a provision to the effect that the trading company should give a bond, with the American Bonding & Trust Company of Baltimore as surety, in the sum of $25,000, conditioned for indemnifying the railway company from all loss and damage on account of any claims for wages of the laborers furnished under the agreement. The answer also alleged the execution of that bond, and set it out at large, among the recitals of which was the following:

"And whereas, said principal obligors [the copartners constituting the Oriental Trading Company] and said obligee [the railway company] by said agreement agreed that all checks for labor due said principal obligors should be paid to A. L. Campbell, trustee, of Seattle, Washington, who shall disburse by checks drawn in favor of the laborers according to the lists and books furnished by said obligee or its agents, and said A. L. Campbell should pay the balance, after all claims are paid, to said principal obligors; the surety having and reserving on notice to the obligors and obligee the right to designate another trustee, or to add trustees to act hereunder, as it may see fit: Now, therefore," etc.

The amended answer also alleged that all of the money paid to Campbell was paid, under and in pursuance of the agreements and bonds mentioned, as trustee for the trading company, and not otherwise; that the latter agreed to and did pay Campbell for his services as trustee the sum of $15 a month during all of the time he so acted; that on or about the 24th of August, 1900, the railway company and the trading company entered into a supplemental agreement reciting the agreement of February 1, 1900, and substituting in place of Campbell John P. Hoyt, of Seattle, and providing "that all pay rolls shall be made out in favor of said John P. Hoyt, trustee, and all checks shall be sent to said trustee, who shall disburse by checks drawn in favor of the laborers according to lists and books furnished by the party of the first part (the railway company) or its agents, and said trustee shall pay the balance after all claims are paid to the parties of the second part" (the trading company), and continuing in force the contract of February 1, 1900, in all other respects. And the amended answer avers that after the execution of that supplemental agreement Hoyt received the checks and money due from the railway company for wages of laborers furnished by the trading company under the agreements mentioned, and disbursed the same in accordance with the terms and conditions of the agreements and bonds. The replication of the trading company admits that the contract of February 16, 1899, was made with Takahashi and Yamaoka, but alleges that at the time of its execution M. Tsukuno was a member of the copartnership, and that the contract was made on behalf of the firm; and similar averments are made in respect to the bond executed on the 15th day of March, 1899. The replication put in issue the averments of the amended answer in respect to the payment by the trading company to Campbell for his services as trustee or otherwise, and also denies that either Campbell or Hoyt was trustee for the trading company; but alleges that each of them, during the time

of the receipt and disbursement by them, respectively, of the moneys, acted as agent, and at the sole instance, of the bonding and trust company.

The case was tried by the court with a jury. The parties agreed in respect to the amount of money received by Campbell and unaccounted for by him, and there is practically no conflict in the evidence. The only contested question in the case relates to Campbell's status in the transaction; that is to say, whether, in the receipt and disbursement of the moneys, he was, as contended on the part of the plaintiffs in the case, the agent and representative of the bonding company, or whether, as contended on the part of that company, he held the relation of trustee to all of the parties. Confessedly, he was the general agent, manager, and resident secretary of the bonding company in the state of Washington In the agreements and bonds he is described as "trustee," but in neither is it stated for whom, or for what purpose In such cases the circumstances and negotiations leading up to and surrounding the transaction constitute its res gestæ, and may always be given in evidence for the purpose, not of in any way altering the writings of the parties, but to enable the court to correctly construe their agreement. Railroad Co. v. Durant, 95 U. S. 576, 24 L. Ed. 391; Reed v. Insurance Co., 95 U. S. 231, 24 L. Ed. 348; Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheat. 326, 5 L. Ed. 100; Baldwin v. Bank, 1 Wall. 240, 17 L. Ed. 534; Bank v. Kennedy, 17 Wall. 19, 21 L. Ed. 554. The case last cited was brought by Kennedy, as receiver of the Merchants' National Bank, against the National Bank of the Metropolis, to recover a balance alleged to be due on a check for $50,000, drawn by one Robinson on the Bank of the Metropolis in favor of the Merchants' National Bank, and duly presented for payment; on the presentation of which the Bank of the Metropolis admitted its obligation to pay it, but, as part payment thereof, delivered to the messenger of the Merchants' Bank a note of the cashier of that bank, one C. A. Sherman, for $20,000. The Merchants' Bank declined to receive the note as payment, and sent it back, demanding the cash, but the Bank of the Metropolis refused to take back the note, insisting that, although it was signed by Sherman individually, it was given for account of the Merchants' Bank, and for a loan made to it. The principal controversy in the case arose upon the question whether the note was given by Sherman on his own account or on account of the Merchants' Bank. The plaintiff in the case was allowed to prove by Sherman the circumstances under which the note had been given, the substance of which was that on the 27th of February he applied to Hutchinson, cashier of the defendants, for a loan to himself of $20,000 to enable him to purchase some stock in the Merchants' Bank, and that this note was given for that loan, with the certificate of the stock attached as collateral; and that he received therefor two drafts for $10,000 each on Baltimore and Philadelphia banks, payable to C. A. Sherman, cashier; that he indorsed them as cashier, and that the proceeds, when paid, went to the credit of the Merchants' Bank. The drafts being produced in evidence, the plaintiff's counsel then asked the witness what took place, when the drafts were about to be drawn, between him and

Hutchinson, in regard to the form of the drafts. This evidence was objected to, was allowed, and an exception taken. The supreme court said:

"It is argued by the counsel for plaintiffs in error that this evidence was calculated to explain or vary the legal effect of the drafts themselves. We do not think so. Those drafts are not sued on in this action. They are introduced merely as part of the res gestæ of the loan, and the conversation of the parties on the subject of the drafts was also a part of that res gestæ. They equally constituted parts of the transaction. The witness might have preferred to receive the drafts in that form. He might have preferred to receive drafts payable to any third person. Evidence as to the reason why they were made in one form rather than another does not in the least vary or contradict the drafts themselves. As the form of the drafts might confuse the jury, the plaintiffs had a clear right to explain how they came to be made as they were. The fact in question was the loan. The circumstances of the negotiation constituted the res gestæ of the loan. The drafts were one of those circumstances; the conversation of the parties was another. Evidence of the reason why a loan was made in particular funds or securities, instead of cash, is perfectly competent where it will tend to elucidate the nature of the transaction, when that is the question at issue. The question here was whether the loan was made to Sherman or to the bank. The note given for the repayment of the loan was given by Sherman individually. The drafts in which he received the loan were made payable to him as cashier. Neither the one nor the other of these documents can prevent the parties from showing, as a matter of fact, to whom the loan was really made. The defendants were endeavoring throughout the cause, contrary to the form of the note, to show that it was really the obligation of the bank, and that the loan was made to the bank. This they had a clear right to do, as the plaintiff had an equally clear right to show the contrary. The principle which governs such cases was explained and enforced by this court in the case of Baldwin v. Bank. There was no error in the admission of this evidence."

In the present case the action is not upon the written agreements and bonds, but is an action for damages for the wrongful withholding by the alleged agent of the defendant company, and therefore for the wrongful withholding by the defendant itself, of moneys to which the plaintiff company is entitled. Whether or not the alleged cause of action is made out depends, as has been said, upon the real status of Campbell, which, for the reasons stated, must be determined in view of all of the facts and circumstances of the case.

Takahashi, one of the plaintiffs, testified that his firm made application for the bond required by the railway company to Campbell as agent of the bonding and trust company, saying:

"Mr. Maud, manager of J. Berkman & Brothers, introduced us to Mr. A. L. Campbell, the agent of the American Bonding & Trust Company, and we asked Mr. Campbell if he would furnish us a bond to be furnished for the Great Northern, and he asked us if we could give him collateral security for the bond; and we could not give him any security; and he says that if we can't give any security, why these moneys have got to go through their hands for the protection of the bonding company; and he said he would go and write to the East,—that is, to the headquarters of the bonding company at Baltimore, Maryland; and a few days afterwards—I don't remember how many days it was afterwards—he came and called on us, and said that he could go on the bonds, and finally he had the bond executed."

Campbell testified that the plaintiffs applied to him for the bond required by the railway company, and that he told them that they would have to agree that the moneys paid under their contract with

the railway company should be paid to and disbursed by a trustee, and that he was to be the trustee; that this was for the purpose of protecting the bonding and trust company; that he wrote to his company in regard to the matter, which letter, however, was not put in evidence, and received from it this reply:

"General Surety Business, Office of the Secretary-Treasurer.
"Baltimore, Md., Feb. 1st, 1899.

"A. L. Campbell, Esq., Bailey Building, Seattle, Washington—Dear Sir: We have your favor of the 25th ultimo, relative to the contract of the Oriental Trading Company with the Great Northern Railway Company, and from will be required a bond, indemnifying the railroad company against loss by reason of any default in the payment of the wages of the individual laborers. We note very carefully the stipulation you will make in the event you secure this bond. We think you take a correct view of the situation, and will approve your action, provided you will be willing to disburse the money to the laborers without any expense to us; i. e. that you will be willing to render the service stated in your letter in connection with the above matter, in consideration of the commission you secure on the premium of this bond.

"Very truly yours, Samuel H. Shriver, Sec'y."

The testimony is to the effect that the plaintiffs made Campbell presents from time to time for his services, which he received, but that no compensation to him by the plaintiffs was agreed on. The evidence also shows that Campbell made various acknowledgments of drafts sent to him by the railway company for the amounts due from time to time to the trading company, sometimes signing such acknowledgments "A. L. Campbell, Manager," and sometimes "A. L. Campbell, Trustee," and that he deposited the moneys in one of the banks of Seattle to his credit as trustee, and drew checks against the same from time to time in the regular course of the business of his office, such checks being signed, "A. L. Campbell, Trustee," and, so far as shown, all of them but two bearing the following counter signature: "This check will not be paid unless countersigned by the American Bonding & Trust Co., by Dorman;" those two excepted checks being countersigned, "A. L. Campbell, Trustee. Moore." Dorman, it appears, was the cashier in the company's office in Seattle. It further appears from the record that when the bonding company displaced Campbell from the management of its business in the state of Washington, and put another person in charge, it at the same time substituted that new agent in Campbell's place for the receipt and disbursement of the moneys under the contracts and bonds in question.

The plaintiffs in the case also put in evidence these extracts from a book of instructions sent by the plaintiff in error to its general agents and managers:

"It is, of course, understood that in the compilation of a book of this character it is impossible to formulate rules to meet all emergencies, the discretion of the representative of the company being largely relied upon, and he is expected to use the same care in all cases as if he personally were the only party interested. * * * Where any doubt is entertained as to the capability or intelligence of the applicant to properly administer the affairs of the trust, the agent must require him to deposit all funds in bank to the joint credit of the fiduciary and the company, so they can only be withdrawn on checks signed by both the fiduciary and the agent. The

securities should also be deposited in a safety-vault box, subject only to joint access. This is what is termed 'joint control,' and is recommended wherever practicable to enforce it, particularly in the cases of inexperienced persons, women unused to business practices, and small guarantyship. In times past this joint control was invariably required and rigidly enforced by all surety companies as one of the conditions only under which they would sign the bonds. It is required by some of them yet. But our experience has taught us that in many instances—large estates particularly—the requirements are ones meeting with frequent objections, and often the occasion for losing much good business, and that frequent reports and periodical investigations offer equal protection where the parties are businesslike and intelligent. But in case of any doubt as to the competency of the fiduciary it should be invariably required. In case of doubt as to the honesty or good character of the applicant, do not sign the bond under any circumstances, no matter what protection or indemnity is offered."

We are of the opinion that the court below was right in holding, as it did, that in the receipt and disbursement of the moneys Campbell was the representative of the bonding company, and, there being no substantial conflict in the evidence, that it rightly directed a verdict for the plaintiffs in the case. In executing the bonds and stipulating, as he did, that the moneys should be received and disbursed by himself, Campbell was clearly acting within the scope of his authority, as shown not only by the letter of the company to him of February 1, 1899, but also as disclosed by the foregoing extracts from the book of instructions issued by the company to its general agents. The requirement that the moneys should be paid to and disbursed by the agent of the bonding company was obviously for its protection, and was so declared by Campbell, and is so shown by the circular instructions of the company. In the latter "joint control" by the insured and the agent of the company of the funds for which the latter is to become liable is recommended in certain cases, but much is thereby left to the discretion of the agent. In the present instance the agent stipulated for his exclusive control of the funds, and his act in that respect was expressly approved by the company. The company thus held out Campbell as a fit and proper person to represent it in the transaction of its business in the state of Washington, and to receive and disburse the funds for which it should become responsible by the execution of the bonds issued by it, and, in the absence of any controlling rule of law to the contrary, should, upon the most obvious principles of fair dealing, be held responsible for his honesty. Fortunately there is no such rule. The bonding company not only selected the person who should receive and disburse the funds, selecting for that purpose its own general agent, but reserved to itself the exclusive right of substituting another in his place, thus reserving the right of discharging him for misconduct or other cause. It is this right which is the foundation of the rule of respondeat superior. Maxmilian v. Mayor, etc., 62 N. Y. 163, 20 Am. Rep. 468; Ham v. City of New York, 70 N. Y. 459; Railroad Co. v. Davis, 23 Ind. 553, 85 Am. Dec. 477. The case of Davis v. Patrick, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090, cited by the plaintiff in error as decisive of the present case in its favor, is not, we think, at all so. That was an action by Algernon S. Patrick against Erwin Davis to recover, among other things, for services

rendered by him in the transportation of certain ore from the Flagstaff mine, in Utah Territory, to the furnaces at Sandy, in that territory. The question at issue was whether the services were rendered for Davis or for the Flagstaff Silver Mining Company, the owner of the mine. Algernon Patrick was employed by M. T. Patrick, who was in charge of the mine under J. N. H. Patrick, named as its manager in a certain contract entered into between the mining company and Davis, and also in a certain power of attorney executed by the mining company to J. N. H. Patrick, of date December 16, 1873. The purport of those papers is thus stated by the court (122 U. S. 149, 7 Sup. Ct. 1106, 30 L. Ed. 1094):

"The company owed the defendant £5,000, with interest at the rate of six per cent. per annum, for that amount advanced by him to it on the 12th of June, 1873. A further advance of money was necessary to enable it to carry on its business. The defendant agrees to advance to it not to exceed £10,000, in addition to the £5,000 already advanced. It had previously sold him a quantity of ore, which it had agreed to deliver to him at its ore house, free of cost, the cost of it having all been paid to the company by the defendant, and a balance of 4,995 tons being yet undelivered. In consideration of the premises, the company appoints J. N. H. Patrick manager of all its property in Utah, he, by himself or his agents, to have the exclusive and irrevocable management, except as thereinafter mentioned, of all its properties in Utah, and of all its mining and smelting business there. He is to conduct and manage the above business until such time as, out of the profits of the working of the properties, he has repaid to the defendant the £5,000 and interest; and also all moneys the defendant may advance to the company under the agreement, with interest; and also until he has mined and delivered to the defendant all the ore so sold to him by the company, as stated in the agreement; and also until he has smelted in the furnaces of the company the ore so to be mined and delivered to the defendant according to the terms and agreement of September 12, 1873, made between the company and the defendant. When all this is done, J. N. H. Partick may resign the management. He is to work the mine in a proper manner, and manage the business of the company with economy, and for the best interests of the parties to the agreement, and is to render a monthly statement, with vouchers, to the company at London. If at any time the defendant becomes dissatisfied with the management of the business and the property in Utah, he may suspend and remove the manager, and appoint another manager in his place, with any or all rights, powers, or authority delegated under the agreement; and, should the defendant proceed to act upon such power of suspension and removal, he is to consult with the board of directors of the company as to the new manager to be appointed. The power of attorney from the company to J. N. H. Patrick appoints him to be the attorney of the company to take possession of and carry on the mine, and for that purpose to appoint workmen and others, and to pay and allow them such remuneration as he shall think fit."

The court said:

"The relation between the defendant and the company was strictly that of creditor and debtor. The agreement of December 16, 1873, in connection with the power of attorney, was simply a method of securing the defendant, as a creditor of the company, for past and future advances, and to insure the delivery of the ore which he had bought and paid for. The irrevocable character of the appointment of J. N. H. Patrick as manager, with the power given to the defendant to suspend and remove him, and to appoint another manager in his place, on consultation with the board of directors of the company, was an incident of the security to the defendant, and a means of having the operation of the mine continued until the debt to him should be discharged. Any new manager to be appointed was to have the rights, powers, and authority delegated to J. N. H. Patrick under the agree-

ment, and none others. The agreement did not in any manner make the defendant a partner with the company, or with J. N. H. Patrick, or make J. N. H. Patrick the agent of the defendant in managing the mine, so as to make the defendant responsible for any contract entered into by J. N. H. Patrick. The company continued to be the owner of the mine, operating it through J. N. H. Patrick, as its manager, agent, and attorney, and responsible for his contracts, as such."

It will be observed, as said by the counsel for the defendants in error, that the mining company was held as Patrick's principal, although Davis reserved the right to remove him. Here the bonding company possessed over Campbell all the power which both the mining company and Davis had over Patrick. Moreover, Patrick was a stranger to both the mining company and to Davis at the time of his appointment as manager of the mining company's property. In the case at bar Campbell was the general agent, manager, and resident secretary of the bonding company at the time of the execution of the bonds, and not only negotiated them, but himself drafted them.

The judgment is affirmed.

BARRIE et al. v. CAROLAN et al.

(Circuit Court, N. D. California. August 12, 1901.)

No. 13,087.

ACTIONS AGAINST MARRIED WOMEN—COMPLAINT.

Complaint in an action against husband and wife for value of books sold the wife on orders of purchase signed by her is insufficient, it not appearing otherwise than inferentially whether it is sought to charge her separate estate or their community estate, there being a possibility of the debt being collectible against either estate under Civ. Code Cal. §§ 167, 171, though the wife should not be joined with the husband as defendant unless it is intended to hold the community property liable.

At Law. On demurrers to complaint.

Jellett & Meyerstein, for plaintiffs.

Joseph S. Tobin and F. S. Brittain, for defendants.

MORROW, Circuit Judge. This is an action at law, brought by the plaintiffs against Harriet Pullman Carolan and Francis Carolan, her husband, to recover the value of certain books sold by the plaintiffs to the defendant Harriet Pullman Carolan upon orders of purchase signed by her. The plaintiffs are citizens of the state of Pennsylvania, and the defendants are citizens of the state of California. The defendants demur to the complaint upon the ground of insufficiency; that no cause of action is stated against the defendant Francis Carolan, and that as against the defendant Harriet Pullman Carolan the complaint is ambiguous, unintelligible, and uncertain, in that it does not appear whether it is sought to charge the said defendant upon her separate estate, or to charge the defendant Francis Carolan by reason of the acts of the said Harriet Pullman Carolan. It appears from the complaint that the books in controversy were

purchased by Mrs. Carolan after marriage, and that the contracts of purchase were signed by her alone. No allegation is made that the books so purchased were the separate property of Mrs. Carolan, or that her separate estate is to be charged therefor; neither is there any allegation charging the community estate with the alleged debt, or the defendant Francis Carolan, as the husband, in control of the community estate. By the law of this state governing the rights and duties in this case, all property acquired after marriage by either the husband or the wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property (sections 162, 163, 164 Civ. Code), and subject to the exclusive management and control of the husband (section 172, Id.). This community property may be liable for the contracts of the wife made after marriage, when secured by a pledge or mortgage thereof executed by the husband. Section 167, Id. Provision is made for the maintenance of the wife's separate estate, and its liability for her own debts contracted before or after marriage. Section 171, Id. It is therefore incumbent upon a plaintiff, in bringing an action to recover upon the debt of a married woman, to specify not only the manner in which the debt was incurred, but the estate chargeable with the debt, where there is a possibility of the debt being collectible against either estate. If it is intended to hold the community property liable, the wife should not be joined with the husband as a defendant. Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497. If it is sought to charge the wife upon her separate estate, special averment should be made in the complaint to that effect, that the contract was made by her individually, and inured to the benefit of the wife's separate estate. In the complaint under examination the defendants are informed only inferentially as to the particular estate which the plaintiffs seek to charge with the debt. It is a cardinal rule of pleading that the facts set forth shall be alleged with such certainty that they can have but a single meaning, to the exclusion of argument or inference with regard thereto. For this reason the demurrer will be sustained upon the ground mentioned, with permission to amend the complaint. As to the other grounds urged by counsel, the demurrer will be overruled.

OCCIDENTAL CONSOL. MIN. CO. v. COMSTOCK TUNNEL CO.

(Circuit Court, D. Nevada. September 2, 1901.)

No. 708.

PLEADING—COMPLAINT—DUPLICITY.

A complaint in an action to recover damages, based upon an alleged wrongful act of defendant, states but a single cause of action, although plaintiff's right to the damages claimed rests upon three separate contracts, of each of which such act is alleged to have been a breach.

At Law. On motion and demurrer to complaint.

W. E. F. Deal, for plaintiff.

Alfred Chartz and F. M. Huffaker, for defendant.

HAWLEY, District Judge (orally). This is an action to recover damages in the sum of $127,292.25. Plaintiff's right of recovery is alleged to be supported by three different contracts: (1) A contract between plaintiff and defendant; (2) a contract between the Chollar Mining Company and the defendant; and (3) a contract between the plaintiff, the Potosi Mining Company, and the Chollar Mining Company. These contracts are of different dates, between different parties, and upon their face might, at first blush, seem to be on different subjects. The defendant moved the court to have the allegations of the complaint made definite and certain by separately and distinctly stating the several causes of action therein set forth and alleged, and has also filed a demurrer to the bill of complaint. The motion is made and the demurrer interposed upon the theory that there are three different causes of action which are not separately stated. The subject-matter of the suit relates to the construction of a tunnel connecting plaintiff's mines with the Sutro tunnel for the sole purpose, object, and intent of working, developing, and draining the mining claims owned by plaintiff on the Brunswick lode by means of the Sutro tunnel and Zadig drift. There is really but one cause of action arising out of this subject-matter. The debatable question involved is whether the averments in the complaint are so connected as to show such a mutuality of contract between the plaintiff and the defendant as to warrant them to be blended in one cause of action. I am of opinion that the cause of action alleged in the complaint could have been stated in clearer terms by appropriate averments without annexing as exhibits the several contracts in full. A clear and concise statement of the facts would have shown beyond controversy that the plaintiff's primary right to recover is upon one cause of action alone, to wit, the failure of defendant to comply with its contract and construct the tunnel and drift so as to connect the Sutro tunnel with the mining claims owned by plaintiff. The complaint alleges "that said Chollar Mining Company, with the full knowledge and consent of the said defendant, and as the agent of said plaintiff, as well as for itself and said Potosi Mining Company, made and entered into said contract marked 'Exhibit B.'" The several contracts all relate to the construction of the drift and tunnel, and as to how and by whom the work shall be done. It is alleged in the complaint that by the terms and conditions of these contracts the plaintiff has the right to work, mine, and prospect its claims on the Brunswick lode through said tunnel; that defendant in November, 1900, wrongfully and unlawfully prevented and stopped any and all work in said Sutro tunnel and in said Zadig drift, and by said means prevented plaintiff and its agent, the Chollar Mining Company, from doing any work in said Sutro tunnel or in said Zadig drift, and thereby destroyed the consideration upon and for which said contracts were made, and certain moneys paid by plaintiff to defendant, and prevented plaintiff from deriving any benefit from said contracts and from the payments of said sums of money, and plaintiff has thereby been damaged in the sum of $27,292.25. It is further alleged in the complaint that, by reason of the wrongful and unlawful acts of the defendant

stated therein, the plaintiff has been and is damaged, in addition to the sums of money paid to defendant, in the further sum of $100,000, "in that by the said wrongful acts of said defendant, and by the violation by it of said contracts, said plaintiff has been deprived of the right to drain, mine, and work its claim on said Brunswick lode by means of said Sutro tunnel and said Zadig drift." The cause of action is the act or delict on the part of the defendant which gives the plaintiff its cause of complaint. In order to found a right of action, there must be a wrongful act done, and a loss resulting from the wrongful act. It does not appear from the averments of the complaint that more than one cause of action has arisen out of the covenants embodied in the several contracts, so far as the rights of plaintiff are concerned. In the construction of a pleading for the purpose of determining its effect, its allegations should be liberally construed. Every action is brought to obtain some particular result. This result is the object of the action. In Pom. Code Pl. (3d Ed.) § 453, the principles which apply to a case of this character are stated as follows:

"Every judicial action must therefore involve the following elements: A primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant, which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant, springing from this delict; and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements the primary right and duty and the delict or wrong combined constitute the cause of action, in the legal sense of the term. * * * They are the legal cause or foundation whence the right of action springs, this right of action being identical with the 'remedial right.' * * * The cause of action, as it appears in the complaint when properly pleaded, will therefore always be the facts from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

Several illustrations of this general principle are given in section 454, and in section 455 the author says:

"The result of this analysis of the necessary elements which enter into every action is simple, easily to be understood, and yet exceedingly important; and the principle I have thus deduced will serve as an unerring test in determining whether different causes of action have been joined in a pleading, or whether one alone has been stated. If the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action, no matter how many forms and kinds of relief he may claim that he is entitled to, and may ask to recover. The relief is no part of the cause of action. * * * These suggestions are necessary to guard against the mistake of supposing that a distinct cause of action will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act of wrong which, in connection with others, may make up the composite but single delict complained of."

See, also, Mullin v. Blumenthal (Del. Super.) 42 Atl. 175, and authorities there cited.

This action is purely legal. There are no averments of an equitable nature contained in the complaint, and the objections urged upon this ground are not well taken. The complaint in its entirety states a cause of action. Motion denied and demurrer overruled.

BOYCE v. UNITED STATES FIDELITY & GUARANTY CO. OF MARYLAND.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1901.)

No. 918.

1. BANKRUPTCY—CREDITOR ENTITLED TO FILE PETITION—BREACH OF CONTRACT.
A contract with a city for public work fixed a time by which the work should be completed, and provided that, if the contractor should fail to commence or proceed with the work to the satisfaction of the trustees having it in charge, such trustees should have the right, on notice, to declare the contract forfeited and cancel the same. The contractor entered into a contract with the surety on his bond by which he agreed to indemnify the surety against any loss by reason of his default, and that in case of his default on breach of the contract the surety should be subrogated to his rights therein, and might use the contractor's property and equipment for the purpose of completing the work. The trustees declared that the progress of the work was not satisfactory, and after due notice declared the contract forfeited and annulled. They afterwards permitted the surety to complete the work, in doing which it incurred a considerable expense above the price received. *Held* that, under the power given the trustees by the contract, their decision that the work was not proceeding satisfactorily and with reasonable expeditior was conclusive on the contractor, in the absence of evidence that they acted fraudulently, and authorized his surety under the contract of indemnity to assume charge of the work, and that the surety thereby became his creditor for the amount of the loss it sustained, and entitled to maintain a petition against him in involuntary bankruptcy.

2. CONTRACTS—CONSTRUCTION—POWER TO DECLARE FORFEITURE.
A stipulation in a contract with a city for public work for the payment of a fixed sum per day for any delay in the completion of the work beyond the time stated, as liquidated damages, is not inconsistent with and does not abrogate a further provision giving the city the power to declare the contract terminated for delay in the progress of the work before the time fixed for its completion, and in such case the city has its election.

3. SAME—SUFFICIENCY OF NOTICE.
Under a contract with a city for public work which gave the city the power to terminate the same if not satisfied with the progress of the work, in case the delay continued after 10 days' notice to the contractor, such notice was not required to contain a positive statement that a forfeiture would be declared; nor could the contractor object that a forfeiture was declared within 10 days after the notice was given, where in the meantime he had entirely abandoned the work.

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

This is an appeal from a decree adjudging the appellant a bankrupt upon the petition of the appellee, which claims to be a creditor. The pivotal question in the proceeding in the district court was whether the petitioner was in fact a creditor of the alleged bankrupt; and this turned upon certain facts involved in the performance of a contract made by the appellant with the city of Cincinnati for the execution of certain work in the city, consisting of grading, draining, macadamizing, and revetment of slopes and masonry on the grounds of the city's waterworks. The due performance of this contract on the part of the appellant was guarantied by the appellee company, which, upon the alleged default of the appellant, took over the contract from the city and completed it, incurring therein an expenditure of as much as $22,000, for which sum it claimed to be a creditor of the appellant, and so entitled to file the petition in bankruptcy. The contract was made on June 2, 1899. The guaranty was made at the same time, and constituted

part of the same transaction. The writings are very lengthy, and only so much thereof will be here referred to as relates specially to the matters involved in the controversy, and is necessary to its determination by the court. By its terms the contract required the work to be completed by the 1st day of January, 1900, and provided that, if the contractor should fail to perform it by that time, he should forfeit $50 for each day thereafter while he was in default, which it was declared should be taken and treated as liquidated damages, and not as a penalty. It contained also the following stipulations: "That in case said contractor shall become insolvent or be declared bankrupt, or shall, from any cause whatsoever, other than any arising from the acts of the trustees, be prevented from or be delayed in proceeding with and completing the work according to this contract, or shall fail to commence or proceed with the work to the satisfaction of the said trustees, it is agreed that said trustees may give, or cause to be given, notice or notices in writing to said contractor. * * * And, in case said contractor shall for ten (10) days after any such notice fail to commence or regularly proceed with the work to the satisfaction of said trustees, all rights of the said contractor under this contract shall thereupon terminate; and it is agreed that said trustees may declare this contract, as to any and all rights of said contractor thereunder, forfeited, annulled, and wholly canceled, and take away, hold, and complete said work by reletting the unfinished part thereof, or completing the same by day work or otherwise, as may be for the best interest of the said first party in the judgment of said trustees. And said trustees shall have the right to apply any sum due or which may become due and payable to said contractor under the terms hereof to the completion of said work, and said contractor shall be liable for any and all damages, loss, costs, or expense incurred and sustained by the said first party by reason of the neglect, refusal, or failure of the said contractor to keep and perform all the conditions and covenants hereof; and in case this contract, or any alteration or modification thereof, be thus terminated, the decision of said trustees, predicated upon the opinion of the chief engineer, shall be conclusive, and said contractor shall not be entitled to claim or receive any compensation or damages for not being allowed to proceed." Section 2c provides: "During the progress of the work, monthly estimates shall be made by the chief engineer of the total relative value of the work done to the time of such estimates. Of the amount of such estimates, the trustees shall retain twenty (20) per cent., as part security for the fulfillment of the contract by the contractor. On or before the 15th day of each month the trustees shall pay to the contractor the amount not retained as aforesaid, after deducting therefrom all previous payments and all other amounts to be kept or retained under the provisions of this contract." It further provides: "Payments may be withheld if the work is not proceeding in accordance with the contract." The contract of indemnity given to the appellee and signed by appellant provides: "And I do further agree, in the event of any breach or default on my part of the provisions of the contract hereinbefore mentioned, that the United States Fidelity and Guaranty Company, as surety upon the aforesaid bond, shall be subrogated to all my rights and properties as principal in said contract, and that deferred payments and any and all moneys and properties that may be due and payable to me at the time of such breach or default, that may thereafter become due and payable to me on account of said contract, shall be credited upon any claim that may be made upon the United States Fidelity and Guaranty Company under the bond above mentioned." Said contract also contains the following stipulation: "And I do hereby bind myself * * * to indemnify the said the United States Fidelity and Guaranty Company against all loss, costs, damages, charges, and expenses whatever, resulting from any act, default, or neglect of mine, that said the United States Fidelity and Guaranty Company may sustain or incur by reason of its having executed said bond or any continuation thereof. And I do further agree, in the event of my being unable to complete or carry on the aforementioned contract, to assign such plant as I may own or have upon said work to the said the United States Fidelity and Guaranty Company, that it may use same in the prosecution of said contract to completion."

The appellant proceeded, directly after the contract was made, with its execution. But his progress was, in the opinion of the city engineer, so slow as to make it unlikely that the work would be completed by the date stipulated; and on the 23d of August that officer addressed to the board of trustees the following communication:

"Gentlemen: The principal part of E. C. Boyce's contract is the paving of the slope adjoining the Little Miami river. The quantity of paving required is 8,100 cubic yards, amounting to $21,870. The total estimated cost of all work embraced in his contract is $35,476. The paving amounts, therefore, to nearly two-thirds of the entire work. Only 100 cubic yards of paving have been laid. This was done in July. No paving has been laid since. To complete his work by January 1, 1900, as he has agreed to do, Mr. Boyce must lay not less than 2,000 cubic yards per month; and the safer plan would be to lay 3,000 cubic yards per month, because the conditions of the river may be such that this work could not be done during December. If the paving is not completed this fall, the grading of the slope, estimated at $6.750, upon which Mr. Boyce has already been paid $3,233, may be entirely lost. I respectfully call your attention to these facts, that you may take such action as you may deem proper to secure the completion of the paving this fall.

"Respectfully, G. Bouscaren, Chief Engineer."

On the 25th of August, 1899, the board of trustees passed the following resolution: "Whereas, the chief engineer has reported to this board that said E. C. Boyce is not proceeding with said work in a satisfactory manner, and that the probabilities are that the same will not be completed at the time limit fixed in the contract,"—and, providing that notice be served upon Boyce, resolved "that it is the intention of this board at the expiration of an additional ten days to cancel said contract * * * unless the said E. C. Boyce can show to the satisfaction of this board that it is his intention to prosecute said work more vigorously in the future, to the end that the same may be finished at the time fixed in the contract," which was personally served on the appellant on the 28th day of the same month.

On September 8, 1899, the engineer presented to the board the following further communication:

"Gentlemen: I beg to advise you that no better progress is being made by E. C. Boyce on his work at California than obtained before August 28th, when a notice was served on him by direction of your board. He is now doing no work on the riprap and paving, and has no material on hand for that work.

"Respectfully, G. Bouscaren, Chief Engineer."

Thereupon the commissioners of waterworks (the board of trustees being such commissioners) on the 12th of September, 1899, adopted a similar resolution to that of August 25th, above recited, and it was served on the appellant the same day. Three days after this notice was served the appellant abandoned the work, and gave notice that he should not proceed with it. On the 21st of September in the same year the engineer reported to the commissioners of waterworks as follows:

"Gentlemen: I beg to report that E. C. Boyce withdrew all his teams and men from his work on the Miami river bank last Saturday, and that no work has been done by him since. All the work done by him has been measured. If the grading of the Miami slope is to be saved from destruction, it must be protected by paving or riprap before the winter floods. In order to do this, work should be started at once with a large force.

"Respectfully, G. Bouscaren, Chief Engineer."

September 22, 1899, the board of trustees adopted the following resolution and the same was served on the appellant:

"Committee of the Whole.

"Whereas, on the 2d day of June, 1899, this board entered into a contract with E. C. Boyce, of Cincinnati, Ohio, for grading, masonry, drains, macadamizing, and revetment of slopes of a part of the Columbia and New Rich-

mond turnpike, of the Little Miami river bank, and of the railroad branch at California, Ohio; and whereas, said E. C. Boyce was not proceeding with said work in a manner satisfactory to this board, and according to the terms and conditions of the contract entered into with him as aforesaid; and whereas, by reason thereof, and in accordance with the stipulation contained in said contract, notice was served on the 12th day of September, 1899, in person, upon said E. C. Boyce, that unless E. C. Boyce could show to the satisfaction of this board that it was his intention to, and that he would, prosecute said work more vigorously, and in accordance with the terms and conditions of this contract; and, whereas, said E. C. Boyce has wholly failed, since service of the above-mentioned notice, to prosecute said work to the satisfaction of this board, and in accordance with the terms of this contract: Therefore, be it resolved, and this board hereby declares, that by reason of the neglect, refusal, and failure of said E. C. Boyce to keep and perform all the conditions and covenants of his said contract, the same has been broken by him, and that he will be held liable to the city for all damages resulting therefrom."

On the 3d of October, 1899, on the request of the appellee, the trustees adopted a resolution permitting and authorizing the United States Fidelity & Guaranty Company, surety on the bond of said Boyce, to complete the work under the contract in accordance with its terms and conditions.

Testimony was submitted to the district court by the appellant tending to show the reasons for the delay in the progress of the work, and, among other things, it was proven that during the summer, upon the occasion of a sudden rise in the Miami river, the engineer took the appellant's men and teams to build a protection on the river bank to keep the water off the appellant's work, and that this disorganized his force and contributed to the delay. But this was done with the appellant's consent. It was also proven that the parties with whom the appellant contracted for stone failed to deliver it, and that he was thereby embarrassed and delayed. There is no proof in the record that the appellant consented in terms to the forfeiture of the contract by the board of trustees, or the substitution in his place of the guaranty company. But it does appear that, after all this had transpired, he, upon the request of the company, turned over to it his working plant for its use in completing the work; he at the same time repeating his purpose, which he had before declared, of suing the city for damages on account of its refusal to permit him to go on with his contract. Other testimony was submitted on both sides in respect to the progress of the work, and the likelihood of his ability to complete his work by the time specified. Evidence was also introduced by the petitioner tending to show that within four months preceding the filing of the petition the appellant, while insolvent, had transferred the substance of his property to other creditors, with the intent to prefer them. The district judge was of opinion that the petitioner was entitled to be regarded as having been lawfully substituted in the place of the appellant for the execution of the contract which it had guarantied, and had thereby become a creditor; that the acts of bankruptcy were proven as charged; and that the petition should be sustained. The order of adjudication passed accordingly.

John C. Healy, for appellant.
A. W. Goldsmith, for appellee.

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

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

The contention of the appellant in the case is that his contract with the city was wrongfully terminated by the board of trustees. The argument in this court seems to be based upon the assumption that the district court should have determined whether the fact was so upon original grounds, and that upon appeal we should proceed

in the same way. But an important factor in the case is that, as we understand, no fraud is charged upon the trustees, or, if that is meant to be imputed, there is no evidence which would support the charge. By his contract with the city the appellant consented that the board of trustees should have power to determine whether he was proceeding with reasonable expedition towards the completion of the work. The stipulation is that, if he—

"Shall fail to commence or proceed with the work to the satisfaction of the said trustees, it is agreed that said trustees may give or cause to be given notice or notices in writing to said contractor. * * * And in case said contractor shall, for ten (10) days after any such notice, fail to commence or regularly proceed with the work to the satisfaction of said trustees, all rights of the said contractor under this contract shall thereupon terminate; and it is agreed that said trustees may declare this contract, as to any and all rights of said contractor thereunder, forfeited, annulled, and wholly canceled, and take away, hold, and complete said work by reletting the unfinished part thereof, or completing the same by day work, or otherwise, as may be for the best interest of the said first party in the judgment of said trustees."

The parties expressly made the completion of the contract by the day named an integral part of the contract and it was clearly the purpose of the above stipulation to secure its full and complete performance in this respect, as well as in others. It would have defeated this purpose, if the city was required to lie by, while the other party was neglecting the work, until the day for completion had been reached. The public interests and convenience might be seriously delayed by tying up the hands of the city after it was demonstrated that the contractor either would not or could not, with his facilities, finish his undertaking within the appointed time; and we are convinced that such considerations were the reason on which it was stipulated that the board of trustees should have power to determine whether the progress of the work gave reasonable ground for expecting the due fulfillment of the work. It is contended by counsel for the appellant that the language of the recited stipulation refers to the manner in which the work was being done, and not to the progress of it. But it is clear that this is not so. There would be no defect in the manner of doing the work if the contractor should "fail to commence" doing it, and the language, "or proceed with the work," which is linked with the other, would be very ill chosen in a power to simply supervise the manner of doing the work. If the design was to provide only for the correction of mistakes or defects in the work as it was being done, we should naturally expect to find language especially adapted to express such a purpose. Doubtless the right construction is that it was intended to clothe the board of trustees with authority to determine all questions relating to the progress of the work, whether in respect to its conformity with the specifications, or to the expedition with which it was being executed. This delegation of authority by the parties to works of construction to pass from time to time as occasion shall arise upon the incidents of its execution is not unusual. Generally it is devolved upon the engineer in charge if there be one; but the same rule applies, whoever may be appointed. And if the appointee, without fraud or manifest mistake, makes a determination

upon any of the matters falling within the scope of the authority committed to him, the parties are bound by the decision. Sweeney v. U. S., 109 U. S. 618, 3 Sup. Ct. 344, 27 L. Ed. 1053; Railroad Co. v. March, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255; U. S. v. Gleason, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284. There being no sufficient ground for finding that there was any fraud or manifest mistake of fact on the part of the board of trustees, the elaborate and able argument addressed to us by counsel for appellant, intended to demonstrate that the board went wrong in its conclusion that the work was not being properly proceeded with, is wasted. That was a question which the appellant agreed to refer to the board, and its decision thereon is final.

It is contended on behalf of the appellant that the stipulation in the contract for a penalty of $50 per day as liquidated damages for delay in executing the contract beyond the time appointed for its performance negatives the right of the city to require any part of the work within any particular period of time, and that he could not be held in default until the full time had elapsed. But this stipulation is entirely consistent with the construction which we put upon the contract. The city might see fit not to demand that the contract should be terminated. The circumstances might be such that it would be deemed expedient for it to allow the work to go on rather than to exercise its election to put an end to it. There is room for both stipulations to stand without conflict.

It is further argued that the notice of the city should have contained a positive statement that it would absolutely forfeit the contract and that a conditional notice is not sufficient. The contract, however, by requiring a notice of 10 days, plainly implies that the contractor should have that time within which to retrieve his default, when, if he did not avail himself of his opportunity, the city could, if it elected to do so, declare the default to be absolute. The notice given conforms to this view.

Another point made is that the city itself was in default for the nonpayment of $1,900 due on an estimate made on the 15th of September. The notice was served on the 12th of that month. The appellant was then continuing his own default; that is to say he was not proceeding with his contract to the satisfaction of the board. By the terms of his contract with the city it was agreed that "payments may be withheld if the work is not proceeding in accordance with the contract"; and, under his contract of indemnity with the guaranty company, this money would go to the company if his default should continue through the 10 days given him for mending matters. By that he agreed:

"That deferred payments and any and all moneys and properties that may be due and payable to me at the time of such breach or default, that may thereafter become due and payable to me on account of said contract, shall be credited upon any claim that may be made upon the United States Fidelity and Guaranty Company under the bond above mentioned."

We do not decide whether in the absence of any controlling stipulations in his contract, the appellant could, for the nonpayment at the day of this estimate, desert the further performance of it.

Lastly the question is raised "whether if the contract requires ten days' notice to authorize a forfeiture, a notice for a less time is effectual." If by this reference is made to the notice itself, we have already answered it, by saying that the notice conforms to the contract. If it is intended to present the inquiry whether the city could declare the contract off before the lapse of ten days after giving the notice, one sufficient answer is that three days after the notice was given him he abandoned the work, and gave distinct notice that he should not proceed with it. Having done this, he is not in position to insist that the full ten days were not given him in which to set himself right. There is no occasion to inquire whether, but for his own course in reference to the prosecution of the work, the time which elapsed after the notice and before the contract was declared forfeited by the city was sufficient.

The evidence leaves no doubt that, as found by the district judge, the appellant, while insolvent, transferred his property to some of his creditors with intent to prefer them.

We think no error is shown by the record, and the order must be affirmed, with costs.

In re SCOTT.

(District Court, D. Massachusetts. October 26, 1901.)

No. 5,159.

BANKRUPTCY—JURISDICTION—BURDEN OF PROOF IN VOLUNTARY PROCEEDINGS.

Where the allegation of a voluntary petition in bankruptcy in respect to the residence of the petitioner within the district is contested by a motion filed by a creditor as soon as possible after adjudication to vacate the same, while the adjudication requires the creditor to introduce evidence in support of his motion, the burden of proof upon the issue remains on the petitioner.

In Bankruptcy. On review of decision of referee dismissing the petition of a creditor to vacate the adjudication.

Clarence F. Eldredge, for objecting creditor.
Doherty, Lowrie & Ginsberg, for bankrupt.

LOWELL, District Judge. Scott was adjudged bankrupt on his voluntary petition September 21, 1901. The petition alleged "that he has resided or has had his domicile for the greater portion of six months next preceding the filing of this petition at said Boston." On September 24th a creditor filed a petition to vacate the adjudication and dismiss the petition upon the ground that Scott was not a resident of Massachusetts at the time the petition was filed. If the creditor had opposed the adjudication, and if the hearing had taken place before the adjudication was made, the burden of proving residence in Massachusetts would have been upon Scott. I cannot think that this

rule is altered by the fact that the adjudication has already been made, and that the creditor now seeks to vacate it. Where, as here, no opportunity ordinarily exists to contest the adjudication, and the motion to vacate is made as soon as possible, it seems that the burden of proving residence within the district still rests upon the bankrupt. This seems to have been held in Re Waxelbaum (D. C.) 97 Fed 562. Doubtless the adjudication puts upon the creditor the burden of introducing evidence, but, after the evidence is all in, the burden of proof is upon the bankrupt. I hold, therefore, that Scott had the burden of proving that he was at the time of filing the petition a resident of Massachusetts.

At the hearing before the referee the creditor introduced little evidence, and Scott none at all. It appeared that Scott came to Massachusetts on February 6th, and has been held here in confinement since February 12th. The referee found that he had resided in New York shortly before he came to Boston. The evidence of this is scanty, but apparently the fact was not seriously contested. There was no evidence that Scott had ever resided in this district at any time before February 6th. Doubtless he might have acquired a residence between February 6th and February 12th which would not have been interrupted by his consequent confinement, but, unless he was a resident of Massachusetts at the time of his arrest, he has acquired no residence since. Upon the whole evidence, Scott did not prove that he had taken up his residence here by February 12th. He did not take the stand in his own behalf to explain his movements and intentions, and his failure to do so is suspicious.

The judgment of the referee dismissing the creditor's petition to vacate is reversed, but, as there may have been some misapprehension concerning the burden of proof, the matter is recommitted to the referee to permit the introduction of further evidence if he deems this desirable, and otherwise to proceed in a manner not inconsistent with this opinion.

In re MOORE.

(District Court, W. D. Kentucky. October 21, 1901.)

BANKRUPTCY—PROVABLE DEBTS—JUDGMENT FOR FINE.

A judgment imposing a fine as a punishment for violation of a state statute is not a debt provable against the estate of the defendant in bankruptcy. Although within the terms of Bankr. Act 1898, § 63a, defining provable debts, if literally construed, it cannot be supposed to have been the intention of congress that a discharge in bankruptcy should release a defendant from a fine imposed as a punishment for a criminal offense against the laws of either the United States or a state, and such section should be construed as applying only to civil liabilities.

In Bankruptcy. On petition to review decision of referee.

The following is the opinion of Bagby, referee:

On the 13th day of September, 1900, said John W. Moore was by the grand jury of the circuit court of McCracken county, Kentucky, indicted for keeping and maintaining a nuisance in the nature of a disorderly house; and on the 6th day of April, 1901, he was by the verdict of a petit jury in the circuit court of said county found guilty of the charge in the indictment,

and his fine fixed at $400, upon which judgment was entered, and a capias pro fine awarded. Thereafter, on the 30th day of April, 1901, said Moore filed his petition in bankruptcy, and subsequently was adjudicated bankrupt. Afterwards the commonwealth of Kentucky filed herein its claim for amount of the judgment aforesaid. To this claim of the commonwealth of Kentucky the trustee of the bankrupt's estate has filed exceptions, and asked that same be disallowed and expunged, for the reason that same is not a provable debt in bankruptcy. The issue created by the exceptions of the trustee to the claim of the commonwealth of Kentucky filed in this proceeding is whether a judgment upon a fine under an indictment for the offense of keeping and maintaining a disorderly house is a provable debt, within the provisions of the present bankrupt law. In their rulings upon this question the courts have not been uniform, and, because of the importance of the interests involved and to be determined by the judgment of the court in this case, I have deemed it proper that the court should give some reasons for the conclusions reached by the judgment rendered herein.

Section 63 of the present bankrupt act reads as follows: "Debts Which may be Proved. (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments." A literal application of the section quoted makes every debt, claim, and demand against a bankrupt provable which exist at the time the petition in bankruptcy is filed. And from all such debts the bankrupt is released by his discharge according to section 17 of the bankrupt act. "Except such as (1) are due as a tax levied by the United States, the state, county, district or municipality in which he resides; (2) are judgments in actions of frauds, or obtaining property by false pretenses or false representations, or for willful or malicious injuries to person or property of another; (3) have not been fully scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." Section 17 of the bankrupt statute. Reading together sections 63 and 17 of the bankrupt act, it appears that, with the exceptions named in section 17, a discharge in bankruptcy releases the bankrupt from all the provable debts, which are specifically named in section 63. The general ill effects resulting from a literal application of these provisions of the bankrupt law would be so far-reaching and disastrous to the public welfare, I cannot believe that such was the intention of congress in the passage of the act. It is a rule of construction that a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers of the law; and the court, in order to ascertain the intention of the lawmaking body, will look at the whole statute and all its parts; and it is the duty of the court, when satisfied of this intention, to give effect thereto, and not defeat it by adhering too closely to the mere letter of the statute. Oates v. Bank, 100 U. S. 244, 25 L. Ed. 580.

If the claim of the commonwealth of Kentucky filed herein is a provable debt, within the contemplation of the bankrupt law, then the bankrupt will be discharged from so much of the fine adjudged against him by the state

court as the bankrupt's estate is insufficient to satisfy. And it is not contended that the claim is in any sense entitled to priority. For the court to so rule, should the estate of the bankrupt be insufficient to pay his creditors in full, would relieve the bankrupt from the fine imposed upon him as a punishment by the state court, and to that extent would operate as a pardon of his offense. I cannot believe that such was the intention of congress. It is a familiar rule of construction applicable to statutes that the government is not bound by a statute, unless expressly named therein. Laws are prima facie presumed to be made for subjects only, and the government will not be presumed to be binding itself by them unless this intention affirmatively appears. In England the crown is not reached, except by express words or by necessary implication, in any case where it would be ousted of any existing prerogative or interest. And so in the United States the states and national government are not bound by a general statutory provision whereby any of their prerogative rights, titles, or interests will be impaired, unless by express words or irresistible implication. Thus the statutes of limitation are no bar to claims by the government unless the government is included by express words. 23 Am. & Eng. Enc. Law, pp. 365–367. Section 34 of the bankrupt act of 1867 provides "that a discharge duly granted under this act shall * * * release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, * * * as a full and complete bar to all suits brought on and such debts, claims, liabilities or demands." Mr. Bishop, in his work on Statutory Crimes (section 103), referring to this section, says it "is of no avail against a suit by the government"; and in this connection the distinguished author quotes with approval U. S. v. Herron, 20 Wall. 251, 22 L. Ed. 275, wherein it is decided by the supreme court that debts due to the United States are not within the provisions of the bankrupt act of 1867, and are not barred by a discharge under such act, chiefly for two reasons: "(1) The United States are not named in any of the provisions of the act, except the one which provides as to all debts due the United States, and all taxes and assessments under the laws thereof. (2) That many of the provisions describing the duties, obligations, and rights of creditors, * * * if held to include the United States, could not fail to become a constant and irremediable source of public inconvenience and embarrassment." The effect of a discharge under section 17 of the present bankrupt statute has been very ably considered in the case of In re Baker (D. C.) 3 Am. Bankr. R. 101, 96 Fed. 963, wherein the court holds that the claim of a state is not within the provisions for the release of debts owing by the bankrupt by his discharge in bankruptcy, unless expressly made so, and declares that the legislature will not be taken to have postponed the public right to that of an individual, except in cases where such purpose has been most plainly manifest, and in support of its views cites Johnson v. Auditor, 78 Ky. 282, and the action of the United States supreme court in U. S. v. Herron. In reference to the last-named case the court says that the differences between the acts of 1867 and 1898 "are insufficient to indicate an express intention on the part of congress, in the passage of the present act, to establish a different rule as to the devesting of the government, national or state, of its rights or remedies, than that which obtained under the act of 1867, as construed by the supreme court in U. S. v. Herron, supra. If congress had intended that the bankrupt's discharge should operate as a release of his debts owing to the government, it would undoubtedly have so provided in unmistakable terms, especially in view of the rule of construction which has been established and so uniformly followed for so many years." Whether a discharge in bankruptcy will release a debtor from a fine came before Judge Lowell in the United States district court at Boston. A sentence of one year's imprisonment and a fine of $500 had been imposed on O'Donnell for complicity in the bribery of a certain alderman in Lowell. He had served his imprisonment, and contended that his discharge in bankruptcy exempted him from the payment of the fine, as that was one of the items included in his petition in bankruptcy. The commonwealth contended that the fine as well as the imprisonment was a punishment, and that by re-

lieving him from its payment the court would also relieve him from part of his punishment. Upon a writ of habeas corpus tried before Judge Lowell, the writ was refused. See 1 Nat. Bankr. N. p. 59. In construing section 68 of the present bankrupt law, which defines what debts are provable, in the case of Turner v. Turner, 3 Nat. Bankr. N. 823, 108 Fed. 785, in the United States district court, district of Indiana, the court says: "The court will not give to the meaning of a statute a construction which will defeat the benign policy of the state, and which would strike at the foundation of public order and tranquillity. It would overturn and defeat the wisest policy of the state. To so hold would be to decide that congress has the power indirectly, through a bankruptcy law, to defeat the policy of the state in one of its essential features of government. It could not do so directly, because the regulation of the police power is a matter of purely domestic concern. The court could not impute to congress the design to defeat the policy of the state, unless the language claimed to accomplish it is so clear and unmistakable that no other construction can be given it."

The views here contended for by the referee, he believes, are sustained by nearly if not all the leading authorities on bankrupt law and procedure. A fine, penalty, or costs imposed on the bankrupt as a penalty is not usually a provable debt. Lowell, Bankr. It seems clear from subdivision 1 of section 63 that all judgments are provable, except, perhaps, such as are imposed in the nature of punishments, and which are therefore not dischargeable. Coll. Bankr. 384. Such judgments entered before commencement of proceedings in bankruptcy do, indeed, evidence a fixed liability owing at the time, but we feel confident that they are not provable. They may be within the letter of the law, but are not within the spirit of it. Under all former acts they have been considered as not provable. Id. 386. It may be safely said, therefore, that a judgment for a fine, as distinguished from a judgment on a contract, express or implied, or for damages, is not provable. Branden. Bankr. 590, 591. In the absence of specific provision to the contrary, it has been uniformly held that debts due the sovereign are not released by a discharge in bankruptcy, nor is it in any wise bound by a bankruptcy law. Id. 266. That from which the bankrupt's discharge releases him is "all his provable debts." Section 17 of the bankrupt act. And section 1, subd. 11, of the act declares that "'debt' shall include any debt, demand, or claim provable in bankruptcy." From investigation I am disposed to hold that a judgment to recover a fine imposed in the nature of a punishment is not a debt, claim, or demand contemplated by the bankrupt law. The word "debt," as defined by Mr. Blackstone, is: "A sum of money due by certain or express agreement, as by a bond for a determined sum; a bill or note; a special bargain; or rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it." Referring to this definition, Mr. Loveland, in his work on the Law and Proceedings in Bankruptcy, says: "That this is the sense in which 'debt' is used in this section is fairly to be inferred from the context. * * * If this be the meaning of 'debt' in this section, it is clear that a judgment for a fine or penalty, or a claim for alimony, or any other claim or debt not founded upon an agreement or contract, however just or lawful in itself, is not provable in bankruptcy." Loveland, Bankr. § 110. "Debt" has been held not to include a liability in tort, nor costs in a criminal case, nor a fine. 5 Am. & Eng. Enc. Law, 149–152, and notes. In the case of Spalding v. People, 7 Hill, 301, where a fine of $3,000, with costs, had been imposed as a penalty for a criminal offense, the court says: "The very statement of the case is therefore enough to show that there is no color for the ground taken, viz. that the fine is a debt, within the bankrupt law. It is no more a debt than if it had been imposed after conviction on an indictment, or for any of the numerous minor offenses within the calendar of crimes." In this case the debtor applied to the United States court for a writ of habeas corpus, and on appeal to the supreme court of the United States it was held that the fine was not affected by the discharge. 4 How. 21, 11 L. Ed. 858. To the same effect is In re Sutherland, 3 N. B. R. 314, Fed. Cas. No. 13.639, where, after giving the definitions of "debt" in 3 Bl. Comm. 154, and Gray v. Bennett, 3 Metc. (Mass.) 522, the court said: "Look-

ing at the act or the nature of the subject either separately or conjunctively, it appears to me that a judgment for a fine, imposed as a punishment for crime, is not a debt provable against the estate of the bankrupt." This was a decision rendered in the construction of the bankrupt act of 1841 relative to provable debts in bankruptcy,—a statute in this respect quite like the present act.

Counsel insist that the fine in this case having been reduced to judgment before the petition in bankruptcy was filed, according to the provisions of subdivision 1 of section 63, it then becomes a debt, and "a fixed liability, as evidenced by a judgment, absolutely owing at the time of the filing of the petition," and therefore a provable debt; that the criminal nature of the liability is merged in the judgment, and thereby becomes a debt. I do not concur in this statement of the law. It appears to me the better opinion and weight of authority that a claim is not merged in judgment so far as to change the nature of the indebtedness out of which judgment arises. It is true, under the act of 1867 the decisions were not uniform on this point; but after a time the question was presented to the supreme court of the United States in the case of Boynton v. Ball, where the court held that the doctrine of merger did not apply, and that the debt remained the same. See, also, In re McBryde, 3 Am. Bankr. R. 729, 99 Fed. 686; Beers v. Haulin (D. C.) 99 Fed. 695; and the able opinion of Referee Hotchkiss in Re Pinkel, 1 Am. Bankr. R. 333; and Coll. Bankr. 384. My attention has been invited to the decision of Judge Jackson in the case of In re Alderson (D. C.) 98 Fed. 588, in which a contrary opinion is expressed. I regret that after a careful consideration of the questions at issue in this case, and a review of the authorities bearing on the same, I cannot reach the conclusions at which Judge Jackson has arrived.

The exceptions to the claim of the commonwealth of Kentucky filed by the trustee herein are sustained, and allowance of the claim is refused

Samuel Houston, for F. W. Cook Brewing Co. and Arthur Martin, trustee of bankrupt.

W. F. Bradshaw and Eugene Graves, for the Commonwealth.

Hendricks & Miller, for the bankrupt.

EVANS, District Judge. This proceeding is before the court upon a petition for a review of the ruling of the referee expunging the proof of debt filed by the commonwealth of Kentucky. The claim thus proved is for the amount of a fine imposed by a judgment of a state court in a criminal prosecution upon an indictment for a serious public offense. At the trial of the indictment the bankrupt was found guilty, and the statutory punishment was inflicted as the result. Subsequently the petition in the case was filed. The referee disallowed the claim upon the exceptions filed by the trustee, and the question is now before the court upon that ruling. It might be admitted that sections 63 and 17 of the bankrupt act, if only the letter of those provisions be looked to, would embrace such judgments as the one referred to; but it is well settled that there may be cases in which such literal construction is not admissible. U. S. v. Kirby, 7 Wall. 487, 19 L. Ed. 278. And especially where it would lead to an absurd result. Lau Ow Bew v. U. S., 144 U. S. 59, 12 Sup. Ct. 517, 36 L. Ed. 340. I shall not go into details in this opinion. It may suffice to say that nothing but a ruling from a higher court would convince me that congress, by any provision of the bankrupt act, intended to permit the discharge, under its operations, of any judgment rendered by a state or federal court imposing a fine in the enforcement of criminal laws, as such, of either jurisdiction. In my opinion, it was never in-

tended in this indirect way, in derogation of the exclusive right of the chief executive to pardon offenders or to remit fines imposed upon them, to relieve criminals from penalties incurred for criminal acts. It seems to me that to rule otherwise would make the bankrupt court the means of frustrating proper efforts to enforce criminal statutes enacted for the public welfare. Congress, in my opinion, never so contemplated or intended. Judgments such as the one proved in this case may possibly appear to come within the letter of the statute; but nevertheless, as neither state nor national government is mentioned in the act in this connection, I am persuaded that its operations cannot properly be held to embrace judgments imposed in executing the public criminal laws. End. Interp. St. § 161; Black, Interp. St. pp. 119, 120, and cases cited. While in its broadest interpretation this general principle might be considered as applying only to the sovereignty which enacted the statute, still, in our dual form of government, and in view of the considerations already suggested and of an obvious public policy, I think it is clear that the operation of the principle must be so extended as also to exclude the states of the Union, when congress enacts the legislation, and that it should be held in the case before us that congress did not mean to include within the operations of the bankrupt act fines imposed in executing the criminal laws of a state because it did not expressly legislate to the effect that such fines were dischargeable. I know this is a view different from that taken by the venerable judge of the district court of West Virginia in the case of In re Alderson, 98 Fed. 588, 3 Am. Bankr. R. 544; but, with all due respect to that learned and most experienced judge, I cannot yield the convictions which I have expressed. The provisions of the bankrupt act have reference alone to civil liabilities, as demands between debtor and creditor, as such, and not to punishments inflicted pro bono publico for crimes committed. The use of the word "debts" in sections 17 and 63 seems to make this construction inevitable. Any other construction would seem to be improper, and might trench, as already indicated, upon the exclusive constitutional right of the chief magistrate, state or national, to remit fines and grant pardons. With the exceptions mentioned in section 17, any "debt" which is provable is made dischargeable. As a judgment like the one in question does not come within any one of the exceptions, it will be discharged, if provable. As I do not think it can be discharged, the test upon which its provability depends is not met. If these principles are sound, their operation will control in regard to the judgments of federal courts as well as to the judgments of state courts in criminal cases.

It may possibly be that the fine in this case has been replevied, in which event, if the sureties have paid it, or if they do pay it before the distribution of the assets in this case, a civil liability may, and doubtless would, be thereby created between the sureties and the bankrupt, which would be provable by the sureties alone, and they might be entitled to their pro rata share of the assets. This should be looked into, and, if the fact exist, provision should be made accordingly, but otherwise the ruling of the referee is approved and confirmed.

In re McCARTY.

(District Court, N. D. Illinois. October 26, 1901.)

BANKRUPTCY—ISSUES ON APPLICATION FOR DISCHARGE.

The right of a bankrupt to a discharge and its effect are wholly distinct questions, and the latter question cannot properly arise or be considered by the court of bankruptcy on an application for a discharge.

In Bankruptcy. On objections to report of referee on application for discharge.

George B. Foster, for objector.
H. S. Miller, for bankrupt.

HUMPHREY, District Judge. McCarty was adjudged a bankrupt April 23, 1901. The only liability scheduled and the only claim proven is a judgment recovered by William Sheehy against the bankrupt at the March term, 1896, of the circuit court of Peoria county for the loss of the services occasioned by the seduction of the daughter of the said William Sheehy by the said bankrupt, the same being an action of trespass on the case; judgment, interest, and costs amounting to the sum of $3,400. The bankrupt petitioned for his discharge May 13, 1901, and the referee reported May 28, 1901, that he was entitled to his discharge. The objector, William Sheehy, on the 1st day of June, 1901, filed his objections to the discharge, his contention being that the bankrupt is not entitled to be discharged from the debt in question under the second clause of section 17 of the bankrupt law, which provides that a discharge in bankruptcy shall release a bankrupt from all his debts except such as are judgments in actions * * * for willful and malicious injury to the person or property of another; and the objector contends that the injury complained of was willfully and maliciously committed against the person of him, the objector. When a bankrupt files his application for discharge, the only facts pleadable in opposition thereto are the causes mentioned in section 14 of the act. Unless the bankrupt has committed some one of the offenses described therein, the court must discharge him. Section 17 of the bankrupt law reaches further, but it does not control this case. The right to a discharge and the effect of a discharge are entirely distinct propositions. Section 14 fixes the right to a discharge. Section 17 goes to the effect of a discharge. The question before the court is as to the right of the bankrupt to his discharge. The other question—the effect of such discharge if, in the future, it shall be pleaded in bar of the collection of the judgment in question—will arise in the proper tribunal where such collection is sought to be enforced. In re Marshall Paper Co., 43 C. C. A. 38, 102 Fed. 872.

The exceptions to the report of the referee are not sustained. The report is approved, and the discharge will be granted.

In re MUTUAL MERCANTILE AGENCY.

(District Court, S. D. New York. October 22, 1901.)

1. BANKRUPTCY—CORPORATIONS—MERCANTILE AGENCY.
A corporation organized to "establish, maintain and conduct a general mercantile agency," and whose business was gathering information and printing and publishing a book of ratings with respect to the standing of merchants, which it loaned to its subscribers, comes within the provisions of Bankr. Act 1898, § 4b, and may be adjudged an involuntary bankrupt.[1]

2. SAME—ACTS OF BANKRUPTCY—WRITTEN ADMISSION BY CORPORATION.
A written admission, signed by the president of a corporation by order of its board of directors, that the corporation is unable to pay its debts, and is willing to be adjudged a bankrupt on that ground, is sufficient to constitute an act of bankruptcy, under Bankr. Act 1898, § 3a, cl. 5, which will authorize its adjudication as an involuntary bankrupt.

3. SAME—INVOLUNTARY PETITION—TIME FOR APPEARANCE BY OPPOSING CREDITORS.
Bankr. Act 1898, § 59f, which provides that creditors other than the original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition, does not authorize a creditor to appear and file an answer to an involuntary petition raising new issues after the time fixed for pleading to the petition by section 18b has expired, where such time has not been extended, and the petition has been heard on the issues as then made up.

In Bankruptcy. Hearing on involuntary petition.

Dill & Baldwin, for petitioning creditors.

J. Quintus Cohen, for opposing creditor.

George Edwin Joseph, for receiver.

ADAMS, District Judge. Three creditors of the Mutual Mercantile Agency filed a petition alleging it to be a corporation organized under the laws of the state of New Jersey, engaged principally in publishing, printing, and mercantile pursuits; that, being insolvent, it committed an act of bankruptcy, in that it admitted in writing, over the signature of its president, and by order of the board of directors, its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground. A creditor duly answered the petition, and, without denying the facts alleged in the petition, alleged that the corporation was not one falling within the terms of the act, and asked for a dismissal of the petition. The action was brought to trial on the 3d day of October, 1901, upon this issue. At the opening of the case a motion was then made by the creditor to dismiss the petition on the ground that it did not state facts sufficient, under the statute, to have the defendant declared a bankrupt. Decision upon this motion was reserved. The charter was then introduced in evidence, by which it appeared that the company was incorporated in April, 1899, to conduct a general mercantile agency. It provides as follows:

"To establish, maintain and conduct a general mercantile agency, to carry on every branch of business usually transacted in connection therewith, including the obtaining and acquiring by purchase or in any other lawful

[1] What persons are subject to bankruptcy law, see note to Mattoon Nat. Bank of Mattoon v. First Nat. Bank of Mattoon, 42 C. C. A. 4.

manner information, statistics, facts and circumstances of, relating to, or affecting the business, capital, debt, solvency, credit, responsibility and commercial condition and standing of any and all individuals, firms, associations and corporations engaged in or connected with any business, occupation, industry or employment in any part of the civilized world, and particularly in and throughout the United States, and Canada, and to dispose of, sell, loan, pledge, hire and use in any and all lawful ways the information, statistics, facts and circumstances so obtained and acquired; also to establish, maintain and conduct a general collection business for the recovery, enforcement and collection of accounts, bills, debts, dues, demands and obligations and claims of all kinds; also to establish and conduct a general business of making and issuing contracts to secure the faithful performance of any mercantile or commercial contract or agreement, and for the prompt payment of any debt or obligation due by, under or arising from or out of any mercantile or commercial transaction; also to acquire by purchase or otherwise and to establish, maintain and conduct a general printing, publishing, bookbinding and advertising business, and to prepare and distribute newspapers, books, pamphlets, directories, catalogues, reports, ratings, digests, lists and other printed matter of interest or use to merchants, traders, bankers and lawyers."

The charter further provided:

"(3) The board of directors, and when the board is not in session the executive committee, in addition to the powers and authorities by statute, and by the by-laws expressly conferred upon them, are hereby empowered to exercise all such powers and to do all such acts and things as may be exercised or done by the corporation, but subject, nevertheless, to the provisions of the statute, of the charter, and to any regulations that may from time to time be made by the stockholders: provided, that no regulations so made shall invalidate any provisions of this charter, or any prior acts of the directors or the executive committee which would have been valid if such regulations had not been made."

Testimony was then given tending to show that the business of the company was gathering information and printing and publishing a book of ratings with respect to the standing of merchants in the United States and elsewhere. This information was furnished to subscribers throughout the country by means of the books which it loaned to the subscribers. No testimony was offered in behalf of the objecting creditor. At the close of the case a motion was made to dismiss the petition upon its allegations and the evidence.

The corporation seems to be one falling within the description of section 4b of the act. The admission of the bankruptcy of the corporation by the directors is apparently within their authority. It seems to be well established that the acts of directors in such particulars are sufficient to establish bankruptcy. In re Marine Machine & Conveyor Co. (D. C.) 91 Fed. 630; In re T. L. Kelly Dry Goods Co. (D. C.) 102 Fed. 747; In re Rollins Gold & Silver Min. Co., Id. 985; In re Peter Paul Book Co. (D. C.) 104 Fed. 786, 788.

It is said, however, on behalf of the objecting creditor, that the laws of New Jersey (Laws 1896, p. 298, art. 7, § 64) preclude the directors from legally assenting to an adjudication of bankruptcy. I do not find that such is the case. The section in question would doubtless prevent the directors from making a valid transfer of the property of an insolvent corporation, or one in contemplation of insolvency, but would not prevent them from admitting, for the benefit of the creditors generally, that the corporation is unable to

pay its debts, and its willingness to be adjudged a bankrupt on that ground under the federal law.

The trial was completed on the 3d day of October, and decision was reserved. On the 5th day of October the attorney for the objecting creditor filed an answer on behalf of another creditor, raising entirely new issues in the action. The petitioning creditors moved to strike out this answer on the ground that the time within which the objecting creditor could file an answer under section 18, subd. "b," of the bankruptcy act, expired on the 7th day of September, 1901, and that no further time had been allowed by the court. The objecting creditor relied upon the provision of section 59, subd. "f," providing that creditors other than the original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition. I do not think it was intended by such provision to permit creditors to come in one by one, and each have an opportunity to contest the questions incident to an involuntary adjudication. This case is governed by section 18, subd. "b."

Motion to strike out granted, and adjudication ordered.

In re RONK.

(District Court, D. Indiana. October 23, 1901.)

No. 914.

BANKRUPTCY—LIENS—MORTGAGE EXECUTED PURSUANT TO PRIOR AGREEMENT.

A chattel mortgage executed by an insolvent within four months prior to his bankruptcy to secure in part a past loan is not rendered a valid lien as to such past consideration because of an agreement to execute it when the loan was made, when it would otherwise be voidable as a preference under Bankr. Act 1898; and especially where, by the laws of the state, if the mortgage had been executed at the time the loan was made, but not recorded until the time it was actually executed, it would have been void as to other creditors.

In Bankruptcy.

Harvey, Pickens, Cox & Kahn, for creditors.
Crane & Anderson, for Mary A. Ronk.

BAKER, District Judge. This is a petition to review the order of the referee adjudging a chattel mortgage executed when the bankrupt was insolvent, and within four months of the adjudication, to be a valid and preferential lien over the claims of other creditors. The mortgage secures two notes,—one of $750 and one of $350,—with interest; each bearing date November 14, 1900, and falling due in one year thereafter. The bankrupt is a householder, and entitled to an exemption of $600 under the statutes of the state. His entire estate above his exemption does not exceed the sum of $800, so that, if the mortgage is a valid preferential lien, other creditors of the bankrupt equally meritorious will receive nothing. The mortgagee is the mother of the bankrupt, who, with his wife, lives in the same house

with his mother. That the mortgage would be invalid, except to the extent of $100 advanced on the day the mortgage was executed, is not and cannot be seriously questioned, in the absence of the facts about to be mentioned. It is earnestly insisted, however, that the mortgage constitutes a valid lien, because at the time the loan was agreed to be made the bankrupt promised and agreed to give his mother a chattel mortgage on all the goods, wares, and merchandise in his store, and also on all his after-acquired goods, wares, and merchandise, to secure the loan of $1,100. On November 14, 1900, the mortgagee agreed to loan her son $1,100, to be repaid within one year; and on that day she advanced to him $750 on account of the loan, and agreed to advance the remaining $350 from time to time as she might be able to do so. I find no evidence in the record to show when or within what time the balance of the loan was to be paid to the bankrupt. The $350 was actually paid as follows: On December 12, 1900, $100; on February 15, 1901, $45; on February 18, 1901, $55; on March 7, 1901, $50; and on March 29, 1901, $100. On the last-named day the bankrupt executed his note to his mother for $350, dated November 14, 1900, and falling due one year after date, and at the same time executed the chattel mortgage in question to secure the payment of these two notes. No time was ever agreed upon, either on November 14, 1900, or at any other time, when the $350 should be paid. The testimony is that the mother was to pay it as she might be able to collect it from certain claims owing to her. The evidence does not show whether the mortgage was to be made at such time as the mother might request it, or whether it was to be made contemporaneously with the last payment. The time within which the $350 was to be paid was never agreed upon, nor was any time agreed upon when the mortgage should be executed.

Does the verbal agreement made on November 14, 1900, to give the mother a chattel mortgage, under the circumstances above stated, constitute such claim or lien as to render the mortgage thereafter executed in pursuance of it a valid preferential security? The statute of this state (section 4913, Rev. St. Ind. 1881) enacts:

"No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof."

If the mortgage had been executed on November 14, 1900, and had not been recorded until March 29, 1901, manifestly it would have been invalid as against creditors. It is difficult to perceive how, in view of this statute, a secret claim or equity can be held to have been created by the verbal agreement, when a mortgage or assignment actually executed by the parties at that time, if unrecorded, would have been invalid as against creditors. It is apparent that it was the purpose of the legislature to allow no valid claim, lien, or secret equity to be created on goods unless public disclosure was made either by delivery of the goods to the assignee or mortgagee and the retention thereof by him, or by recording the assignment or mort-

gage within 10 days. To hold otherwise would be to defeat the beneficial effect of the recording statute. Section 67, cl. "a," of the bankruptcy act, provides:

"Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

It cannot be successfully maintained that the verbal agreement created a valid lien as against the claims of the creditors; and, if it did not create a valid lien, then, by the terms of the bankruptcy act, it cannot be enforced as a lien entitled to priority over other claims. It created no lien,—nothing but a secret equity, possibly good as between mother and son, but certainly not valid and enforceable to the prejudice of the claims of creditors. The bankruptcy act embraces payments for the purpose of giving preferences, as well as the giving of securities for such purpose; and it would hardly be contended that a preference by way of payment, otherwise invalid, would be valid because the debtor had agreed at the time it was contracted to pay the debt, without defalcation, on a specified day. The doctrine contended for by the mortgagee would necessarily invite and inevitably lead to the defeat of the bankruptcy act. It would be easy in every case where it was desired to thwart the operation of the law and to give a preference to a relative or a friend to make an agreement at the time the money was loaned or the credit given for a mortgage to be executed in the future. If the law can be thus evaded, it would be an open invitation to every person loaning money or giving credit to the bankrupt to enter into such a verbal agreement with him. Such agreements, if held valid, would create secret liens upon the bankrupt's property, and would enable him in every case to effect the very objects which it was the purpose of the bankruptcy act to prevent. Such agreements would undoubtedly be made in every case where the debtor wished to secure relatives and friends to the detriment of his other creditors. It would be a standing invitation to perjury, and would defeat the declared policy and purpose of our state legislation, as well as the policy and purpose of the bankruptcy act. I have examined all the cases cited by counsel for the respective parties, but it seems to me that it would serve no useful purpose to enter upon a review of them. It is sufficient to say that they are not in entire harmony.

The order of the referee must be reversed, with directions to enter an order allowing the claimant a preferential lien to the extent of $100, with interest from March 29, 1901, and to disallow the residue of the mortgage as a preferential lien; and if the claimant shall within 15 days surrender said mortgage, except to the extent above indicated, then the residue of her claim shall be allowed without preference, to be paid pari passu with the claims of other creditors; and, if she fails to surrender as above required, then her claim is to be expunged, except to the extent above allowed.

SMITH v. KEEGAN.

(Circuit Court of Appeals, First Circuit. October 17, 1901.)

No. 384.

BANKRUPTCY—DISCHARGE—GROUNDS FOR REFUSAL.

To authorize the refusal of a discharge to a bankrupt on the ground that he has committed an offense punishable by imprisonment under Bankr. Act 1898, it must be clearly shown that the alleged acts were committed with unlawful intent.

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

John J. Scott, for appellant.

Gilbert O. Burnham, for appellee.

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

PUTNAM, Circuit Judge. This is an appeal from an order of the district court for the district of Massachusetts, sitting in bankruptcy, granting a discharge to the bankrupt, who is the appellee. The only portions of the record brought before us are the report of the referee, which was before the district court, and an examination of the bankrupt by the creditor, who is the appellant. The only grounds of opposition to the discharge which are brought before us are, in substance: First, that the bankrupt made a false oath in his schedule of creditors filed by him as a bankrupt, in that the same set out that the appellant resided on Green street, in Boston, while in fact he never lived there, and in that the bankrupt thus willfully, knowingly, and falsely made oath with reference to the creditor's place of residence; second, that the bankrupt is the owner of a certain parcel of land which stands in the name of his wife in trust for the bankrupt, but that the bankrupt, while a bankrupt, knowingly and fraudulently concealed from the trustee his ownership of such real estate; and, third, that the bankrupt, while a bankrupt, knowingly and fraudulently concealed some $2,800.

The several grounds of opposition fall, of course, within the purview of that portion of section 14b of the act to establish a uniform system of bankruptcy throughout the United States, approved on July 1, 1898, which relates to committing an offense punishable by imprisonment. With reference to the first objection, nothing appears in the examination of the bankrupt, or in the facts stated by the referee, except matters which are of too indefinite and loose a character to justify any tribunal, whether proceeding in a civil suit or in a criminal cause, to find the unlawful intent which the statute requires in this connection. So far as the second and third specifications, which are in essence one, are concerned, we do not find it necessary for this case to determine whether or not the bankrupt has any interest in any property which the trustee might reach by any proceeding at law or in equity, because clearly there is nothing in the record which shows the unlawful purpose required by the stat-

ute to justify the refusal of the bankrupt's discharge. In this latter particular we agree with the referee in his finding, which was approved by the district court, that the specifications are wholly unsupported by the evidence. As only mere questions of fact are involved, nothing would be gained by extending this opinion in reference thereto.

The order of the district court granting a discharge is affirmed, and the costs of appeal are awarded to the appellee.

In re YOUNG.

(Circuit Court of Appeals, Eighth Circuit. September 9, 1901.)

No. 25.

BANKRUPTCY—PROPERTY TAKEN ON ORDER OF SEIZURE—MOTION FOR RETURN.

Where a marshal, under an order of seizure issued to him by a court of bankruptcy under Bankr. Act 1898, § 2, cl. 3, took property which he found in the bankrupt's possession, and which was surrendered to him by the bankrupt as his own, the court did not commit error in refusing, on a mere motion, to order such property returned to a mortgagee upon his claim that he was legally in possession under his mortgage when it was seized, the validity of his mortgage being denied by creditors, but the court acted within its discretion in requiring the claimant to assert his rights by plenary action, in which they could be more properly tried and determined.

Petition for Review of Order of the District Court of the United States for the Western District of Arkansas, in Bankruptcy.

Homer C. Mechem and Edgar E. Bryant, for petitioner.

Ben T. Du Val, for respondent.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge. This is an original petition addressed to this court for the purpose of obtaining a review of an order made in a bankruptcy proceeding by the United States district court for the Western district of Arkansas. The opinion of the district judge on which the order in question was based is reported in 106 Fed. 873. The petition for review discloses the following facts: John D. Bender was adjudged a bankrupt on March 12, 1901, under an involuntary petition which was filed on February 2, 1901. Previous to the institution of bankruptcy proceedings, and on or about October 8, 1900, Bender had executed mortgages upon his property, and had placed the same of record, which, as his creditors claimed, were fraudulent and operated as a preference, he being at the time insolvent. On March 12, 1901, certain affidavits were filed in behalf of the bankrupt's creditors, which charged, in substance, that the bankrupt was neglecting his property, and that it was liable to be disposed of improperly unless a warrant was issued to the marshal requiring him to take immediate possession of all of his property. In view of the representations so made, a warrant of seizure

was issued to the marshal, in obedience to which the marshal went to a saloon which was at the time in the actual possession of the bankrupt, and on exhibiting his warrant the possession of the saloon and its contents was surrendered to him by the bankrupt without protest. Subsequently D. J. Young, the petitioner, appeared in the district court and moved that the marshal be required to surrender to him the possession of the saloon and its contents. In support of this motion he exhibited a mortgage which had been executed in his favor by the bankrupt on September 18, 1900. He claimed that at the time the saloon was seized by the marshal the bankrupt was in possession thereof merely as the petitioner's agent, and under an arrangement existing between them whereby the bankrupt accounted to the petitioner for the daily sales made at the saloon. This motion was resisted by the bankrupt's creditors. They alleged, and the district court so found, that when the marshal exhibited the warrant to the bankrupt the latter surrendered the possession of the saloon without protest, and did not even advise the officer that he was holding the property as Young's agent. They further charged that the mortgage under which the petitioner claimed had been concocted by the bankrupt and the petitioner for the purpose of hindering, delaying, and defrauding the bankrupt's creditors, and that it was also voidable under the provisions of the bankrupt law, as an unlawful preference. After a hearing had upon the motion the same was overruled by the district court, but without prejudice to the petitioner's right to bring a plenary action for the recovery of the property in any court of competent jurisdiction. This order is said to have been erroneous, in that the motion should have been sustained, and in that the district court should have ordered the marshal to relinquish the possession of the saloon and its contents to the petitioner without forcing him to bring a plenary action for the recovery of the property.

In the case of Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, which was recently decided by the supreme court, it was held that clause 3 of section 2 of the bankrupt act vests courts of bankruptcy with authority after the filing of a petition in bankruptcy, and also after an adjudication in bankruptcy, but before the trustee has qualified, to appoint a receiver or the marshal to take charge of the property of the bankrupt when it is deemed absolutely necessary to do so for the preservation of his estate. In the same case it was also decided that a warrant issued to the marshal under such circumstances authorizes that officer to take possession of the property of the bankrupt in the hands of third persons who claim title thereto, and in that behalf certain observations of Mr. Justice Miller in Sharp v. Doyle, 102 U. S. 686, 689, 690, 26 L. Ed. 277, showing the necessity which exists in certain cases for the exercise of such a power, were quoted with approval. Reference was also made with approval to the decision in Feibelman v. Packard, 109 U. S. 421, 3 Sup. Ct. 289, 27 L. Ed. 984, wherein it was held that a district court of the United States sitting in bankruptcy has jurisdiction to seize goods that are the property of the bankrupt, although they are in the possession of another person under a claim of title,

and that, if the officer is sued by such third party for the seizure of the property, he may justify his conduct by proof that the title to the property was vested in the bankrupt, and that any local law in conflict with the exercise of such right will not be regarded as having any application to seizures made under the bankrupt law. In the same case the court also took occasion to observe that the statement contained in its previous decision in Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, to the effect that the marshal could not forcibly seize property of a bankrupt in the possession of an adverse claimant, although acting under a writ issued pursuant to clause 3 of section 2 of the bankrupt act, was an inadvertence and purely obiter.

It follows, therefore, that on the showing made by the creditors of Bender the district court properly issued an order directing the marshal to take possession of all his property and effects, and that under that order the marshal had the right to take possession of such property, although it was found in the custody of third parties, and was claimed adversely by them. The decision in Bryan v. Bernheimer, supra, seems to answer all of the contentions on the part of the petitioner. The marshal had a valid warrant for the seizure of all the bankrupt's property of every kind and description. He found the saloon and its contents in the actual possession of the bankrupt, and was not advised that the bankrupt claimed to be in possession as a bailee or agent for the petitioner. When this latter fact was averred by Young in support of his motion for a restoration of the property, it was met by a counter averment on the part of the bankrupt's creditors to the effect that the mortgage under which the petitioner claimed title to the property was fraudulent and void, that the saloon and its contents in reality formed a part of the bankrupt's estate, that it was rightfully held by the marshal, and that the possession thereof ought not to be surrendered to the petitioner. The order of the district court which we are asked to review was in effect a refusal to try the issues thus raised upon a mere motion. Inasmuch as the marshal had the right to seize the saloon and its contents, although it was held adversely by the petitioner, if it was in fact and in law the bankrupt's property, the district court could not grant the motion and order a surrender of the property without hearing such evidence as the bankrupt's creditors might produce, and deciding whether the property formed a part of the bankrupt's estate. It declined to do this upon a mere motion, and remitted the petitioner to his action at law in any court of competent jurisdiction, or to an intervention in the bankruptcy proceeding, where the issues involved could be more formally presented and determined. It is manifest, therefore, that the order made below was not an erroneous order which this court should disturb, unless it be true that the petitioner had the right to have the controversy between himself and the bankrupt's creditors touching the ownership of the saloon determined on a mere motion. He was denied no other right, since the order made below leaves him at full liberty to assert his title to the property in controversy in any other appropriate form of proceeding. We are unable to hold that the peti-

tioner is entitled to have his right to the property adjudicated upon a mere motion, but are of opinion that in the exercise of its discretion the district court had the power to require the petitioner to assert his title to the property by a plenary action or by an intervention. It is true that it is the duty of all courts to see that such process as they may issue directing the seizure of property is not abused or so executed as to needlessly oppress or injure third persons who are strangers to the litigation. Ordinarily they should act with as much expedition as possible when complaint is made that under color of process the rights of third parties have been invaded. Gumbel v. Pitkin, 124 U. S. 131, 145, 146, 8 Sup. Ct. 379, 31 L. Ed. 374; Boltz v. Eagon (C. C.) 34 Fed. 445, 447. But the obligation to grant relief for an alleged abuse of its process is not so imperative as to require a court to hear and decide on a mere motion whether its officer has acted wrongfully, in every case when it is suggested that he has seized property that was not within the terms of his warrant. When third parties claim title to property that has been seized by the marshal under a warrant, as forming part of a bankrupt's estate, it will sometimes be found most convenient to settle the controversy summarily on a mere motion filed in the bankruptcy proceedings; but in other cases, where the claimant's right depends upon a decision of contested issues of fact or disputable questions of law, it will doubtless be found most expedient to require the controversy to be determined by a plenary action either in the bankruptcy court or in some other court of competent jurisdiction. As such controversies arise, the bankruptcy courts can best determine how the issues involved can be tried with least delay, inconvenience, and expense, and with the greatest assurance of reaching a correct result. They should accordingly be allowed to direct the course of procedure in such cases, and orders made in that behalf should not be disturbed unless the case discloses a clear abuse of this discretionary power. In view of the charge made by the bankrupt's creditors in the case in hand that the mortgage under which the petitioner claimed was fraudulent in fact as well as voidable under the provisions of the bankrupt act, we are satisfied that the order made by the learned district judge declining to dispose of these issues on a mere motion, and requiring them to be tried and determined in a plenary action or by an intervention, was a reasonable and proper order.

The petition to obtain a review and a nullification of that order is accordingly dismissed at the costs of the petitioner.

In re NOVAK.

(District Court, N. D. Iowa, Cedar Rapids Division. October 11, 1901.)

BANKRUPTCY—TITLE OF TRUSTEE TO MORTGAGED PROPERTY—RIGHT OF REDEMPTION.

Where under the state laws the legal title to mortgaged property remains in the mortgagor, such title vests in his trustee in bankruptcy, together with his statutory right of redemption from a foreclosure sale under a decree rendered after the adjudication.

In Bankruptcy. On certificate of referee presenting question of right of trustee to redeem certain realty from foreclosure sale.

S. H. Fairall, Ranck & Bradley, and W. J. Baldwin, for trustee.
Remley & Ney, for bankrupt.

SHIRAS, District Judge. The question presented by the certificate of the referee is whether the trustee in this case has the right to redeem certain realty from a sale made thereof under a decree of foreclosure rendered by the district court of Johnson county, Iowa, on the 17th day of September, 1900, in which case the bankrupt and the trustee were made parties defendant. On behalf of the bankrupt it is contended that the decree, by its terms, bars all equity of redemption, and therefore the trustee cannot exercise such right, and furthermore that, if not barred by the terms of the decree, the trustee possesses and can exercise only the right of redemption conferred by the statutes of Iowa upon creditors of the debtor, who are required to redeem within nine months from the date of sale, and that the right reserved by the statute to the judgment debtor to redeem within the three months succeeding the nine months is a personal right belonging to the debtor, which will not pass to the trustee in bankruptcy. The decree of foreclosure in terms bars all the equity of redemption of all of the defendants, but this only means that the equitable right to redeem from the mortgage is barred, leaving to the parties the rights of redemption from the sale which are provided by the statutes of Iowa. If it be true that in this case the trustee possesses only the right of redemption accorded to creditors, then he cannot redeem from the sale, as that took place more than nine months ago. Under the law of Iowa the title to mortgaged realty remains in the mortgagor, and under the provisions of section 70 of the bankrupt act there passed to the trustee in this case the title held by the bankrupt at the date of the adjudication to all "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." The adjudication in bankruptcy preceded the entry of the decree of foreclosure, and therefore at the date of the adjudication the title to the realty passed to the trustee, and was vested in him at the date of the decree and at the date of the sale had thereunder. Under these circumstances the trustee is the successor to the rights of the bankrupt in said property, including the statutory right of redemption; and the referee rightly held that there was no interest left in the bankrupt which would preclude the trustee from exercising the right to redeem the property in case it was deemed advisable so to do.

The ruling of the referee is therefore affirmed.

As a matter of equity, the trustee should act promptly in the premises, and, if he concludes not to redeem the property, he should at once notify the bankrupt of such conclusion, in order that the latter may redeem from the sale if he wishes to do so.

In re ELLITHORPE.

(District Court, W. D. New York. August 8, 1901.)

No. 382.

BANKRUPTCY—EXEMPTIONS—PROPERTY PURCHASED WITH PENSION MONEY.

Under the laws and decisions of New York a bankrupt pensioner of the United States is not entitled to have set off as exempt real property purchased in the first instance partly with pension money, but out of which he has withdrawn, by way of mortgage, more than the pension money originally put in, and used the money so withdrawn in other ventures.

In Bankruptcy. On review of order of referee.

Calvin S. Crosser, for bankrupt.
William H. Means, trustee, in pro. per.

HAZEL, District Judge. The bankrupt objects to the refusal of the referee to set off to him as exempt certain real property alleged to have been purchased with pension money. Under the provisions of the bankruptcy act, the bankrupt is entitled to the exemptions allowed him by the state of his residence. The present case is therefore governed by the laws of the state of New York. The authority for the bankrupt's claim is based on section 1393 of the Code of Civil Procedure of the state, which provides, among other things:

"The pay and bounty of a non-commissioned officer, musician or private in the military or naval service of the United States or the state of New York; a land warrant, pension or other reward heretofore or hereafter granted by the United States, or by a state for military or naval services: * * * are also exempt from levy and sale, by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding; except that real property purchased with the proceeds of a pension granted by the United States for military or naval services and owned by the pensioner, or by his wife or widow, is subject to seizure and sale for the collection of taxes or assessments lawfully levied thereon."

This section has been construed by the state court of appeals, and the rule of that court will be adopted here. The exemption of the pension money is for the benefit of the pensioner, and is not permitted to inure to the benefit of any other person. The money may be applied to his support and maintenance, may be saved intact for future use, or may be invested by the beneficiary in real or personal property necessary for the maintenance and support of himself and family. Such property is exempt as long as it can be strictly identified as the actual proceeds of the pension. If the pension is embarked in business enterprises or employed in speculation, which results in intermingling the bounty of the government with other property interests and rendering the pension funds incapable of identification, then the statutory exemption is lost. Bank v. Carpenter, 119 N. Y. 550, 23 N. E. 1108, 7 L. R. A. 557, 16 Am. St. Rep. 855. The referee has exhaustively and accurately reviewed the authorities upon this question. He has fully and correctly reported the facts. I have examined the evidence as handed up by the referee. It clearly appears that the real property in question was only partly

purchased with pension money, and was not necessary or convenient for the support and maintenance of the pensioner and his family. It is not essential that the pensioner should reside on the property claimed to be exempt, but, as the referee well states, it is not unreasonable to require that a bankrupt claiming exemption should show:

"(1) That the property claimed was originally purchased, or is the outcome by exchange or transfer of property originally purchased, with the pension money, and that its substitute now claimed was and is necessary and convenient for the support and maintenance of the pensioner's family; and (2) that the property claimed is worth above the mortgage no more than the pension money originally put in, and that that money is still in the property."

It is insisted by counsel for bankrupt that, inasmuch as a pensioner would be entitled to an increase of pension money judiciously invested, an investment in real estate, and the increase thereof realized by virtue of rents, barter, and sale, are also exempt. The rule of law, briefly stated, is that if the investment solely of the pension money is in the nature of a particular kind or class, intending to provide either for the present or future welfare of the pensioner and his family, it will be protected as exempt. The proofs do not show that any such intention existed on the part of the bankrupt at the time of the investment nor since, and it also appears that the bankrupt has more than twice received the amount of pension money invested in this property, as a result of sales of a portion thereof. Proof of the essential elements justifying exemption is lacking.

The question submitted for review, whether under the laws and decisions of the state of New York a bankrupt pensioner of the United States is entitled to claim and have set off to him as exempt real property purchased in the first instance partly by pension money, out of which the bankrupt has withdrawn, by way of mortgage, more money than the pension money originally put in, and used such moneys so withdrawn in other ventures, must be answered in the negative. So ordered.

UNITED STATES v. ONE PEARL NECKLACE et al.

(Circuit Court of Appeals, Second Circuit. August 22, 1901.)

No. 135.

1. CUSTOMS DUTIES—ADMINISTRATION—ENTRY OF PASSENGER'S BAGGAGE.
Rev. St. §§ 2799, 2801, are not intended to provide alternative methods of dealing with the baggage of a passenger entering the United States, and the discretion given to the customs officers by section 2801 to make an examination of such baggage does not dispense with the necessity of making the entry required by section 2799 in all cases before the baggage can be landed.

2. SAME—FORFEITURE—FAILURE TO MENTION ARTICLE FOR ENTRY.
Any dutiable article found in the baggage of a passenger entering the United States, which was not at the time of making the entry of such baggage under Rev. St. § 2799, "mentioned to the collector before whom such entry was made by the person making the entry," is subject to forfeiture, under the provisions of section 2802, without regard to the

existence of any fraudulent intent; but it is a sufficient "mention" of an article to avoid forfeiture if it is called to the attention of the officer who, as representative of the collector, takes the entry or declaration, although it is not mentioned therein.

3. SAME—EXEMPTIONS—PERSONAL APPAREL AND EFFECTS.
Paragraph 697 of the tariff act of 1897 (30 Stat. 202) places on the free list "such articles of wearing apparel, personal adornment, toilet articles and similar personal effects as are in the use of and accompanying persons arriving in the United States and are necessary and appropriate for the immediate purposes of the journey and their present comfort and convenience: provided that in case of residents of the United States returning from abroad all wearing apparel and other personal effects taken by them out of the United States to foreign countries shall be admitted free of duty, without regard to their value, * * * but no more than one hundred dollars in value of articles purchased abroad by such residents of the United States shall be admitted free of duty upon their return." *Held*, that such paragraph classifies exempt articles according to the citizenship of the persons arriving in this country, and that the provisions preceding the proviso have no application in case of a citizen of the United States, whose exemptions are those only enumerated in the proviso.

4. SAME—FORFEITURE—FAILURE TO DECLARE FOR ENTRY.
The fact that the printed form for entry of baggage prepared by the treasury department and presented to passengers entering the country for signature is misleading and unintelligible, or that it is not properly filled out by the customs officers, will not relieve a passenger from the forfeiture consequent upon his failure to mention to the officer articles which are dutiable.

5. SAME—ACTION FOR FORFEITURE—INSTRUCTIONS.
In an action by the United States for a forfeiture of property for an alleged violation of the customs laws, it is error to charge the jury that the government has a lien upon the property, and can recover the duty thereon, although they should return a verdict for defendant, such instruction being irrelevant to the issues, and one which could serve no purpose except to unduly influence the jury.

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

Henry F. Burnett, U. S. Atty.
W. Wickham Smith, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The government was the plaintiff in the court below, and brings this writ of error to review a judgment for the claimant entered upon the verdict of a jury. 105 Fed. 357. The action was brought to condemn as forfeited to the United States certain jewelry, the property of the claimant, seized June 24, 1899, by the collector of the port of New York, upon the theory that it had been introduced into the United States in violation of the revenue laws. The information contained four counts. The first count averred that the articles of jewelry were smuggled and clandestinely introduced into the United States, with the intention of defrauding the revenue. This count was abandoned upon the trial. The second count averred that the jewelry was dutiable merchandise fraudulently imported into the United States by the claimant without entering the same for duty, and without paying the duty thereon, and was liable to forfeiture under section 3082 of the Revised Statutes. The

third count averred that the articles were subject to duty, were found in the baggage of the claimant when she arrived within the United States on the steamship St. Paul, and had not been mentioned or declared to the collector at the time of making entry of said baggage, and were liable to forfeiture under section 2802 of the Revised Statutes. The fourth count averred that the articles were subject to duty, and were brought into the United States in the steamship St. Paul, and unladen and delivered within the port of New York from said vessel without a permit from the collector and naval officer according to sections 2872 and 2874 of the Revised Statutes.

Upon the trial of the action the following facts appeared: The claimant, a passenger returning to her home in the city of New York from a visit to Europe, arrived on the steamship St. Paul at the port of New York on the 24th day of June, 1899, bringing with her as baggage several trunks and other parcels of luggage. Before the vessel reached the dock, she made an entry of her baggage, and subscribed and verified by oath the accompanying declaration presented to her by one of the customs officers, in which she specified the number of her trunks and other parcels. The declaration contained the following printed statement:

"That such baggage is my personal property (and that of my maid, who accompanies me); that all of the articles in my baggage or on my person purchased abroad (and intended for others or for sale), and their cost prices paid by me, or by others who have intrusted them to me, are fully set forth and described in the annexed entry; that, with the exception of said articles, the said baggage contains only such wearing apparel and personal effects (as were taken by me and my ——— out of the United States) and includes only such articles as are in the use of and necessary and appropriate for the immediate purposes of the journey and present comfort and convenience of myself (and my ———), and are not articles intended for other persons or for sale."

The entry annexed to the declaration set forth the foreign cost of two articles which she had purchased abroad, but did not mention the cost price of any of the jewelry; nor did it contain anything to indicate that there was any jewelry in the baggage. After the vessel reached the dock, and claimant had disembarked, and her baggage had been landed, and while it was being examined by the customs officers, she was accosted by one of them, and told by him that he was informed that she had with her valuable jewelry which she had not entered for duty in her declaration. He asked her to indicate that part of her baggage in which it could be found, whereupon she stated that her jewelry was in the satchel then in her hands, and handed the satchel to the officer. The satchel was opened, and found to contain, besides toilet articles, jewelry of the dutiable value of over $40,000. Among the jewelry a large necklace of the value of $35,000 and a small one of the value of $4,500 were presents which had been given to her during her visit in Paris shortly before she left to return home. None of the jewelry was entered upon the vessel's manifest. Besides proving the foregoing facts, the government gave evidence tending to show that when the claimant signed the declaration she was asked by the customs officer if she had with

her in her baggage or on her person anything purchased abroad, and made reply that she had the two articles mentioned in the entry, and that when she handed the satchel containing the jewelry to the officer she stated that there was nothing in it but what she had taken from this country abroad. It was further shown that the practice of the treasury department at the port of New York was, and for many years had been, to examine the baggage of passengers upon arriving vessels after such vessels reach their wharf; that when the vessels arrive within the harbor they are boarded by the customs officers, and with their assistance the passengers are asked to subscribe a printed document entitled "Baggage Declaration and Entry," and fill out the blanks therein descriptive of their articles; that when a vessel reaches the wharf all the baggage of the passengers is transferred to a portion of it which is surrounded with a rope and has a gate at which one of the officers is stationed; that the passenger and a customs officer proceed to and select the baggage of the former, and the officer proceeds to examine it; that, if dutiable articles are found in the baggage, one of the appraisers assigned to that dock is called upon to appraise its value, and, after its dutiable value has been fixed, the passenger, accompanied by a customs officer, goes to the desk of the collector, and pays the duty, this desk sometimes being inside the rope and sometimes outside; and that, after the examination is complete, each piece of baggage is marked by the customs officer, and it is then permitted to be removed through the gate.

At the close of the evidence introduced by the government the claimant moved the court to dismiss the information. In denying the motion the trial judge announced that he should rule "that articles belonging to the class of personal baggage or personal effects, although they may be dutiable by reason of their amount, are not to be forfeited, under the present practice of the department, unless there is some concealment or fraud which brings them within some other provision of the Revised Statutes than section 2802." The government then introduced further evidence showing that there were distributed among the passengers of the St. Paul printed circulars such as are customarily distributed by the customs officers upon the arrival of a vessel in the harbor. These circulars were entitled "United States Custom Notice," and read as follows:

"To Passengers Arriving from Foreign Countries: It will be necessary for you to make a declaration before the United States customs officer in the saloon of this vessel stating the number of your trunks and other packages and their contents; and residents of the United States returning from abroad should provide a detailed list of articles purchased abroad, and the prices paid therefor. A failure to declare all dutiable goods in your possession will render the same liable to seizure and confiscation, and yourself to fine and imprisonment. * * * By Order of the Secretary of the Treasury."

The claimant then introduced evidence tending to show that she had not seen any of the circulars distributed on the steamship; that she did not state, when she handed her satchel to the customs officer, that there was nothing in it but what she had taken from this country abroad; that in omitting to mention the jewelry in her declaration

she did not do so intentionally; and that she was throughout acting upon the belief that the jewelry was not dutiable. At the close of the evidence the government moved the court to direct a verdict in its favor upon the three counts of the information. The motion was denied, and the government excepted. The trial judge submitted the case to the jury under instructions which, as we understand them, were, in substance, that if the jewelry was brought in by the claimant without any purpose of escaping the payment of duties, and not as merchandise in the guise of baggage, she was entitled to a verdict. The government excepted to the instructions generally, and especially to the instructions in respect to the necessity of proof of fraud to authorize a verdict of condemnation.

The principal question which has been argued at the bar is whether the court below should not have ruled that the jewelry became liable to forfeiture under section 2802 of the Revised Statutes, irrespective of any evidence of fraudulent intent on the part of the claimant. The statutory provisions which bear upon the question are found in sections 2799, 2801, and 2802 of the United States Revised Statutes. These sections read as follows:

"Sec. 2799. In order to ascertain what articles ought to be exempted as the wearing apparel, and other personal baggage, and the tools or implements of a mechanical trade only, of persons who arrive in the United States, due entry thereof, as of other merchandise, but separate and distinct from that of any other merchandise imported from a foreign port, shall be made with the collector of the district in which the articles are intended to be landed by the owner thereof, or his agent, expressing the persons by whom or for whom such entry is made, and particularizing the several packages, and their contents, with their marks and numbers; and the person who shall make the entry shall take and subscribe an oath before the collector, declaring that the entry subscribed by him and to which the oath is annexed contains, to the best of his knowledge and belief, a just and true account of the contents of the several packages mentioned in the entry, specifying the name of the vessel, of her master, and of the port from which she has arrived; and that such packages contain no merchandise whatever other than wearing apparel, personal baggage, or, as the case may be, tools of trade, specifying it; that they are all the property of a person named who has arrived, or who is shortly expected to arrive in the United States, and are not directly or indirectly imported for any other, or intended for sale."

"Sec. 2801. On compliance with the two preceding sections, and not otherwise, a permit shall be granted for landing such articles. But whenever the collector and the naval officer, if any, think proper, they may direct the baggage of any person arriving within the United States to be examined by the surveyor of the port, or by an inspector of the customs, who shall make a return of the same; and if any articles are contained therein which in their opinion ought not to be exempted from duty, due entry of them shall be made and the duties thereon paid.

"Sec. 2802. Whenever any article subject to duty is found in the baggage of any person arriving within the United States, which was not, at the time of making entry for such baggage, mentioned to the collector before whom such entry was made, by the person making entry, such article shall be forfeited, and the person in whose baggage it is found shall be liable to a penalty of treble the value of such article."

These statutes apparently provide a special system for the entry of dutiable articles contained in the packages of baggage brought by passengers arriving by vessel in the United States from foreign countries. Dutiable articles brought by such passengers, but not

in their packages of baggage, are to be entered as merchandise, pursuant to section 2785 of the Revised Statutes, within 15 days after the report to the collector of the arrival of the vessel; and, if not entered, or if the duty thereon is not paid, and the omission is with fraudulent intent, they are liable to forfeiture by the provisions of section 3082; and, if unladen from the vessel without the payment mentioned in section 2872, they become forfeited by the provisions of section 2874. None of these statutes in respect to the entry and unlading of merchandise have, in our judgment, any application to the case of dutiable articles brought by passengers in their packages of baggage, and as to such articles the entry and unlading is governed by sections 2799 and 2801. The requirement that the entry shall particularize the packages and their contents, and be accompanied with the sworn declaration of the passenger, is doubtless intended to inform the customs officer so fully and specifically about the contents of the packages that no dutiable articles will be likely to be omitted by reason of the ignorance, misapprehension, or deception of the passenger in making his entry. Until this entry has been made, the baggage cannot be landed. After it has been made, and as a further precaution against the introduction of dutiable articles, the customs officers are permitted, if they think proper, to examine the baggage. If they make such an examination, and find in the baggage any articles which they deem dutiable, they are to require due entry of them to be made, together with payment of the duties. But, if an article subject to duty is found in the baggage which was not mentioned to the customs officer when the passenger made his entry, it is liable to forfeiture. This provision refers to articles not mentioned when the passenger has made the entry provided for by section 2799. The terms of the three sections do not sanction a construction whereby the forfeiture is saved if the passenger mentions the dutiable articles when a new entry is required, and they have been discovered by the customs officers in examining the baggage. The three sections are a modification of provisions originally embodied in the act of March 2, 1799. In that act the provision embodied in section 2801 permitted the entry by the passenger previous to the examination of the baggage to be dispensed with at the discretion of the customs officer, and an examination of the baggage substituted. The ruling of the court below seems to have been made upon the theory that section 2801 was open to the same construction, that it was competent for the custom-house officers to forego a compliance by the passenger with the making of the entry and declaration prescribed by section 2799, and that in such case the passenger would not incur liability of forfeiture for not mentioning dutiable articles in his entry. In the revision of statutes any language of the original act which justified the construction that the entry pursuant to section 2799 was a matter optional with the customs officers has been eliminated, and, as the language is plain and unequivocal, we are not permitted to resort to the original act to interpret the section differently from its terms. As the sections now read, there must be an entry pursuant to section 2799, and there may also be an examination of the baggage, and a further entry, pursu-

ant to section 2801, if dutiable articles are found. They do not contemplate a formal custom-house entry,—probably because this would put the passenger to needless delay and inconvenience; though doubtless, under the statutory powers of regulation conferred upon the secretary of the treasury, it would be competent for the treasury department to require such an entry. The forfeiture provision does not mean necessarily that the article is subject to forfeiture whenever it appears that it was not mentioned in the entry or the declaration. The statute does not so declare, and as a penal statute it is not to be enlarged by implication to embrace cases not within its terms. The entry and declaration by the passenger are usually made upon the vessel, and often hurriedly, and omissions may occur in the documents from inadvertence or ignorance as well as from intention. The documents are executed in the presence of the customs officer who administers the oath to the declaration, and who is the representative of the collector in receiving the entry; and, if these omissions are brought to his notice by the passenger, it would seem to be sufficient to satisfy the statute. If at any time while the entry is being made, and before it is completed, there is a disclosure by the passenger which is sufficient to put the customs officer upon inquiry as to the dutiable character of any of the contents of the packages, we think that within the meaning of the statute it is to be deemed that the articles were "mentioned to the collector before whom such entry was made," notwithstanding they were not mentioned in the documents. Of course, if the articles are mentioned in the entry or declaration, they are mentioned to the collector. Section 2802 does not make the element of fraudulent intent an ingredient of the cause of forfeiture.

If we have correctly interpreted these sections, it follows that, if the claimant omitted to mention the jewelry to the customs officer who received her entry made before the examination of her baggage, the articles became liable to forfeiture if they were in fact dutiable. Concededly, the two necklaces were subject to duty in about the amount of $24,000, unless exempt by the provisions of paragraph 697 of the tariff act of July 24, 1897 (30 Stat. 202). That paragraph places upon the free list "such articles of wearing apparel, personal adornment, toilet articles, and similar personal effects as are in the use of and accompanying persons arriving in the United States and are necessary and appropriate for the immediate purposes of the journey and their present comfort and convenience: provided, that in case of residents of the United States returning from abroad, all wearing apparel and other personal effects taken by them out of the United States to foreign countries shall be admitted free of duty, without regard to their value, upon their identity being established, under appropriate rules and regulations to be prescribed by the secretary of the treasury, but no more than one hundred dollars in value of articles purchased abroad by such residents of the United States shall be admitted free of duty upon their return." As we read this paragraph, it classifies exempt articles according to the citizenship of the persons arriving in this country. The proviso carves out an exception from the general clause in the case of our own citizens,

and the general clause as to them is as if it did not exist. Taken together, the clause seems to be designed to permit foreigners coming here as visitors or intending to remain to bring with them, without paying duties, such of the articles enumerated as are appropriate for the purposes of the journey,—or, in other words, whatever is included in the term "baggage" according to judicial definition,—and to restrict our own citizens returning from abroad to bringing in free of duty such baggage as they may have seen fit to take with them upon a foreign journey, together with articles purchased abroad, not exceeding in value $100. Unless the articles belong in one of the two categories, they are not exempt; and it is wholly immaterial whether they are purchases or presents, or whether they belong to the person bringing them. We cannot doubt that the jewelry was dutiable.

We are unable to appreciate the argument for the defendants in error that, because of the misleading and unintelligible form of the declaration, the jewelry was not liable to forfeiture. The forms are prepared by the treasury department for the convenience of passengers, and to facilitate the making a sufficient entry of their baggage. The form in question was prepared for the purposes of section 2799. It is not perspicuous, and is discreditable to the department, because it is calculated to befog the understanding of those to whom it is presented. It was evidently prepared for two classes of passengers, foreigners and our own citizens. If some of the clauses had been erased by the claimant or the customs officer who received it, the declaration would have fully served the purpose of the section. But, however inappropriate, or even misleading, the form may have been, the circumstance does not help the claimant. The statute imposed upon her the duty of making a proper entry and declaration, and she could not escape the obligation by transferring it to any other person. If the customs officer, in assisting her in doing what she was bound to do herself, did not exercise due care to correct the printed form presented to her, the consequences must fall upon her, however great may be the hardship. But there was no element of hardship in the case. It was not because she made a declaration and entry which may have been obscure and unintelligible to her that she subjected her property to forfeiture. If she had suggested to the customs officer that she had in her baggage such valuable jewelry, she would have been safe. It would seem that an ordinarily honest and intelligent person would, under the circumstances, have done so.

The statutes confer upon the secretary of the treasury the widest discretion to remit forfeiture and penalties accruing for a violation of the customs and revenue laws. This discretion has always been liberally exerted in cases where violation was unintentional or excusable upon any consideration.

In ruling, as the court below did, that it was necessary for the government to show an intent to defraud the revenue on the part of the claimant in order to maintain its action, and unless the jury found fraud it was their duty to find for the claimant, we are of the opinion that error was committed, which should lead to a reversal

of the judgment. We also think that the court should have refused the instruction requested in behalf of the claimant to the effect that, if the jury should render a verdict in her favor, the government would have a lien upon the jewelry, and could recover whatever lawful duties they were subject to. The instruction could have served no other purpose than to unduly influence the jury in her behalf, and incline them to find in her favor upon the theory that, in any event, the government could not be a loser by their verdict. It submitted to the jury a consideration which was wholly extraneous to the controversy to be decided.

The judgment is reversed.

LACOMBE, Circuit Judge. I concur in the conclusions and in nearly all that is said in the opinion of the majority of the court. As to paragraph 697, however, I do not concur in any construction which applies the $100 restriction to articles "purchased abroad" unless they are purchased by the "returning resident" of the United States. The language of the paragraph precludes any such construction, although, of course, on the theory of inherent absurdity, the paragraph may be construed in the teeth of its text, as in the Holy Trinity Case, 12 Sup. Ct. 511, 36 L. Ed. 226. But to me there is nothing inherently absurd in the exemption of presents received abroad. Inasmuch, however, as claimant was a "person arriving in the United States," I am unable to see why the provisions of the first half of this paragraph do not apply; and, inasmuch as the two necklaces were not necessary or appropriate for the immediate purposes of the journey, reach the same conclusion as the majority of the court. With regard to the extraordinary form of entry which was presented to the unfortunate passengers arriving on this steamer, it would seem that the treasury department was not responsible. By circular No. 141 (Treas. Dec. 1897, p. 816) that department instructed the customs officers as follows:

"In order that passengers may be duly apprised of the requirements of the law, a notice to passengers which will contain a copy of paragraph 697 in full and a reference to the provisions of law as to undervaluation and bribery, will be distributed among the passengers."

This instruction exhibits most careful consideration for the incoming passengers, but the so-called "circular" proved in this case wholly fails to comply with the instructions.

MORRISON et al. v. SONN et al.

(Circuit Court, N. D. New York. October 14, 1901.)

No. 6,702.

1. PATENTS—SUIT FOR INFRINGEMENT—DEFENSES.

In a suit for infringement the chancellor should be satisfied upon three fundamental questions: First. Has the patentee invented something? Second. Is the invention described in the specification? Third. Is it covered by the claim? If these questions be all answered in the affirmative, the court should not permit a defendant who has appropriated all

the advantages of the invention to escape because of changes in form only, no matter how specious or ingenious they may be.

2. SAME—VALIDITY AND INFRINGEMENT—BRUSH-MAKING MACHINE.

The Morrison patent, No. 570,604, for a brush-making machine, the essential feature of which is a reciprocating hopper for assembling the bristles in the recesses of the brush plate, discloses an invention of a high order of merit and usefulness in the art, which was not anticipated, and the patent is valid, and entitled to a liberal construction. Claim 1 construed, and *held* infringed.

In Equity. Suit for infringement of patent. On final hearing.

George A. Mosher, for complainants.
N. Davenport and William W. Morrill, for defendants.

COXE, District Judge. This action is brought to restrain the infringement of letters patent No. 570,604, granted November 3, 1896, to William Morrison for improvements in brush-making apparatus. The patent is now owned by the complainants. The main object of the invention is to provide efficient means for rapidly feeding and inserting short lengths of bristle into the recesses of an apertured plate. This is accomplished by employing a reciprocating hopper for holding the bristles, having a reticulated bottom through the meshes of which, when the hopper is agitated, the bristles are sifted vertically and inserted in the receiving plate beneath, until its apertures are filled with knots or bunches ready for the brush. The characteristic of the invention is that the bristle-receiving plate is supported in a fixed position relatively to the hopper while the latter is being moved rapidly towards and from the plate. The first claim only is involved. It is as follows:

"In a brush apparatus, the combination with a bristle-feeding hopper having a reticulated bottom, and mechanism for agitating the hopper, of a bristle-receiving plate having a plurality of bristle recesses and a stationary support for the plate below the hopper, substantially as described."

The defenses are lack of novelty and invention and noninfringement.

The combination of the claim contains the following elements: First. A bristle-receiving hopper having a reticulated bottom. Second. Mechanism for agitating the hopper. Third. A bristle-receiving plate having a plurality of bristle recesses. Fourth. A stationary support for the plate below the hopper. This combination is new in the art of brush-making. A reciprocating hopper was never used before for the purpose of assembling the bristles in the recesses of the brush plate. Novelty is not negatived by the suggestion that at the time of the invention sieves for sifting ashes and flour were old. Wire gauze was old when Davy invented the safety lamp, and hard rubber was old when used as a plate for holding artificial teeth; but no one disputes the valuable inventions residing in the new application. The use of a reciprocating hopper in brush-making was a novel and ingenious idea which would not occur to the ordinary mechanic. The truth of this statement will be apparent when the phenominal character of the work accomplished is considered. A bushel of loose bristles is thrown promiscuously into the hopper. These bristles are less than an inch in length and are zigzagged at every conceivable angle. A

quick jarring vertical motion is imparted to the hopper and the bristles are quickly assembled in the stationary plate below in vertical bunches ready to be anchored for use in the completed brush. Nothing in the art suggests such a use or such a result. Prior to the Morrison invention brushes were made by hand, assisted, in recent years, by machinery at several stages of the process. Hellwig, in 1893, (letters patent No. 506,397) invented a brush machine in which a box is filled with bristles carefully arranged in an upright position above an apertured receiving plate, or brush back, which is firmly fastened to the box. The box is then secured to a jolting platform which, when agitated, causes the bristles to fall into the holes of the brush back. The bristles are in a perpendicular position from the beginning to the end of the jolting operation. Hutchinson, in 1895 (letters patent, No. 538,782) having in mind, undoubtedly, the Hellwig patent, thus describes the prior art:

"In making brushes it is customary to arrange the bristles or hair in a box containing a perforated brush back and then to shake the box violently up and down so as to force the bristles longitudinally through the perforations in the said brush back."

His object, evidently, was to produce a shaking machine of greater simplicity and capacity than the Hellwig structure. There is nothing in either patent to suggest the use of a reciprocating hopper filled with bristles thrown in promiscuously. This feature is unquestionably the gist of the Morrison invention and it is found nowhere in the prior art or any allied arts.

The argument in favor of noninfringement rests wholly upon the allegation that the defendants do not use a removable guide plate or an equivalent therefor. Whether this position is tenable or not depends largely upon the construction given to the claim. It is clearly the duty of the court, being convinced that Morrison has made a valuable step in the art of brush-making, to give the claim a liberal rather than a narrow and technical construction. There is nothing in the claim itself to require the limitation to a removable metal guide plate with funnel-shaped holes. The claim speaks of a receiving plate having a plurality of bristle recesses. It says nothing more. Neither the prior art nor the specification requires the limitation. Indeed, the patents in evidence show that plates of both constructions were used interchangeably and as well-recognized equivalents. That the patentee did not intend so to limit the first claim is shown by the fact that the second claim is expressly restricted to a plate having downwardly tapering holes. In short, the court fails to perceive why a wooden plate with holes of uniform size from top to bottom is not within the claim. This is precisely what the defendants use, and they fill its apertures with bristles in the indentical manner described. In other words, they use the patented combination and seek to avoid responsibility because, after using it, they adopt a different method of holding the bristles in place from that described in the specification. The essence of the invention is not found in the form of the plate, the material composing it, or the shape of the holes. The plates in controversy are clearly equivalents. The defendants' plate could be filled with bristles if placed under the hopper of the

patent and the complainants' plate would operate equally well if held in position under the defendants' hopper. It cannot be possible that one using the identical machine described in the patent can escape infringement because he subsequently uses the apertured plate as a brush back. And yet if the contention of the defendants be carried to its logical conclusion it would compel the court to release an infringer who uses the machine of the patent because he uses something in addition to that machine. The chancellor should, in these cases, be satisfied upon three fundamental propositions: First. Has the patentee invented something? Second. Is the invention described in the specification? Third. Is it covered by the claim? If these questions be all answered in the affirmative the court should not permit a defendant, who has appropriated all the advantages of the invention, to escape because of changes in form only, no matter how specious or ingenious they may be. It would be an exceedingly harsh construction, because the patentee has illustrated one way, and the preferred way, of making a brush by his machine, to hold that others may use the machine and avoid the consequences because they adopt a different though well-known method of holding the tufts in place.

The complainants are entitled to a decree for an injunction and an accounting.

WESTERN ELECTRIC CO. v. KINLOCH TEL. CO. et al.

(Circuit Court, E. D. Missouri, E. D. June 7, 1901.)

No. 4,214.

PATENTS—INFRINGEMENT—LIGHTNING ARRESTER.

The White patent, No. 438,788, for a potential discharging protector or lightning arrester for making an earth connection with an electric circuit, construed, and *held* infringed as to claim 1, and not infringed as to claim 4.

In Equity. Suit for infringement of patent. On final hearing.

Geo. P. Barton and De Witt C. Tanner, for complainant.

Chas. C. Bulkley, for defendants.

MARSHALL, District Judge. This is a bill in equity for an injunction and the recovery of damages for the infringement of letters patent No. 438,788, dated October 21, 1890, issued to Anthony C. White for a potential discharger or lightning arrester. The patented device consists of two carbon plates mounted parallel to each other, and only separated by a thin dielectric. The solid portion of this dielectric, which is preferably of mica, is slotted so as to permit of disruptive electric discharges through the air space separating the plates. The upper plate has a plug of easily fusible metal or alloy fixed in a hole in its surface. In use one of these plates is connected electrically with a telegraphic or telephonic circuit and the other with the earth. The purpose of the patented device is to protect telegraphic or telephonic apparatus from injury due to lightning or to the accidental crossing of the circuit by electric circuits conducting

powerful currents under high potential. The trespassing current of high potential seeks a short path to the earth. It breaks down the air dielectric between the carbon plates, and a spark or disruptive discharge from plate to plate results. If the current is of small volume, the spark is all, but, if of any considerable volume, an arc forms, and heat ensues. The fusible plug melts, and, running down, forms a conducting union between the carbon plates. The resistance to the current at once ceases, the metal cools, and a permanent earth connection is made. The following are the claims alleged to have been infringed by the defendants:

"(1) A potential discharging protector or lightning arrester comprising two conducting plates placed with parallel surfaces closely adjacent to each other, adapted to be connected, respectively, with an electric circuit and the earth, and an interposed thin dielectric, one of the said plates having a plug or mass of easily fusible conducting material imbedded in its approximate surface, substantially as hereinbefore described, and for the purposes specified."

"(4) A protecting appliance comprising two carbon plates interposed between the conductor of an electric circuit and an earth connection, and connected, respectively, therewith, the said plates having their opposing surfaces roughened, as described herein, and placed closely adjacent to each other, but electrically separated by an interposed thin dielectric, as described, whereby the disruptive discharge of a dangerous potential from an electric circuit to earth may be effected, and means, such as a mass of fusible metal or alloy, for automatically establishing conductive union between the said plates upon the development of an electric arc between them, substantially as described."

The device used by defendants is similar to the complainant's, with the exception that in it the carbon plates are held apart by a silk dielectric which is not slotted; and instead of the alloy plug of the White arrester each of the defendants' carbon plates contains in a conical recess a lead pellet or shot, held in its place by a small quantity of beeswax. The opposing surfaces of the plates are not specially roughened, but are as smooth as the ordinary process of manufacture permits. It is claimed that these differences so distinguish the devices that the defendants cannot be held to be infringers. Although the validity of the complainant's letters patent was, on the hearing, admitted, and it is only a question of infringement, it will facilitate a discussion of that question to consider just what White's invention was. There had been lightning arresters before this invention. One method was to mount metallic plates parallel to each other, and only separated by a thin dielectric. When one of these plates was electrically connected with the line and the other with the ground, currents of high potential would be diverted from the line. But it was found that even the momentary discharges form plate to plate due to currents of high potential and small volume caused threads of the substance of the plates to form, connecting the plates. Thereafter, while the arrester would work effectually, it would short-circuit the line, and so divert from it the currents of low intensity necessary to its operation. At the time of White's invention it involved no inventive skill to substitute carbon plates for the metal plates before used. The carbon plates are highly refractory, and the threads of the metal plates are obviated. But

when persisting currents of high intensity get on the line an arc is formed between the carbon plates. Great heat is generated, and danger from fire ensues if means are not used to connect the plates conductively so as to lessen the resistance. The carbon plates, in remedying one evil, brought another in its place. The latter defect was remedied by the insertion in one of the plates of the plug of easily fusible conducting material. White's invention then consisted in an arrester which would divert currents of high potential and small volume without impairing the working of the line or its own efficiency, and which would also divert a persisting current of high potential by the forming of a conducting union between the plates. While not a pioneer invention, it marked a decided advance in the art. In the first claim of the patent in suit one of the elements is a "plug or mass of easily fusible conducting material," and the defendants claim that the lead shot of their device are not easily fusible, within the meaning of this claim. In practice the shot used in the defendant's arrester sometimes, but rarely, melt. When a current of high potential persists, the wax melts, releases the shot, and they falling together form the permanent conducting union between the plates, provided the silk dielectric is then burned away at its approximate center. If the silk be not burned away, it holds the shot apart, and the union is not formed until it is so burned. The melting of the shot is at no time essential to the operation of the defendants' device, while in the White arrester the fusible plug is only released by its own fusion. The permanent conducting connection formed by the complainant's device under a persistent current of high voltage does not, however, depend on the melting of the entire plug. It is sufficient if it melts superficially, so as to be released from the hole in which it is held. So that the essential difference is that the defendants used a cement of wax, which is not a conductor, and melts at a slightly lower degree of heat than the alloy used in White's arrester; and a lead shot, which is a conductor, and fuses at a slightly higher degree of heat than the alloy, instead of the homogeneous fusible plug of the White patent. The two devices operate in substantially the same way. In each the spark discharges do not develop sufficient heat to release the metallic conducting mass. But, when an arc is formed, heat is generated sufficient to release the plug or shot by the fusing of an easily fusible material. It does not matter that in the one case the material fused is itself a conductor and in the other is not. In both cases a conductor is released, and the same result is produced in substantially the same way. But the defendants assert that the wax used in their device is but a workshop expedient for convenience in the assembling of the parts; that it is to hold the shot until the parts are assembled. After that the silk dielectric is said to prevent the coming together of the shot and the short-circuiting of the line. But it appears that in practice the silk dielectric is sometimes burned away at a point which would permit the loose shot to come together, although the heat is not sufficient to melt the wax. In such case the wax plays an important part in the operation of the device. Without it the line would be short-circuited, and with it the operation of the line

is not interfered with, and the arrester remains in a working condition. So that, however useful the wax may be as a workshop expedient, it is also a useful feature of the completed device. The defendants also base an argument on the carbonizable character of the dielectric used by them. White, in describing his invention, expressed a preference for mica as the solid portion of the dielectric separating the carbon plates, "because carbonizable dielectrics,—such as paraffined paper,—which are often used, when perforated by spark or flash discharges, frequently leave a carbonized edge round the perforation, which develops into a perfect and permanent earth connection." But the inventor did not limit himself to a special dielectric. In claim 1 of the patent the only expressed limitation is that the dielectric shall be thin, and in the description he especially recognizes that carbonizable dielectrics may be used. I think the defendants' device infringes the first claim of the White patent.

As to claim 4 a different question is presented. The carbon plates claimed are plates having their opposing surfaces roughened. In his specifications the patentee states:

"I also prefer to roughen the opposed surfaces of both carbon plates, such roughened surfaces being virtually composed of a large number of interspersed points and depressions, it having been experimentally ascertained that such a formation facilitates discharge and prevents short-circuiting of the plates."

It seems that, as originally applied for, claim 4 differed from the present claim 4 of the patent in the omission of the words "such as a mass of fusible metal or alloy." It was rejected. The patentee amended the claim by the insertion of the words quoted, and said by way of argument:

"Claim 4 is designed to cover substantially the structure of the other claims, with the further limitation that the carbon plates have their opposing surfaces roughened."

In the manufacture of its plates the complainant makes them rough by grinding them on an abrading wheel. It is evident that the roughness described in the fourth claim is a necessary element of the claim, and is intended to be something different from the roughness necessarily incidental to the manufacture of the carbon plates when roughness is not sought. Within the meaning of the fourth claim of the patent, the carbon plates of defendants' device do not have their opposed surfaces roughened, and this claim is not infringed.

It follows that the complainant is entitled to a decree against the defendants for an infringement of the first claim of letters patent No. 438,788, and for the usual injunction and accounting.

NEW YORK CONTINENTAL JEWELL FILTRATION CO. v. CITY OF SULLIVAN.

(Circuit Court, D. Indiana. October 4, 1901.)

No. 9,994.

1. PARTIES—FEDERAL COURTS—CONFORMITY TO STATE PRACTICE.
Rev. St. § 914, requiring federal courts to conform to the state practice in civil actions at law, does not authorize the maintenance of an action at law, exclusively cognizable in such courts, by any one except the owner of the legal title to the cause of action, notwithstanding a state statute requiring all actions to be brought in the name of the real party in interest.[1]

2. PATENTS—ACTION AT LAW FOR INFRINGEMENT—PARTIES.
Where the owner of a patent has granted an exclusive license to make and sell, but not to use, the patented article within a specified territory, an action at law against an infringer by using the article within such territory can only be maintained in the name of the licensor, though it may be brought for the joint use of the licensee where he is entitled by the terms of the license to a share of the damages recovered.

At Law. On demurrer to amended complaint.

Bond, Adams, Pickard & Jackson, for complainant.
Miller, Elam & Fesler and John S. Bays, for defendant.

BAKER, District Judge. This is an action at law by the New York Continental Jewell Filtration Company for the use of itself and the O. H. Jewell Filter Company against the city of Sullivan to recover damages for the infringement of letters patent No. 293,740, issued to Isaiah Smith Hyatt on the 19th day of February, 1884, for certain new and useful improvements in the art of filtering. The complaint shows that by various mesne conveyances the entire right, title, and interest in and to said letters patent became vested in the plaintiff on the 5th day of August, 1896. The complaint further shows that on or about the 21st day of February, 1898, the plaintiff entered into a certain contract or agreement in writing with the O. H. Jewell Filter Company, a corporation organized and doing business under the laws of the state of Illinois, in which, among other things, it was provided that the plaintiff, upon certain terms and conditions in said contract specified, granted to the O. H. Jewell Filter Company an exclusive license to make and sell machines embodying and containing the invention described in the claims of said Hyatt patent for the entire term of said patent throughout the United States, except the New England States, New York, New Jersey, Pennsylvania, Maryland, Delaware, Virginia, the District of Columbia, West Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, and Mississippi, whereby, and by reason of which said instrument in writing, said O. H. Jewell Filter Company became the exclusive licensee under said letters patent granted to said Hyatt for the entire United States except the states above excepted. It was in said agreement provided that, in case any litigation thereafter

[1] Conformity of practice to that of state courts, see notes to O'Connell v. Reed, 5 C. C. A. 594; Insurance Co. v. Hall, 27 C. C. A. 392.

arose upon the said Hyatt patent against any infringer thereof, said suit should be conducted at the joint and equal expense of the plaintiff and the O. H. Jewell Filter Company, and in case of the recovery of any damages in any such litigation such damages thereafter recovered should be equally divided between the plaintiff and the O. H. Jewell Filter Company. The complaint further alleges that the plaintiff is the sole owner at law of all claims and demands of every kind and nature whatsoever growing out of any infringement of said letters patent during the lifetime of said letters patent, subject only to the right of the O. H. Jewell Filter Company to assist in the conducting of any litigation arising out of any infringement of said letters patent, and to share equally any damages that might arise therefrom or be recovered therein. The complaint further alleges that the defendant, contriving to injure the plaintiff, and in violation of the plaintiff's rights, within six years immediately last passed, and during the lifetime of the patent, and before the execution of the license as aforesaid to the O. H. Jewell Filter Company, wrongfully and unlawfully, and without the authority, license, or consent of the plaintiff, made use of the said invention patented as aforesaid by erecting and causing to be erected in the city of Sullivan a filter plant containing and embodying the invention described and claimed in said letters patent, and by constructing or causing to be constructed the said filter plant containing, embodying, and employing the invention in said letters patent described and claimed, and by making use of the said filter plant containing, embodying, and employing the invention of said letters patent aforesaid; thereby infringing the exclusive right secured by said letters patent, owned by the plaintiff as aforesaid, contrary to the statute. The plaintiff demands judgment in the sum of $50,000, and prays that under the statute he may have such additional amount, not exceeding three times the aggregate amount of actual damages, as the court may see fit to adjudge, and for costs. To this amended complaint the defendant, the city of Sullivan, has interposed a demurrer alleging that said amended complaint does not state facts sufficient to constitute a cause of action. In argument the objection pointed out is that the Jewell Company has an equal interest in the cause of action with the plaintiff, and ought to have been joined as a coplaintiff. It is urged by counsel for the defendant that the statute of Indiana requires actions at law to be prosecuted in the name or names of the real parties in interest, and that the real parties in interest here are the two above-named corporations. The rule suggested, even in cases cognizable in the courts of the state, is not a universal one, as will be seen by reference to the case of Steeple v. Downing, 60 Ind. 478. In that case the Downings were the owners of the naked legal title to the land in controversy, and one John Weston was the owner of the entire title in equity by virtue of a deed of conveyance made to him before the commencement of the suit by the Downing heirs, the land at the time of the conveyance being in the adverse possession of Steeple and wife. In this case it was held by the supreme court of the state that the action was well brought in the name of the Downings, the holders of the legal title, notwithstanding the fact that John

Weston was the owner of the entire equitable title to the land in controversy, and would alone be entitled to the fruits of the recovery. But, however the rule may be in the courts of the state, section 914 of the Revised Statutes of the United States, requiring conformity of practice of the federal courts in actions at law with the practice in the courts of the state, does not compel, or even authorize, the maintenance of an action at law by any one except the owner of the legal title in cases exclusively cognizable in the courts of the United States. In this case the complaint shows that the legal title is in the plaintiff, and that the O. H. Jewell Filter Company is simply a licensee. The terms of the agreement invest the O. H. Jewell Filter Company with the right to make and sell throughout the designated territory, but confers upon it no right whatever to use the patented invention. In the case of Waterman v. McKenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923, it is held by the supreme court that an agreement by which the owner of a patent for an invention grants to another person the sole and exclusive right and license to manufacture and sell the patented article throughout the United States (not expressly authorizing him to use it) is not an assignment, but a license, and gives the licensee no right in his own name to sue a third person at law or in equity for an infringement of the patent. This complaint shows that the whole legal title to the patent in suit remains in the plaintiff, and the plaintiff is the only party entitled to maintain an action at law for the infringement of the patent. The rule is well and accurately stated in Walk. Pat. (3d Ed.) § 400, as follows:

"Where a person has received an exclusive license to use or to sell a patented invention within a specified territory, all actions at law against persons who, without right, have done anything covered by the license, must be brought in the name of the owner of the patent right, but generally for the use of the licensee."

See, also, Littlefield v. Perry, 21 Wall. 205, 22 L. Ed. 577; Goodyear v. McBurney, 3 Blatchf. 32, Fed. Cas. No. 5,574; Blair v. Lippincott Glass Co. (C. C.) 52 Fed. 226.

The agreement in this case is alleged to have conferred simply the right to make and sell the patented invention. The right to use the patented invention is not parted with by the plaintiff, but it still remains the owner of the right to use the patented invention. The wrong charged in the complaint is in the use of the patented invention. It is a wrong done to the right of use remaining in the plaintiff, and which never was transferred to the O. H. Jewell Filter Company.

For these reasons the demurrer is overruled, to which the defendant excepts.

ADAMS CO. et al. v. SCHREIBER & CONCHAR MFG. CO.

(Circuit Court, N. D. Iowa, E. D. September 30, 1901.)

1. PATENTS—INFRINGEMENT—EQUIVALENT PARTS.
A mere change in the form of an element or part of a patented device, where it performs the same function in substantially the same manner, does not avoid infringement.

2. SAME—INFRINGEMENT—MECHANICAL EQUIVALENTS.
The doctrine of mechanical equivalents conditions the construction of all patents, only in different degrees, depending upon the advance made in the art by the invention of the patent; and a patent for an article of improved construction, having elements of novelty and usefulness, though within narrow limits, protects the inventor against the appropriation by another of the substance of his improvement by the substitution of devices which are known equivalents, and perform precisely the same function.

3. SAME.
The mere strengthening of a part in a patented device to give it longer life, where it does not improve or change the device in operation, does not constitute invention, nor differentiate the new device from the old to avoid infringement.

4. SAME—ADJUSTABLE STOVE DAMPERS.
The Farwell patent, No. 493,548, for an adjustable stove damper, claim 2, construed, and *held* infringed.

In Equity. Suit for infringement of patent. On final hearing.

M. M. Cady, Alphonse Matthews, and L. L. Bond, for complainants.

Henderson, Hurd, Lenehan & Kiesel and Church & Church, for defendant.

SHIRAS, District Judge. This case involves the construction of the second claim of letters patent No. 493,548, dated March 14, 1893, issued to Fay O. Farwell, as the inventor, one-half interest therein having been assigned to the Adams Company, of Dubuque, Iowa. In the specifications of the letters patent the object of the invention is stated to be "to provide a damper to be used in repairing broken or worn-out dampers in stoves (more particularly cooking stoves), which shall be easily and readily placed in the stove, without taking the stove apart, and which shall be adjustable to stoves of different sizes and of different makes or patterns, requiring handles of different lengths." It appears from the evidence that for some years prior to the issuance of this patent the Adams Company had been engaged in the manufacture and sale, among other articles, of stove repairs, including dampers, and had in its employ Fay O. Farwell, co-complainant in this case. The greater portion of the dampers manufactured prior to 1893 was of the kind or style known as the "Newby damper," described in letters patent No. 246,808, issued to A. S. Newby under date of September 6, 1881. Dampers of this make, however, could not be adjusted to stoves of different sizes and styles without procuring a rod of the proper length, as the blade of the damper could not be moved along the rod for any distance without disengaging the rod from the lugs of the blade, and thus destroying the connection between the rod and the blade. Hav-

ing learned from his practical experience in the business that neither the Newby damper nor any other style then known to the trade fairly met the requirements of an adjustable stove damper so constructed as to be usable in the repair of the different makes of stoves in common use, Farwell undertook the task of devising an adjustable damper that should, as nearly as possible, meet this want. The facts of the situation were that in the community were to be found stoves of many different patterns, differing in the size of the flue opening, differing in the position of the flues (which might be in the center or upon either side thereof), and differing in the position of the oven doors. The problem presented for solution was the devising of a stove damper adaptable to the different sizes of flues and adjustable to the variant positions of the flues and of the oven doors, which could be readily put in place in the stove needing repair without the aid of a skilled mechanic. The solution reached by Farwell was the combination described in letters patent No. 493,548, the elements of which are the blade, or that portion of the damper intended to cover the flue opening when the damper is closed, the rod by means of which the blade is operated, and the means of attachment between the rod and the blade, comprising lugs upon the blade through which the rod passes, and a screw for confining the blade to the proper position upon the rod. The rod is made with two grooves, one on each side, extending nearly the entire length of the rod. The blade has reversely curved lugs in opposition upon its lower edge through which the rod is passed, and thus a means is provided for slipping the blade along the rod until it is properly placed in front of the flue opening, where it can be securely fastened by means of the screw or bolt passing through the blade with a nut thereon. In this combination, as the rod is not permanently fastened to the blade, it can be inserted in the lugs from either side of the blade, and thus the handle or projecting part of the rod can be so placed on the side of the stove as to avoid interference between the handle of the damper and the oven door. The Adams Company entered upon the manufacture of dampers of the Farwell type under the name of the "Diamond Adjustable Cook Stove Damper," and the large sales made thereof show that it has proved an acceptable article, well fitted for the purpose for which it is intended. Under date of April 18, 1899, letters patent No. 623,417 were issued to Anton Ohnermus and Henry Sanner for an improvement in stove dampers, and the defendant, the Schreiber Conchar Manufacturing Company of Dubuque, commenced the manufacture and sale of dampers in accordance with the specifications of this patent, and thereupon the complainants, claiming that the damper manufactured by the defendant was an infringement of the rights secured to them by the second claim of the Farwell patent, brought this suit to enjoin such infringement and for an accounting, and the case has been submitted on the pleadings and proofs. Upon the argument before the court and in the brief filed on behalf of defendant it is stated that the issue is narrowed down to the question of infringement, the position taken being that, in view of the prior state of the art, the patent of complainants must be limited to a particular form, and cannot be con-

strued so as to include the peculiar form found in the damper manufactured by the defendant company.

The second claim of the Farwell patent reads as follows:

"A stove damper, comprising a rod having two grooves in it, one on each side thereof, extending nearly its entire length, and a blade formed with lugs on its opposite sides, said lugs being fitted loosely in the grooves or flutes, and adjustable with the blade in said grooves to any point desired, so as to adapt the dampers to stoves requiring different lengths of handles, and a screw for confining the blade to its adjusted position, substantially as described."

In the damper manufactured by the defendant company is found a blade with lugs on its opposite sides, intended to receive the rod from either end of the blade, and a rod so formed that the blade can be slipped along the same to any desired position, with a screw passing through the blade, one purpose of which is to fasten and hold in position the blade upon the rod. Substantially, therefore, all the elements of the combination described in the second claim of the Farwell patent are found in the damper manufactured by the defendant company; but it is claimed that the forms of these elements have been so modified or changed that the charge of infringement cannot be sustained. The evidence shows, and it is so admitted in the brief of counsel for defendant, that the damper made by the defendant company is intended to accomplish the same purpose as the damper manufactured by the complainants, and therefore the question is whether there are to be found in the component parts of these dampers, to wit, the blade, the stem or rod, and the means of attaching or fastening the blade in the desired position upon the rod, such differences as will serve to differentiate the one combination from the other. The blades of each manufacture are alike in general form, the only difference being that in complainants' damper the lugs intended to receive the rod are an integral part of the blade as cast, whereas in the defendant's damper three of the lugs are cast with the blade, and one is cast with a separate piece, which is fastened with a screw to the blade when the damper is put in operative condition. So far as these lugs are to be deemed to be parts of the blade and as parts of the combination for receiving the rod, their position and mode of operation are indentical with the lugs of the Farwell damper, and the mere fact that in defendant's damper the one lug is cast upon a separate plate, intended, however, to be fastened to the blade, does not constitute any material difference in the form or mode of operation of the blade. It may be further said that, although the Adams Company in fact cast the blade with the opposing lugs as integral parts thereof, there is nothing in the patent limiting the combination in this particular. All that is called for is a blade formed with lugs on opposite sides, and this form may be given to the blade by following the method adopted by the complainants or by following that adopted by the defendant, and both forms will meet the requirements of the Farwell patent. Coming to the rods as parts of the combination in the second claim of the Farwell patent we find the rod described to be "a rod having two grooves in it, one on each side thereof, extending nearly its entire

length"; whereas in the rod found in defendant's damper the rod is wider on the side next the blade, and the sides are inclined without perceptible grooves cut thereon. While to the eye there is a difference in the form of the rods, the question is whether there is any real difference in the purposes and modes of operation of the same. The grooves called for in the Farwell patent are primarily intended to engage with the lugs on the blade, so that when the rod is slipped therein they form a connection between the blade and the rod. This connection could have been secured by causing the lugs to embrace the entire rod, but in that event a space would have been left between the blade and the oven, through which the air and heat would pass, and, to avoid this undesirable result, Farwell provided a method of connecting the blade and rod, wherein the lugs did not pass entirely around the rod, but engaged only with the upper part of the rod. This was accomplished by grooving out the sides of the rod for a sufficient depth to permit the curved ends of the lugs to slip into this space, and by engaging with the upper side of the rod to form the desired connection. This connection, however, is formed by the combination of the upper surface of the rod with the curved lugs, and is not aided by the lower lip or edge of the groove, which can be wholly removed, and yet leave the connection between the rod and the blade unaffected. In the defendant's damper the rod does not show the deep grooves of the Farwell patent, but the connection between the blades and the rod is secured by curved lugs which do not pass entirely around the rod, but the ends of which engage with the sloping sides of the rod, and the connection between the blade and rod is formed by the upper part of the rod resting in the curvature of the ends of the lugs; and the only difference in the mode of connection shown in the dampers manufactured by the parties complainant and defendant is that the slope of the sides of the rod with which the ends of the lugs engage in the Farwell damper is somewhat greater or more abrupt than that found in defendant's damper. The difference is in form only, and but slight at that, and not at all in the mode of securing the connection of the blade and rod in the particulars named. So far as the mere matter of form is concerned, it is disposed of by the ruling of the supreme court in Ives v. Hamilton, 92 U. S. 426, 430, 23 L. Ed. 494, 495, wherein it is said:

"The substitution of guides at the top, made crooked by a broken line instead of a curve line, is too transparent an imitation to need a moment's consideration. A curve itself is often treated, even in mathematical science, as consisting of a succession of very short straight lines, or as one broken line constantly changing its direction. * * * At all events, in mechanics, when, as in this case, a broken line is used instead of a curve, being deflected at one or more points by a very slight angle, and performing precisely the same office as a curve similarly situated, the one is clearly the equivalent of the other."

Coming now to the third element in the combination, to wit, the mode of fastening the blade upon the rod when it has been adjusted so as to cover the flue opening, we find in the specifications of the Farwell patent the statement that "through the blade, A, I pass the bolt, F, which prevents the blade from sliding on the rod when it is in position, and allows the blade to be set in any position on the

rod." In the second claim of the patent there is included in the combination "a screw for confining the blade to its adjusted position, substantially as described." In the first claim it is described as a screw and nut fastening. Neither in the specifications nor in the claims of the Farwell patent is there any further description of the place or mode by which the fastening of the blade to the rod is to be secured, save that it is by means of a screw and nut. In the defendant's damper the screw and nut are used to draw the curved ends of the lugs into such close connection with the sides of the rod that the blade will no longer slide upon the rod, and therefore the mode of fastening used in the defendant's damper certainly is by means of a screw fastening,—that is, a bolt passed through the blade with a screw thread on the end, upon which a nut is placed,—and by the tightening of this screw the fastening of the blade to the rod is secured; and it is difficult to see how the means employed in the defendant's damper can be excepted out from the mode described in the Farwell patent. But it is argued that in fact there is a difference in the mode in which the screw fastening operated in the dampers manufactured by complainants and the defendant, in this: that in the form adopted by the complainants the head of the screw and the nut on the opposite end impinge directly on the opposite sides of the rod, and by clamping the same prevent a lateral motion of the blade on the rod, whereas in the damper manufactured by defendant the screw and nut are not brought into contact with the rod, but, when tightened, they cause the lugs on the blade to press closely against the sides of the rod,—that is, to clamp it,—and thereby prevent a lateral motion of the blade on the rod; and therefore a difference is shown in this respect between the dampers of sufficient magnitude to maintain the claim that the defendant's damper does not utilize the exact combination covered by the Farwell patent. In support of this contention it is argued that this patent, in view of the state of the art at the date of its issue, must be narrowly construed, and is not entitled to the benefit of the rule that ordinarily protects the inventor and patentee against the use of mechanical equivalents. In one sense it may be true that the Farwell patent is limited within narrow boundaries, but within those boundaries it possesses elements of novelty and usefulness, which entitle it to protection against all efforts to appropriate its meritorious features under the guise of mere changes of form, or of the substitution of recognized equivalents. The rule to be followed is very clearly and forcibly stated by the circuit court of appeals for this circuit in National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 45 C. C. A. 544, wherein it is said:

"One who invents and secures a patent for a machine or combination which first performs a useful function is thereby protected against all machines and combinations which perform the same function by equivalent mechanical devices; but one who merely makes and secures a patent for a slight improvement on an old device or combination, which performs the same function before as after the improvement, is protected against those only who use the very device or improvement he describes, or mere colorable evasions thereof. In other words, the term 'mechanical equivalent,' when applied to the interpretation of a pioneer patent, has a broad and

generous signification, while its meaning is very narrow and limited when it conditions the construction of a patent for a slight and almost immaterial improvement. * * * But the great majority of patents falls between these two extremes. They are neither for pioneer inventions nor for improvements so slight as to be almost immaterial. While they do not evidence the first or the last step in the progress of the art to which they relate, they often make signal advances and protect useful improvements. The doctrine of mechanical equivalents conditions the construction of all these patents, and in determining questions concerning them the breadth of the signification of the term is proportioned in each case to the character of the advance or invention evidenced by the patent under consideration, and is so interpreted by the courts as to protect the inventor against piracy, and the public against unauthorized monopoly. * * * The doctrine of mechanical equivalents is governed by the same rules, and has the same application, when the infringement of a patent for a combination is in question, as when the issue is over the infringement of a patent for any other invention. * * * Mere changes of the form of a device, or of some of the mechanical elements of a combination, secured by a patent, will not avoid infringement, where the principle or mode of operation is adopted, unless the form of the machine or of the elements changed is the distinguishing characteristic of the invention."

Applying the rule thus stated to the facts of the case at bar, it follows that the difference in the application of the screw fastening in the dampers manufactured by the parties, if it can be held to be a difference in reality, is merely a substitution of a known equivalent, both methods being intended to accomplish the one result of fastening the blade to the rod.

There remains but one other variation in the construction of these dampers by which it is sought to differentiate the one from the other, and thus to escape the charge of infringement, and that grows out of the form of the rod. In the specifications of the Farwell patent the rod is described to be one of an ovate figure, resembling an acute triangle slightly rounded at the angles, and when the same is engaged with the lugs on the blade the narrower side is next to the blade. In the defendant's damper this position of the rod which is ovate in shape is reversed, the broader side thereof being next to the plate. In the Farwell damper the blade is adjusted so as to stand inwardly of the center of the rod, this position being given to it so that when the blade is thrown upon the oven plate it will lie flat thereon, thus affording little or no space for the passage of the air or heat beneath the blade. In the defendant's damper the blade is substantially at right angles with the center of the rod, and when placed upon the oven plate the blade will not lie flat thereon, for the reason that the lugs extend beyond the circumference of the rod. It is claimed that this constitutes a marked difference between the dampers. No good purpose, however, is effected by a mode of construction which prevents the close contact of the blade with the oven plate. This matter of contact between the blade and the oven plate is not a necessary part of a combination intended to supply a readily adjustable damper, and it is not referred to in the second claim of the Farwell patent. The difference between the dampers in this particular results from a mere change in form, which does not vary in any substantial particular the operation of the elements of the combination called for by the Farwell patent, and the only perceivable effect of

the change is to increase the liability for the passage of air and heat beneath the blade of the damper, which is a wholly undesirable result. Even if this resulting change in the position of the damper, when thrown upon the oven plate, had produced some beneficial effect, it could only be regarded as an improvement upon the operation of the Farwell combination, but that would not entitle the defendant to the use of the invention protected by the patent to Farwell. Thus, in Elizabeth City v. American Nicholson Pavement Co., 97 U. S. 126, 137, 24 L. Ed. 1000, 1005,—a case involving the infringement of the Nicholson patent for block pavements, the question turning upon the difference between the strips of board placed between the block, it being stated in the Nicholson patent that "the auxiliary strip may be about half the height of the principal block, but it must not be permitted to fill up the grooves permanently and entirely when the pavement is completed, or to perform any part of the pavement,"—it was said by the supreme court:

"The strips used by the defendants are substantially the same as here described, and perform the same office. The only difference in their construction and application between the block is that they are beveled by being made wider at the top than at the bottom, the extra width at the top part being let into a notch or groove in the block. If they perform the additional office of partially sustaining the pressure of the blocks and locking them together, they do not any the less perform the office assigned to them in Nicholson's pavement. Their peculiar form and application may constitute an improvement on his pavement, but it includes his."

In Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017, it is said:

"It may be true, as contended by the defendants, that the device used by them is in some respects better than that of the plaintiff; but this cannot relieve them from the charge of infringement, if the devices are substantially alike."

But, as already said, it is not shown that the difference in question produces any improvement over the combination shown in complainant's damper, and all that can be claimed for it is that it produces a slight change in the position of the blade when in contact with the oven plate,—a difference which does not affect in the slightest degree the operation of the Farwell combination in accomplishing its avowed object of producing a readily adjustable damper.

It is also contended that the form of the rod used by the defendant, and described in the patent of Ohnermus and Sanner, is preferable to that used by complainants' in that it is less liable to warp when subjected to heat. The file wrapper connected with this patent is in evidence, showing the action of the department upon the application therefor, from which it appears that, in order to induce the examiner to report favorably upon the application, after it had been twice rejected, it was stated that:

"From experience in the use of the shape of the stem shown in the Farwell patent, it has been found that the Farwell form of stem is liable to warp, whereas the applicant has produced a construction of stem which overcomes the disadvantage existing in the former construction of stem, which was approximately of hour-glass shape in transverse section. To the applicant's form of stem the first and second claims are now restricted."

It was upon this application that the patent was finally granted, and it is thus shown that the useful result claimed to follow from using a rod in the shape of that described in the patent and found in the dampers manufactured by the defendant is the lessened liability to warp when in actual use. The same claim is advanced in defendant's brief, but the only evidence adduced in support of the assertion is the opinion of the expert witness A. S. Steuart, who, after stating generally that he thought the rod used by the defendant company would be less liable to warp than would the rod used by complainants, further testified that he did not recall having ever seen either of the styles of rod in a stove which had been used, thus showing that he had no knowledge based on experience,—a statement which falls far short of sustaining the assertion made to the patent office that experience in the use of the Farwell rod had shown its liability to warp. Not a witness was called on behalf of defendant to testify that he had ever known the Farwell rod to warp when in use, but the claim was left without support unless it be said that the mere theoretical opinion of the expert can be accepted in place of testimony based upon actual experience. On behalf of complainants it is shown that some 200,000 dampers of the Farwell patent have been sold within the past seven years, and no complaints of the warping of the rod have been made. On the evidence submitted it must, therefore, be held that this assumed superiority of the form of rod used by the defendant company is not proven to exist, and it cannot be held that the difference in the form of the rod causes it to perform any function other than those resulting from the use of the rod in the shape found in the Farwell patent, and the mere difference in form between the rods is therefore of no importance; for, as is said by the supreme court in Machine Co. v. Murphy, 97 U. S. 120–125, 24 L. Ed. 935, 936:

"Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that, if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape."

But, if the evidence in the case had shown that the rod described in the Ohnermus and Sanner patent was less liable to warp than that used in the Farwell patent, that fact would not show that the rod described in the former patent performed any additional function, or performed the same function in a different or novel manner. It would only tend to show that the one rod would perform the same functions as the other for a longer period before it was rendered useless by the heat of the stove, and it cannot be true that a valid patent can be granted for that which is only a mere strengthening of the parts of the combination, if the combination, as originally patented, furnished a practical, useful, and operative machine. Experience might show that it was desirable to strengthen certain parts of the combination in order to gain a longer life for its usefulness, but improvements of this character would not call for the exercise of the inventive faculty, but only for the exercise of mechanical improvement, which in nearly every case follows from the actual use of the

invention, and which is recognized as being merely the improvement due to use of the machine. If these views of the actual working of the dampers manufactured under the Farwell patent, as compared with the working of the dampers manufactured according to the claims of the Ohnermus and Sanner patent, are substantially correct, there seems to be no escape from the conclusion that the latter must be held to infringe upon the combination protected by the Farwell patent.

In considering the question presented for determination I have viewed the same from the position taken by counsel for the defendant company, which is that the dampers manufactured by the defendant company were so manufactured under the rights conferred by the patent to Ohnermus and Sanner, the defendant claiming in the argument and brief to hold a license from such patentees, although it is not so averred in the answer; and, so viewing the case, the conclusion reached, as already stated, is that the defendant company, in the manufacture and sale of the dampers modeled in the form of those described in the patent to Anton Ohnermus and Henry Sanner, have infringed upon the rights of complainants secured to them by the letters patent No. 493,548, and the usual decree for an injunction and accounting in favor of complainants must be granted.

WHITE v. PEERLESS RUBBER MFG. CO.

(Circuit Court, W. D. Pennsylvania. September 26, 1901.)

No. 15.

1. PATENTS—INFRINGEMENT.
   One who appropriates a patented invention so as to gain imperfectly and to a limited extent only the advantages thereof, does not thereby free himself from infringement.
2. SAME—PACKING.
   The White patent, No. 337,000, for a packing, consisting of a tubular, nonelastic core, capable of being bent or flattened, incased in an elastic tube, *held* valid and infringed.

In Equity. Suit for infringement of patent. On final hearing.

James Bredin and Christy & Christy, for complainant.
Dickerson & Brown and Ernest Hopkinson, for respondent.

BUFFINGTON, District Judge. Complainant charges infringement of both claims of his patent No. 337,000, dated March 2, 1886, for packing. The claims are as follows:

"(1) As a new article of manufacture, a packing consisting essentially of a tubular, practically nonelastic core capable of being bent or flattened, and a casing or covering of elastic material adapted to constitute a seal, substantially as described. (2) As a new article of manufacture, a packing consisting of a tubular lead core incased in a tube of rubber, substantially as described."

While the patent concedes the value of lead and rubber combined as packing material was known, yet no such combination as White's, viz. a tubular lead core incased in a tube of rubber, is shown to have existed prior to this patent. The prima facies of novelty and pat-

entability arising from the grant of the patent have not been overcome. The utility of such a device is shown in several statements made by respondent's expert. The testimony of Logan is positive of its efficiency in actual use, and is not controverted. The fact that White did not manufacture under his patent, the reason for which is shown, did not lessen the intrinsic worth of the device, and will not deprive him of the monopoly granted him for what is now proved to be a meritorious combination. The respondent company sells a packing which, when in use, consists of a section of rubber tubing and a short section of tubular lead core introduced into each end of the tubing to form a joint, which joint is tightly wrapped with a rubber band. As thus fitted for operative use, the respondent company has at the joint a tubular lead core incased in a rubber tube, and for the rest of the packing a rubber tube alone. In the joint section it thus uses the combination of the second claim, viz. "a packing consisting of a tubular lead core incased in a tube of rubber." It seeks to escape the consequences of the use of this combination by the fact that the lead tube does not extend through the entire length of the rubber tube. While White points out certain advantages resulting from carrying the lead through the entire length of the rubber, yet there is no limitation in his claim which compels him to so extend it. While such construction is not suggested in the patent, yet nothing is stated which precludes the use of a section of rubber tubing as a section of packing in conjunction with another section, where the rubber and lead tubes are used conjointly. White shows a ring construction and a straight construction as well, but neither form is made an element of the claims. The claim is for "a packing consisting essentially of a tubular, practically nonelastic core, capable of being bent or flattened, and a casing or covering of elastic material adapted to constitute a seal." Respondent uses such tubular, nonelastic core. It is capable of being bent or flattened. Because of the particular construction used, it does not avail itself of the lead's capacity to bend and maintain an angular position, as does White, to make the packing conform to the angular shape of a particular joint, but it does avail itself of the tubular, nonelastic, and flattening capabilities of the lead in conjoint use with the rubber to secure, at the point where it uses the combination, a tight joint, just as White does, and by use of the two elements in the relation first shown by White. If this section of respondent's packer be located at the most vulnerable point, to wit, where the surfaces are uneven, it is evident that the action of the compressible lead tube and the sealing rubber is exactly that detailed by respondent's expert as a feature of White's patent, viz.:

"I also recognize the correctness of the statement as to the conjoint action of the lead core and rubber casing, as in fact the rubber is compressed tightly between the opposite faces of the flattened lead core and the faces or seats of the joint; and if the latter are irregular, or not perfectly flat, the lead core against which the rubber is pressed will be caused to conform to the shape of the surface against which it rests,—that is, the surface of the rubber,—which also conforms to the surface of the seat. The space between the seats is thus completely filled by the closely compacted lead and rubber, even if such space is not regular in form."

At the joint, which is the most vulnerable place in the packing, and at the point where there are inequalities in the surface, which is the most difficult place to seal, the respondent uses the identical elements of White's combination operating in the same way. If it secure the same result as White by using his device where its use is essential and substantial and discards it where it is nonessential and immaterial, we must still hold, if the patent serves to substantially protect, that the respondent has taken the substance of White's device. We therefore hold the respondent an infringer, for one who appropriates an invention so as to gain imperfectly or to a limited extent the advantages which may be derived therefrom, does not thereby free himself from infringement. Sewall v. Jones, 91 U. S. 171, 23 L. Ed. 275, and cases cited. To the extent the respondent uses White's combination, to such an extent it acquires the full measure of benefit from it. Celluloid Mfg. Co. v. Chrolithion Collar & Cuff Co. (C. C.) 23 Fed. 397, is akin to this case. By using some of the complainant's packing, respondent uses enough to make it an infringer.

BURRILL et al. v. CROSSMAN et al.

(District Court, S. D. New York. October 21, 1901.)

ADMIRALTY—PLEADING—AMENDMENT.

Where respondents in a suit in admiralty pleaded a special defense, which they permitted to stand in the same form during the litigation of the case in the district court, the circuit court of appeals (where new pleadings were filed), and the supreme court, by each of which it was considered and adjudged insufficient, they will not be given leave to amend the answer so as to present such defense in a new form after the cause has been remanded for a retrial upon another issue.

In Admiralty. On motion for leave to amend answer.

Black & Kneeland, for libelants.

Wheeler & Cortis, for respondents.

ADAMS, District Judge. This action was brought in 1894, by the owners of the bark Kate Burrill, against the charterers thereof, to recover 53 days' allowance of demurrage for detention of the bark in the port of Rio de Janeiro, Brazil, in September, October, and November, 1893. The bark was chartered in March, 1893, to carry a load of lumber to Rio. On the voyage out she lost a portion of the cargo by perils of the sea, and delivered the remainder during the said months. The answer to the libel, after some general denials, set up affirmatively, in the fourth article, that, under a cesser of liability clause contained in the charter, there was no liability on the part of the respondents; and, further, in the fifth article, that, owing to a state of war which prevailed in Brazil at the time, it was impossible to remove the cargo from the vessel any sooner than it was removed. Exceptions were filed to the answer by the libelants, to the general effect that the respondents had not answered fully and distinctly, and, further, to the sufficiency of the fourth

article, which set up the cesser clause, and to the fifth article, which set up vis major by reason of the state of war mentioned. The fourth and fifth, subsequently, in an amended answer, became the fifth and sixth articles. After lengthy proceedings in this court, the exception to the original fourth article was sustained, and the exception to the original fifth article was overruled. The libelants thereupon moved for leave to withdraw the exception to the original fifth article of the answer, and to amend the libel so as to confess and avoid and explain the new matter set forth in that article of the answer. This motion was denied, and, after some testimony was taken, the libel was dismissed, with costs. 65 Fed. 104. The libelants then appealed to the circuit court of appeals, and assigned as error the overruling of their exception to the said fifth article of the answer, in denying libelants' motion for leave to withdraw the said exception, and in dismissing the libel. The libelants then moved in the court of appeals for leave to amend the libel in the manner moved for in this court, which motion was granted. An amended libel was then filed, which, in addition to the allegations in the original libel, alleged certain facts with respect to the anchorage of the vessel at Rio, her discharge there, proceedings touching an account, and want of authority on the part of any one there to enter into an accord and satisfaction of the demurrage in question. An answer was filed to this libel, substantially denying its allegations, and again setting up, in the fourteenth and fifteenth articles, the matters of cesser and war difficulties, which were the subjects of the fourth and fifth articles of the original answer. The answer, in the sixteenth article, also set up an accord and satisfaction, which the libelants had anticipated and denied. The libelants thereupon excepted, inter alia, to the fourteenth, fifteenth, and sixteenth articles of the answer, on the ground that they were insufficient in law to constitute a defense. The exception to the fourteenth article (original fourth) of the answer was sustained, the opinion of the district judge being adopted as a satisfactory discussion of the question involved. The exception to the fifteenth article was also sustained; and the exception to the sixteenth article overruled. 16 C. C. A. 381, 69 Fed. 747. Testimony by depositions in Brazil and New York was taken, and a decree was subsequently directed to be entered in the district court in favor of the libelants for the sum of $3,151, with costs. 33 C. C. A. 663, 91 Fed. 543. A writ of certiorari was then applied for by the respondents, and issued by the supreme court, to review the said decree of the circuit court of appeals. It was there determined (179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106) that the decisions below sustaining the exception to the article of the answer setting up the cesser clause of the charter party as a defense were correct. It was also held that the questions of accord and satisfaction were rightfully determined below, on conflicting evidence. The decree, however, was reversed, on the ground that it was error to sustain the exception to the defense of state of war in Brazil or vis major, and the cause was remanded to this court for further proceedings in conformity with the opinion rendered.

The cause is now again in this court, and the respondents move for leave to amend their amended answer, filed in the circuit court of appeals, by substituting a new "fourteenth" article.

The article in question reads as follows:

"Fourteenth. And, further answering, the respondent alleges that the charter party referred to in the libel herein contained a clause providing that the vessel should have an absolute lien upon the cargo for freiglft and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading; that said vessel was fully laden, as alleged in the fourth article of the libel herein; and that thereafter, and long prior to the said 4th day of September, 1893 (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready to discharge her cargo), bills of lading of similar tenor for the whole of said cargo were duly signed by the master of said vessel, a copy of one of which is annexed hereto and made part hereof, and said bills of lading were duly assigned and delivered to the Companhia Industrial do Brazil, and by them assigned and delivered to Messrs. Manoel da Cruz & Filho, who thereby became the consignees of said cargo; and that thereupon all liability of these respondents to the owners of said vessel under said charter party ceased, and it became the duty of the master and owner of said vessel, upon the failure, alleged in the fifth article of said libel, of the consignees of said cargo to discharge the same at the agreed rate per day, to notify said consignee of the amount of the demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid, in accordance with the terms of the charter party."

The proposed new article reads as follows:

"Fourteenth. And, further answering, respondents allege that the charter party referred to in the libel herein contained a clause providing that the vessel should have an absolute lien upon the cargo for freight, dead freight, and demurrage, and that the charterers' responsibility should cease upon the loading of the cargo and signing of the bills of lading; that said vessel was fully laden, as alleged in the fourth article of the libel herein; and that thereafter, and long prior to the said 4th day of September, 1893 (the date upon which it is alleged in the fifth article of said libel that notice in writing was given to the agents of the respondents at Rio Janeiro that said vessel was ready to discharge her cargo), bills of lading of similar tenor for the whole of said cargo were duly signed by the master of said vessel, and said bills of lading were duly assigned and delivered to the Companhia Industrial do Brazil, which company was the owner of the lumber mentioned in said bills of lading, and had purchased the same from the respondents before the charter was made, and in December, 1892. Such charter was effected for the purpose of transporting said cargo of lumber from Pensacola to Rio Janeiro. The whole purpose of the issue of said bills of lading was to enable respondents to attach them, or one of them, to a draft for the purchase price of said lumber, which was drawn against a letter of credit issued by Jacob Walter & Co., of London, in favor of said Companhia Industrial do Brazil. Said draft was paid to respondents, and the lumber was delivered in Rio Janeiro to the purchaser thereof, said Companhia Industrial do Brazil, or to its order; and the function of said bills of lading was thereupon fully performed, and said Companhia Industrial do Brazil, or its vendee or agent, received the said lumber,—not by virtue of said bills of lading, but pursuant to said charter party and the consignment of said lumber to it."

The contention on the part of the respondents is that it appears by an expression in the opinion of the supreme court (page 109, 179 U. S., page 41, 21 Sup. Ct., and page 111, 45 L. Ed.) to the effect that, because it was not pleaded in the case that the indorsees of the bills of lading were the persons who had originally authorized

the chartering of the vessel, such point was not considered there, and that the real merits of the cesser defense have not been considered at all. It appears that testimony concerning this matter was given in this court on behalf of the respondents, which the respondents admit fully covers their present point, so that no further testimony is required by them. The libelants contend that such testimony was considered by the different courts through which the cause has been litigated, and that there is no merit in the application. The several decisions upon the exceptions to the clause in question, without mention of the testimony, would seem in some degree to negative the libelants' position, but I do not consider it necessary to decide this controversy. It is certain that the respondents have relied upon the form in which they presented the question of liability under the cesser clause through all the courts, and it does not seem to me that in this stage of the litigation the door should be opened to further dispute in such respect. The supreme court evidently considered that its decision settled all the questions in the case excepting the defense of vis major, which is now in this court to be determined.

The motion is denied.

THE HIGHLAND LIGHT.

(Circuit Court of Appeals, Ninth Circuit. September 9, 1901.)

No. 664.

SHIPPING—LOSS OF GOODS THROUGH NEGLIGENCE OF CHARTERER—LIABILITY OF VESSEL.

A bark was chartered to a transportation company for a monthly hire, the charter providing that the company should have all available cargo space, should do all lightering, and be responsible for all damage or loss of cargo. Libelants, with knowledge that the vessel was chartered, contracted with the company for the transportation of goods from Seattle to Dawson on the bark, "or any other vessel of the company, or on board of any vessel the company may employ," and to be shipped from St. Michaels up on the company's river boats. The goods were laden on the bark, which took them to St. Michaels. On reaching there it was found that the company had provided no means of lighterage, had no river vessels to forward the goods, and there was no warehouse in which they could be stored, or person to receive them. After remaining there several weeks, by using the small boats and constructing lighters, the passengers and their effects and such cargo as there was any one to receive were landed, and the master returned to Seattle with libelants' goods on board. *Held*, that while the company was liable for the damages caused by its gross negligence, there was no ground upon which the bark could be charged with negligence or liability for the breach of the company's contract.

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

Gorham & Gorham and Chas. E. Naylor, for appellants.

Upton, Arthur & Wheeler and Seymour W. Condon, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The proceeding in which the decree appealed from was rendered was commenced in the court below by the filing of a libel by Charles P. Pettey against the bark Highland Light, her tackle, apparel, and cargo, the Seattle, St. Michaels & Dawson City Transportation & Trading Company, a corporation, Thomas F. Townsley, E. W. Price, A. B. Graham, and Thomas H. Dempsey, as defendants, to recover for the alleged breach of a contract for the delivery at Dawson City, on the Yukon river, certain freight of his, shipped from Seattle, Wash., on board the Highland Light, in which proceeding William McCord and George W. Britain intervened and filed separate libels against the same defendants to recover for the alleged breach of a contract to deliver at Dawson certain freight of theirs put on board the bark at Seattle. The record shows that the bark Highland Light was, on the 20th day of January, 1898, chartered by its managing owner, George E. Plummer, of Alameda, Cal., to T. F. Townsley, of Seattle, Wash., for a period during which the occurrences here in question took place, and for voyages between Seattle, Wash., and St. Michaels, Alaska, at a stipulated sum per month, to be paid by the charterer to the owner of the bark. Among the provisions of the charter party are the following:

"Second. That said party of the first part (the owner) does further engage that the whole of said vessel (with the exception of the cabin, and necessary room for the accommodation of the crew and the stowage of the sails, cables, and provisions) shall be at the sole use and disposal of the said party of the second part (the charterer) during the voyage and/or voyages aforesaid; and that no goods or merchandise whatever shall be laden on board otherwise than from the said party of the second part. * * * Fourth. It is also further understood and agreed that the crew of the said vessel shall be used to handle cargo, as is customary on the Pacific coast, but that all lighterage of cargo and all extra labor employed in the handling of the cargo and/or cargoes taken on board of the said vessel shall be at the expense of the party of the second part, and all cargo and/or cargoes shall be delivered to and received from ship tackles alongside of said vessel. And it is also further understood and agreed that any and all claims for shortage of and/or damage to any cargo and/or cargoes carried by the said vessel shall be settled and paid for by the said party of the second part."

The charter party was subsequently assigned by Townsley to the Seattle, St. Michaels & Dawson City Transportation & Trading Company, a corporation, of which Townsley was the manager, Dempsey treasurer, Price president, and Graham vice president. The business of that corporation is indicated by the following advertisement published by it in one of the newspapers of Seattle, introduced in evidence, just prior to the application of the libelants to it for the transportation of their freight to Dawson:

"Added to Alaska's Fleet.

"An Ocean Steamship, Two River Boats, and Four Barges.

"New Company in the Field.

"Seattle, St. Michaels & Dawson City Transportation & Trading Company Charters Bark Highland Light, Preparatory to Engaging Heavily in Alaska Freight and Passenger Trade. Capital, $100,000.

"Another has been added to the list of Alaska steamship enterprises, having been organized by some of the most solid and conservative capitalists in Seattle. A large bark is under charter, and within a week contracts will be let for the construction of one ocean steamer, two river steamers, and

four barges, to operate between Seattle and Dawson. The company is the Seattle, St. Michaels and Dawson City Transportation and Trading Company, and it has a cash capital of $100,000. The officers are: President, E. W. Price; vice president, A. B. Graham; treasurer, Flavius S. Cole; secretary, T. H. Dempsey; manager, T. F. Townsley. It is a close corporation, and intends to engage permanently in the Alaskan transportation business, as well as in trading and mining on the Yukon. The company has chartered for eight months the bark Highland Light, of 2,200 tons freight capacity, which is due here any hour. It will load freight and stock for Skagway and Dyea, and will continue on that run until May 1, when it will be loaded with freight and passengers for St. Michaels. Meanwhile plans and specifications are being prepared by E. L. McAllaster, the marine architect, for one ocean steamer, two river steamers, and four barges, for which contracts will be let next week, and which will be completed ready for service by June 1. The ocean steamer will be 212 feet long, 32 feet beam, and 23 feet deep, and will have a capacity for 1,000 tons of freight and at least 300 passengers. The river steamers will be modeled after those running on the Mississippi river, and will be 150 feet long and 30 feet wide, with a capacity of 300 tons of freight and 300 passengers each. The barges will be 125 to 150 feet long, and will have a freight capacity of 250 to 300 tons each. All the steamers will have steam winches and all modern conveniences, including electric light, marble baths, etc. Bids for the machinery are now being made by several houses in the East, but the boats and all other fittings will be built in Seattle. As soon as navigation on the Yukon river opens, the Highland Light will be transferred to the St. Michaels route, and, with the ocean steamer, will run in connection with the river boats. The Highland Light has already secured almost a full cargo for her first trip to Lynn Canal, and contracts for freight to St. Michaels are being made so rapidly that it may be decided to add to the river fleet. The cost of the fleet so far provided will be $125,000, which is more than the capital of the company, but its financial backers are amply able to enlarge it without associating any others with them. The Highland Light has just come off the Merchants' dry dock at San Francisco, where she has been thoroughly overhauled. The freight space in her hold has been enlarged. Upon returning to Seattle the bark will be fitted up for a voyage to the mouth of the Yukon river with the sections of four barges and two river boats to be put together on Hooper's Bay, and made ready for operation on the Yukon in the spring."

The libelants, desiring to go to Dawson for mining purposes, and perhaps attracted by this grandiloquent advertisement, applied early in June, 1898, to this transportation company to carry their provisions and mining outfits to that place, which the company undertook to do, giving to each of the libelants a bill of lading, dated May 2, 1898, reciting the receipt of the property, describing it, with its weight, address, and destination, and stating that it was "to be shipped on board of the Highland Light—Dawson City—Canada, or on board of any other vessel of the company, or on board of any vessel the company may employ," and further providing that it was "to be shipped to Dawson on our first river boat from St. Michaels up. Duties to be paid here by shippers," and with various other provisions common to such instruments. The libelants then proceeded to Dawson by way of Skagway and the overland route, expecting to receive their provisions and outfits at that place. The transportation company shipped them on board the Highland Light to St. Michaels, at which point it was necessary to transfer them to lighter craft for carriage thence to Dawson. When the Highland Light left Seattle with the charterer's passengers, numbering more than 100, and a cargo of about 1,200 tons of freight, including that of the libelants,

she carried on board but one representative of the charterer, and that was the purser, who, two days after the bark reached St. Michaels, left her, and attached the coal on board for wages alleged to be due him from the transportation company. The latter had made no arrangements whatever for the landing of its passengers and freight at St. Michaels, nor for the forwarding of either passengers or freight to their points of destination. That company's neglect in this respect naturally gave rise to serious loss, inconvenience, and dissatisfaction on the part of the passengers, as well as on the part of the captain of the bark; and as the best, and apparently the only, way for temporary relief, the captain and passengers, after waiting several days for the performance of the company's obligations, combined for the landing of the passengers and as much freight as possible by means of the small boats of the bark and such lighters as could be and were constructed out of lumber carried by the bark. This method was pursued as expeditiously as possible, the freight of the passengers being delivered to them by the captain upon the surrender to him of the bills of lading held therefor. In the midst of this proceeding Dempsey appeared at St. Michaels on board the steamer Del Norte, with a little steam launch capable of carrying about a dozen passengers and about 30 tons of freight, but unfit, according to the evidence, to carry even those up the Yukon river. It is contended that he was sent by the transportation and trading company to St. Michaels to take the passengers and freight from the Highland Light, and carry out the contracts of that company for the transportation of both on to destination; and that he had with him an order from Townsley, as manager of the company, on the captain of the bark, for the delivery to him of certain supplies of the company, and also all of the freight, including that of the libelants; which order, in so far as concerned the freight of the libelants, the captain refused to comply with, but retained that freight on board, and brought it back to Seattle in a damaged and practically worthless condition. In the first place, we think the probabilities are all against the truth of that contention. The value of the libelants' property was, according to the evidence and the findings of the court below, $107 in Seattle at the date of its shipment, on which the libelant paid to the transportation company $294 for freight charges, duties, etc.; the value of the intervening libelant McCord's property was $200 at Seattle at the date of its shipment, on which he paid the transportation company $150 for freight charges, duties, etc.; and that of the intervening libelant Britain was $300 at the same place and time, on which he paid to the transportation company $195.45. The evidence shows without conflict that the captain delivered all of the freight of all of the passengers upon the surrender of the bills of lading therefor held by them, and that he delivered to Dempsey the supplies specified in the order presented by him from the manager of the transportation company; and it would seem very unreasonable to expect to find that he refused to deliver to Dempsey the few provisions and outfits of the libelants if they had been called for by the order, as the captain would very naturally be anxious to free his ship of all the freight he had taken to St. Michaels. He had nothing to gain by bringing a por-

tion of it back to Seattle, as the evidence shows he did that of the libelants. What the order given by Townsley, as manager of the transportation company, to Dempsey, and by him presented to the captain at St. Michaels, contained, is in dispute, and the testimony in relation thereto conflicting. None of the testimony in the case was given before the court, but all of it that was presented to the court below was taken either before a commissioner or by deposition. In this court some additional evidence has been introduced in the form of the deposition of Carl Ackerman, a witness on behalf of the appellants, who was the first officer of the bark on its voyage from Seattle to St. Michaels and return. Turning to the testimony of Dempsey himself in respect to the contents of the order given him by Townsley, as manager of the transportation company, and by Dempsey presented to the captain of the bark, we find it very indefinite, uncertain, and unsatisfactory. We extract from his cross-examination in regard to the order:

"Q. Now, did you take that order with you on the Del Norte from Seattle? A. Yes, sir; I took the order from here. Q. In going? A. Yes, sir; and I presented the order to Captain Herbert on the ship. Q. What ship? A. On the Highland Light. Q. When? A. Well, within a few days of when I landed. It might have been the first day. I think it was the first day, because in the order it stated that I was to have, among other things, a range which was used on the Highland Light, and a lot of cooking utensils, for my camp, bedding and furniture of that kind; and I was to get it; and I presented the order as soon as I went there. Q. Is it not a matter of fact, Mr. Dempsey, that that order that you refer to was an order upon Captain Herbert from Mr. Townsley for the company's supplies and goods on the Highland Light? A. No. Q. Is not that the fact? A. Well, it was for certain supplies that were to be given me, and that I would represent them. Q. In taking the supplies you represented the company? A. Yes, sir; I did the lightering and the taking care of the goods. Q. There was no order given you by Townsley upon Captain Herbert for the goods other than the merchandise and supplies of this company, was there? A. Yes, sir; I think there was an order given me for the goods that— That I would do the lightering. Q. What goods? A. For all of the freight, and I would take care of it. Q. The whole cargo on the Highland Light? A. The freight which was to go up the river. Q. The whole of it? A. Such as we would take care of, that I would do the lightering. Q. You had an order for all of the through freight on the Highland Light? A. Yes, sir. Q. Which included the supplies and goods of this company, as well as the goods shipped by private individuals? A. No; I had an order to take care of the goods generally and the freight on the boat. Q. Which included the supplies and goods of this company as well as the goods shipped by private individuals? A. Only part of the company's, because Mr. Nestor, he had another order for part of the company's goods. Q. Now, which part of the goods did you have an order for? That is what I am trying to get at. A. I had an order for a certain range which was on the Highland Light. Q. What else? A. Certain mattresses and cooking utensils. Two scows, and I cannot— Let me see. And as much coal as was necessary. I cannot recollect whether there was anything else or not. Q. Would not you know whether there was anything else? A. Well, it is so long now. That is the most of it, though. Q. You think that is the most of it,—a range, and some mattresses, and cooking utensils, and some coal? A. Yes, sir. Q. You think that was all that the order was for? A. Yes, sir. And supplies were sold, I understand, from Mr. Nestor— Q. Now, you are satisfied, are you, with what you have enumerated? A. To the best of my memory. Q. To the best of your memory. All of the things described in that order which you were entitled to receive? A. Well, the receipt, of course, or the order, if I had it— There are so many things, I would not be sure. Q. But you think you have included

all? A. I think that was about all, but there might be some little things. Q. I did not say there might not be one or two more little articles. A. Oh, that was in a general way. Q. That is practically what the order was for? A. Yes, sir. Q. And for nothing else? A. Well, I could not remember just now whether there was something else on it or not."

We have not overlooked Townsley's testimony to the effect that he gave Dempsey an order on the captain of the bark for all the freight; but, in view of the clear and explicit statements of Ackerman, the first officer, and of the captain, and considering all of the circumstances of the case, we are unable to conclude that such was the purport of the order. It does not admit of question that the transportation company wholly failed in its duty to make timely and suitable provision for the discharge of its passengers and freight at St. Michaels, and the forwarding of the same to the respective points of destination. Dempsey did not even appear at St. Michaels until about two weeks after the Highland Light arrived there. It seems almost absurd to contend that he was sent to that point for the purpose of discharging the bark of its more than 100 passengers and its cargo of about 1,200 tons of freight, and carrying them up the Yukon river by means of the little launch that he took with him. He was provided with no means with which to secure tugs, lighters, or other means of even discharging passengers or freight, much less with steamers or barges for the forwarding of them to their destinations. The testimony of Ackerman, which, as has been said, was not before the court below, appears to have been given in a very straightforward manner. What was done upon the arrival of the bark at St. Michaels, which was on the 4th day of July, appears from this extract from his testimony:

"The passengers' contract called for a tug and scow ready on our arrival at St. Michaels, but they were not there when we got off, so at first the passengers did not know how to get their things ashore. They held a meeting in the ship's cabin, and invited the captain and myself to be present, and wanted to know what was to be done,—how they would get their freight ashore? They concluded that the only thing to get it ashore would be to help themselves, and Captain Herbert was willing to lend them the ship's boats to get their things ashore until a lighter was built to carry more than the ship's boats. So the next morning all the freight in the hold was separated according to their marks, and they commenced to ship it ashore in the ship's boats. At the same time some of the sailors broke down the starboard side of the deck house, rafted the lumber ashore, and some of the carpenters (five) amongst the passengers built a scow out of that lumber. The material outside of the lumber was furnished by the Chicago Company. We continued to send their freight ashore in the ship's boats until all the separate companies had enough provisions, tents, and tools ashore to commence working on their own boats, for which we had the lumber aboard of the ship. Then we rafted the lumber, and they commenced building their boats. After we had the lumber ashore, the scow was finished. We loaded her up, sometimes twice a day, and towed her ashore, also with the ship's boats. At that rate we lightered about 350 tons a week; that is, by sending the scow ashore two or three times a day."

Dempsey did not arrive at St. Michaels until about the 26th or 27th of July, going there on the steamer Del Norte, at which time, according to Ackerman's testimony, more than two-thirds of the 1,200 tons of freight that the bark carried had been discharged. After his arrival he towed, by means of his launch, a number of light-

ers ashore, for which, according to the testimony of Ackerman, he demanded and received pay from the passengers. Both Ackerman and the captain of the bark testify distinctly that Dempsey said that the transportation company had broken up, and that he had lost money by it; that he was up there to make some money for himself, and that he had no more connection with the company; that on the day of his arrival he presented an order from the manager of the transportation company for the delivery to him of certain articles, embracing dishes, knives and forks, cooking utensils, lamps, one range, and other things; but that the order did not call for any other freight. In the surrounding circumstances, which clearly show, among other things, that Dempsey was not provided by the transportation company with any means, and had none of his own, with which to forward the freight of the libelants or any other freight of the bark's cargo to Dawson, we find strong corroborative evidence of the truth of the testimony of the captain and of the first officer of the bark to the effect that Dempsey presented no order for the freight of the libelants; and we are of opinion that from his statements to the captain and his circumstances the captain was justified in refusing to deliver to him the provisions and outfits of the libelants. There being no one at St. Michaels authorized to receive them, and no place of storage there, there was nothing left for the captain to do but to bring the property back to Seattle with his ship, which he did. For the transportation company's gross neglect in the matter it is, as a matter of course, liable to the libelants, and from the judgment against it no appeal appears to have been taken; but we are unable to see any just ground upon which the judgment against the ship can be sustained. The case shows clearly that the libelants' goods were carried by the bark under a charter party giving to the Seattle, St. Michaels & Dawson City Transportation & Trading Company the whole capacity of the ship; that the libelants had notice of this fact, and therefore constructive notice, at least, of the terms of the charter party, including the provision that "any and all claims for shortage of and/or damage to any cargo and/or cargoes carried by the said vessel shall be settled and paid for by the said party of the second part" (the charterer), and contracted, not with the master or owner of the ship, but with the charterer, in the form of a bill of lading giving to the transportation company the right to ship the goods on board of the Highland Light, "or on board of any other vessel of the company, or on board of any vessel the company may employ." It so happened that the transportation company did ship the libelants' goods on the Highland Light, but the latter did not thereby become liable for the due performance of the charterer's contract, as was held by the court below. As there was no breach of duty on the part of the ship or of its owner or master, the judgment against it must be reversed.

The judgment, in so far as concerns the appellants, is reversed, with costs.

PARSONS et al. v. EMPIRE TRANSP. CO.

(Circuit Court of Appeals, Ninth Circuit. September 9, 1901.)

No. 669.

1. SHIPPING—LOSS OF CARGO—UNSEAWORTHINESS OF BARGE.
A barge *held* unseaworthy, from the manner of her construction, for a voyage between St. Michael and Nome, Alaska, in October, and her owner for that reason not entitled to exemption, under section 3 of the Harter act, from liability for the loss of cargo taken on board for such a voyage.

2. SAME—LIMITATION OF LIABILITY—LOSS THROUGH NEGLIGENCE.
A corporation engaged in the transportation of cargo and passengers between Seattle and Alaskan points maintained a line of steamers to St. Michael, which was the Alaskan headquarters of its fleet, and there transshipped to other steamers and barges, which were run by the company between that port and Dawson and other points on the Yukon river. Its general manager was located at San Francisco, and he sent a superintendent to take charge of all the company's business at St. Michael. Such superintendent being compelled to return, by reason of illness, in July, left in charge his assistant, who was incompetent for the position by reason of his inexperience in such matters, which was known to the general manager, but who was permitted to remain in charge during the remainder of the season. About October 1st he contracted on behalf of the company to take a cargo to Nome, and loaded the same on a river barge, which was wholly unfit for such a voyage at that season, and which sank in a storm before having started, through the additional negligence of the agent in not having it taken to a safe place. *Held* that, whether such agent in fact had authority to accept such cargo, he had ostensible authority, and the company was bound by his action, and responsible for his negligence and incompetence, and was not entitled to a limitation of liability for the loss under Rev. St. §§ 4283–4285, which were not intended to relieve shipowners from personal liability for their own willful or negligent acts.

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

Brady & Gay and Edward Brady, for appellants.

Thomas R. Shepard, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a proceeding instituted in the court below by the appellee, a New Jersey corporation, to obtain the benefit of the limitation of liability provided for in sections 4283–4285 of the Revised Statutes (embodying provisions of the act of March 3, 1851), and amendatory acts, and in section 3 of the act of February 13, 1893 (27 Stat. 445). The petition sets forth, among other things, that on the 30th day of September, 1899, barge No. 2, of which the petitioner was the owner, was lying in the harbor of St. Michael, Alaska, alongside the steamer Lakme, chartered and operated by the Seattle & Yukon Transportation Company, transferring freight therefrom to the steamer; that the Lakme was to take the barge from St. Michael to Nome, Alaska, but that during the night of the day mentioned a heavy sea prevailed in the harbor, causing the barge to bump so hard against the side of the steamer as to induce the latter's captain to drop the barge astern of the steamer with about 40

fathoms of rope out, and that during the next morning the wind began to freshen and blow hard from the north, for which reason the captain of the steamer, desiring to drop astern of the Lakme the barge Admiral, which was also transferring stores on board the steamer, and had remained alongside of her during the night of September 30th, ordered the master of barge No. 2 to stand by, and drop his anchor, as he was going to cast that barge off from the steamer; that barge No. 2 was accordingly cast off, and, after drifting 600 or 700 yards in towards the shore, its anchor was dropped; that the storm continued to increase, and the waves began to dash over the bow of barge No. 2 and against its deck house, and that about 9 o'clock in the morning the barge began to settle by the head very rapidly; that the captain and crew of this barge were compelled for their own safety to abandon it, which was done by means of a lifeboat sent out from the steamer Lakme, and that thereafter barge No. 2, together with all her tackle, apparel, boats, and appurtenances, became a total loss; that no freight moneys were earned, paid, or received therefrom; that the accident happened and the loss mentioned was occasioned without fault, privity, or knowledge of the petitioner, and without the fault of any of its officers, agents, or servants, but was solely due to perils of the sea; that, notwithstanding those facts, certain persons (naming them), claiming to have lost their property on board of the barge, have already brought suits against the petitioner, and other suits are threatened, to recover damages for the alleged loss of such property, and for further damages by reason of the loss of work at Nome, Alaska, occasioned by the loss of the property, and that the actions alleged to have been commenced are still pending; that barge No. 2 was in all respects sound, staunch, seaworthy, and properly and efficiently fitted for the voyage upon which she was about to proceed, and properly manned and equipped, and commanded by a careful, competent, and experienced master. In the petition the petitioner, while not admitting, but denying, that it is under any liability for the loss or damage so incurred, and claiming the right to contest any liability therefor, further claims to be entitled to have limited its liability, if such shall be found to exist, to the amount or value of its interest in barge No. 2 immediately after the accident. The foregoing are, in substance, the averments of the petition, followed by the appropriate prayer, to which petition the appellants Parsons & Co. filed an answer and cross libel. By their answer the appellants admit that at the times stated in the petition barge No. 2 was lying in the harbor of St. Michael alongside the steamer Lakme, which was to take the barge from that point to Nome, Alaska, and also admit that the barge became a total loss, as alleged in the petition. But the answer denies all of the averments of the petition in respect to its seaworthiness, and also denies that the loss of the barge and its freight occurred without the fault, privity or knowledge of the petitioner or of any of its officers, agents, or servants, and denies that it was due solely or at all to the perils of the sea. By their answer the appellants also affirmatively allege that the loss of the barge and its contents was occasioned by the fault, privity, and knowledge of the petitioner and of its duly-author-

ized agent and manager, F. G. Patterson; and, further, that at the time of the accident the barge was unseaworthy, and was not properly fitted for the voyage she was about to undertake; was not properly manned or commanded, but was in charge of a watchman, without a master, and without a sufficient and competent crew. The appellants further allege that the petitioner received from them for transportation on the barge from St. Michael to Nome, Alaska, goods, wares, and merchandise of the value of $26,081, which became a total loss by reason of the negligence of the petitioner in the particulars above stated.

It appears from the record that in the year 1898 the appellee engaged in the business of transporting passengers and freight from Seattle, Wash., to Alaska, and for that purpose, and as parts of its fleet, had caused to be constructed at Nixon's shipyard at Elizabeth, N. J., under the superintendency of Capt. Peter Bloomsburg, four barges, numbered, respectively, 1, 2, 3, and 4, for carrying freight and coal; four barges for carrying passengers and freight; and two steamers, named, respectively, International and Empire, for towing the barges. Barge No. 2—the one here in question—was built of steel, with steel frames entire, two lattice girders running lengthwise inside for strengthening. It was built in 10 sections, each section being 10 feet long longitudinally of the vessel, 35 feet wide, and with a depth of 6 feet 6 inches. Each section had a water-tight bulkhead at each end. They were to be and were bolted together, forming a whole boat of 10 water-tight compartments. Three-inch angle bars were riveted in each end of each section. In that condition the sections were taken on cars from Elizabeth, N. J., to Seattle, Wash., at which place they were placed on the steamer Conemaugh, and carried to St. Michael, Alaska, where they were floated, and there in the water bolted together through the angle bars placed about eight inches apart at the top, bottom and sides. Before being removed from New Jersey, however, the sections were bolted together, thus forming a complete boat, and as such was measured and enrolled in the custom house at New York. The barge was also decked and housed in in sections at Elizabeth, but the house was taken apart, and conveyed in sections to St. Michael. The deck was of two-inch Florida pine, bolted together with steel deck beams. The house was built of one-inch white pine, dressed, with a sill running the length of the vessel, bolted through the deck, four by six, with a studding tenanted. The siding was then nailed to the top of the studding, three by six plank, mortised also to receive the upper end of the studding, on which the carline running across to support the upper deck was fastened, three 2½ by 5 ridge poles running under the carline fore and aft equal distance apart. On that was laid the upper deck, one-inch stuff, dressed, covered with No. 6 canvas, and painted; the forward and aft bulkheads being built of the same material and of the same dimensions as the sides. The extreme length of the house was 85 feet, its height 8 feet, and its breadth the same as the beam of the boat, 35 feet. The draft of the barge was 18 inches, the intention being to load her to five feet, which would leave about 18 inches above water when carrying a full load. It was in this barge

that the appellants' merchandise was stored by Patterson, acting for the appellee, for transportation to Nome, September 30—October 1, 1899. We have no hesitation in holding, as did the court below, such a craft unseaworthy for a voyage from St. Michael to Nome at that season of the year. Indeed, one of the appellee's witnesses, Capt. Barlow, who was employed as captain of one of the appellee's steamers, and whose experience as captain on the Pacific coast extended over a period of 14 or 15 years, testified that "a barge of that description has no business in Behring Sea at all"; certainly not, we think, at a season of the year when heavy storms are liable to occur at any time. This fact is virtually admitted by the learned counsel for the appellee in that portion of their brief in which they discuss the lack of authority in Patterson, real or ostensible, to undertake to send barge No. 2 to Nome; for they say that the appellee company, "having carefully selected its subordinates, and having in its fleet not only such barges as this [barge No. 2], designed solely for towing in a harbor and along a river, but also river steamers that might safely have made the voyage to Nome, if necessary, and deep-sea vessels that were fully adapted to that voyage, cannot be supposed to have contemplated that its agent, if he contracted in its behalf to transport freight from St. Michael to Nome, would use for that purpose a river barge, seaworthy for its restricted use, but not for a trip on a stormy sea, and least of all that he would so use the barge at the beginning of the Arctic winter, after the season of navigation had closed, and only one steamer remained in the harbor for a last departure to southerly ports, and after the barge itself had already been stored in winter quarters." Without regard, therefore, to the alleged improper loading and improper equipment and insufficient manning of barge No. 2 for the voyage undertaken by her, we hold, upon the facts appearing in the record, that she was not, as alleged in the petition for the limitation of liability provided for by section 3 of the act of February 13, 1893, in all respects seaworthy; for which reason the court below was right in refusing to award the petitioner the limitation of liability provided for by that act.

The court below, however, did award the petitioner the limitation of liability provided for by sections 4283–4285 of the Revised Statutes, and acts amendatory thereof, upon the ground that the petitioner "proved by satisfactory evidence that the losses and damages were entirely without the knowledge, privity, or negligence of any one of its managing officers." That question remains to be considered. The act of March 3, 1851, provisions of which are embodied in sections 4283–4285 of the Revised Statutes, provides, among other things, as follows:

"The liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

At the time the appellee commenced its transportation business on the Pacific coast, Nome was not known. Dawson and other points

along the Yukon river were the places to which large numbers of people were flocking in search of gold, and to which large quantities of freight were then being shipped. So that the line established by the appellee, the general management of which was intrusted to George H. Higbee, with headquarters at the city of San Francisco, extended from Seattle, Wash., by means of deep-sea steamers, to St. Michael, Alaska, at which point passengers and cargoes were transferred by the appellee to its light-draft steamers and to barges for transportation thence to Dawson and intermediate points. The transshipping point of St. Michael therefore became and was a very important point, not only because of the fact just stated, but also because of its remoteness from the general office of the appellee and also from its general manager on the Pacific coast. To that point was assigned, at the opening of the season of 1899, as the general superintendent of all of the company's business in that region, Capt. Bloomsburg, who, as has been said, not only superintended the construction of the barges and some of the steamers of the company in New Jersey, but had had, as appears in the record, an extensive experience as superintendent of various other transportation companies. There is no doubt from the evidence that he was competent for the position assigned him. He left Seattle for St. Michael early in June, 1899, but arrived at his point of destination so ill that he was compelled to return by the same ship, leaving St. Michael July 12th, and leaving in his place and in charge of all of the business of the appellee at St. Michael, F. G. Patterson, who had been sent there by the appellee as the assistant of Capt. Bloomsburg, and designated freight and passenger agent. The appellee was advised of Bloomsburg's illness and return and of the fact that Patterson had been put in his place in charge of the company's business at St. Michael, and Patterson was by the appellee permitted to so remain during the balance of the season. The appellee's general manager, Mr. Higbee, testified that before Capt. Bloomsburg's departure for St. Michael in June, 1899, he (Higbee) gave him verbal instructions, which he confirmed by letter of date June 8, 1899, in which he expressed the company's "desire that all our fleet shall winter at St. Michael in some suitable place; that the crew, excepting the necessary watchmen, shall be discharged, and returned here in the fall, and to this end you should refuse to take cargo for a late trip, if, in your judgment, there is risk in being frozen up in the river for the winter, unless you can get sufficient freight money to pay the entire lay-up expenses during the winter, which we estimate at $20,000"; that he was in communication with Patterson during the season of 1899, who, as Higbee testifies, was first Bloomsburg's "assistant, more in the line of chief clerk," and who, so far as appears, was without any nautical knowledge, and without any experience in the matter of loading, equipping, manning, or operating water craft of any kind. That Patterson's incompetency for the position of superintendent of the appellee's business at St. Michael was known to the general manager, Higbee, is shown by the fact that he telegraphed to Mr. Fahnestock, who was the general agent of the appellee on the Pacific coast, and was then at Dawson, to have Patterson select some suitable captain to assist

him in matters relating to the company's shipping interests; and is further shown by the following answer of Higbee to the question why he did not send some competent person to St. Michael to take the place of Capt. Bloomsburg,—his answer being:

"When Captain Bloomsburg arrived here [Seattle] ill, I was in San Francisco, and previous to that it was decided between Mr. Fahnestock and myself that either one or the other of us would go to St. Michael. I was detained in San Francisco, and Mr. Fahnestock started. He left here [Seattle] late in July, going in over the pass by Dawson, and was detained at Dawson all winter, and did not get to St. Michael; but we expected him to arrive there and be there in time to close up all our affairs in the fall. It would make it unnecessary to send a man in from here to take the place of Captain Bloomsburg, as all that he was sent up for was practically attended to, or would have been attended to, before any new man could have reached there."

So that Patterson, an inexperienced man, with full knowledge on the part of appellee's general manager for the Pacific coast, was allowed to act as general superintendent of all of its business at St. Michael, including the control of the entire fleet in those waters.

At the time of the accident which gave rise to the present proceedings, the brief season during which Alaskan waters can be navigated was about coming to a close, and the appellee's fleet was assembled in the harbor of St. Michael, and was being put in winter quarters. The appellee having some surplus stores on hand, Patterson, thinking it for the best interests of the company, concluded to send them to Nome, and there sell them; and the appellants also having a lot of merchandise left over were also desirous of sending it to Nome, which Patterson, acting for the appellee, agreed to ship at the rate of $20 a ton, along with the company's own surplus stores, on barge No. 2, in tow of the steamer Lakme. Accordingly, both the appellee's and the appellants' merchandise was put on board of the barge, and Patterson, acting for the appellee, sent the barge, by means of one of the company's tugs, alongside of and delivered it to the steamer Lakme for towage to Nome; shortly after which the barge, with all of the goods on board, was sunk, and became a total loss, as hereinbefore stated.

It will have been observed from the foregoing statement of the contents of the petition herein that the limitation of liability thereby sought was not in the petition based upon any lack of authority, real or ostensible, in Patterson to undertake the shipment of the appellants' merchandise to Nome, but the limitation of liability sought under the provisions of the Revised Statutes and acts amendatory thereof was based upon the averment that the losses and damages growing out of the accident were occasioned without the fault, privity, or knowledge of the petitioner, or of any of its officers, agents, or servants, but was solely due to perils of the sea; and that the limitation of liability claimed under the provisions of the act of February 13, 1893, was based upon the averment that the barge was in all respects sound, staunch, seaworthy, and properly fitted for the voyage upon which she was about to proceed, properly manned and equipped, and commanded by a careful, competent, and experienced master. Without considering the suggestion of the appellants that

the appellee is, by the averments of its petition, estopped to deny the authority of its agent Patterson, and without considering his actual authority to undertake in behalf of his company the shipment of the appellants' merchandise to Nome, we are of the opinion that he at least had the ostensible authority to undertake the shipment, and that by his act in that behalf the appellee is bound. The appellee, being a corporation, necessarily acts through agents of different kinds. In charge of all of its business on the Pacific coast it appointed a general manager, with headquarters at the city of San Francisco, and through him, and by reason of the illness of Bloomsburg, caused to be installed and maintained at St. Michael, as superintendent of all of the business of the company, including the dispatch of boats and the making of contracts for the transportation of passengers and freight, F. G. Patterson. He was its representative at that point, in charge of all of its operations, and the public was entitled to regard him in that light. It is a mistake to say, as do the counsel for the appellee, that the company's field of operations from St. Michael was limited to Dawson and the intermediate points; for the record shows that Clark, one of the appellants, saw the company's superintendent engaged in sending some of the company's own surplus stores to Nome for sale, and contracted with him, as such superintendent, to send by the same boat some of the appellants' merchandise, which Patterson undertook to do. Surely, the man to whose management the company's entire fleet of boats in those remote waters, as well as all of its other property in that region, was intrusted, should be regarded as the company's representative, and his dispatch of any of the company's boats to a neighboring point as being at least within his ostensible authority. His knowledge must, therefore, be regarded as his company's knowledge, and his acts as the acts of the company. That it was gross negligence to ship goods from St. Michael to Nome at the beginning of the winter season in barge No. 2 has already been sufficiently shown. But the appellee, through its superintendent, was guilty of further negligence in failing to send one of its tugs, and tow the barge to a place of safety, which the evidence shows might very readily have been done by the exercise of reasonable diligence. The truth is, as is abundantly shown by the record, that Patterson knew nothing about the shipping business, and was wholly unfit for the position in which the appellee permitted him to remain, and thus held him out to the public. It was not the intention of congress, by the provisions of sections 4283–4285 of the Revised Statutes, embodying provisions of the act of March 3, 1851, nor of any act amendatory thereof, to relieve shipowners of responsibility for their own willful or negligent acts. Craig v. Insurance Co., 141 U. S. 638, 12 Sup. Ct. 97, 35 L. Ed. 886; Moore v. Transportation Co., 24 How. 1, 16 L. Ed. 674; Walker v. Transportation Co., 3 Wall. 150, 18 L. Ed. 172; The Republic, 9 C. C. A. 386, 61 Fed. 109; The Colima (D. C.) 82 Fed. 665; Quinlan v. Pew, 5 C. C. A. 438, 56 Fed. 111.

The judgment is reversed, with costs to the appellants, and with directions to the court below to deny the petition for limitation of liability.

DORRELL v. SCHWERMAN.

(District Court, E. D. Wisconsin. August 26, 1901.)

1. SEAMAN—AUTHORITY OF MASTER OVER.
The master of a vessel is strictly accountable to those under him, both criminally and civilly, for wanton injury inflicted upon them, or oppressive and unreasonable treatment; but he is necessarily vested with great authority, which it is his right and duty to exercise in the maintenance of discipline, and will be protected in the exercise of such authority, even to the extent of inflicting corporal punishment on a subordinate, where the circumstances are such as to justify it, and he acts from proper motives and in a reasonable manner.

2. SAME—ACTION AGAINST MASTER FOR ASSAULT—EVIDENCE CONSIDERED.
Evidence considered, and *held* insufficient to sustain a libel filed against the master of a steamer by the steward to recover damages for personal injuries alleged to have resulted from an unprovoked assault made upon him by the master.

In Admiralty. Libel in personam by a seaman against the master of the steamer Burnham to recover damages for an alleged assault by the master on board the steamer while on her voyage upon Lake Michigan.

McCabe & Dahlman, for libelant.
Max C. Krause, for defendant.

SEAMAN, District Judge. The libelant was in the service of the steamer Burnham as steward or cook, and avers in his libel that the master committed an unprovoked assault upon him while on the voyage to Chicago, whereby he received serious physical injuries, resulting in permanent paralysis. The fact of his present paralyzed condition is undisputed, and the fact of a prior altercation with the master on shipboard, with some corporal hurt, is equally undisputed; but the libelant's version of the circumstances of the conflict and extent and manner of the force used is supported by his testimony alone, while it is directly controverted by the master in every feature on which the cause of action depends, and the master's version is corroborated in important particulars by other witnesses, especially by three of the crew who claim to have been present during parts of the occurrence. Nevertheless the duty of the court is to sift the evidence of this unseemly transaction on shipboard, and ascertain so far as possible whether the true preponderance is or is not with the libelant; whether his claim is sustained in the light of the circumstances which are either conceded or appear by credible testimony, with just allowance for the interests or relations of the witnesses.

As the libelant was in the relation of mariner, he was during such service subject to the authority vested in the master of the steamer. The rule as to this authority is thus stated by Kent (3 Kent, Comm. 131), and frequently approved by the courts: "Being responsible over to others for his conduct as master, the law, as well on that account as from the necessity of the case, has intrusted him with great authority over the mariners on board. Such authority is required for the safe navigation of the ship and the preservation of

good order and discipline. He may imprison and also inflict reasonable corporal punishment upon a seaman for disobedience to his reasonable commands, or for disorderly, riotous, or insolent conduct; and his authority in that respect is analogous to that of a master on land over his apprentice or scholar." Although punishment by flogging, as formerly sanctioned, was abolished by statute in 1850 (Rev. St. § 4611), it has been held that such provision does not curtail the authority of the master in other respects under the rule above stated, even as to "reasonable corporal punishment," if otherwise justifiable under the circumstances. Mr. Justice Curtis in Charge to Grand Jury, 1 Curt. 509, Fed. Cas. No. 18,249; U. S. v. Trice (D. C.) 30 Fed. 490; 2 Pars. Shipp. & Adm. 90. At the same time the master is strictly accountable to those under him for oppressive and unreasonable treatment, and if he inflicts or causes wanton injury his liability is both criminal and civil. It is of the utmost importance in cases of this nature to preserve the line of distinction between the exercise of just authority and oppressive conduct. As aptly remarked by Chief Justice Taney in Dinsman v. Wilkes, 12 How. 390, 403, 13 L. Ed. 1036, in reference to like complaint arising in the naval service, it is essential to the security and efficiency of the service "that the authority and command confided to the officer, when it has been exercised from proper motives, should be firmly supported in the courts of justice as well as on shipboard," but it cannot be permitted "that the humblest individual in the service be oppressed and injured by his commanding officer, from malice or ill will, or the wantonness of power, without giving him redress in the courts of justice." In the case at bar these facts are clearly established: The libelant was an old man, and had been in the service of the steamer about two months as steward and cook. During that time he had under him successively four boys as "second cooks," with whom he quarreled to such extent that it became necessary to discharge one after the other, and in some instances they were so intimidated by his treatment on the trip that one of the deck hands was substituted by the mate as a temporary assistant. In those instances the libelant used abusive and threatening language, and the witnesses mention him as "very cranky" and as using intoxicating liquors at times, although there is no direct proof of actual intoxication. About two weeks prior to the difficulty in question, the master had directed him to clean up his kitchen, to which the libelant made sullen response, but complied with the order, and subsequently exhibited to the mate his anger over this "interference," with threat that he would "stick his fork through that mulhead captain if he comes back here and interferes with my business." This threat was reported by the mate to the master, with a warning that "the steward is sore on you for some reason." On the occasion in controversy the steamer was on her trip from Racine to Chicago, and the master, in passing aft in the course of duty, to go down to the engine room, found the libelant seated on a stool, smoking, with his feet upon the after rail, and in such position that the passageway to the stairs was entirely blocked. The testimony is undisputed that the libelant either refused or neglected to move or change his position

to allow the master to pass when the latter appeared and gave notice of such purpose, so that the master pushed by, removing the man's feet from the rail, with no unseemly violence and no hurt. The only material dispute at this point is in reference to the immediate conduct of each when the way was thus cleared, and incidentally whether the libelant was then under the influence of liquor. The libelant testifies that he remained seated after his feet were pushed off the rail, until the master turned and "commenced to jaw" him, and he then "went to get up," and was "tackled and choked" by the master and thrown against an ice box and the rail; while the master states that the libelant jumped up at once, using abusive language, with the exclamation, "I will drop your guts on deck," and started for the kitchen, which was a step away, and that he merely kept the man pinioned by grasping his wrists to prevent his move to the kitchen. Under either version it thus appears that the difficulty originated in gross insubordination on the part of the libelant, for which no explanation is offered by him, as he claims he had not been drinking, although the master and other witnesses testify that he appeared to be "in liquor"; and, upon the libelant's statement, the only issue presented is whether the conduct of the master, after the way was cleared, in either view, (1) was abusive and wanton, and exhibited excessive violence against the libelant; and, if it so appears, (2) was the proximate cause of the paralysis from which he is suffering. With the issue so narrowed, I deem it neither necessary nor instructive to review the testimony in detail, and rest the decree upon the following deductions therefrom: (1) The libelant's testimony that he was first seized by the neck when he started for the galley, and then choked and thrown against the ice box, dragged against the rail, and thus severely injured while so held, is not confirmed by any other circumstances or by marks of injury, and is difficult to reconcile with the conceded fact that he was finally held by the wrists to prevent him from reaching the galley, all within the contracted space of two or three feet at the utmost. (2) The testimony of the master that he used no force or violence, other than holding the man by the wrists to prevent his reaching the galley and its supply of cutlery, is consistent with the authenticated facts, and confirmed by the attitude of the parties as witnessed by the second cook and the engineer, and by the absence of heat or anger in the appearance of the master, as attested by all the other witnesses. (3) The conceded conduct of the libelant when released by the master, following his call to the second cook for his kitchen knife, tends to confirm the master's statement of threats, and clearly justifies the exercise of reasonable force to prevent the threatened or even probable action of the angry and insubordinate man,—conduct which shows uncontrolled passion on the part of the libelant, and both threat and effort to cut the master with a long knife, followed up by chasing the latter, brandishing the knife in one hand and loaded revolver in the other, with crazy abuse and threats. (4) And, finally, upon the issue of excessive force, it is clear that the testimony does not preponderate in favor of the libelant in respect of apparent credibility. (5) The question of proximate cause does not arise, on the

view indicated, but it may well be remarked that the testimony shows no appearance of injury from the alleged assault on that day or during the following day, except an abrasion of the hand which occurred in the struggle to reach the galley, and nothing to indicate physical hurt which would tend to produce the paralysis which appeared after the libelant's arrival by steamer on the second day thereafter in Milwaukee; and, taking into account the testimony of his prior condition, it seems improbable, if not impossible, to attribute that condition to an injury inflicted by the master, notwithstanding the guarded expression of opinion by his attending physician. I am of opinion that the libel must be dismissed, and it is so ordered.

BALL et al. v. RANDERSON.

RANDERSON v. BALL et al.

(District Court, D. Rhode Island. September 16, 1901.)

No. 1,081.

1. TOWAGE—CONSTRUCTION OF CONTRACT—DAMAGES FOR BREACH.
   Libelant agreed to perform towing services in connection with dredging operations at a stipulated price per day. There was no agreement that the tug should work for any particular length of time or while any particular amount of dredging was being done. *Held*, that there was no implied agreement that the tug should be always in readiness, or always able to work, which would render her liable for damages resulting to respondent because of her failure to be in attendance at all times.

2. DAMAGES—BREACH OF TOWAGE CONTRACT—EVIDENCE.
   A claim for damages against a tug, under contract to perform towing services for a dredging fleet, because of her occasional absence or unreadiness, can only be sustained by proof of actual damage resulting. In the absence of such proof, evidence of the earning capacity of the dredging plant per day, when fully employed, affords no basis for charging the tug with damages computed at the same rate for time lost by her.

In Admiralty. Suit to recover for towage services and cross libel for damages.

Matteson & Healy, for libelants.

Worthington Frothingham and Adoniram J. Cushing, for respondent.

BROWN, District Judge. The libelants, Fenner Ball and others, owners of the steam tug Alma, seek to recover from John P. Randerson a balance claimed for services performed by the tug in towing the dredge Empire State and her scows in dredging operations at Block Island in this district. The cross libel of Randerson is for damages for an alleged breach of contract, for negligence in crushing a small boat, and to recover the value of coal and water furnished by Randerson for use by the tug in connection with the dredging operations, but used by the tug for her own purposes.

Though the original libel of the owners of the tug was simply for services rendered from July 23 to November 8, 1900, the pleadings

and evidence require a consideration of the relations of the parties from an earlier period. I find, as a matter of fact, that the tug, which was new and untried, began work for the dredge upon the 9th day of April, 1900; that no previous contract had been made for her services, which began without any agreement as to their duration or as to the rate of payment, the efficiency of the tug at that time not having been tested. Randerson testified, on this subject, that he told the agent of the tug "to try it and see what he could do." I find, also, that according to the preponderance of evidence the tug continued to perform services for the dredge until about July 21, 1900, before the parties arrived at any express agreement as to the price to be paid. During this time, the tug was furnished with coal and water by the owner of the dredge. The tug having rendered valuable services without any express contract, I find an implied contract to make payment for the value of the services during this period. Upon the whole evidence I am of the opinion that a fair price for the tug's services is the sum of $25 per day for working days and $12.50 a day for lay days. It appears that the tug did work in towing the barges and dredge on 86 days, and lay idle, but in readiness to work, on 2 lay days, during this period. It appears, however, that during these 86 working days the tug was either incapacitated by accident or absent through delays or upon business of her own for periods of time amounting in all to 6 days, 5 hours, and 10 minutes. The tug claims full compensation at the rate of $25 per day for each day when the tug performed any services, irrespective of any delay, absence, or incapacity upon her part during the remainder of the day. This claim is obviously untenable, and inconsistent with the position that she is entitled to the reasonable value of the services rendered. I find the tug entitled to payment at the rate of $25 per day for 79 days, 4 hours, and 5 minutes, and at the rate of $12.50 per day for 2 days, amounting in all to the sum of $2,012.92, for services rendered between April 9 and July 21, 1900.

It is agreed that at some later day an agreement was made whereby the tug should furnish her own coal and receive a fixed price per day. There is no evidence, however, that this agreement was for any specified period of time. Either party was at liberty to terminate the contract at will. The date of this contract, the rate of payment, and the terms of the contract are all in dispute. The libelant contends that the date was July 23d; the libelee, that it was August 4th. The libelee concedes that this makes practically little difference, since the new rate claimed by the libelants—$30 per day, finding her own coal and water—differed but little from the rate of $25 per day, with coal and water furnished. While the evidence is, perhaps, not entirely satisfactory as to the exact day, I am of the opinion that, according to the preponderance of evidence, it was on or about July 23d that the tug began work under the new arrangement. Ball states that the agreed rate was $30 per day for working days and $15 a day for lay days. Randerson testifies that it was to be at that rate, but only on condition that Ball should arrange to furnish him with water at the rate of $75 per month; otherwise, it was to be at the rate of $28 per day. He testifies that he was obliged to pay $90 per

month for water, and therefore claims that he should pay but $28 per day. Ball denies expressly that the contract included any agreement as to water, and there would seem to have been no reasonable theory upon which Ball would have accepted a reduction of $2 a day on the price of his boat for a difference of $15 per month in the price of water, even were we to consider the suggestion of counsel that Ball himself had the practical monopoly of the water supply. I find that the agreement for the price of the boat was definite at the rate of $30 per day, and not conditional upon the price of the water. I find that the tug Alma and the tug Harriet, which was supplied and accepted in her place during a portion of the time, worked 80 days, 8 hours, and 25 minutes at the rate of $30 per day, and that the libelants are entitled to receive therefor the sum of $2,425.25, and that there were 12 lay days for which they are entitled, at the rate of $15 a day, to the sum of $180. The total earnings of the tug were as follows: For services from April 9 to July 21, 1900, inclusive, $2,012.92; for services from July 23 to November 8, 1900, $2,605.25,—total, $4,618.17. I find, also, that Randerson has paid on account the sum of $3,189.34, leaving an unpaid balance of $1,428.83. Randerson is entitled to deduct for coal and water consumed by the tug for her own purposes the amount of $57.58, leaving a balance due the owners of the Alma of $1,371.25.

There remain to be considered the claims set up in the cross libel for damages for breach of contract and for the loss of a small boat, which latter claim I disallow for insufficiency of proof. The claim for damages for failure upon the part of the tug to attend upon the scows must also be disallowed. I find that no agreement was made that the tug should work for any particular period of time; that the contract was terminable at the will of either party; that she did not agree to perform services for any particular amount of dredging; nor was there any guaranty or agreement, express or implied, that the tug should be in constant attendance and always able to work. The contract was simply for certain towing, etc., to be performed by her by the day, and that the tug should receive a stated price per day. Counsel for Randerson lay stress upon the allegation of the libel that the tug was employed in order to enable said Randerson and his said dredge and scows to prosecute the work and finish the contract upon which Randerson was then engaged; but the libelants cannot be held upon this allegation alone, even if, fairly interpreted, it amounts to anything more than a mere statement of Randerson's purpose in employing the tug by the day. Ball was in no sense a subcontractor for this work, and there is no evidence on the part of Randerson to show that Ball was employed to finish a particular job. But, even should we have found evidence of a contract by Ball to supply the tug for the whole period of Randerson's contract with the United States, or for any part of it, the claim for damages would yet fail for the reason that there is no proof in this case whereon any finding of the amount of actual damage could be based. The method whereby it is sought to compute these damages is wholly fallacious. There is no proof of any actual damage, or of the amount of any actual expenses incurred, or of any actual profits lost, by reason of any delays. The evidence

is merely to the effect that the plant was a $45,000 plant; that it had an earning capacity of so much per hour when employed upon certain government contracts. There is no evidence whatever that Randerson lost other employment through the delay, or that there was any substantial damage suffered. The absurdity of attempting to compute damages in this way is shown by an examination of the account appended to the cross libel. For a single day's absence the tug, which was to receive $30 a day, is charged $300 damages for the day; for an absence of 1 hour and 20 minutes, she is charged damages to the amount of $33.32; and for an absence of 20 minutes is charged $8.32. From the close account made by the inspector of the absences of the tug, even for periods of 10 minutes, it appears that she was fairly diligent in her attendance, and that the work was performed in a reasonably satisfactory manner, rather than that the tug was continuously damaging the owner of the dredge to very large amounts during the entire period from April to November. As the tug could have been discharged at any day when her services had proved unsatisfactory or a detriment to the dredge, it cannot be assumed, without direct proof, that there was any substantial damage.

The owners of the Alma are entitled to a decree for the sum of $1,371.25, and for their costs. The only substantial matter set up in the cross libel being such as could have been set up in the answer, the cross libel is dismissed, with costs to the owners of the Alma.

THE MESABA.

THE MARTELLO.

(District Court, S. D. New York. June 12, 1901.)

1. COLLISION—OVERTAKING STEAM VESSELS—UNANSWERED SIGNAL.
   Under article 18, rule 8, of the inland navigation rules, when an overtaking steam vessel signals her desire to pass it is the duty of the vessel ahead to answer the signal at once, and the overtaking vessel is prohibited from attempting to pass, where it is not clearly safe and the co-operation of the vessel ahead is required, unless she receives an assenting answer to her signal. Where both vessels violate these requirements, the overtaking vessel mistaking the silence of the other for acquiescence in her signal, and in attempting to pass at a bend in a channel a collision occurs, both are in fault; and neither is relieved from liability by the fact that her violation of the rule was not the sole cause of collision, and that the passage would have been safely made but for the improper navigation of the other.
2. SAME—RESPONSIBILITY OF OVERTAKING VESSEL.
   An overtaking vessel takes whatever risks attend her attempt to pass, from whatever cause arising, except from the fault of the vessel ahead, which is bound only to keep her course and speed.
3. SAME—VESSEL OVERTAKEN—RULE AS TO COURSE AND SPEED.
   Where at the time an overtaking vessel signaled her intention to pass the vessel ahead, the latter had stopped her engines to permit a schooner to cross her bows, which purpose was obvious to the overtaking vessel, the resumption of her former course and speed after the temporary purpose of her stopping has been accomplished can hardly be charged as a violation of the rule requiring her to keep her course and speed.
4. SAME—EFFECT OF SUCTION.
   The suction caused by a moving vessel, and its lateral effect upon another vessel, depend upon a number of circumstances, of which the

most important are the size and speed of the two vessels, and particularly the depth of water beneath them, and the mass and extent of the water on each side; the force being at its maximum and operative for a considerable distance where the water is shallow or confined.

5. SAME—TOO CLOSE APPROACH—SUCTION.

A large steamer, 482 feet long, and drawing 29 feet, and going at a speed of 12½ knots an hour at the time she overtakes another vessel of nearly the same size and draft, is not justified in passing at a distance of not more than 150 feet at a place where the water is little deeper than their keels; and a collision occurring under such circumstances by the swinging of the bow of the overtaken vessel against the quarter of the one passing may reasonably be attributed to the effect of suction, in the absence of other apparent cause.

In Admiralty. Libel and cross libel for collision.

Convers & Kirlin, for the Mesaba.
Wing, Putnam & Burlingham, for the Martello.

BROWN, District Judge. At 10:32 a. m. of September 22, 1900, the steamships Martello and Mesaba, both outward bound from this port, came in collision not far from the western entrance of Gedney channel, by which both vessels sustained damages, for which the above libel and cross libel were filed.

The Mesaba is 482 feet long, 52 feet beam, 31 feet in depth, of 4,423 net tonnage and drew at that time 29½ feet aft. The Martello is 370 feet long, 43 feet beam, 28 feet deep, of 2,439 net tonnage and was drawing at that time 27¾ feet aft. The Mesaba's full speed at sea was 15 knots, the Martello's 12 knots. But at this time under a less head of steam, and according to the revolutions of the propeller then making, the Mesaba's full speed through the water was about 13 knots, and the Martello's, 10 knots. To this 1 knot should be added for the moderate west wind and the ebb tide running S. E. at about 1¾ knots. Both vessels went down the bay through the Main channel and around the southwest spit. The Martello passed Sandy Hook beacon abeam of her bridge at 10:28; the Mesaba, at 10:30, the Martello being then about one-third of a mile ahead. The Mesaba subsequently after a passing signal of two whistles, put her engines at full speed ahead and overhauled the Martello by going to port. In passing her on her port or northerly side, not far from the black buoy E. 7, which with the opposite red buoy E. 8 marks the western end of Gedney channel, when the Martello's stem was about abeam of the Mesaba's midships or a little more aft, the Martello's bow was seen to turn to port towards the Mesaba, and it continued to turn more rapidly as the Mesaba advanced until the bluff of her port bow, about 20 feet from her stem, struck the starboard quarter of the Mesaba about 100 feet forward of the Mesaba's stern a violent blow, which broke a number of the Martello's iron plates and damaged her stem so that she was obliged to return to New York. The Mesaba sustained less injuries, and was able to continue her voyage. The faults charged against the Mesaba are

(1) Too great speed; (2) too close approach to the Martello in passing her; (3) attempting to pass at a dangerous place while on the turn from the Main channel into Gedney channel; (4) crowd-

ing the Martello closely towards the starboard side of the channel, instead of keeping further to the northward; (5) not waiting for the Martello's assent to her passing signal.

The faults charged by the Mesaba against the Martello are (a) failure to keep on the starboard side of midchannel; (b) crowding unnecessarily to the northward; (c) failure to reply to the Mesaba's overtaking signal; (d) failure to keep her course and speed.

It is contended for the Martello that the actual point of collision was a little to the eastward of buoy E. No. 7; for the Mesaba, that the collision was to the westward of that buoy and before the Mesaba had made any turn to enter Gedney channel. The regulation overtaking signal of two blasts of the steam whistle was given by the Mesaba when she was at a distance variously estimated from one or two lengths to a quarter of a mile astern of the Martello and upon the same general course, but a little more to the northward, and having the Martello a trifle on her starboard hand. It is admitted that no answer was returned by the Martello to this signal, for the reason, as claimed by the latter, that it was not safe for the Mesaba to pass at the turn into Gedney channel, and because her pilot had no idea that the Mesaba would attempt to pass the Martello until after that turn was completed.

The change of course from the Bayside channel into Gedney is 2¾ points to the southward, the compass course as laid down upon the chart from the southwest spit to the western entrance of Gedney being E. by N., and from that point through Gedney channel E. S. E. ¼ E. Through Gedney channel the breadth of available water, as laid down upon the chart, between the line of black buoys on the south and of the red buoys opposite on the north, is about 1,000 feet; and through the Main or Bayside channel, leading to Gedney channel, the breadth is about the same.

For the Mesaba it is urged that the space was sufficient for safely overtaking and passing even on the turn; that she went at a safe distance and without porting at all up to the time of collision, and that the collision was brought about by the starboarding of the Martello. The Martello contends that the collision was brought about by the Mesaba's too close approach in passing, by her porting her helm and by the powerful suction of the after part of the Mesaba as she passed the Martello at high speed, which it is said irresistibly drew upon her quarter the Martello's bow, despite all that the latter could do by a hard a-port wheel to check its influence; and that she did not starboard at any time, but ported to make the turn into Gedney when the Mesaba's bow lapped her port quarter about 30 feet.

1. The testimony as to the place of collision, whether at the entrance of Gedney channel or to the eastward or westward of that point, is very conflicting; the same witnesses at different times making inconsistent statements. This may be partly explained by the confusion in the recollection of the witnesses resulting from the fact that the Martello's bow upon collision clung fast to the Mesaba's quarter so that the vessels remained together for four or five minutes until they had nearly passed through Gedney channel, when the Martello cleared and passed to the southward between the outer Gedney buoys.

The times noted on each vessel when Sandy Hook beacon was abeam of the bridge, viz. 10:28 and 10:30 respectively by the deck logs, the time of collision, 10:42, and the speed of the vessels as given by the revolutions, with the other known data, are sufficient to compute quite approximately the place of collision as well as the intermediate positions at different times. The Martello passed Sandy Hook at full speed (11 knots with tide), but in order to allow a schooner going to the southward in the Swash channel to cross ahead of her, slowed at 10:30 by the engine room log, stopped her engines at 10:31, remained stopped for two minutes and at 10:33 again put her engines at full speed. During this interval her headway was much deadened, and she could have obtained her full headway again only shortly before she reversed, not over a minute before collision. This reversal was at 10:39 by the same engine room log, and the collision being at 10:40 by that time, or two minutes slower than the deck time, two minutes must be added to the above times of her slowing and stopping for the purpose of comparison with the Mesaba. This is further confirmed by the fact that the distance from Sandy Hook beacon to the middle of the Swash crossing is so great (8,800 feet) that the Martello would not slow for a schooner crossing in the Swash at less than half that distance from the crossing, which at 11 knots speed is 4 minutes time from Sandy Hook. Moreover, if the time of the deck and engine room had been the same, the Martello would have traversed the distance to the point of collision in 12 minutes, the same time occupied by the Mesaba; so that the Mesaba would not have overtaken her at all.

The Mesaba, previously going "slow" (7½ knots with tide), when passing Sandy Hook at 10:30 put her engines at "half speed," i. e. about two-thirds of "full speed," or 9⅔ knots with tide, and so continued until soon after signaling to the Martello that she would pass her. She then starboarded her helm and put her engines at "full speed" (14 knots with tide), and this was continued until collision at 10:42, 12 minutes after passing Sandy Hook, and afterwards till the vessels separated. Full speed headway, however, could not be acquired by the Mesaba or Martello in less than from 3 to 5 minutes after the order "full speed."

The distance from Sandy Hook beacon to Gedney entrance between buoy E. 7 and E. 8 is 13,600 feet, almost exactly 2¼ nautical miles; to the buoys next west, B. 1 and the cage buoy B. 2 opposite, 10,800 feet; to buoy B. 3, where the pilot of the Mesaba says he signaled, 6,300 feet. From buoy B. 3 to the Swash is 2,500 feet; thence to E. 7, 4,800 feet.

From the distance from Sandy Hook to E. 7 (13,600 feet) it is evident that the Mesaba could not have reached Gedney channel in 12 minutes, except by going at somewhat above 12 knots speed during the whole time, whereas she was going slow (7½ knots with tide) off Sandy Hook, and at only "half speed" of her engines (9⅔ knots with tide) for the next 5 to 6 minutes; so that the place of collision must have been somewhat to the westward of the entrance to Gedney.

Upon computation from the data above stated, appear the following approximate results:

(a) That when the Mesaba's bridge was abreast of the Sandy Hook beacon, the bridge of the Martello (2 minutes in advance) would be about 2,222 feet ahead of the Mesaba's bridge; the Martello during the next two minutes gained about 475 feet, so that her stern was then ahead of the Mesaba's bow about 2,300 feet, the Martello's bow being then about 4,600 feet from the beacon and about 4,200 feet from the middle of the Swash channel crossing; (b) at 10:32 the Martello slowed and at 10:33 stopped her engines for 2 minutes; during this three minutes up to 10:35 she dropped her speed to about 4½ knots, traveling in that time about 2,200 feet; and the Mesaba, then going at 9⅜ knots (half speed) gained upon her during that time about 750 feet, making her bow then about 1,550 feet behind the Martello's stern, which was then about 150 feet to the eastward of buoy B. 3, when full speed was ordered by the Martello; (c) within a minute afterward the Mesaba gave her signal of two whistles, and very soon after gave the order "full speed"; and at collision at 10:42 the Mesaba's bow was about 600 feet west of the entrance of Gedney, and the Martello's about 950 feet.

Nearly all the testimony agrees that at the Mesaba's signal of two whistles, she was a quarter of a mile astern of the Martello. My computation is the same. At their respective speeds, it was impossible for the Mesaba to make the subsequent gain she did make up to collision (about 2,250 feet) in less than from 5 to 6 minutes. When she put on full speed shortly after signaling, she must therefore have been in the vicinity of buoy B. 3, as her pilot Butler testifies, and this was therefore within a minute after the Martello ordered full speed, after waiting for the schooner to cross ahead of her.

The computed rate of full speed is from 1½ to 2 knots greater than the estimate given by the officers of both vessels. But if a reduction to their estimates were made, the place of collision must necessarily be brought from 600 to 800 feet more to the westward than I have computed it. On account of the drag on the vessels while in shallow water but a few feet deeper than their keels, I have reckoned full speed in such places at 13½ and 10¾ knots instead of 14 and 11 respectively.

The above computation made upon data about which there is little doubt or difference, agrees with much of the testimony, and serves to correct many evident mistakes. The two pilots, the captains, and even Chief Officer Rayward at last agree that the collision was to the westward of E. 7 "on the turn into Gedney." Both the pilots in their reports made at the time so stated. This turn, which might possibly be made in three lengths under a hard a-port wheel, is usually made more slowly with helm not hard a-port, as the pilot testifies; so that the turn would usually occupy from 1,500 to 2,000 feet before reaching Gedney, though a part of it might probably be made in Gedney channel itself.

Upon the whole evidence, therefore, I find that the collision took place when the Martello's bow was from 300 to 400 yards to the westward of the black buoy E. 7, while both vessels were making the turn into Gedney channel, although the Mesaba may not have had any express order to port, as she was steered partly by the buoys; that the Mesaba had signaled her intention to pass the Mar-

tello from 5 to 6 minutes previously, when more than a mile to the westward of the point of collision and at least a quarter of a mile astern of the Martello; and that the Mesaba's stem overtook the stern of the Martello when about half a mile to the westward of E. 7, or a little west of buoy B. 1. As the Mesaba gained 720 feet on the Martello from the time the latter ported (when overlapped 30 feet) up to collision, the computation shows that that gain would take 1¾ minutes, which agrees with the testimony; and that during that time the Martello advanced about 1,660 feet, and the Mesaba about 2,380 feet; so that the Martello must have ported when she was about 2,700 feet west of Gedney, i. e. when about abreast of black buoy B. 1.

It is very probable that the pilot of the Mesaba noticing his rapid gain upon the Martello during the three minutes when she slackened her speed to let the schooner pass ahead of her, supposed that by signaling and going at full speed he could pass the Martello before it was necessary to begin the turn into Gedney channel. That turn could easily be completely made by the Mesaba within the space of 500 yards before reaching the entrance, and at the moderate speed the Martello was then making he would pass her long before he would need to begin the turn. I find it difficult, however, to credit the pilot's statement that he supposed the Martello was stopping to allow him to pass her. If he had observed the schooner he ought to have understood that the Martello's stop was probably to let the schooner pass ahead. The schooner was noticed by Paul, the chief officer of the Mesaba, on the deck below, though no report of her was made; but if the pilot did not notice her, that is a poor excuse for his erroneous supposition. He ought to have understood that the Martello would naturally increase her speed, although he might not know to what rate; and very soon after he gave the full speed order, he must have seen that the Martello was increasing her own speed.

The circumstances, however, were such as made it peculiarly incumbent on the Martello to answer the Mesaba's overtaking signal. For when this signal was given, although it was after the Martello's engines had been again put at full speed, her way had been so much deadened by her previous stop of three minutes, that the Mesaba was very rapidly gaining on her, as the Martello's pilot says; and the pilot of the Mesaba could not know at what speed the Martello was going, or how quickly she would gain, or would seek to regain, her full headway. It was necessarily uncertain, therefore, just when or where the Mesaba would overtake and fully pass the Martello, whether before reaching the necessary turn into Gedney channel or not. This depended on the conduct and speed of the Martello; and the Martello therefore plainly ought to have answered the Mesaba's signal. Her failure to answer, it is said, led the Mesaba to suppose that the Martello did not dissent, and would do nothing to embarrass the Mesaba in passing. Under the language of article 18, rule 8, of the inland rules of navigation, the pilot had perhaps no right to draw that inference, but it was not a wholly unnatural inference.

It is evident from the testimony of most of the witnesses that it is undesirable for one steamer to attempt to pass another while on the turn into Gedney channel. Passing should either be accomplished before the turn is begun, or postponed until the turn is passed and each is again straightened upon her course. From the width of the channel, however, viz. about 1,000 feet, I do not doubt that passing may be accomplished safely even on the turn, provided that there is a perfect understanding between the vessels, and concert of action to avoid danger; but not otherwise. When there are no other vessels in the way, coming in or going out, if the vessel ahead keeps well on the starboard side of the channel, the other by going on the port side can keep four or five hundred feet of space between the vessels, while each would be 200 feet from the buoys on the south or north. I do not doubt, however, that the Mesaba expected to pass the Martello before porting to enter Gedney channel, as it is not necessary to commence porting more than 1,000 feet to the westward of the entrance, though it is usual to port earlier.

The rule as respects passing, then and now in force, is as follows:

Article 18, rule 8. When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port;

Or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard;

Or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals.

The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel. 2 Supp. Rev. St. p. 638.

Although the critical reading of this rule may discover some ambiguities or incompleteness in its phraseology, its very plain intention, as it seems to me, is (a) that the vessel ahead shall always answer an overtaking vessel that signals her desire to pass; and (b) that unless in a clearly safe place for passing the overtaking vessel shall not pass unless, nor until, an assenting signal is given. The language is very specific, that if the vessel ahead "shall not think it safe for the vessel astern to attempt to pass at that point," she shall immediately signify the same by giving not less than four short and rapid blasts of the whistle; and the meaning of the subsequent clause is, that under no circumstances shall the vessel astern attempt to pass except in a safe place, nor until after the vessel ahead has given an assenting signal promising co-operation, if needed, so that passing "can be safely done."

The witnesses from the Martello say that attempting to pass at that time, which the Martello foresaw would occur on the turn, was regarded as dangerous; so much so that they did not think the

Mesaba, notwithstanding her signal, would attempt to pass until both vessels had got straightened out in Gedney channel. But this excuse for not answering at all cannot possibly be accepted as valid in face of the positive requirement of the rule that in such a case a dissenting signal shall be given; still less when it was the great increase of the Martello's speed that brought the passing to the turn, the point of danger. The rule says the dissent shall be sounded *immediately*, if it is not thought safe "to pass at that point," i. e. by proceeding to pass at once; not sounded at some future time or place. Nor can the excuse be accepted even as a fact, since the Mesaba was plainly to be seen overhauling the Martello, and continuing to approach nearer and nearer without any abatement of speed for three or four minutes before the Martello ported, so that the Martello must have seen that the Mesaba was intending to pass at once, in accordance with her signal; and still no dissent was given.

When the Martello ported she had regained, according to the pilot's testimony, very nearly her full speed, thus delaying the Mesaba in passing much longer than was anticipated. The Martello, by failing to give the dissenting whistles that the statute required, seemed to acquiesce in the Mesaba's proposal, while she at the same time increased and prolonged the difficulties of passing by increasing her own speed to the utmost, and thereby bringing the vessels to the point of danger, until perhaps a minute and a half before collision, or a little less, when she slowed and reversed. The pilot of the Mesaba testifies that had he received any dissenting whistles, he should not have attempted to pass. I see no reason to doubt this testimony. I think the conduct of the Martello was calculated to mislead the Mesaba and to some extent did so; particularly in view of the common but blamable practice of pilots to omit signals which they think unnecessary, though required by the rules; and as failure to answer was in direct violation of the positive requirement of the rules of navigation, the Martello must be held in part to blame for the collision.

2. But the Mesaba is certainly no less in fault for the disregard of rule 8. Though not wholly free from ambiguity, its plain intent seems to be, as above stated, wherever the place is not clearly safe, or requires co-operation, as in this case, to prohibit the vessel astern from passing until she receives an assenting signal, and making it the duty of the vessel ahead to signal her dissent at once, if an immediate attempt to pass is deemed unsafe, and thereafter to give an assenting signal as soon as a safe place for passing is reached; so that the overtaking vessel in such situations shall never attempt to pass until the assent is given. However natural, therefore the Mesaba's interpretation of the Martello's failure to answer may have been, as an acquiescence in his proposal, he was not in this case justified under the express prohibition of the rule in going on; and for this disobedience of the rule the Mesaba is equally to blame with the Martello.

It is not a sufficient answer to say that the omission to signal did not cause the collision. It indeed was not the only cause, but it was

one of the contributing causes, inasmuch as obedience to the rule on either side would undoubtedly have led to an avoidance of the collision. The precise object of the rule was to prevent any such collisions as this and to dispense with the necessity of inquiry into the immediate causes of them, often with most unsatisfactory results, by making it a positive obligation on the one side to answer the signal, either by assent or dissent; and on the other side, not to attempt to pass in a place of doubtful safety without a signal of assent. Both vessels disobeyed the rule, and a collision resulted, in which almost every other cause that can be invoked to account for the collision is involved in conflict, obscurity and doubt. The court is not called on to attempt to resolve these doubts, and to attempt to decide the cause on independent grounds, since whatever might be determined in regard to them would not alter the fact of the disregard of this rule by both vessels and their consequent joint liability. The New York, 175 U. S. 187, 205–207, 20 Sup. Ct. 67, 44 L. Ed. 126; Id. (D. C.) 53 Fed. 553, 558; The Garden City (D. C.) 19 Fed. 529, 533; The Nereus (D. C.) 23 Fed. 448, 451–454; The Minnie (D. C.) 20 Fed. 543, affirmed in 31 Fed. 301.

The case in other aspects, however, is so interesting, and has been so carefully presented by counsel that I add a few observations on some other points.

The Mesaba as an overtaking vessel was bound to keep out of the way of the Martello (article 24), and took whatever risks attended the attempt to pass where she did, whether arising from the narrowness of the channel, the shallowness of the water, suction, the tide, or any other causes except those arising from the fault of the Martello herself; the latter was bound to keep her course and speed. Article 21.

In the Mesaba's log entries and in some of her testimony, the collision is ascribed to the Martello's starboarding her wheel when the Mesaba had come abreast of her. A similar claim was made in the case of The Aurania and The Republic (D. C.) 29 Fed. 98, 119–121, in a collision near the same place as this. I was satisfied in that case that there had not been any such mistaken change of the wheel. And in the present case I do not think this change is on the whole sufficiently proved; although the very unsatisfactory evidence as to the course and steering of the Martello makes it not impossible. The pilot and the officers of the Martello say that the Martello's wheel was not starboarded at all, but was ported, when the Mesaba's stem had lapped her stern about 30 feet, and was thereafter kept hard a-port. No doubt the helm was ported about that time; but it certainly was not at once put and kept hard a-port, as several of her witnesses state; for if it had been, the Martello, being then from 800 to 900 yards from buoy E. 7, would have gone to the southward of Gedney channel before reaching it. The pilot admits that the helm was not put hard a-port at once, and the fact that up to a few moments only before collision, when her stem suddenly swung to port towards the Mesaba, she had turned her stem to starboard under her port wheel only about two points, while advancing about 500 yards and reversing about one-half of a minute, is conclusive proof that her wheel was at first but slightly ported, and that she was mak-

ing a very gentle turn. If, as is quite probable, the immediate normal action of the port helm was retarded by the bow wave of the Mesaba as she advanced upon the port quarter of the Martello, all this retarding action would be offset by the opposite and accelerating influence of the same bow wave as the Mesaba advanced beyond the Martello's midships and reached her port bow.

In fact, nothing except uncertainty can be deduced from the testimony as to the mode of steering either vessel. The chief officer on each states that his vessel was steered mostly by the buoys, not by compass. The pilots' testimony is different. The pilot of the Martello says that his course was E. by N., and that the tide though running S. E. did not affect him "enough to make any change of course whatever." The pilot of the Mesaba says that he starboarded a quarter of a point to the northward "until he got the Mesaba where he wanted her," and then steadied to E. by N. again, and was on that course when he lapped the Martello. This is most unsatisfactory; for both say that the tide was running about S. E. and, being in the last quarter of the ebb, at about 1¾ knots; and such a tide crossing the vessels' courses of E. by N. at an angle of nearly five points would set the Martello to the southward at the rate of at least 140 feet to every 1,000 feet of her advance, even when she was at her full speed; and it would set the Mesaba the same distance to the southward for every 1,300 feet advance at her full speed. To offset this would require a constant heading of from two-thirds to three-fourths of a point to the northward of N. by E., or else such fluctuations and changes of the helm from time to time as should be equivalent to that; and without either one or the other, if the direction of the tide is truly stated, the Martello, if headed E. by N. must have gone to the southward of E. 7 outside of Gedney channel. If on the contrary the vessels were steered by the buoys, this might easily be attended with fluctuations and unsteadiness of course. And if from any cause after first porting the Martello on approaching E. 7 got very near the southerly line of the Bayside channel, she would have been compelled to starboard to avoid getting aground. I think, however, that she did not get into that situation, but kept up more to the northward towards midchannel.

As respects the place of collision, whether on the north or south side of midchannel, and which vessel, if either, crowded the other, the testimony is equally conflicting. All the witnesses for the Mesaba say that she was in the northern half of the Bayside channel; her pilot says he was 600 feet to the northward of E. 7. Most of the witnesses for the Martello claim that the collision was near the southerly buoys. The pilot of the Martello says that while stopping to let the schooner pass down the Swash channel, the Martello sagged somewhat towards the southerly buoys, and the pilot of the Mesaba places the Martello then within 60 feet of them. But the course subsequently traced carries the Martello towards midchannel in Gedney, and her master in very carefully indicating on the chart the place of collision, places her very near midchannel to the westward of Gedney; and in his testimony he describes the Martello as only a "little to the southward of midchannel," though he also inconsistently gives a distance in feet much nearer to the southerly buoys.

The force of the blow of collision was such as to send the Mesaba's stern somewhat to the northward, as much as was needed, according to her testimony, to make the proper turn into Gedney, and a little more; so that after collision the vessels were turned a little towards the southerly buoys in Gedney channel, and after proceeding for several minutes clinging together, the Martello on getting clear went to the southward of Gedney between the two outer black buoys, as above stated. This testimony from both sides indicates that at collision the Martello was only a little southerly of midchannel, as the master says, since otherwise, on getting turned towards the buoys, with that and the tide, the Martello would have been carried south of Gedney much sooner. I think the collision was not caused by the crowding of either vessel towards the buoys.

The charge against the Martello that she did not keep her course and speed in accordance with the requirement of article 21, when she knew that the Mesaba was overtaking her, is undoubtedly true as a literal fact; but the application of the rule to the situation in such a way as to constitute fault, is I think doubtful. The pilot of the Mesaba testifies that when he whistled, signifying his desire to pass the Martello, and even when he gave the order "full speed," the Martello's engines were stopped, because he looked and saw no motion of the water at her wheel. But the testimony from the Martello is that the whistles were heard after the Martello had given the order full speed ahead, and my computations agree with that.

The pilot says that when he started up he did not see any motion in the water at the Martello's wheel; but as he did not see the schooner at the same time passing ahead of her, it is not surprising that he did not see the quick water a quarter of a mile distant. When the leading vessel has necessarily slackened her speed for an obvious temporary purpose only, such as to avoid collision by allowing another vessel to pass ahead of her, I doubt whether after this purpose is accomplished she is forbidden by article 21 to resume her previous course and speed as it ought to have been understood by the vessel behind, merely in order to enable the latter to pass ahead of her. I think the vessel ahead, in such a case, might fairly count on the other's understanding the temporary necessity and that the vessel astern would govern herself accordingly; but in proportion as any such temporary change is prolonged, the less reliance should be placed on any such presumed understanding by the vessel astern. In the present case, as everything was in clear view, and the course and previous speed of the Martello were proximately known, I should not count the resumption of former speed as an independent fault. But the fact that the Martello had lost more than half of her former speed by her considerable waiting, did make it specially obligatory on her to observe the rule and to answer the Mesaba's signal of her desire to pass, in order to prevent any possible misunderstanding, and that the pilot of the Mesaba might know her actual intention to resume full speed at once.

As respects the counter charge of overporting by the Mesaba, there is no probability in its favor, while all the witnesses say that she had not ported at all. As I have said above, since the steering

was more by the buoys than by compass, she may have turned her head somewhat to starboard without any direct order to port her helm; and unless this had been done, I do not see how she could have kept so long about parallel with the Martello, as all the witnesses say she did, since the latter certainly ported from one to two points. If, as the Martello alleges, the Mesaba was on the southerly side of the channel, it is in the highest degree improbable that she would have turned still more to the southward; there would be no possible object in doing so, but every reason for keeping well up to the northward. I do not think this charge is proved.

Most important of all, however, is the near approach of the Mesaba to the Martello as she overhauled her. It was certainly nearer than is customary with vessels of such size and at such high speed in water little deeper than their keels, whether the distance was 50 feet or 150. The distance was probably from 100 to 150 feet; and from the testimony I think that was unjustifiably near for such steamers in that locality. The Mesaba's witnesses say that such near passing is common in the Thames without any effect from suction. But the important conditions of speed and depth of water there are not satisfactorily proved, and these make a very great difference.

There can be no doubt of the strong force of suction from a large and deep vessel moving in shallow places where there is but little water beneath her keel; and this must be further increased by any great speed of the passing vessel. Here there were but three or four feet of water beneath the Mesaba's keel, and in some places less than that depth; and during the last third of a minute before collision, the Mesaba was going at 12½ knots through the water and was passing the Martello at the rate of about 6 knots an hour. The vast volume of water running in to fill up the space rapidly left vacant by her advancing bulk, had to come mostly from each side; and this force would necessarily operate in so shallow water much as it operates in slips, where at a very much lower speed in moving out, steel cables holding other vessels to their moorings, as the evidence shows, may be broken by the strain. See, also, The Bremen (D. C.) 111 Fed. 228, 231.

There are no authentic data, so far as I am aware, for determining how far suction is likely to operate laterally in a given case. It is a matter of common observation that in deep water, objects upon the surface, such as barrels, ice, etc., may be passed by vessels at considerable speed quite near, without any sensible deflection. The subject has been presented in quite a number of cases of collision, in some of which suction has been regarded as the sole or contributing cause, while in others it has been rejected. In The City of Brockton (D. C.) 37 Fed. 897, a side-wheel steamer 283 feet long collided with the tug Hartt in passing within a distance of from 50 to 100 feet. Judge Benedict on a careful consideration of the facts, deemed suction to be the cause. In The Ohio, 33 C. C. A. 667, 91 Fed. 547, the Mather was passing from 40 to 75 feet distant from the Siberia, and suction was held to be the cause of the deflection. In the case of The City of Cleveland (D. C.) 56 Fed. 729, neither the size of the vessels, nor their distance apart is stated in the report; but 50

feet was considered by Mr. Justice Brown as a safe distance for passing and the theory of suction was rejected. In The Alexander Folsom, 3 C. C. A. 165, 52 Fed. 403, the vessels were of moderate size and draft and about 60 feet apart, and going at slow speed, and the influence of suction was rejected. It was also rejected by me in The Aurania and The Republic (D. C.) 29 Fed. 98, vessels of about the same size and speed as those in this case; but according to the testimony on both sides the vessels were about 250 feet apart when their special approach to each other was noticed, and I considered that distance too great to admit suction as the cause of collision. In the present case the distance apart was probably less than half as great.

The instances cited in the present testimony, viz., of the Fuerst Bismarck and of the Westernland, indicate the undoubted influence of suction in passing at a distance of from 100 to 120 feet. The Fuerst Bismarck, one of the largest of the steamers coming into this port, was passing an oil tank in a narrow channel in shallow water, near black buoy No. 9 at the tail of the west bank at about the same speed as the Mesaba; the oil tank was much attracted towards her, first at the stern and then at the stem, and Pilot Butler testifies that collision would have resulted had he not stopped his vessel.

From these and others cases, I think there is no doubt that the strength and the lateral extent of suction caused by passing vessels, depends on quite a number of circumstances, of which the most important are the size and speed of the two vessels, and particularly the depth of the water beneath them, as well as the mass and extent of the water on each side. In abundance of water the effect is probably slight; in scanty waters, at its maximum and operative for a considerable distance. In the present case the circumstances were all favorable to its powerful action, and I think it not improbable that it was one of the operative causes of this collision, though I find no reported decision except in the City of Brockton in which the collision has been ascribed to the suction of a vessel passing at a distance of from 100 to 150 feet. Prudent navigation, however, requires the allowance of a sufficient margin for the unavoidable incidents of deviation from an exact course, through the influence of wind, of tide and of currents, and the impossibility of absolute steadiness. Where large vessels are navigating side by side at high speed, as in this case, for a distance of over a third of a mile, prudence requires, in my judgment, a separation of at least from 200 to 300 feet, as stated by the witnesses for the Martello, to avoid all these contingencies of navigation.

Without undertaking, however, to determine the specific causes of the collision, I place my decision holding both in fault upon the clear violation by both of the eighteenth article of the inland rules of navigation.

Decree accordingly.

THE BREMEN.

THE MAIN.

(District Court, S. D. New York. September 8, 1901.)

1. SALVAGE—CARE OF PROPERTY BY SALVORS.
Salvors are responsible for the reasonable care of the property which they have in charge, both as respects damage to the property itself and the infliction of damage on other property.

2. SAME—SALVORS' NEGLIGENCE—FORFEITURE OF RIGHT TO COMPENSATION.
Where tugs, having taken a burning ship from her dock, which was on fire, with plenty of room, and, without excuse, beached her in such close proximity to another which has been previously beached that the fire on the latter was renewed, after having been practically extinguished, and so as to impede the work around both ships, and delay the final extinguishment of the fire, causing increased damage to the owners to an amount exceeding any reasonable salvage award for their services, they forfeited by their negligence their right to any award.

3. SAME—COMPENSATION—CHARACTER OF SERVICES.
Where tugs made no effort to take a burning ship from her slip when the dock was on fire, but passed her by and went to the aid of another vessel, which at that time did not need their services, and gave her assistance only after she had been brought out by others, while entitled to compensation, their services were not of a high order of merit.

4. SAME—AWARDS FOR SERVICES RENDERED TO BURNING SHIPS.
The salvage services rendered by various tugs to the burning steamships Bremen and Main, which took fire from the burning of their dock at Hoboken, in rescuing seamen, towing the ships to where they could be beached, and in putting out the fire, considered, and awards made therefor.

5. SAME—FALSE CLAIMS—FORFEITURE OF AWARD.
Where an officer of a vessel makes false claims as to the extent of salvage services rendered, and supports the same by his testimony, he will be excluded from any share in the award made for such services.

In Admiralty. Suits to recover for salvage services by 39 tugs.

Wing, Putnam & Burlingham, for five tugs.
Foley, Wray & Taylor, for eight tugs.
Alexander & Ash, for nine tugs.
James J. Macklin, for six tugs.
Carpenter & Park, for three tugs.
Benedict & Benedict, for three tugs.
Peter S. Carter, for two tugs.
Maxwell Evarts, for tug El Amigo.
De Lagnel Berier, for tug Volunteer.
Sutherland D. Smith, for tug C. N. Kimpland.
Shipman, Larocque & Choate, for the Bremen and the Main.

BROWN, District Judge. In the above matters 34 libels in behalf of the owners of 35 different tugs were filed against the steamship Bremen, and 11 libels in behalf of as many tugs against the steamship Main, for the recovery of salvage compensation for services rendered to those vessels in towing them to places of safety, and in extinguishing the fire on board, which broke out at about 4 p. m. of Saturday, June 30, 1900, at the time of the great fire at the North German Lloyd piers, at Hoboken, N. J.

The general circumstances of the fire are stated in the case of The Kaiser Wilhelm der Grosse (D. C.) 106 Fed. 963.

Of the 11 tugs making claims against the Main, 7 tugs claim also for services rendered to the Bremen at the same fire. The different suits against each vessel were consolidated; and as the salvage operations in behalf of the Main affected the fire on the Bremen and the claims against each, the two cases will be here considered together.

In the case of The Kaiser Wilhelm der Grosse, the most important part of the salvage service was very short, consisting solely of towage for about 10 or 15 minutes only in expediting her retreat from the southerly side of pier No. 1, a few minutes after the outbreak of the fire, whereby she escaped any substantial damage. In the present cases, both steamers were a mass of flame before any help could be rendered; each sustained large loss, and the services of the tugs were in towing away and beaching the vessels on the Weehawken flats where they could be more easily raised and repaired, and in the long-continued pumping with their fire apparatus in extinguishing the fire on board, thus saving considerable additional loss. In each there was also the additional element of the saving of human lives.

1. The Main, a new steamer 500 feet long by 60 feet beam, and of about 10,000 tons capacity, was on the northerly side of pier 1, and when the outbreak of the fire was perceived, a few minutes past 4 p. m., her lines were cast off from the pier, the ports closed and efforts made to warp her across the slip to the Thingvalla pier next above. This however could not be effected. Her movements were obstructed by other craft alongside and astern of her, and before she could be moved at all, her officers and men were compelled to fly from the fire that was communicated to the Main from the adjacent pier and bulkhead. Most of her officers and men escaped by jumping into the water or upon lighters alongside, from which they made their way. Many were picked up from the water by different tugs. Seventeen of the crew, however, not getting timely warning of the danger, were imprisoned below the decks in the Main by the fire above, and were taken out from one of the coal ports by Superintendent Moeller, with the aid of the tug Stevens (not one of the libelants) at about 11 p. m., soon after the Main was beached at Weehawken.

No efforts were made to rescue the Main until about 9:30 p. m., when the tug Cahill first went under her stern, made a line fast to her rudder and with the further help of the tugs Lee, Kemphill, Moran and Booth, pulled her out of the slip and towed her in the flood tide to the flats at Weehawken, where she was beached at about 11 p. m., as above stated. For about seven hours, from 4 p. m. to 11, the fire had been raging in the Main substantially unchecked, and when beached her upper side plating was red hot. From 11 p. m. of Saturday to the following Monday morning, the above five tugs and six others, viz. the Mattie, Lyndhurst, Merritt, Dailey, Florence and Timmins, poured water upon and into her from their fire pumps, some for a few hours only, and some for the whole period. The fire boat New Yorker also played four stands of hose upon her from midnight until 3 a. m. of Sunday, when no flames

on her were visible, and the New Yorker then turned her streams upon the Bremen.

During Saturday night the Main grounded her whole length, took a list to starboard (towards the New York shore) and her lower ports becoming submerged she filled with water to her main deck. By Sunday morning the fire was mostly extinguished, but smoldering below in some of the hatches and occasionally breaking out a little; by Sunday afternoon the fire was practically out, but the ship still needed a little watching and cooling and some occasional playing in the hatches, and on Monday morning the Chapman & Merritt Derrick & Wrecking Company, under a contract with the owners of the Main and the Bremen, took charge of all further salvage operations.

All the woodwork of the Main was consumed; the interior ironwork, including the iron decks and frames, was to a considerable extent so twisted and warped by the intense heat as to be useless, and much of her side plating was also bent and useless.

The superintendent, Mr. Moeller, testifies that on the Main

"* * * Every plate was bent, nearly from the keel up to the superstructure.

"Q. That wasn't so with the Saale? A. No.

"Q. So that the Main received more injury on account of being in the fire longer? A. Yes, the fire was longer in her."

The engines and boilers were also damaged by the heat, though there was no fire in the engine compartments, as they contained nothing combustible. The agreed value of the Main before the fire was about $850,000; her value after the fire, as she lay beached, was for the purposes of this hearing agreed to be taken at $225,000; and her damaged cargo at $14,096.45. After being raised she was taken to the Erie Dry Dock for temporary repair, and thence to Norfolk for permanent repairs.

Notwithstanding the very large loss sustained by the Main, amounting to about three-fourths of her value before the fire, I think the service rendered by the tugs and the fire boat was of considerable substantial benefit to her, both in enabling her to be raised at less expense, and in arresting her practical destruction as a vessel. I see no reason why she should have fared much better than the Saale, in the end, had she not received any aid; and the Saale was nearly a wreck. No doubt the aid rendered to the Main came so late that about everything on her that was combustible, except her cargo, was consumed; but the practical extinction of the fire by Sunday afternoon, except some smoldering, and occasional slight outbreaks in some of the hatches, and the more rapid cooling of the vessel by the water poured into her and upon her, diminished considerably I think the extent of the damage that would otherwise have resulted, particularly in the engine compartments, so that sufficient was saved to leave her still worth repairing.

I doubt, however, whether the actual saving through the work of the tugs and fire boat together exceeded $125,000; and of this I think one-fourth at least is due to the latter. A saving of $90,000 to the Main's hull and cargo through the work of all the libelants would, I think, be a liberal estimate. Before considering what

awards, if any, should be made for these services, her relations to the Bremen must be considered.

2. The Bremen was somewhat larger than the Main, being 525 feet long by 60 beam, and 3 years old. Her value before the fire was about $910,000; and after the fire, as she lay beached at Weehawken, her value is agreed, for the purpose of this trial, to have been $625,000, and her cargo worth $4,737.35. The damage to the Bremen by the fire was therefore about $285,000. When the fire broke out she lay on the northerly side of the pier next below the Main's pier, and opposite to the Kaiser Wilhelm in the same slip. Being nearer the origin of the fire, she took fire a little earlier than either the Kaiser Wilhelm or the Main at the pier above. So rapid was the spread of the flames down the piers and along the line of the bulkhead, that the Bremen's officers and crew had no more than time to cast off her lines, close her ports and bulkheads, and give warning to the men below deck, before they were compelled to fly. Most of them were rescued, although about 40 were only taken from her bunkers through the coal ports from one to four hours later; but some 35 of those who had jumped into the water were missing and are believed to have been drowned.

When the Kaiser Wilhelm went out of her slip, the Bremen speedily followed her without assistance; being, no doubt, drawn out by the suction of the Kaiser Wilhelm through her immense displacement in moving in shallow water out of the same slip. See The Mesaba and The Martello (D. C.) 111 Fed. 215. Going out stern foremost, her stern swung downwards with the ebb tide, while the westerly wind at the same time carried her gradually across the river towards the New York shore. The numerous tugs in the vicinity of the fire were then mostly engaged in attending to the Kaiser Wilhelm, and in picking up persons from the water, or in taking them from the ends of the burning piers or from the small craft on which they had taken refuge.

While the Bremen was thus drifting down and across the river, and when, as I find, she was almost in midstream at about 4:35 p. m., the fire boat New Yorker came first upon her port (windward) side and opened upon her three powerful streams, throwing 1,800 gallons of water per minute. This she continued for an hour or over, throwing into the Bremen in all between 400 and 500 tons of water. (See Capt. Braisted's report.) A few moments only after the New Yorker, came the tugs Wendell Goodwin, Theresa Verdon, James A. Lawrence, Wm. H. Beaman, Baltic, Petersen, Florence, El Amigo, Howard, and the Laurida, several of which at once played water on the steamer, while others, by lines made fast to her, or by pushing against her, endeavored to keep her from collision with the piers on the New York shore. She sagged, however, somewhat heavily against pier 31, the New York Central pier at Desbrosses street, doing damage to the pier that required repairs, but no damage to herself.

At this point the tug El Amigo, one of the most powerful of the tugs, and the tug Pennsylvania (not in this case), with the help of several other tugs shoved her off from pier 31 and kept her from the line of the piers as she drifted slowly down. Before she reached pier 26, the Old Dominion pier, which projects considerably beyond

the others, the Komuk, Walker and Lyndhurst came up, and with their additional aid she cleared pier 26, and was gradually hauled further out in the stream with the aid of the tugs E. Hawley, Annie L., East Chester, Ceres and Charm, which arrived about that time. At about the same time, that is from 5:30 to 6 p. m., the New Yorker left the Bremen, being then about off Chambers street, and landed some 28 of the Bremen's men who had been taken out through one of her coal ports, including Chief Engineer Tinker, Engineer Rabien and Electrician Ssudders.

The ebb current having now become slacker below, on the rising flood tide, although the surface current in the North river in midstream continues to run down about three hours after low water (The Ludvig Holberg [D. C.] 36 Fed. 914, 917, note), the Bremen was gradually swung around stern up-river by the tugs then present; and thereafter, with the further aid of the tugs Robt. White, E. J. Berwind, J. J. Merritt, D. S. Arnott, Dictator, C. F. Roe, Brandon, Hoffman, Timmins, R. Haddon, Mattie, J. A. Bouker and Volunteer, which joined her on the way up, she was towed up to the Weehawken flats and her stern beached a little below the Weehawken & West Shore Ferry, at probably about 8:30 p. m. The time is approximately fixed by several witnesses who say that it was then about dark. Not long afterwards her bow swung round in the flood current so as to head nearly up-river.

When the Bremen was first approached by the New Yorker in midstream, she was a mass of flames amidships and as far back as the end of the smokestack, with little fire forward and none at her stern. The New Yorker going on her windward or port side about midships, played one of her powerful standpipes forward, one amidships, and one aft; and this was continued, as above stated, for about an hour and a quarter, when the New Yorker left her in the vicinity of Chambers street before the Bremen was completely swung around bow downstream. At that time, according to the testimony of the witnesses from the New Yorker, no flames were anywhere visible on the Bremen; the fire, though smoldering and smoking, was under substantial control, and one effective stream, according to the estimate of Captain Braisted, was all that was necessary to subdue any further outbreaks. Notwithstanding some contradictions on this point, I think from other testimony and corroborative circumstances, such as the number of tug men who at that time or soon after were on board the Bremen, that such was then substantially the condition of the fire. The master of the tug T. Verdon says that the fire decreased 90 per cent. while the New Yorker was there. The estimate, however, that a single effective stream would be afterwards sufficient, I have no doubt was much too little. The distribution of the fire, not yet reduced to mere smoldering, over three-fourths of the length of the ship, that is, over a length of about 375 feet, would call for a number of streams to extinguish promptly any outbreaks, and such outbreaks were in fact frequently occurring, both while towing up to the Weehawken flats and for some time afterwards, though many streams were continually played upon her. Superintendent Moeller, who came from the Saale to the Bremen soon after she was beached, at about 9 o'clock, says:

"There was some little fire in amidships and I was on board, on the upper promenade deck. for myself I got hose from the Dewey on board, and we got that fire out. I was around the whole ship."

About half an hour before the Bremen was beached, the Laurida's stern got knocked in, by which she was disabled and she then left. The Volunteer left soon afterwards, there being no apparent need of her remaining. When beached, the tugs Goodwin, Beaman, Komuk, Walker and Roe, which did towing only, also left.

Before the Main came up, at 11 p. m., several other tugs also left, because the fire seemed to be practically extinguished, no flames being visible, and no further need of them appearing; among these were the El Amigo, the Timmins, the T. Verdon and R. Haddon, and not long afterwards the East Chester. When the Main came near, the Mattie turned one of her two streams upon the Main.

It was while the Bremen was in this condition, with the fire practically extinguished, and when little further damage was likely to be suffered, that the Main, a mass of flames and her plating red-hot, at about 11 p. m., was beached by her salvors alongside of the Bremen, and so near to her that tugs could not work between the two, and those already on the starboard side of the Bremen were forced away by the flames and heat of the Main. Their distance apart is variously stated at from 30 to 200 feet. After a time the Dewey and Berwind, aided perhaps by the rising tide, went in between the two bows and shoved the Main a little further away, so that the tugs could afterwards work on the port or windward side of the Main. The testimony of many witnesses, however, leaves no doubt that the effect of beaching the Main so near to the Bremen, was to start the fire upon the Bremen afresh, continuing some time with considerable violence, so that it was not again brought under control until about 3 a. m., nor finally extinguished until 9 a. m. of Sunday morning. The Main thus prolonged the fire upon the Bremen from 6 to 12 hours.

The New Yorker returned to the Bremen towards midnight, but played upon the Main until 3 a. m., and after that upon the Bremen for two hours, until 5 a. m., when she left. The fire on both steamers was at that time reduced to smoke and smoldering only.

Superintendent Moeller testifies that on Sunday morning he went all over the Bremen, and that the fire was then all out, except a little smoke in some cotton in hatch No. 6, and that it was all out upon the Main by Sunday afternoon.

The entire damage to the Bremen was, as above stated, about $285,000. Everything combustible in the central part of the ship, above the engine room between hatches 2 and 6, was consumed; towards the bow, in hatches No. 1 and 2, there was comparatively little fire below. The fire did not enter the engine room, and the machinery was but little damaged by the heat. Seven men, including one engineer, remained there voluntarily to attend to the machinery until after the Bremen was beached, and were supplied with food by the Robt. White, stating that "they were quite comfortable." Aft of hatch No. 6, the ship suffered little or no damage; the second cabin and its state rooms and dining room were unharmed. There was some fire in the cotton in hatch No. 6, and most of the cargo

was greatly damaged or destroyed by fire or water. After some temporary repairs at Erie Basin, the vessel went to Philadelphia and thence to Stettin, Germany, under her own steam, for permanent repairs.

3. It is impossible to say precisely how much the damage to the Bremen was increased by the additional fire caused by beaching the Main so near her. That the fire was thereby prolonged from 6 to 12 hours seems beyond doubt. From 75 to 100 feet of the after part of the ship escaped any substantial injury; the port quarter, which was originally more exposed than the starboard quarter, was not scorched; whereas in the end, in consequence apparently of the fire in the Main, the Bremen's starboard quarter, which was lapped by the Main, was burned considerably further aft than the port quarter. If the whole damage during the 29 hours from 4 p. m. Saturday to 9 a. m. of Sunday was $285,000, according to the stipulation of the parties, one-twentieth part of that sum, or $14,000, would seem to be a very moderate estimate of the damage caused by the Main, through the renewal of the fire on the Bremen, and its continuance to a greater or less extent during the 10 hours from 11 p. m. of Saturday to about 9 a. m. of Sunday.

Still further loss was caused by the Main's position, both in the further salvage expenses caused by the renewal and prolongation of the fire on the Bremen, and also by the inability to work properly on both sides of the Main in putting out her own fire, and the consequently increased damage to the Main herself, the necessary prolongation of the salvage service, and the consequent increase in the awards.

Salvors are responsible for the reasonable care of the property which they take in charge, both as respects damage to the property itself, as well as respects its inflicting damage on other property. Serviss v. Ferguson, 28 C. C. A. 327, 84 Fed. 202; The Sumner, 1 Brown, Adm. 52, Fed. Cas. No. 13,608.

I cannot persuade myself that there was any reasonable excuse for beaching the Main, as was done in this case, alongside the Bremen. The Weehawken flats extend for a length of from one-half to three-fourths of a mile. The testimony shows that there was abundant opportunity to beach the Main safely above or below the Bremen. The two or three vessels in the neighborhood offered no obstruction to going elsewhere. Every witness who was questioned on the subject, save those who did it, agree that the Main might and should have been landed elsewhere. The danger to the Bremen in bringing the Main there, or in preparing to beach her in the immediate neighborhood of the Bremen, was so self-evident, that the conduct of the towing tugs that took the Main there must be held to have been grossly negligent, careless and reckless of consequences. The claim that they did not know the Bremen was there is not credible, even granting that no flames from the Bremen were visible. For there were at least a score of tugs with lights; and with the wind from the southwest those lights could not have been wholly obscured. Besides, the approach of the Main was seen and recognized by the tugs about the Bremen, and numerous alarm

whistles were sounded by them to attract attention and keep the Main away.

Mr. Moeller, the superintendent, was also in the stream on the tug Stevens, outside of the Bremen, and before the Main was beached he hailed the tugs towing her to keep away from the Bremen; his hails were coarsely scouted and were unheeded. The flood tide would have made easy taking the Main further upstream; so that all things considered, I must hold the act of the five tugs in beaching the Main where they did, to have been wholly inexcusable; nor can I doubt that this act caused increased damages to the owners in the several ways above mentioned, far in excess of any possible award that might otherwise have been properly made to the five tugs that put her there, for all their services to both vessels. No allowance should, therefore, be made in either of these cases to the tugs Cahill, Lee, Moran, Kemphill or Booth.

4. Six other tugs make claims for salvage against the Main, viz.: The Timmins, Florence, Mattie, Dailey, Lyndhurst and Merritt. They are entitled to a reasonable award for their services, since they were not responsible for her being beached where she was. One important circumstance, however, detracts from the merit of all of them, except the Dailey, which did not come to the Main until 3 a. m. Monday morning. None of them went to the aid of the Main in her slip nor helped her until she was brought to them alongside by the other tugs. All knew that she was burning; they passed her at from 7 to 8 p. m., when the fire on the Bremen was already subdued; yet up to 11 p. m. none had proposed to go to her assistance. So far as the testimony indicates, she would have been burned out, and the seven men on board of her have perished, had she not been towed out of her slip up to the Weehawken flats, and beached there by the other five tugs. Thus the chief reason for liberal awards in salvage cases, viz.: promptness and heroism in going to the rescue of life and property in peril, is here, on the part of the five tugs above named, as respects the Main, not only wholly wanting, but the Main was virtually abandoned by them in her extreme need; since they chose to stick by a more promising prize, where their services were not even apparently needed in any degree approaching the evident need of the Main. The Merritt, Mattie and Timmins had joined the Bremen but a short time before they passed the Main, and had not the Main been afterwards beached in an improper place, their services would not have been needed by the Bremen at all.

The evidence further shows that the last-named six tugs contributed but a small fraction of the whole salvage service to the Main. As the heat and flames on the wharves and bulkhead at Hoboken where the Main took fire prevented any effective efforts to extinguish the fire on her there, her removal and beaching was the first indispensable service, to which these six tugs contributed nothing. By 3 a. m. of Sunday morning the fire on the Main was largely subdued and under control, through the efforts of the five tugs that beached her, the New Yorker's powerful streams, a little help from the Merritt, two streams from the Lyndhurst for about an hour prior to 1:30 a. m. (when most needed) after which she left (the fire "being then

under control"), and one stream from the Mattie for four hours, which was afterwards continued more or less until 8 a. m. of Monday. All work after 3 a. m. of Sunday was of minor merit, consisting only of playing on the smoldering remains of fire, or on occasional small outbursts of flame, or down the hatches. The Main was already submerged, with the water above her main deck. At least four-fifths of the most meritorious work was, therefore, done by others than these six tugs.

The Timmins played but one stream two hours, from 9:45 Sunday morning, and left before noon, because "things looked all right"; her captain says that "any boat that had a pump was welcome to come and play on the fire." The Florence on Monday played four hours in hatch No. 1, from 2 a. m. to 6 a. m.; the Dailey, two streams from 3 a. m. of Monday till midnight, 12 hours after the Merritt Company had taken charge; the Mattie, one stream from about 11 p. m. of Saturday till 8 a. m. of Monday; the Merritt, after Sunday morning played 2 streams on the Main's bow "whenever it blazed up," while she was lying alongside the Bremen forwards, at some distance from the Main.

Considering all the circumstances, I think a reasonable award for their services to the Main will be:

To the Merritt	$800 00
To the Mattie	500 00
To the Mattie for repair of scorching, requiring repainting, etc	150 00
To the Florence	250 00
To the Lyndhurst	350 00
To the Timmins	150 00
To the Dailey	150 00

5. The services to the Bremen consisted—First, in the rescue of many of her officers and men; second, in checking her rapid drift towards the New York shore and easing her contact with pier 31, and thereby preventing the probable breaking of some of her side plating, and possible entanglement in the slips or with other shipping, which would have been very damaging; third, in towing and beaching her on the flats; and fourth, in putting out the fire.

(1) Saving life: As respects the rescue of the men after the tugs came alongside, I do not find that there was any such special work done by either of the few tugs that took off the Bremen's men as to require any special awards. The peril to the men imprisoned below the decks no doubt increased the merit of the service as a whole; but as this aid was while the general work was going on and was such only as any of the tugs along that part of the vessel would have rendered, and was not marked by any special features, it should be treated as a part of the general service.

It is otherwise, I think, as respects those tugs that either picked up the men from the water, or from the burning piers, or took them from the Bremen before the work upon her began. For such early and special service in rescuing the Bremen's men, the Laurida, Theresa Verdon, Maria Hoffman, and Wendell Goodwin are, according to the evidence, entitled to some additional compensation.

The Laurida picked up and landed from 25 to 30 men; the Theresa Verdon about the same number, including one of the engineers; the

Maria Hoffman, 7 men, including the first officer; and the Wendell Goodwin, 3 men from the Bremen's bow.

(2) Towage: The W. Goodwin, Beaman, Petersen, Komuk, Walker, and C. F. Roe, played no streams, but did towing and pulling only. Several of them had no fire pumps. The other tugs that arrived before the Bremen was beached, took part in towing or shoving her, except the New Yorker and Lawrence, and played one or two streams on the Bremen from the time they reached her. Although all that took part in the towage stand on the same pro rata footing as respects reaching the flats, those that joined before the Bremen hit pier 31 are alone entitled to the credit of any saving of damages to the Bremen or to the piers that this part of the towing effected.

(3) Putting out the fire. Up to the time when the New Yorker left, a little before 6 p. m., streams were also played by the Lawrence, Dewey, El Amigo, and many others which had arrived prior to that time. I have no doubt that when the New Yorker left, the fire was substantially subdued, that it was no longer threatening, and that it was then easily controllable by a few tugs. On the way upriver, while the Bremen was being towed to the flats, 13 other tugs joined, as above stated, a number of which played their pumps on the Bremen while going up, at the same time towing or pushing. Several of the captains of these tugs say that at that time no flame was visible. It is evident, therefore, that the most important part of the work of subduing the original fire, was done by the New Yorker and the other tugs that arrived before the Bremen was turned head downriver; though the work was thereafter continued by all the pumping tugs until 9 or 10 p. m., when abundant testimony shows that the original fire was practically extinguished, and several of the tugs left either then or earlier, including the El Amigo, Laurida, Volunteer, Timmins, T. Verdon and R. Haddon.

After the renewal of the fire, at about 11 p. m. through the near approach of the Main, it could not be put out until the flames and heat of the Main were subdued. Work on both vessels proceeded together. The New Yorker, which had followed the Main, reached her soon after she was beached and played upon her until 3 a. m., when, with the help of the other 11 tugs, except the Dailey, the heat and flames upon her were greatly subdued, and the fire got under control. During the same time very effective work was done on the Bremen by the tugs here represented. The New Yorker also played on her from 3 a. m. to 5 a. m. and then left; and by 9 a. m. of Sunday the fire was practically out. The direct work of the New Yorker upon the Bremen after the new outburst of fire at 11 p. m., was less, as compared with the work of the other tugs, than in the original fire, when the New Yorker played on the Bremen from the first. After 9 a. m. of Sunday, and until Monday morning, when the Chapman-Merritt Company took charge, the need of pumping on the Bremen was occasional only, and was of minor importance. Yet 11 tugs remained by her most of Sunday and 5 others until Monday. One-fourth of that number would have sufficed. The stay of so many so long was so largely voluntary and unnecessary that scarcely more than ordinary rates should be allowed them after 9 a. m. of Sunday, and nothing after Monday morning.

As regards the respective merits of the different tugs at work on the Bremen at the same time, some towing only, some playing their hose only, and some doing both, I think no distinction should be made as to the kind of work done, since both kinds were equally necessary, and neither was neglected. Each tug engaged in either kind of service should therefore be compensated according to her comparative capacity, value, effectiveness and length of service during the most important part of the work, that is, from 4 p. m. of Saturday to 9 a. m. of Sunday morning, with some additional compensation, at a much lower rate, for standing by and rendering occasional service up to Monday morning.

It is argued that as the Bremen and the Main were of about equal value before the fire, the difference in their values after the fire, viz.: about $375,000, represents the value of the services rendered by those tugs to the Bremen; but this is hardly correct, since the Bremen was never so exposed as the Main, and the fire on her was never so general, or likely to become so. The Bremen followed the Kaiser Wilhelm der Grosse out of the same slip a few minutes after the fire broke out, while the Main remained by the burning wharf and bulkhead for five hours afterwards, till 9:30 p. m., with her plating red-hot and the fire raging unchecked inside of her from stem to stern, during all this time. The Bremen, on the other hand, escaped into the river before the fire had got beyond a part of her superstructure, and though no water was played upon her for at least 20 minutes afterwards, the fire never extended aft much beyond her smokestack and hatch No. 6.

After the New Yorker at a little past 4:30 p. m. put her powerful streams upon the Bremen, the fire made no more headway, but was soon reduced within evident control by the New Yorker and the other tugs arriving before the Bremen was turned head downriver, as above stated. The tugs that arrived before that time, i. e. before 6 p. m., are, therefore, entitled to a larger share of the award for services to the Bremen; and there can be no doubt that these tugs were the means of preventing a much greater loss to the Bremen.

Considering the other calls for similar services at the same fire, I do not think it can be fairly said that there was any lack of promptness or energy in aiding the Bremen, at the outset. The Beaman's waiting in the vicinity of her slip for a few minutes while the Kaiser Wilhelm was coming out, and a few minutes afterwards, hardly justifies that contention. The Beaman was a small tug, and had no fire apparatus. Alone she could accomplish little or nothing, and she joined the Verdon when the latter appeared.

From the testimony of the officers, I have no doubt that towards Sunday morning, when the fire on both vessels had been largely subdued and only smoldering remains were left, and when there was consequently less need of energetic work, the men were much less active, being no doubt wearied after long-continued work, and this apparent indifference gave some annoyance to the officers of the Bremen, so that they obtained before daylight on Sunday morning, some of their own men from the Kaiser Wilhelm to help man the hose. More to the discredit of the tugs' men is the testimony of the Bremen's officers that some of the tug men were at every oppor-

tunity wandering about the steamer in search of valuables, for which they were often reprimanded, but with little effect.

These individual incidents, though annoying, are not of great importance as affecting the general merit of the salvage service. And the same is to be said of the mistakes in some of the pleadings, and the erroneous estimates of the times of arrival of the various tugs, and of the condition of the Bremen, much of which testimony is no doubt exaggerated, and upon which some comment is made by the respondent. I do not think these errors or exaggerations are for the most part so flagrant as to warrant the inference of bad faith or of fraudulent misrepresentation.

To this an exception should be made as respects the testimony of Capt. Blake of the Mattie, and of all the witnesses for the Volunteer except the pilot. The effort of these witnesses was evidently to make their services appear to have been rendered from the very beginning, whereas there can be no doubt from other testimony and circumstances that those tugs did not join the Bremen until about 7 p. m. For boldness and persistent effrontery of false statement I have seldom met the equal of Capt. Blake's testimony, and for this reason I must disallow him any share of the award to the Mattie. In the case of the Volunteer, the pilot's evidence, and the captain's own statement that when he arrived the Bremen was heading about southeast, correct the false impressions that the evidence of her other witnesses tends to convey.

The net saving to the Bremen through the salvage services of all these tugs, excluding the independent service of the New Yorker, cannot, I think, have been less than about $300,000 in all, upon which sum 10 per cent. will, I think, be a reasonable and proper award, with the same percentage upon $4,737.35, the value of the cargo saved. The apportionment of this sum among the different tugs, excluding the tugs Moran and Booth for the reasons previously stated, upon the basis of the value, capacity, effectiveness, promptness in time, and the length and nature of the services of each, I have found somewhat complicated and difficult; but the following distribution upon the above basis is as nearly just to all as I have been able to determine.

The allowances are arranged in three groups; and in each group in the order of the size or value of the tugs, as nearly as I could ascertain; the evidence, and even the answers to interrogatories being in several cases either indefinite or wanting.

In the sums awarded I have included for the saving of life an allowance to the Theresa Verdon and to the Laurida of $400 each, for the rescue of 25 or 30 persons by each of them, from the water or slips; to the Maria Hoffman $150 for the rescue of 7 persons, and to the Goodwin $75 for the 3 men taken by her from the Bremen before she returned to begin towing her. For the rescue of many other persons previously picked up by the Goodwin, an allowance was previously made to her in the case of The Kaiser Wilhelm. I have also taken into consideration the special service of the Dewey and the Berwind, and the danger run by them in going in between the Main and Bremen to separate them so far as possible. To John Swain, steward of the Admiral Dewey, I allow $150 for his

injuries, and I also allow to the owners for their losses and the damages to their tugs during the service, the respective sums below stated, as proved upon the trial, including, in the cases of the Dewey and the Berwind, their loss of time in the nature of demurrage.

The tugs varied greatly in their times of leaving; and in pumping, some played one stream and some two. In making the awards I have endeavored to take into consideration all the varying circumstances of each tug.

Tugs at work before contact with pier 31 at from 5 to 5:15 p. m.

To the El Amigo	$1,550 00	Florence	$900 00
" " Wendell Goodwin	650 00	Laurida	750 00
		and damages	150 00
" " James A. Lawrence	1,500 00		
" " Howard	1,125 00	Wm. H. Beaman	350 00
and damage to hose	90 00	towing only.	
" " Theresa Verdon	1,073 41	J. H. Petersen	100 00
and damages	130 32	towing one hour only.	
" " Baltic	1,150 00		

Tugs arriving after the contact and before the Bremen was turned around stern upriver, at from 5:30 to 6 p. m.

To the Admiral Dewey	$1,850 00	Annie L.	$900 00
damages	900 00	damages	45 00
" " John Swain	150 00		
" " Hawley	1,100 00	East Chester	700 00
" " Ceres	1,000 00	Lyndhurst	700 00
" " Charm	1,000 00	Walker	300 00
		Komuk	300 00

Tugs arriving while towing upriver from 6 to 8:30 p. m.

To the I. J. Merritt	$2,000 00	Ed. M. Timmins	$300 00
" " Ed. J. Berwind	1,700 00	Volunteer	300 00
and damages	700 00		
" " Maria Hoffman	1,200 00	C. F. Roe	250 00
" " D. S. Arnott	1,000 00	Brandon	600 00
damages	100 00	damages	60 00
" " Dictator	1,050 00	Robt. White	700 00
		damages	50 00
" " Bouker	900 00	Mattie	450 00
" " Haddon	450 00		

Tugs arriving after the Bremen was beached.

To the John D. Dailey (after 9 a. m. Sunday) $200 00

One-fourth of the sums above given for services, except to the Mattie and the Volunteer, are awarded to the masters and crews to be divided among them in proportion to their wages, the master, however, taking a double portion; the residue goes to the owners. In the cases of the Volunteer and Mattie, the owners are awarded four-fifths; the master and crew of the Volunteer to take one-fifth pro rata, the master a single portion only; the crew of the Mattie, excluding the master, take one-fifth pro rata and the master nothing.

Decrees may be entered accordingly with costs, to the extent of the disbursements of each party recovering, and $10, part of a docket fee before consolidation, for each libel on which a recovery is had.

LAMM et al. v. PARROT SILVER & COPPER CO. et al.

(Circuit Court, D. Montana. October 23, 1901.)

No. 154.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—SUIT BY STOCKHOLDERS.

A suit by stockholders of a corporation against such corporation and a second corporation, which, the bill alleges, has, through an unlawful combination, obtained a controlling interest in the first, and by virtue of such control has managed its business to the detriment of its stockholders, and for its own benefit, and where an injunction is prayed restraining the payment of dividends by the second corporation until an accounting has been made, is one in which the complainants in effect represent their corporation, and which involves a separable controversy as to the second corporation that entitles it to remove the cause where the other facts requisite to give a right of removal exist; and officers of the two corporations made defendants with a prayer for an accounting from all the defendants are merely formal parties, whose joinder does not defeat such right of removal, where no facts are alleged which entitle the complainants to relief against them as individuals.[1]

On Motion to Remand to State Court.

McHatton & Cotter, Jas. M. Denny, and W. C. Jones, for plaintiffs.

A. J. Shores, for defendant Amalgamated Copper Min. Co.

KNOWLES, District Judge. This case was commenced in the district court of Silver Bow county, Mont. On the petition of one of the defendants, the Amalgamated Copper Company, a corporation alleged to have been organized under the laws of the state of New Jersey, the cause was removed to this court from said state court. The grounds of said removal were that the defendant Amalgamated Copper Company was and is a citizen of the said state of New Jersey, and that, although there were other defendants, the bill presented a separable controversy. Complainants have now come into this court, and moved that this cause be remanded to the state court on the ground that the contention of said defendant Amalgamated Copper Company as to a separable controversy is not correct. This is the question presented to this court for solution. The plaintiffs, it is alleged, are stockholders in the Parrot Silver & Copper Company, a corporation organized under the laws of Montana. On the ground that the said Parrot Silver & Copper Company has passed under the control of the said Amalgamated Copper Company, and certain wrongs have been done in regard to its rights and property, this suit is brought by said plaintiffs. In effect plaintiffs represent the Parrot Company. They have the right to maintain this action only because the said company, being under the control of the Amalgamated Company, will not protect itself. The rights that they seek to protect are the rights of the said company. Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815. The machinery and ore

[1] Separable controversy as ground for removal of cause, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Mineral Co., 35 C. C. A. 155.

alleged to have been taken were the property of the company, not the property of the individual plaintiffs, who are only stockholders in the company. Upon an examination of the bill we find that complainants set forth:

"That the defendants, with others, not named, combined to form and create a trust or monopoly for the purpose of controlling and monopolizing the production and sale of copper and other metals in the United States and throughout the world; and in pursuance of such unlawful and malicious conspiracy, confederation, and combination said defendants organized a corporation under the laws of New Jersey, under the name Amalgamated Copper Company, having a capital stock amounting to seventy-five million dollars ($75,000,000)."

The articles of incorporation are then set forth. Complainants then allege that in furtherance of said conspiracy and combination "said persons caused said Amalgamated Copper Company, either directly or through the agency of a trustee, to purchase a majority of the capital stock of this defendant corporation (the Parrot Silver & Copper Company), which said stock the said Amalgamated Copper Company now owns and controls. Said persons also procured said Amalgamated Copper Company to purchase all of the shares of the capital stock, except organizing shares, of the following corporations, to wit: The Washoe Copper Mining Company, the Colorado Smelting & Mining Company, the Diamond Coal & Coke Company, the Big Blackfoot Milling Company, the Hennessy Mercantile Company." It is also alleged that said persons procured said Amalgamated Company to purchase and become the owner of large amounts of the capital stock of the Boston & Montana Consolidated Copper & Silver Mining Company. What was the object of making these allegations? They are either immaterial, or they were made with a view of attacking the right of said Amalgamated Company to purchase, own and control the said stock in the said Parrot Company. This is a controversy in which the said Amalgamated Company and plaintiffs, as the representatives of the Parrot Company, are alone interested. If the Parrot Company has any interest in this controversy, it is not with the Amalgamated Company. It has no interest in maintaining the contention that said Amalgamated Company had a right to purchase, own, and control its stock. It is set forth in the bill:

"That shortly after the said Amalgamated Company became the owner of a majority of the capital stock of the defendant the Parrot Silver & Copper Company, and thereby secured the management and control of said defendant company, the directors, acting in conjunction with the Amalgamated Copper Company, caused the concentrating and smelting plant of said defendant company, situate at Butte, as aforesaid, and the refining plant of said company, situate at Bridgeport, Connecticut, to be closed down, and partially dismantled, and caused part of the machinery of said concentrating and smelting plant to be removed from Butte, and placed in reduction works of another corporation, to wit, the Anaconda Copper Mining Company, situated at Anaconda, Montana, and caused a useful, convenient, and facile shaft, necessary to the honest and economical working and development of the mines of said defendant company, * * * to be abandoned; and since said date, either directly or through the agency and connivance of officers and directors of said Anaconda Copper Mining Company, have caused large quantities of ore of great value to be taken from the mines of the defendant company through shafts and workings of said Anaconda Copper

Mining Company, and shipped over the railroad of said Butte, Anaconda & Pacific Railway Company to the smelters and reduction works of said Anaconda Copper Mining Company, at great expense of freight, hauling and handling, and then to be reduced, smelted, and treated at an expense greatly in excess of the amount which it costs or would cost said company to smelt and reduce and treat its said ores at its own works in Butte, and in excess of any reasonable or proper charge; and plaintiffs allege that they are informed and believe that said ores so taken from the mines of defendant company aforesaid were never sampled or weighed properly or sufficiently, or at all, and that no true or sufficient account was ever kept by said defendant, or any one, of the ores so taken."

Here we find charges against the Amalgamated Company in which the Parrot Company is interested only as against the said Amalgamated Company. It should be observed that the Anaconda Copper Mining Company is not made a party to this bill. This should be considered in viewing the prayer for an accounting in the bill. Turning now to the prayers in said bill, and we find it asked:

"That the defendant the Amalgamated Copper Company, its officers, directors, and trustees, be enjoined from paying any dividends from moneys obtained from the defendant Parrot Silver & Copper Company, or from any of the stockholders thereof, or from any stock of said company held by them in trust or otherwise, until it be ascertained what amount of money obtained by the defendant the Amalgamated Copper Company from the Parrot Silver & Copper Company, or by any corporation controlled by said Amalgamated Copper Company, for the extraction of ores, or for the smelting, concentrating, or refining the same, and which were taken from the property of the defendant Parrot Silver & Copper Company, and which was in excess of the lawful charges for such purpose, and being in excess of what it would have cost the defendant Parrot Silver & Copper Company to have extracted, concentrated, and refined the same."

It will be seen from an examination of this prayer, although somewhat involved and confusing, that special relief is asked against the Amalgamated Company. The naming of the officers, directors, and trustees of said company does not change the effect of the prayer. They are named in their official capacity. The last prayer in the bill is as follows:

"That all of the defendants be required to account for any moneys received by them, or by any of them, from the said defendant Parrot Silver & Copper Company, in connection with any of the matters and things set forth in said complaint, and for such other and further relief as to the court may seem just and equitable."

Looking to the allegations in the bill, and it is evident that the accounting here sought is against the said Amalgamated Company alone. There are no allegations that all of the defendants jointly obtained any property of the Parrot Company. The ore and machinery for which an accounting might be made was received, if at all, by said Amalgamated Company and the Anaconda Company; and the Anaconda Company, as before stated, is not a party to the suit. Under these circumstances it has been held that there is, in this matter of accounting, a separable controversy presented. Railroad Co. v. Zeigler, 39 C. C. A. 431, 99 Fed. 121; Barney v. Latham, 103 U. S. 205, 26 L. Ed. 514. Undoubtedly, the bill was drawn in this case with a view to excluding the claim that it presented a separable controversy as to the Amalgamated Company. A court, how-

ever, should view the matters presented in the bill, and see if the joining of some of the parties is merely colorable, and as to whether, considering the allegations in the bill, any relief could be obtained as against such colorable parties. If not, they become only what is termed "nominal parties," and the joining of them in no way should affect the jurisdiction of the court. In the joining of the officers and agents of the Amalgamated Company or those of the Parrot Company, the complainants could not have expected any relief against them, considering the scope of the bill. Such parties would be presumed to act for and in behalf of their company, and no individual relief could be obtained against them.

The motion to remand this cause to the state court is overruled.

PETERS v. MALIN.

(Circuit Court, N. D. Iowa, E. D. October 21, 1901.)

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—ACTION INVOLVING RIGHTS OF TRIBAL INDIANS.

   The foundation of an action for false imprisonment is the fact that such imprisonment was brought about by the issuance and enforcement of void or irregular process; and where the plaintiff is a tribal Indian, and the wrong complained of is his arrest and imprisonment under process issued by a state court, for the violation of a state law to which it is alleged he was not subject, the issue whether such process was void or not depends primarily upon questions arising under the laws and treaties of the United States, and a federal court has jurisdiction of the action.[1]

2. INDIANS — AUTHORITY OF UNITED STATES OVER TRIBAL INDIANS — RESERVATIONS.

   The Indians of the Sac and Fox tribe residing in Tama county, Iowa, on lands purchased by them with the consent of the state, and held in trust for their benefit, are tribal Indians, and their lands constitute a reservation under the control of the United States in all matters pertaining to the domestic relations of such Indians. Such right of control in the general government arises from its relation to all the tribal Indians, as such, and is not dependent upon the title to the land upon which they reside.

3. SAME—SAC AND FOX TRIBE IN IOWA—STATE JURISDICTION OVER.

   A court of the state of Iowa has no jurisdiction to appoint a guardian for the persons of minors of the Sac and Fox tribe of Indians who reside on the reservation of the tribe in Tama county; and an order making such an appointment, and directing the guardian to place and keep his wards in the industrial school established by the United States, thus removing them from the reservation and from the immediate control of their parents and relations, was void, and conferred no authority upon the guardian over such minors.

4. SAME—CRIMINAL STATUTES OF STATE.

   The state of Iowa, by Act February 14, 1896 (Acts 26th Gen. Assem. p. 114) c. 110, § 1, tendered to the United States "exclusive jurisdiction of the Sac and Fox Indians residing in Iowa and retaining the tribal relation * * * and of all lands now or hereafter owned by or held in trust for them as a tribe," and further provided that "as soon as the United States shall accept and assume such jurisdiction all such juris-

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[1] Federal question as ground of jurisdiction, see notes to Bailey v. Mosher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

diction on the part of the state of Iowa shall cease." By section 3 certain reservations were made,—among others, that nothing in the act should prevent the courts of the state from exercising jurisdiction of crimes against the laws of the state committed on such lands either by said Indians or others, or of such crimes committed by said Indians in any part of the state. The cession was accepted by act of congress. *Held*, that such reservation did not subject such Indians to the criminal laws of the state, except for offenses committed against white persons, or reserve to the state any jurisdiction or control over the domestic affairs or relations of the Indians, which would practically nullify the purpose of the act as declared in its first section, and which jurisdiction the state in fact never possessed.

5. SAME—ILLEGAL PROSECUTION—LIABILITY FOR FALSE IMPRISONMENT.
Plaintiff, a member of the Sac and Fox tribe of Indians, residing on their reservation in Iowa, assisted an Indian woman who was also a member of the tribe in removing her minor children from the reservation to prevent their being compelled forcibly and against her wishes to remain in attendance at the Indian school, which was some distance from the reservation. Defendant, who was the agent for the tribe, and who had also been appointed by a district court of Iowa guardian of such minors, caused plaintiff to be arrested; and he was held to the grand jury, indicted, and imprisoned pending his trial in the state court for violation of Code Iowa, § 4761, which makes it an offense to take, decoy, or entice away any child under the age of 15 years, with intent to detain or conceal such child from its parent, guardian, or other person having lawful charge thereof. *Held*, that such provisions had no application to the acts of plaintiff, all parties to the transaction being tribal Indians, and the defendant having no lawful authority over the minors by virtue of his void appointment as guardian; that the state court was without jurisdiction to try or punish plaintiff under such statute for the acts committed by him, and the action of defendant, therefore, constituted a false imprisonment, for which he was liable in damages.

6. FALSE IMPRISONMENT—INADEQUACY OF DAMAGES AWARDED—NEW TRIAL.
Plaintiff, a tribal Indian, was confined in jail some nine days while awaiting trial in the state court, in which he was acquitted by direction of the court. There was no actual malice on the part of defendant, who caused the false imprisonment, and no ground for the recovery of anything beyond compensatory damages. *Held*, that a verdict awarding $10 damages, while smaller than should have been rendered, would not be set aside, in view of the improbability that a verdict would be secured on a second trial for an amount sufficiently greater to compensate plaintiff for the additional expense.

Action at Law for False Imprisonment. On motions for new trial filed on behalf of plaintiff and defendant. See 104 Fed. 849.

J. W. Lamb and Wm. G. Clark, for plaintiff.

Caldwell & Walters, Struble & Stiger, and H. G. McMillan, for defendant.

SHIRAS, District Judge. This action was brought by the plaintiff, who is a member of the tribe of Indians settled in Tama county, Iowa, against the defendant, who is the agent appointed by the United States and placed in charge of the tribe, to recover damages for a false imprisonment of the plaintiff. The case was tried before a jury at the September term of the court at Cedar Rapids, and a verdict awarding the plaintiff damages in the sum of $10 was returned by the jury, and now both parties move for a new trial. It will probably conduce to a better understanding of the questions

presented by the motions to give a brief recital of the dealings of the state and national governments with these Indians:

The Indians settled in Tama county are a remnant of the once powerful combined tribe of Sacs and Foxes, who at an early day occupied a large part of the territory now forming the state of Iowa. Under date of October 11, 1842, a treaty was entered into between the United States and the confederated tribes of Sacs and Foxes by which the latter ceded to the former all their interest in the lands west of the Mississippi river in consideration of the payment to be made by the United States of the sums of money named in the treaty, and upon the promise of the government to assign to the Indians a suitable tract of land upon the Missouri river or some of its tributaries. 7 Stat. 596. In accordance with the terms of this treaty a reservation was assigned to the Indians within the territory now forming the state of Kansas, and the large majority of the Indians removed to the land assigned them, leaving, however, a few individuals who clung to their old homes in Iowa, the number so remaining being increased by others who returned to Iowa. The government of the United States endeavored to compel these Indians to follow the tribes into Kansas, by refusing to pay them their share of the annuities due under the terms of the treaty unless they would join their brethren in Kansas, but without avail. In 1856 the legislature of the state of Iowa adopted an act declaring:

"That the consent of the state is hereby given that the Indians now residing in Tama county, known as a portion of the Sacs and Foxes, be permitted to remain and reside in said state, and that the governor be requested to inform the secretary of war thereof, and urge on said department the propriety of paying said Indians their portion of the annuities due or to become due to said tribes of Sacs and Foxes." Acts 5th Gen. Assem. (Ex. Sess.) c. 30.

In 1857 the Indians bought 80 acres of land in Tama county, which was the beginning of their present settlement, and there has been added thereto since that date some 3,000 acres; the title to part being taken in the name of the governor of Iowa, and the remainder in the name of the secretary of the interior, but all being held in trust for the Indians, whose numbers are now about 400. Since 1867 the government has paid to these Indians their proportionate share of the annuities coming to the Sacs and Foxes, and for years has maintained an agent upon the land in charge of their affairs. As the number of the children in the settlement increased, it was deemed desirable to make provision for their education, and to that end, among others, the state of Iowa, by an act of the general assembly approved February 14, 1896, ceded to the United States exclusive jurisdiction over the Sac and Fox Indians residing in Iowa, which cession was accepted by the United States in the act of congress approved June 10, 1896; and at the same time congress appropriated the sum of $35,000 for the purchase of a site and the erection of the necessary buildings for an Indian industrial school, which was located and erected at Toledo, in Tama county, not upon the Indian lands or reservation, but some four or five miles therefrom. After the erection of the school buildings, efforts

were made by the Indian agent and the school superintendent to secure the attendance of the Indian children; but much opposition thereto was manifested by the Indian parents, who evidently became impressed with the idea that the purpose of the school was to convert the children from the Indian modes of thought and living to those of the white men, and therefore the Indians would not consent to the taking of the children from their homes on the reservation and keeping them at the school at Toledo. In this situation of affairs, a plan was devised for securing the appointment of the defendant, Malin, as the guardian of the persons of the Indian children; and, upon application made, the district court of Tama county, Iowa, appointed the defendant guardian of some 15 to 20 of these children, and directed him, as such guardian, to place and keep these children at the industrial school, and the defendant thus by compulsion placed a number of them in the school. Subsequently two of these children ran away from the school, going to their homes on the reservation, and thereupon the mother of one of them, in order to prevent their being recaptured and forcibly returned to the school, determined to take them away from the reservation, and to that end arranged with plaintiff that he should accompany her and the children to the home of a white man named Ruhl, living in Poweshiek county, in order to drive the wagon that was to convey them, and to act as interpreter in arranging for the board and care of the children. The plaintiff thus aided in taking the children to the place named, and upon his return he was arrested upon an information sworn to by the defendant, and taken before a justice of the peace, charged with the crime of enticing away a child under 15 years from the Indian reservation and keeping her in hiding; the information being based upon section 4761 of the Code of Iowa, which enacts that:

"If any person maliciously, forcibly or fraudulently lead, take, decoy or entice away any child under the age of fifteen years, with intent to detain or conceal such child from its parent, guardian or other person having lawful charge thereof, he shall be imprisoned in the penitentiary not more than ten years or be fined not more than one thousand dollars or punished by both such fine and imprisonment."

Upon the hearing before the justice the plaintiff was held to answer before the grand jury of the state court, and by that body was indicted; and, being brought to trial before the court and petit jury, by direction of the court a verdict of not guilty was returned. During the pendency of these proceedings the plaintiff was imprisoned in the county jail for a period of some nine days, and after the dismissal of the case in the state court the plaintiff brought this action in this court to recover damages caused him by his imprisonment in the county jail. The case was originally brought against Wm. G. Malin, the Indian agent, and J. W. Nellis, the superintendent of the Indian school, but was subsequently dismissed as to the last-named party, and therefore the questions will be considered the same as though he had never been named as a party defendant.

The defendant, Malin, filed a demurrer to the petition on the ground that this court could not take jurisdiction of the case, for

the reason that the controversy was not between citizens of different states, and the cause of action was not based upon any provision of the constitution, laws, or treaties of the United States. The demurrer was overruled, and thereupon an answer and an amended answer were filed, and upon the issues thus presented the case was heard before a jury, a verdict for plaintiff in the sum of $10 being returned; and now the defendant moves for a new trial upon numerous grounds, the first of which is that this court has not jurisdiction over the case, it being contended that false imprisonment is a cause of action at the common law, and does not arise under the provisions of the constitution, laws, or treaties of the United States.

To sustain an action of false imprisonment, it must be shown that the party complaining was arrested and imprisoned without warrant of law, or upon void process. Thus, in Bryan v. Congdon, 86 Fed. 221, 29 C. C. A. 670,—a case decided by the court of appeals for this circuit,—it is ruled that:

"The established law lying at the foundation of this action is that if a person has been arrested and imprisoned under color of legal process, which is thereafter set aside for irregularity, the person who set the process in motion is responsible in damages to him upon whom the indignity and deprivation of liberty have been visited. Where the process is set aside for mere error committed by the court in the progress of the action, in contradistinction to irregular or void process, no responsibility may attach to him who caused its issue; but, when it is vacated because it was irregular in its inception, responsibility at once attaches. 'In the one case a man acts irregularly and improperly, without the sanction of any law, and he therefore takes the consequences of his own unauthorized act. But, where he relies on the judgment of a competent court, he is protected.' * * * The whole doctrine is concisely summed up in Day v. Bach, 87 N. Y. 56–60, and in Fischer v. Langbein, 103 N. Y. 84, 8 N. E. 251, substantially as follows: He who causes void or irregular process to be issued, whereby injury comes to another against whom it is enforced, is liable in damages therefor. Where the process is void, the right of action for the injury attaches when the wrong is committed, and no judgment vacating the process is required. * * * Void process is defined to be such as was issued without power in the court to award it, or which the court has not acquired jurisdiction to issue in the particular case, or which fails in some material respect to comply with the requisite form of legal process."

While, therefore, it is true, as claimed, that the right to maintain an action for false imprisonment is of common-law origin, nevertheless the foundation of the action is the fact that the imprisonment was brought about by the issuance and enforcement of void process; and in the case now before the court the issue whether the process under which plaintiff was imprisoned was void or not depends primarily on questions arising under the laws and treaties of the United States. In the petition filed by plaintiff it is averred that the plaintiff is a tribal Indian; that the defendant is the United States agent, acting under the authority of the federal government; that the defendant well knew that the plaintiff, as a tribal Indian, was not subject to the laws of the state of Iowa; and that he wrongfully and maliciously charged plaintiff with a violation of a state law, and caused his arrest and imprisonment upon such charge. In the answer of defendant, after reciting the proceedings taken against the plaintiff, it is further stated:

"That the said Wm. G. Malin, in causing the arrest of the said Indian, Peters, by reason of the matters aforesaid, acted in harmony with the desire and authority of the government in that regard, all of which acts were approved by the government as being strictly in the line of the duty of the said W. G. Malin as agent aforesaid, as prescribed by law and the rules of the Indian school service; and these defendants aver that said child at the time of the wrongful matters herein alleged was under fifteen years of age; and these defendants further allege that prior to the wrongs alleged to have been committed by him, the said W. G. Malin, against the said plaintiff, he, the said Malin, had been duly appointed by the district court of Tama county, Iowa, as the guardian of the said child, Ma-sqa-see, and was such guardian at the time of said alleged wrongs, and that in regard to all the actions taken by him to secure the attendance of said child at said school, and in causing the arrest of the said Peters for enticing her away, he, the said Malin, was acting in the interests of said child, as guardian of her person, and as the agent of the tribe, representing the United States government, and in accordance with his duty, as he understood it, as such agent and guardian."

It is thus averred that the defendant in taking proceedings against the plaintiff was acting in the capacity of Indian agent appointed under the laws of the United States, and as guardian of the person of the Indian child. It cannot be questioned that the power possessed by the defendant as Indian agent, and whether in the exercise thereof he was justified in causing the arrest and imprisonment of the Indian plaintiff, are questions arising solely under the laws and treaties of the United States. As to the averment that the defendant was also acting as guardian of the person of the Indian child, under an appointment made by the district court of Tama county, Iowa, the material question presented thereby is whether the laws of the state providing for the appointment of guardians for minor children are applicable to the children of the tribe of Indians living in Tama county; and this inquiry involves the questions whether these Indians are tribal Indians, wards of and dependent upon the national government, and, if so, whether they are within the plane of the ordinary laws of the state regulating the domestic affairs of its citizens. The question whether these Indians are tribal Indians is one which must be determined by the laws and treaties of the United States; for, as is said by the supreme court in Elk v. Wilkins, 112 U. S. 94–100, 5 Sup. Ct. 41, 44, 28 L. Ed. 643, 645:

"The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action and assent of the United States."

So, also, the question of the right of the state court to appoint a guardian for the persons or property of the minor Indian children residing on the reservation must be solved by a construction of the acts of the United States with reference to these Indians; for, so long as the tribe (and that term includes minors and adults) remains under the control of the national government, the state cannot undertake the control of the persons and tribal property of the Indians. Worcester v. Georgia, 6 Pet. 515, 8 L. Ed. 483; U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. Under any view, therefore, that can be taken of the issues presented in this case, it must be held that the case is one arising under the laws and treaties

of the United States, and of which the court has full jurisdiction, irrespective of the fact that the plaintiff cannot be said to be a citizen of a state of the Union.

The next position taken in support of the motion for a new trial is that the court erred in holding that the criminal laws of the state of Iowa were not applicable to these Indians in their relations with each other, nor did these laws control the domestic relations and duties of the Indians. It is not questioned by the defendant that these Indians are tribal Indians, and properly under the charge of the government of the United States; but it is contended that the land occupied by them cannot be deemed to be an Indian reservation, because the title thereto is vested in the governor of the state and the secretary of the interior in trust for the Indians, and was purchased by the Indians after the admission of Iowa into the Union. The relation of dependency existing between tribal Indians and the national government does not grow out of the ownership of the land, either by the Indians or the government, but, as is said by the supreme court in U. S. v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228:

"These Indian tribes are the wards of the nation. They are communities dependent on the United States. * * * From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by congress and by this court whenever the question has arisen. * * * The power of the general government over these remnants of a race once powerful, now weak and diminishing in numbers, is necessary to their protection, as well as the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

So long as these Indians retain their tribal relation and continue to be wards of the national government, the control and management of them with respect to their tribal affairs is in the federal government, irrespective of the question of the title of the lands upon which for the time being they may be located. Thus, if the United States should, with the consent of the state, now purchase or lease certain lands from private owners in the state of Iowa for the purpose of furnishing a home for a body of tribal Indians, and should remove the Indians thereto, placing them in charge of an Indian agent, is it not clear that the lands thus occupied would be in fact and in law an Indian reservation? The extent of the control of the state over the lands thus occupied is to be determined by the facts of the particular case; but if it be true that in a given case the state may have reserved to itself the right to build roads through the premises, to execute judicial process thereon, and to punish crimes committed thereon against the citizens of the state, these reservations will not change or affect the status of the Indians as tribal wards of the nation, nor prevent the land occupied by them from being properly denominated an Indian reservation. In the case at bar the lands in Tama county were bought for the benefit of the Indian tribe, the title

being taken in the name of the governor of Iowa and of the secretary of the interior, to be by them held in their official capacity in trust for the Indians. The consent of the state to the purchase of these lands for the benefit of the Indians as a tribe, and to their location thereon, is shown by the act of the general assembly adopted in 1856, consenting to these Indians remaining in the state, by the action of the governor in holding the title of the lands in trust for the Indians, and by the act of the general assembly adopted February 14, 1896 (Acts 26th Gen. Assem. p. 114), ceding jurisdiction to the United States over the Indians and all lands owned by them or held in trust for them. In view of these facts, it must be held that the Indians residing in Tama county are tribal Indians residing on lands purchased for their benefit with the consent of the state, which lands constitute a reservation under the control of the United States in all matters pertaining to the domestic relations of the Indians, and, furthermore, that their status as tribal Indians is not based upon the act of the general assembly of Iowa just cited, but grows out of the fact that they are a part of the confederated tribes of Sacs and Foxes, between whom and the national government the relation of wards or dependents had been recognized and existed long before the state of Iowa was organized, and which condition of dependency has never been changed by any act of the national government.

This being the status of these Indians, then the question arises as to the applicability of the laws of the state of Iowa to them. On the trial of the case the court instructed the jury that the laws of the state providing for the appointment of guardians for the persons and property of minors did not apply to the Indian children living on the reservation, and therefore that the action of the district court of Tama county in appointing the defendant guardian of the persons of the Indian children was nugatory and without legal right to sustain it. The correctness of this ruling is now challenged. This question was before me in the case of In re Lelah-puc-ka-chee (D. C.) 98 Fed. 429, and it was therein held that the provisions of the Code of Iowa authorizing the appointment of guardians of minors did not apply to the tribal Indians of Tama county, and I see no reason for changing the rule therein made. As pointed out in that case, if the provisions of the Code of Iowa with respect to the appointment of guardians is in force in this tribe, then the provisions of the Code with respect to appointing administrators for the estates of deceased Indians would also be applicable, and thus inextricable confusion would result in the administration of the domestic affairs of the Indians. It is apparent that, if the various provisions of the laws of Iowa are to be held applicable to these Indians and their property, then their tribal condition will be speedily broken up, not in pursuance of the acts of the national government, but through the enforcement of the laws of the state, acting upon the persons and property of the Indians. If the district court of Tama county had the right to appoint the defendant the guardian of the persons of the Indian children, it can appoint any competent person to the position; and if, in its judgment, it deemed it advisable, it could direct the placing

these children in any of the schools of the state. In Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49, it is held that with respect to "a member of an Indian tribe, whose tribal organization was still recognized by the government of the United States, the right of inheritance in his land at the time of his death was controlled by the laws, usages, and customs of the tribe, and not by the law of the state of Minnesota, nor by any action of the secretary of the interior." In this case the supreme court cite approvingly the decision of the supreme court of Minnesota in U. S. v. Shanks, 15 Minn. 369 (Gil. 302), wherein it was held that a probate court of the state had no jurisdiction over the estate of a chief of a tribe of Chippewa Indians to whom a section of land had been patented by the United States in pursuance of the terms of a treaty with the tribe. Although these Indians reside within the territorial limits of the state of Iowa, they are, so far as their ordinary life is concerned, without the plane of the legislative jurisdiction of the state; and therefore the act of the district court of Tama county in appointing the defendant the guardian of the persons of the Indian children, and directing him to place and keep them in the industrial school at Toledo, thus removing the children from the immediate control of their parents and relatives, and removing them from the reservation where their families resided, was an act without law to support it, and conferred upon the defendant no authority whatever over the persons of the Indian children.

Upon the trial the court further charged the jury that section 4761 of the Code of Iowa, which enacts that any person who decoys or entices away any child under the age of 15 years with intent to detain or conceal such child from its parent, guardian, or other person, having lawful charge thereof, shall be punished by fine and imprisonment, was not applicable to the plaintiff in his dealings with the Indian children, he being a member of the Indian tribe. It is contended that though it may be true generally that the criminal laws of the state are not applicable to tribal Indians living therein, with respect to their dealings with each other, yet in this particular case the criminal laws of the state are binding upon the Indians by reason of the provision of the act of the general assembly already cited, approved February 14, 1896 (Acts 26th Gen. Assem. p. 114). To fairly present the question, it may be advisable to cite at length the provisions of this act, they being as follows:

"Chapter 110. Be it enacted by the general assembly of the state of Iowa.

"Section 1. That, except as hereinafter provided, exclusive jurisdiction of the Sac and Fox Indians residing in Iowa and retaining the tribal relation, and of all other Indians dwelling with them, and of all lands now or hereafter owned by or held in trust for them as a tribe, be and the same is hereby tendered to the United States, and that, as soon as the United States shall accept and assume such jurisdiction, all such jurisdiction on the part of the state of Iowa shall cease.

"Sec. 2. Consent is hereby given to the United States to purchase any land in Tama county to be used for and in connection with any school or schools to be established and managed by federal authority for the education of said Indians.

"Sec. 3. Nothing contained in this act shall be so construed as to prevent on any of the lands referred to in this act, the service of any judicial pro-

cess issued by or returnable to any court of this state or judge thereof, or to prevent such courts from exercising jurisdiction of crimes against the laws of Iowa committed thereon either by said Indians or others, or of such crimes committed by said Indians in any part of this state, or to prevent the establishment and maintenance of highways and the exercise of the right of eminent domain under the laws of this state over lands now or hereafter owned by or held in trust for said Indians, or to prevent the taxation of said lands for state, county, bridge, county road, and district road purposes, and such other purposes as the general assembly may from time to time by special statute provide."

The contention of defendant is that the provisions of section 3 reserve to the state jurisdiction over all criminal violations of the laws of Iowa committed on or off the reservation by the Indians, and that this must be construed to keep within the jurisdiction of the state the Indians as well as the lands of the reservation. If this construction is given to section 3, it will result in practically nullifying all that is granted in section 1. It is a settled rule of construction that all parts of the act must be considered, having due regard to the general purpose sought to be accomplished by the passage of the act, and a literal construction of particular clauses will not be adopted if the effect thereof would operate against the manifest purpose of the legislature. Scott v. Latimer, 89 Fed. 843, 33 C. C. A. 1; Heydenfeldt v. Mining Co., 93 U. S. 634, 23 L. Ed. 995; Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 844. The general purpose of the act in question is clearly shown by the provisions of the first section, which in effect declares that exclusive jurisdiction over the Sac and Fox Indians residing in Iowa and retaining the tribal relation, and of all the lands owned by them or held in trust for them, is tendered to the United States. The purpose of this section was to relinquish to the United States any and all jurisdiction over the Indians and their property which it might be claimed existed in the state, to the end that the control of these Indians in their tribal condition should be wholly vested in the national government. As already said, I do not believe that these Indians had ever ceased to be tribal Indians, or had ever passed from under the control of the federal government; but the passage of this act by the general assembly of Iowa, and the acceptance of its terms by the national congress, served to put at rest any possible doubts that might arise with respect to the status of these Indians; and certainly it cannot be true that since the passage of this act there remains in the state any control over the domestic affairs or relations of these Indians, including the education of the children, the control of the parents or relations over them, and all other matters that pertain to their relations with each other as members of the tribe. If any of the provisions of the statutes of Iowa, such as those that provide for the appointment of guardians for the persons and property of minors, are held applicable to these Indians, then all of the provisions of the state laws must be applicable, for there is no ground for holding that part of the laws are applicable and part not; and such a ruling would practically nullify the exclusive jurisdiction over the affairs of these Indians, which it was clearly the purpose of the first section of the act of the general assembly to confer upon the national government. But as it was

clearly contemplated that these Indians would continue to reside as a tribe upon their lands in Tama county, and would be brought in some respects into contact with the people of Iowa, it was deemed wise and proper to reserve, for the protection of the latter, jurisdiction in certain particulars over the lands of the reservation, and jurisdiction to punish crimes against the people of Iowa; and these are the purposes of section 3 of the act, which reserves to the state the right to tax the lands, to construct highways across the same, to execute legal process thereon, and jurisdiction in the courts of the state over crimes against the laws of Iowa committed on the reservation by Indians or others, or by Indians in any part of the state. It may be, as claimed, that under this section jurisdiction exists in the courts of the state over acts forbidden by the criminal laws of the state, committed by an Indian against the person or property of one who is within the protection of the laws of Iowa, for in such case the act done violates the rights secured to the citizen or resident of Iowa; but, to sustain the jurisdiction in such cases, it must appear that the Indian occupied a position or relation that brought him within the plane of the legislative jurisdiction of the state. It is well settled with respect to the citizens of the states that they are not within the plane of state jurisdiction when acting in some relation or with respect to some matter which is wholly within the jurisdiction of the national government. This seeming anomaly results from the fact that we live under a dual government, and therefore in determining whether, under given circumstances, a person can be rightfully charged with a violation of a law of the state, regard must always be had to the question, whether, in doing the act complained of, the person charged was acting within the plane of the legislative jurisdiction of the state. Thus, in Re Loney, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. Ed. 949, it was held that the laws of a state punishing perjury were not applicable to parties testifying in cases of contested congressional elections, or in proceedings under national bankrupt acts, or in matters connected with the public lands. In Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648, wherein a deputy collector of internal revenue was assaulted while engaged in the performance of his duty, and in self-defense killed one of his assailants, it was held that he could not be brought to trial in the state court. In the celebrated case of In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55, it was held that, in taking the life of Terry in defense of Justice Field, Neagle was acting under the authority of the law of the United States, and that he was "not liable to answer in the courts of California on account of his part in that transaction." In the matter of In re Waite (D. C.) 81 Fed. 359, it was held that the criminal laws of the state of Iowa were not applicable to a pension examiner appointed under the laws of the United States, with reference to acts done in connection with his duties as examiner. In Ohio v. Thomas, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. Ed. 699, it was held that the governor of a national soldiers' home in Ohio could not be prosecuted under a state statute regulating the use of oleomargarine, for including this article in the supplies used in the home; it being said:

"Whatever jurisdiction the state may have over the place or ground where the institution is located, it can have none to interfere with the provision made by congress for furnishing food to the inmates of the home; nor has it any power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the managers, and by congress. Under such circumstances the police power of the state has no application."

The state of Iowa has the right to exercise its police powers for the protection of its own citizens, but it cannot regulate the affairs of the tribal Indians in their relations to each other, for in these relations the Indians are under the control and protection of the national government. Therefore, in determining whether the Indian, Peters, acted in violation of law in aiding in the removal of the Indian children from the reservation in order to prevent their return to the industrial school,—an act which did not affect any citizen or resident of Iowa other than the Indians,—the question is whether he was then within the plane of and subject to the laws of the state of Iowa. Is it within the power of the state to regulate the conduct of the industrial school at Toledo? Can the general assembly of the state, by special or general legislation, define what shall be taught in the school, or how the inmates shall be fed or clothed, or at what age the scholars shall be admitted? Can the general assembly make it the duty of the Indian parents to send their children to the school, and punish them if they fail so to do? Can it provide for the punishment of children who refuse to attend or escape therefrom? If it be true, as it undoubtedly is, that this school is one created and maintained by the national government for the benefit of these tribal wards of the nation, it must be true that the control of the school is wholly within the jurisdiction of the federal government, and wholly without the legislative jurisdiction of the state. The same is true of the Indians in all their tribal relations to each other and to the national government. With respect to these relations the Indians cannot be subject at one and the same time to the legislative jurisdiction of the state and nation, and, in the absence of action on part of the national government making applicable to the Indians given parts of the laws of the state, it must be held that the legislation of the state is not applicable to the affairs of the Indian tribe in their relations to each other and to the federal government.

It was upon this view of the relation between these tribal Indians and the governments of the state and nation, that upon the trial the jury were instructed that the provisions of the state Code providing for the appointment of guardians for the persons and property of minor children had no application to Indian children living on this reservation, and therefore that the district court of Tama county had no authority to appoint the defendant, Malin, the guardian of the persons of the Indian children, and that such void appointment gave him no authority to remove these children from their homes on the reservation, contrary to the wishes of their parents and relatives, and compel their attendance at the industrial school, and that in aiding the mother of Lelah-puc-ka-chee in taking these children away from the reservation the plaintiff did not violate the provisions of section

4761 of the Code of Iowa, for the reason that this section is not applicable to these Indians, and it does not confer upon the courts of the state the right to try, convict, and punish an Indian for such acts as were proven against the plaintiff. If these views of the law applicable to the situation are correct, it follows necessarily that in causing the arrest and imprisonment of the plaintiff the defendant acted without warrant of law, and the court was justified in instructing the jury that under the admitted facts of the case it was shown that the defendant had wrongfully caused the imprisonment of the plaintiff upon void process, and that the only question left for the consideration of the jury was that of the amount of damages to be awarded. The motion for new trial on behalf of the defendant is therefore overruled.

On behalf of plaintiff a new trial is asked substantially on the ground that the amount of damages awarded, to wit, the sum of $10, is wholly inadequate, and also on the ground that, in the course of the argument to the jury, counsel for the defendant referred to the good record of the defendant as an old soldier, and that during the trial one of the counsel, in talking with members of the jury during a recess in the trial, discussed the same subject; supporting the latter averment with affidavits of the plaintiff and three others. The court, from its observation of these parties during the trial, knows that they are not skilled in the use of the English language, and it is quite apparent that they could readily be mistaken in their understanding of remarks which they claim to have heard only casually while passing by the parties; and there is nothing in the motion for new trial calling for further consideration, except the question whether the amount awarded is so inadequate as to necessitate a new trial. I am free to say that the verdict would have been much more satisfactory to the court if the amount awarded had been a larger sum. The evidence clearly showed that the defendant acted in good faith in the premises, and is not liable to the charge of actual malice or intentional wrongdoing, although, in the judgment of the court, he greatly erred in his interpretation of the law governing his action as Indian agent. It is therefore a case, as the jury were instructed, wherein the damages awarded should be compensatory only. The evidence failed to disclose any special pecuniary loss of moment, and the principal item to be considered was the deprivation of his liberty for the space of nine days, and the effect this had, if any, upon his reputation and standing in his community. If the jury had awarded him from $50 to $100, the verdict would have been much more satisfactory to the court, but their conclusion was to award $10, and no more. If a new trial should be granted, I do not believe a verdict in excess of $100 would be awarded, and the cost and expense to the plaintiff of such trial would fully absorb the increased amount, leaving him no better off than he now is with the verdict as it stands; and, under such circumstances, it is better to avoid all further costs in the premises.

Plaintiff's motion for a new trial will therefore be also overruled, and judgment will be entered on the verdict rendered.

Ex parte GLENN.

(Circuit Court, N. D. West Virginia. October 8, 1901.)

1. CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY.
   A prisoner once tried for felony before a jury regularly impaneled, which failed to agree, and was discharged by the court without the prisoner's consent, and without any actual, imperious necessity, cannot, under the fifth constitutional amendment, be retried for the same offense.
2. SAME—WAIVER.
   A prisoner on trial for a felony cannot waive any constitutional rights.
3. SAME—SILENCE OF PRISONER.
   The fact that a prisoner made no objection to the discharge of the jury, but remained silent, is not a consent to such discharge.
4. SAME—STATUTE OF WEST VIRGINIA.
   Code W. Va. c. 159, § 7, which provides that "in any criminal case the court may discharge the jury when it appears that they cannot agree in their verdict," as construed by the courts of Virginia, from which it was substantially adopted, does not authorize the discharge of a jury and the holding of the prisoner for another trial unless the record shows that such discharge was with the prisoner's consent or from imperious necessity. Any other construction would render it invalid.
5. JURISDICTION OF FEDERAL COURTS—HABEAS CORPUS—DISCHARGE OF STATE PRISONER.
   A circuit court of the United States has jurisdiction to discharge on habeas corpus a prisoner held for trial on indictment in a state court, where he is restrained of his liberty in violation of the constitution of the United States.[1]

Caldwell & Watson, John F. Laird, and J. G. McCluer, for petitioner.

Hunter H. Moss, Jr., for the State.

JACKSON, District Judge. Ellis Glenn, claiming to be a citizen of the state of Illinois, has presented her application to the judge of this court, praying for a writ of habeas corpus, and that she may be discharged from custody and from further trial in the criminal court of Wood county, in this state. Her petition admits upon the face of it that she stands indicted in the criminal court of Wood county for forgery, and that at the May term of the criminal court of Wood county, before the judge of that court, a jury was impaneled to try and true deliverance make between the petitioner and the state of West Virginia upon said indictment, and after three weeks of trial, on the 30th day of July, 1901, the jury before which she was tried was illegally discharged by the judge of the criminal court of Wood county. The petitioner alleges that the jury was not discharged with her consent, nor because of the sickness of the jury nor the expiration of the term, or for any other necessary cause, as shown by the records of the said criminal court in the order discharging said jury, but was the voluntary act upon the part of the said criminal court, without consulting the defendant, as the records heretofore referred to show; that the order discharging the said jury does not show that the jury could not agree upon a verdict,

[1] Jurisdiction of federal courts in habeas corpus proceedings, see note to In re Huse, 25 C. C. A. 4.

but that they were not able to agree, nor does the order of the court show any imperious necessity, or in fact any actual necessity, for discharging the jury. After the discharge of the jury she was required to enter into a recognizance in the sum of $1,000 for her appearance at the next term of the court (the September term, 1901, of the said criminal court of Wood county), to be retried on said indictment, or to be confined in the county jail. Upon this petition the judge of this court made a rule requiring the sheriff of Wood county to produce the petitioner, the prisoner, upon the 7th day of October, 1901, before the judge at chambers, to show cause why a writ of habeas corpus should not issue, and the prisoner be discharged from custody. The sheriff appeared and produced the body of the petitioner, and stated that she was in his custody, charged with forgery in the criminal court of Wood county, as shown by a certified copy of the indictment pending against her. Accompanying this return was the answer of Hunter H. Moss, Jr., prosecuting attorney of Wood county, denying all the allegations of the petition of the prisoner, and insisting that the prisoner should not be discharged from the custody of the criminal court for the reasons assigned in the petition, and insisting, under the statute of West Virginia, that she is not entitled to be discharged because of the inability of the jury to agree in their verdict. Upon the part of the petitioner it is insisted that another and second trial of the case is in violation of the constitution of the United States, which says "that no person shall be subject for the same offense to be put twice in jeopardy of life or limb." Amend. 5. This provision of the constitution has been the subject of a great deal of judicial discussion as to what is meant by the word "jeopardy." If we look to the ordinary definition of the word, we find that it means exposure to or danger of death, loss, or injury; danger; hazard; peril. It is a maxim of the common law of England that no man is to be brought into jeopardy of his life more than once for the same offense. 4 Bl. Comm. c. 26, p. 335. It is but reasonable to suppose that, when the framers of the fifth amendment to the constitution provided "that no person shall be subject for the same offense to be put twice in jeopardy of life or limb," they had in view what is regarded as the universal maxim of the common law. It has been well remarked that when a person is placed on trial upon a valid indictment, before a competent court and jury duly sworn, he is put in jeopardy, and in such cases the discharge of a jury duly sworn without a verdict, unless by consent of the accused entered of record, or from some unavoidable necessity, must necessarily result in the acquittal of the prisoner. But in this case we find, as is disclosed by the record of the proceedings of the criminal court of Wood county, that there was no cause whatever assigned for the discharge of the jury; nor does it appear upon the face of the record that the prisoner consented to the discharge. It is a well-settled principle of law that a prisoner cannot waive any constitutional rights. I have not the time at my disposal, nor the inclination, to hunt up the authorities upon this question, but will content myself to cite the cases of Prine v. Com., 18 Pa. 103; Cancemi v. People, 18 N. Y. 129;

Burley v. State, 1 Neb. 385. In the case of Spurgeon v. Com., that court held "that whatever is essential must affirmatively appear of record, and, where a waiver by the defendant leaves the record destitute of an essential part, he may afterwards take advantage of the defect, notwithstanding the waiver." 86 Va. 652, 10 S. E. 979.

It is contended that, the prisoner in this case not objecting to the discharge of the jury, her silence was a waiver upon her part of the action of the court in discharging it. I do not think so. It is a well-settled principle of law that a prisoner may stand mute. It is for the state to make out its case against the prisoner, and the prisoner is not compelled to do anything that will aid the state in its prosecution. In this case at the time the jury was discharged the prisoner merely stood mute, but the counsel for the prisoner after the jury had been discharged moved the court at a subsequent term to discharge the prisoner from custody for the reason that she had once been placed in jeopardy for said alleged offense, and that the court overruled the motion and required her to answer at a future day of the term. In the case of State v. Hudkins, 35 W. Va. 250, 13 S. E. 367, the court said "that a waiver by a prisoner in a felony case would have to appear clearly and affirmatively by the record," and cited the case of Younger v. State, 2 W. Va. 579, 98 Am. Dec. 791, in which the court so held. In the case of Gruber v. State, 3 W. Va. 703, the court held that, where the discharge of a jury was contrary to law, the accused could not be tried before another jury, but was entitled to a discharge. In the case of Lemons v. State, 4 W. Va. 755, 6 Am. Rep. 293, the court held "that where a prisoner failed to demur or move to quash or move in arrest of judgment, on an indictment not in the exact language required by the constitution, he cannot be held to have waived his right to make objections to the indictment in the appellate court; the right being a constitutional, and not a personal, right." In the case of State v. Miller, 6 W. Va. 600, the same principle is affirmed. In the case of State v. Cottrill, 31 W. Va. 162, 6 S. E. 428, it is apparent from the reasoning of the court that in a case upon a trial for felony the defendant could not waive a constitutional right, although it is not expressly decided. And the same doctrine was reaffirmed by the supreme court of West Virginia in the case of State v. Hudkins, 35 W. Va. 248, 13 S. E. 367.

It is insisted by the attorney for the state that under the provisions of the Code of West Virginia (section 7, c. 159, p. 1019, and section 25, c. 159, p. 1022) the court has a right to discharge a jury when it appears that they cannot agree upon a verdict. This provision is to be found in the Code of 1819 of Virginia, and is substantially the provision of the Code of West Virginia. The provision of the Code of Virginia of 1819 was under consideration in the case of Williams v. Com., 2 Grat. 569, 44 Am. Dec. 403. In that case the court declared that it was its conviction that there was no possibility of the said jury rendering a verdict during the term, and that the further detaining them would be a hardship upon them, and would not promote public justice, nor benefit the accused, whereupon it was ordered by the court that the said jury be discharged, and remanded

the prisoner to jail. This case was decided by the general court of Virginia in 1845, under the existing provisions of the Code of 1819. The court, after reviewing the case at length, and considering the questions raised upon the certificate of the trial court, held that they were unanimously of the opinion that the petitioner, for the reasons stated, was entitled to his discharge, and does so decide. The question that arose on that certificate was whether or not the court had a right to detain the prisoner for a further and another trial merely because the jury could not agree. The court said, "We think the courts have not, and ought not to have, such power." No such practice has ever prevailed in Virginia, and, so far as the judges now composing this court are informed, this is the first instance in which it has ever been done or attempted. In looking to England, we do not find such power to have been exercised or claimed there, while it may be conceded that some of our sister states have varied in their decisions in regard to this practice. But this court holds that it must be governed and controlled in regard to the construction of the statutes by the courts of Virginia and West Virginia, unless the statutes as construed by those courts would be repugnant to the constitution of the United States, in which event this court would not follow them. No authority in West Virginia has been cited which gives a different construction to the statutes of the Code of Virginia of 1819, which was substantially re-enacted in the Code of West Virginia.

The attorney for the state suggests that the court had no authority to issue a writ of habeas corpus in this case while the prosecution was pending in the criminal court of Wood county against her. I shall not discuss that proposition of law, but will content myself by referring to the case of Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868, in which case the supreme court of the United States held that the "circuit courts of the United States have jurisdiction on habeas corpus to discharge from custody a person who is restrained of his liberty in violation of the constitution of the United States, but who at the time is held under state process for trial on an indictment charging him with an offense against the laws of the state."

A number of authorities have been cited by the attorney for the state in opposition to the discharge of this prisoner, but they do not seem to bear upon the question at issue in this proceeding, except the case of State v. Sutfin, 22 W. Va. 771. Judge Johnson, in a very able opinion in that case, speaking for the court, held:

"While the prisoner had a constitutional right to have the jury kept together until a verdict is reached, it is one of that class of rights which he can waive; and, the prisoner having made no objection in the court below to the discharge of the jury, in the appellate court he will be deemed to have waived the objection."

I have already discussed the doctrine as announced by this court, and have reached the conclusion that no constitutional rights of the prisoner can be waived. In the case of Cancemi v. People, supra, the learned judge in delivering his opinion quoted from 3 Inst. 30, the doctrine that "a nobleman cannot waive his trial by his peers and

put himself upon trial of the country; that is, of twelve freeholders." The court might well rest this case here, and order the discharge of the prisoner. In support of the view I take of this case, I rely very strongly upon the case of Poage v. State, 3 Ohio St. 229. The opinion of that court was delivered by Judge Thurman,—one of the ablest jurists and most eminent constitutional lawyers that this country has ever produced. And the very point at issue in this case was presented in that. Judge Thurman, in delivering his opinion, reviewed the authorities upon the question, and reached the conclusion (no member of the court dissenting) that where a court in a criminal case, after a jury retired to consult on their verdict, discharges them without the assent of the prisoner, without the existence of a cause for which they might lawfully be discharged, the prisoner cannot again be retried for the same offense. See, also, the case of State v. Richardson. In a very able opinion delivered by Judge McIver, reported in 47 S. C. 166, 25 S. E. 220, 35 L. R. A. 238, the court held "that a prisoner will not be held to have consented to the withdrawal of the case from a jury, and its continuance, merely because he does not offer any objection to such course, especially where he is not asked if he has any objection." And the same court remarked "that the discharge of a jury in a criminal case, upon a valid indictment, without the consent of the prisoner, not called for by imperious necessity, operates as an acquittal and bars a further trial." And the same court holds that it is a well-settled principle of law that a prisoner is said to be put in jeopardy whenever he is put on trial before a competent court and jury under a valid indictment, and the jury are said to be thus charged when they are impaneled and sworn. I reach the conclusion that if the court discharges a jury in a capital or felony case without the consent of the prisoner, and without imperious necessity, such action entitles the prisoner to a final discharge from further trial or prosecution. See 1 Bish. Cr. Proc. par. 821; 2 Am. Cr. Law, par. 576; Com. v. Cook, 9 Am. Dec. 472; State v. McKee, 21 Am. Dec. 506, note; Mahala v. State, 31 Am. Dec. 591; In re Ah Jow (C. C.) 29 Fed. 182; Com. v. Andrews, 3 Mass. 126; Ex parte Royall, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. Ed. 868. The petitioner in this case is a citizen of the United States, and a resident and citizen of the state of Illinois, and is entitled to invoke the tribunals of the United States to pass upon this question that affects her liberty. It is clear to my mind that no state can pass a statute which would deprive her of her liberty under the constitution of the United States. For the reasons assigned, I am clearly of the opinion that, under the provision of article 5 of the amendment to the constitution of the United States, another trial upon the indictment for the same offense would be putting her twice in jeopardy of her liberty.

The prisoner will be discharged, and an order will be drawn certifying the action of this court to the criminal court of Wood county, discharging the prisoner from further custody.

PATTERSON v. FARMINGTON ST. RY. CO. et al.

(Circuit Court, D. Connecticut. October 1, 1901.)

No. 1,048.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—NECESSARY PARTIES.

To a suit for the specific performance of a contract, which requires the transfer of stock in a corporation on its books to make the relief prayed for effective, the corporation is a necessary party, and its presence as a defendant, where it is a citizen of the same state as complainant, will prevent the removal of the cause by the principal defendant.[1]

On Motion to Remand to State Court.

Seymour & Knapp, for complainant.

William F. Henney and Edward D. Robbins, for respondent Coykendall.

TOWNSEND, District Judge. Motion to remand. This is an action brought by James T. Patterson, of Connecticut, against the Farmington Street Railway Company, a corporation located in Connecticut, Samuel D. Coykendall and Henry C. Soop, both of the state of New York, and Edwin S. Greeley, of Connecticut. The complaint alleges an agreement by Coykendall to sell 135 of 315 first mortgage bonds of the Hartford & West Hartford Railroad Company, a Connecticut corporation; foreclosure of the bonds; purchase of the property of the last-named company by Coykendall, Soop, and Greeley, as trustees for the holders of the 315 bonds; the organization of the Farmington Street Railway Company by subscription by them, each, for 630 shares, as trustees for the persons entitled to the bonds; that said bonds are now represented by stock in said railroad company; that the bonds are held under the control of said Coykendall, Soop, and Greeley as trustees; that no certificates of stock have been actually issued by the Farmington Street Railway Company; that plaintiff has made a tender, and is entitled to execution of said contract; that Coykendall, Soop, and Greeley intend to transfer the stock of said company, and prevent the plaintiff from obtaining his due portion of the same, to wit, $^{135}/_{315}$ thereof, and that the Farmington Street Railway Company will allow such transfer to be made upon the books of the company,—and claims a decree against Coykendall, Soop, and Greeley for the transfer of 810 shares of the stock or the delivery of 135 of the bonds; an injunction restraining the Farmington Street Railway Company from allowing any of the 630 shares subscribed for by Coykendall, or so many subscribed for by Soop and Greeley as shall not leave 180 beyond those subscribed for by Coykendall; against issuing to any person except the plaintiff so many certificates as not to leave 810 shares standing in the names of Coykendall, Soop, and Greeley; and a similar injunction against said Coykendall, Soop, and Greeley from transferring stock, and for such other and further relief as is due in the premises. A temporary in-

[1] Removal of causes involving separable controversies, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86, and Mecke v. Mineral Co., 35 C. C. A. 155.

junction was issued, and order of notice of the injunction on the defendants made, which order directed the sheriff of the county of Hartford, and either of his deputies, to give notice by leaving a true and attested copy with or at the usual place of abode of the secretary of the railway company and the defendant Greeley, and by sending a like copy by mail to Coykendall and Soop. Coykendall, on the return day of the writ, pleaded to the jurisdiction that the writ had never been served upon him personally, and that the action was not on joint contract, and that no proper order of notice of the institution or pendency of the complaint had been made by any judge, clerk, or assistant clerk of the court; and on the same day filed his petition for removal, alleging that the defendants, the railroad company, Soop, and Greeley, were merely nominal parties to the suit, and the suit was substantially a suit for the specific performance of a contract alleged in the complaint, in which only the plaintiff and Coykendall were interested, and that there was a separable controversy concerning the right of the plaintiff to the performance by Coykendall of an agreement on his part to sell plaintiff certain bonds.

Laying aside the question as to whether Soop and Greeley are merely nominal parties, the present case does not seem to be distinguishable in principle from Railway Co. v. Wilson, 114 U. S. 60, 5 Sup. Ct. 738, 29 L. Ed. 66; Crump v. Thurber, 115 U. S. 56, 5 Sup. Ct. 1154, 29 L. Ed. 328; Rogers v. Van Nortwick (C. C.) 45 Fed. 513. In Crump v. Thurber, Crump claimed that he had assisted one Wilson in selling rights under a patent under an agreement that Wilson would give him one-half of what he should receive above $20,000; that the rights had been disposed of to the Southern Dairy Company, who, with Wilson, was made a defendant; that Wilson had received 1,000 shares of the stock of said company of $100 each, of which he had sold 100 shares for $5,000, and that Crump was entitled to 300 shares of said stock. Wilson had transferred his stock to Thurber, who was then made a party. The corporation claimed that it was a mere stakeholder between the parties, and asked for a judgment which would correct it. Thurber removed the case to the circuit court, which adjudged, after a trial on the merits, that Thurber was entitled to the stock. On appeal to the supreme court it was held that the case should be remanded; that, in order to give Crump the fruition of the decree claimed by him, there should be a decree ordering the corporation to cancel on its books the evidence of ownership of Wilson, and issue to Crump the certificate for the shares. The suit was founded upon a contract to pay a share of proceeds, and it does not seem to differ essentially from the present case. In one of the other cases cited the plaintiff claimed that he had purchased stock on execution sale, the validity of which the record stockholders deny; and in the other the controversy was over the ownership of stock. In one of them the corporation claimed—apparently with considerable force—to be a mere stakeholder, but the court held that it was a necessary party, whose presence prevented removal. The point is raised that, because the complainant does not specifically claim a transfer on the books of the company and the issue of stock to it, the present case is not parallel. Under the

common law of Connecticut, unless changed by the practice act, necessary relief may be granted under the general prayer for relief; and such is the case in the United States courts. The rule requiring the plaintiff to specifically state the relief claimed does not prevent the court from granting relief under the general prayer, if it sees fit, although it might prevent the plaintiff from claiming error if the court should refuse to grant any particular relief on the ground that it was not demanded. If defendants should move to strike out the prayer for general relief upon the ground of the rule, the plaintiff could, within the 30 days allowed for amendment, amend by inserting a prayer for transfer on the books of the company, and the issue of new certificates.

The motion to remand is allowed.

ALLIS CHALMERS CO. v. RELIABLE LODGE et al.

(Circuit Court, N. D. Illinois, N. D. October 18, 1901.)

No. 25,976.

1. INJUNCTION—LABOR STRIKES—UNLAWFUL CONSPIRACY.

It is the undoubted right of workmen to quit work, either severally or in a body, so long as the act does not come within the rule against conspiracies to injure the property of another, and they may also, subject to such rule, use peaceable means in persuading others to join them in carrying out a strike. But such rights must be exercised in such manner as not to otherwise interfere with the right of the employer to conduct his business in a lawful manner, or with the equal right of every other man to work or not to work for such employer, as he may think best. They have no lawful right to impose the course of conduct or rules adopted for themselves upon any other man against his wishes, and, where they attempt to do so through concerted acts of violence and intimidation, they are guilty of an unlawful conspiracy, and it is the duty of a court of equity to enjoin such acts when they inflict irreparable injury upon the employer or other workmen.

2. SAME—ACTS OF VIOLENCE AND INTIMIDATION.

Where a labor organization whose members are engaged in a strike undertakes to prevent the employer from carrying on its business by preventing other men from remaining in, or entering, its service, by systematically maintaining pickets around and about the entrances to its premises, virtually placing them in a state of siege, and it is shown that strikers and others incited by them have committed assaults upon workmen employed therein, and have employed threats and intimidation against such workmen to such an extent that the latter do not dare to leave the works through fear of bodily injury, and their employer is compelled to provide board and lodging for them within the premises, and other workmen are from the same reason prevented from entering its employment, to its irreparable injury, such state of facts clearly justifies the conclusion that the defendant organization and its members have not confined themselves to lawful methods of persuasion and argument, and that they are engaged in a conspiracy to stop the business of the employer by intimidation and violence, which entitles the employer to protection by injunction against the continuance of such unlawful acts.

3. SAME—EQUITY JURISDICTION.

The fact that acts committed by defendants constitute criminal offenses under a statute does not deprive a court of equity of jurisdiction to enjoin such acts, where their continuance will result in irreparable injury to property rights.

In Equity. On motion for preliminary injunction.

Pam, Calhoun & Glennon, for complainant.
Hornstein & Coith, for defendants.

KOHLSAAT, District Judge. The bill in this case alleges that the workmen employed in certain departments of complainant's manufacturing plants have left such employment in a body; have organized a "strike"; have, for the purpose of enforcing said "strike" and compelling complainant to accede to their demands, conspired to use organized efforts to injure complainant's business, and to cause complainant great pecuniary loss; have, in pursuance of such conspiracy, established patrols or pickets about complainant's several premises; and have, by acts of violence, as well as by other actions and words calculated to intimidate, caused such persons as desired to enter or remain in the employ of complainant to fear bodily injury in the event they do not refrain from such employment. The bill further alleges that many acts of violence have been committed against employés of complainant by strikers and by members of the lodges made parties defendant; that, because of the fear of said employés to go upon the streets of Chicago, complainant is compelled to maintain said employés within its premises, at great cost to it and injustice to them; that complainant's business has been injured to the extent of more than $100,000 by reason of said conspiracy and the acts of defendants in pursuance thereof; that the persons committing such acts are irresponsible; and that the damage done to complainant's business is, by reason of the premises, irreparable. The bill prays for the usual relief, and also for a temporary injunction restraining the various lodges made parties defendant, their officers and members, as well as the individuals specifically named as defendants, from conspiring to injure complainant's business and property, and from in any manner compelling or inducing, by the use of threats, intimidation of any sort, fraud, deception, or violence, any persons to leave complainant's employment, or not to enter its employ, if desirous of so doing, and from doing any act or thing whatsoever by any of the aforesaid means or methods in furtherance of a purpose to impede, interrupt, obstruct, or interfere with the business of complainant, or to impede any of its officers or employés in the free and unhindered conduct and control of complainant's business; also that the defendants and each of them, and their confederates, aiders, and abettors, be restrained from, both singly and in combination with others, picketing, guarding, obstructing, impeding, besetting, or patrolling the streets, alleys, or approaches to the premises of complainant, or ordering the same to be done, with the purpose and in such manner as to intimidate, threaten, impede, obstruct, or coerce any of the employés of complainant or persons seeking employment of the complainant.

In support of this motion complainant presents numerous affidavits, from which it appears that many of the present employés of complainant have been waylaid and badly beaten in going to and from the works of complainant; that the present employés are all in great fear of bodily injury in the event they leave the premises of

complainant; that these assaults are committed both near complainant's works and near the homes of such employés in distant parts of the city; that because of this fear on the part of said employés it has become necessary for complainant to provide for the board and lodging of said employés within its works, in order to retain them in its employ; that it is practically impossible for such employés to enter or leave said works without being accosted by patrols or pickets, and assaulted or menaced by acts or threats, with bodily injury in the event they remain in such employ; and that persons approaching said works for the purpose of obtaining employment from complainant are in like manner subjected to threats and intimidation.

By way of reply, two pleas have been filed,—one by defendant Ireland, averring that complainant is a trust, and therefore has no standing in equity; and the other by defendant Roderick, averring that complainant is a member of a voluntary association or combination of employers organized for the purpose of fighting the International Association of Machinists in the matters involved in this suit, and the methods pursued by said combination of employers are similar to the methods of defendants complained of in the bill. Neither of these pleas can be considered upon this application, at this stage of the proceeding.

Defendants also file numerous affidavits, which, in substance, set forth that none of the defendants have either committed, counseled, or countenanced any of the acts complained of in the bill and affidavits; that a strike is in progress, but that the same is peaceful and orderly; that no intimidation, threats, or violence are or have been used by defendants or by their direction; that the acts of violence set forth in complainant's affidavits, if the same ever occurred, were committed by enemies of defendants and of organized labor, for the purpose of discrediting defendants in the eyes of the court and of the public, or by the criminal elements of society, who have no manner of connection with defendants; that the only methods or procedure used by defendants in furtherance of their said strike are those of peaceable organization and moral suasion; that pickets have been established, under the direction of certain of defendants, near the works of complainant, for the sole purpose of notifying all workmen seeking employment there that a strike is on, and that the plant is fighting organized labor; that these pickets simply give this information, and in no manner, by acts, words, or demeanor, attempt to intimidate employés or prospective employés of complainant, or to coerce them into refusing to work for complainant.

While it will be seen that defendants deny all violence and intimidation, yet it is beyond question that such a condition exists about said plants that men seeking to work there stand in fear of bodily injury to such a degree that complainant for such reason is unable to secure a sufficient number to carry on its said business, and is compelled to keep what men it does employ within its premises, as in a fortress. They are there subject to so many privations that the only reasonable explanation for their enduring them is their evident desire to work, and their fear of bodily injury in case they

leave the plants. It further appears that the so-called "picketing" is systematically carried on, and that all persons supposed to be aiding complainant in the work formerly performed by the strikers are approached and remonstrated with. Certainly, if only peaceful persuasion is used, and there are no underlying or implied threats in the demeanor or language used by the strikers, either a large body of men are unusually and strangely timid, or defendants and their confederates have been very unfortunate in their manner of disclosing their peaceful and harmless intentions.

Under all the conflict of evidence in this case, it is undeniable that the defendants, or some of them, and their confederates, have conspired to and have greatly intimidated complainant's workmen, and thereby have intended to and have done great and irreparable injury to complainant's business and property, largely in excess of the necessary jurisdictional amount. It is conceivable, theoretically, that patrols or pickets could be maintained upon the platonic basis claimed by defendants; but the evidence, taken as a whole, leaves no doubt in the mind of the court that the name was not misapplied in this case. Here a siege exists. Probably to some extent the acts of violence complained of have been done by persons not members of the union and not connected in any manner with the striking workmen, but in some of the cases the evidence is so specific that it cannot be overlooked. It is true that at such times, when excitement runs high, the public mind is inflammable, at least among such persons as usually attach themselves to strikers. It is also true that the criminal classes take advantage of such occasions to commit, under cover of honest men, dastardly and cowardly acts. These facts applied to this case make it apparent that the conduct of defendants was calculated to work a serious wrong to complainant. In the judgment of the court, the pickets were in some case themselves guilty of intimidating complainant's workmen, and were the indirect, if not the direct, inspiration of like acts and of violence by others. It is conceded that these pickets were appointed and directed by officers and members of defendant lodges. That a conspiracy existed among a number of these officers and members to stop, and thereby injure, the business of complainant, by intimidation and violence, is evident. In a conspiracy of this character, where it is difficult to even learn the names of the individual members of the lodges, the active co-operation of the individual members in the conspiracy is difficult to establish by direct proofs; but their acquiescence in, and connivance at, the methods pursued by their officers and leaders, is easily established by the results sought and accomplished.

These being the facts in this case, the law is clear and emphatic. The jurisdiction of a court of equity to restrain the defendants, under the circumstances, is too well established to require citations or be called in question by any one familiar with the decisions. The jurisdiction being established, is there any doubt as to whether the court should, in this case, grant the temporary injunction prayed for? I am clear there is not. As now presented, the court must grant the writ in broad and unmistakable terms, commensurate with the exigen-

cies of the situation, as shown by the facts in evidence upon this proceeding. To do so will work no hardship, nor will it even hamper the actions of any law-abiding person. Indeed, no one without a purpose to commit an unlawful act would be affected thereby.

It is the undoubted right of workmen to quit work severally or in a body, so long as the act does not come within the rule against conspiracies to injure the property of another. They may also use peaceable means in persuading others to join them in carrying out the strike, subject to the above rule. Both of these rights, however, must be exercised in such a manner as not to otherwise interfere with the right of every man to run his own business in his own way, provided he keeps within the law in so doing, or the right of every man to work or not to work, to strike or not to strike, to join a union or not, as he may think best. In other words, a man may decide his own course, and hold himself to certain rules, but he cannot impose those rules or that course upon the conduct of any other man, against his wish, any more than he can place fetters upon his hands or shackles upon his feet. And when, as in the case at bar, the attempt is made, through intimidation and acts of violence, to effect this end, it is tyranny of the most despotic character; it is civil war; it is treason to the principles of this and almost every other government. It will not be tolerated.

In many of the states this is prohibited by statute. In sections 158, 159, c. 38, Hurd's Rev. St. Ill., it is provided as follows:

"Sec. 158. If any two or more persons shall combine for the purpose of depriving the owner or possessor of property of its lawful use and management, or of preventing, by threats, suggestions of danger, or any unlawful means, any person from being employed by or obtaining employment from any such owner or possessor of property, on such terms as the parties concerned may agree upon, such person so offending shall be fined not exceeding $500, or confined in the county jail not exceeding six months.

"Sec. 159. If any person shall, by threat, intimidation, or unlawful interference, seek to prevent any other person from working or from obtaining work at any lawful business, on any terms that he may see fit, such person so offending shall be fined not exceeding $200."

This is a part of the Criminal Code. To the same effect is a long line of decisions independent of the statute.

When, however, the acts referred to are likely to cause irreparable injury to property, courts of chancery have, from time immemorial, taken jurisdiction for the purpose of protecting parties from such loss. In these days, when capital is tending towards combination, the application of the law is by many assumed to be the creation and enforcement of a new rule. It is as old as the common law, which itself succeeded the law of force. In this country the courts constitute an arm of the government. It is their province to protect the personal and property interests of every man, woman, and child in the enforcement of the laws. This, subject to such imperfections as are human, they have always done, and will do in the future. And herein is the safety of every citizen. Justice is said to be blind. Certain it is that she can discover no difference between the murderous assault, inflicted under cover of a strike, and that of the midnight assassin. Both are equally infamous; both equally criminal.

In considering the situation, it is reassuring to know that the great body of working men are law-abiding. They, of all men, appreciate the necessity of the enforcement of law. They have not so misread history as to think that capital was ever vanquished by labor in a struggle in which the weapons were force. They are fully alive to the public interests. The future holds the adjustment of the vexing disputes between labor and capital. These disputes are far from being one-sided. Their solution calls for all the wisdom and patience of which human nature is capable. But it will come, as right always will, even though force and injustice may clog its feet. The basis of its advancement must be that the rights of all are respected by each, and the rights of each by all.

Complainant's attorneys may prepare an order in accordance herewith, submit it to defendants' counsel, and present it to the court on Monday morning next.

TRAVELERS' PROTECTIVE ASS'N OF AMERICA v. GILBERT.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1901.)

No. 1,517.

1. JUDGMENTS—SUIT IN EQUITY TO SET ASIDE FOR FRAUD—REQUISITES OF BILL.
In a bill to set aside a judgment for fraud it is not sufficient to charge generally that the judgment was procured fraudulently, or that the court was imposed upon, but a state of facts must be disclosed from which the court can see that the conclusions stated by the pleader are properly and fairly drawn. Where the judgment sought to be set aside was rendered on an insurance policy, and the fraud charged is the omission of the plaintiff to attach a copy of the policy to the complaint, it must be shown that, if so attached, its provisions would have negatived some allegation of the complaint, and rendered it insufficient, or that the purpose was to withhold from the court facts disclosed by the policy; and such purpose is negatived where it appears from the record in the action that the policy was introduced in evidence by the plaintiff.

2. SAME—FRAUD IN PROCUREMENT—ALLEGATIONS IN PLEADINGS.
In an action by the beneficiary in an accident insurance policy, which contains a provision exempting the insurer from liability in case the insured shall come to his death by reason of poison, whether taken accidentally or designedly, the plaintiff is not guilty of fraud which will vitiate the judgment because she does not allege in her complaint that the insured committed suicide by poison, and thus plead herself out of court, although she may believe such to be the fact.

3. SAME—RELIEF AGAINST IN EQUITY—ACCIDENT OR MISTAKE.
To entitle a defendant to avail himself of the equity jurisdiction to be relieved from a judgment on the ground of fraud, accident, or mistake, he must show that the fraud, accident, or mistake on which he relies is unmixed with negligence of himself or his agents; and where legal service was made upon the defendant, a corporation, in the action in which the judgment was rendered, by serving summons on an agent upon whom such service was authorized by statute, the failure of such agent to transmit the summons to defendant, whether through misapprehension or because of his belief that the service was not legal, was negligence for which defendant is responsible, and which precludes it from relief in equity against the judgment because of such facts.

4. SAME—JURISDICTION OF EQUITY TO SET ASIDE—ADEQUATE REMEDY AT LAW.
Where the statutes of a state provide for proceedings in a court of law to set aside a judgment rendered by such court on the ground of fraud

or unavoidable casualty or misfortune preventing the party from appearing or defending, such provisions, by force of the conformity act, are applicable to and govern procedure in the federal courts in the state in cases coming within their purview, and afford a plain and adequate remedy at law, which excludes the jurisdiction of equity.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

On November 3, 1898, Mary J. Gilbert, the appellee, commenced an action at law in the circuit court for the Eastern district of Arkansas to recover from the Travelers' Protective Association, the appellant, the sum of $5,000, alleged to be due her as beneficiary in a membership certificate issued by the association to her husband in his lifetime. The summons was duly served by delivering a true copy thereof to one Bass, stated in the return of the marshal to be the secretary of the local subordinate lodge of the defendant association located in the city of Little Rock, the chief officer thereof being, as stated, absent, and his whereabouts unknown to the plaintiff or the marshal. At the return term the defendant failed to appear or plead to the action, and judgment was, on December 27, 1898, rendered in favor of the plaintiff for $5,075 and costs of suit. At the next succeeding term of the court a motion was made by the defendant association to vacate the judgment on the ground that it had been obtained without proper service, and because procured by fraud. This motion was heard and denied by the court, and a writ of error prosecuted to this court by defendant. At the hearing in this court it was contended, among other things, that the service was defective, and that the complaint failed to state a cause of action. In an opinion handed down April 2, 1900, both these propositions were adjudged against the defendant, and the judgment of the circuit court was affirmed. See Association v. Gilbert, 41 C. C. A. 180, 101 Fed. 46. The present suit is a bill in equity, instituted by the appellant against the appellee to vacate the judgment so rendered on December 27, 1898, on the alleged ground that the secretary of the subordinate lodge (upon whom due service was made in the action at law as determined on the writ of error, supra) failed through want of appreciation of the fact of such service to apprise the defendant thereof, and that thereby it was deprived of an opportunity to defend the suit, or to present to the consideration of the court the true facts with regard to the claim sued on; and on the further ground, as alleged, that the plaintiff fraudulently misstated and suppressed the real facts of the case in her complaint in the action at law, in this: that, notwithstanding she was well aware of the fact that her husband's death was occasioned by a narcotic poison taken by him with suicidal intent, such as would, under the terms of the certificate of membership, have avoided the certificate, and precluded recovery by her in a suit thereon, she stated in her complaint that the death of her husband was occasioned by his accidentally taking an overdose of chloral hydrate with no intent to end his life thereby. It is further alleged that the plaintiff in the action at law failed to attach to her complaint or file therewith the certificate of membership sued on, or a copy thereof, and that this omission on her part was for the purpose of withholding from the attention of the court the conditions and limitations of the certificate of membership, which, if brought to the attention of the court, would have shown that she could not recover thereon. It is further alleged in the supplemental bill that it necessarily resulted from the fact that the certificate of membership was not attached to or filed with the original complaint in the action at law that the same was not brought to the attention of this court on the writ of error, because the defendant was compelled, by reason of the fact that it was not informed of the institution of the suit at law until it was too late to file a bill of exceptions, and thus make the certificate of membership a part of the record, to rely solely for the reversal upon the record of the case proper. A demurrer to the bill, supplemental bill, and amended bill, setting forth the foregoing facts and others, which, if necessary, will be referred to in the opinion, was filed by defendant, and sustained by the court. Thereupon the bill was dismissed. To review the action of the trial court in so dismissing the bill, the appellant prosecuted its appeal to this court.

W. E. Hemingway, U. M. Rose, and G. B. Rose, for appellant.
P. C. Dooley, for appellee.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

Two propositions were settled by the judgment of this court in the former case (41 C. C. A. 180, 101 Fed. 46), namely, that the service of process as made upon the defendant in the legal action was sufficient to subject it to the jurisdiction of the court in that case, and that the complaint in the legal action stated a good and meritorious cause of action, notwithstanding the fact that the certificate of membership sued on was not filed with it. This leaves but three important facts alleged in the present bill as grounds for equitable interference, namely, First. That the plaintiff in the legal action intentionally omitted to file the certificate of membership with her complaint for the purpose of keeping facts therein disclosed from the court's attention. Second. That appellee made a false allegation that her husband's death was caused by accidentally taking an overdose of chloral hydrate, when she knew that he came to his death by a narcotic poison taken with suicidal intent. Third. That Bass, who was the president, as well as secretary, of the subordinate lodge at Little Rock, upon whom the service of process was made in the legal action, by misapprehension as to the intention of the marshal in making service failed to inform the executive officers of the association of the fact of the service, and that it was thereby prevented from making a defense to the action at law.

It may be here appropriately said that the bill does not charge any collusion between the appellee and the marshal to procure a doubtful service, or to cause any misapprehension on the part of Bass with respect to the officer's purpose.

We have not overlooked the fact that the bill, taken as a whole, charges a fraudulent purpose on the part of plaintiff in the action at law to deceive the court by withholding the certificate of membership from the files, nor that it charges that she misstated the facts in her complaint, already adverted to, for the purpose of defrauding the association. These general averments do not aid the bill in any material respect, provided the acts alleged to have been done by the appellee were not in and of themselves calculated to impose upon or deceive the court before whom the action was pending. It is not sufficient to charge generally that the judgment was procured fraudulently, or that the court was imposed upon. "A state of facts must be disclosed by the bill from which the court can see that the conclusions stated by the pleader to the effect that the judgment was fraudulently procured are properly and fairly drawn." U. S. v. Norsch (C. C.) 42 Fed. 417; Passaic Print Works v. Ely & Walker Dry-Goods Co., 44 C. C. A. 426, 105 Fed. 163. We must therefore take up and consider the three important facts which are said to constitute the wrongful conduct in connection with the action at law. We are unable to discern how the failure to file the certificate of mem-

bership with the complaint could have deceived or misled the court. A complete cause of action, as already seen, was stated without it. If it had been filed, it manifestly would have disclosed, so far as it is now pertinent to consider it, only the fact that the association did not thereby insure against death resulting from taking poison with suicidal intent. But what of that? It was not alleged in the complaint that the appellee's husband died as a result of any such voluntary action on his part, and therefore that the association was not bound by the obligations of its contract. On the contrary, it was alleged that he died as a result of accidentally taking an overdose of chloral hydrate, which, if true, brought the association within the obligation of its contract. The certificate might have informed the court of the association's obligations under divers state of facts, but it could not, in the nature of the case, have disclosed what the extraneous facts might be. It is, moreover, apparent from the opinion in the former case that this certificate of membership was produced and read in evidence at the trial. This clearly negatives any intention on the part of the appellee to withhold from the trial court any of the facts disclosed by the certificate, whatever the same might be. In ordinary practice the court never sees the exhibits filed with the complaint until they are called to its attention at the trial. It seems to us, as a result of the foregoing observations, that the failure to file the certificate with the complaint could not, in the nature of things, have deceived or misled the court with relation to any pertinent facts of the case; and if, by any possibility, it might have so done, its production in evidence at the trial, while judgment was under consideration, served every fair and reasonable purpose.

We are next brought to consider the effect of the alleged false statement in the complaint. The contention is that the appellee should have pleaded herself out of court by alleging facts which disclosed no cause of action; in other words, that she should never have instituted her suit at all. This is high ground to occupy, and enters into the domain of morals and conscience; and into this, which in a large sense is the proper domain of equity, we will follow it. Even if appellee knew (and for the purposes of this case, under the pleadings, we must assume she did know) that her husband intentionally committed suicide, had she not the right, under the highest dictates of equity as well as law, to submit her claim in the due and orderly course of legal procedure, first, to the consideration and deliberate judgment of the association, and then, if necessary, to that of the court? The association might, as a matter of policy, voluntarily have waived the defense of intentional suicide, or it might, by reason of its conduct before or after the death of the insured, have estopped itself from asserting any such defense. Waivers and estoppels of all kinds are frequently found in the pathway of insurance litigation. Not having the certificate of membership before us, we are unable to state the exact language creating the condition under which the association seeks to escape liability. But it sufficiently appears from the averments of the bill that the language employed created a condition subsequent. The bill charges that: "It was expressly provided in said certificate that, if said David Baxter

Gilbert came to his death in consequence of any narcotic, or by reason of any poison, whether taken accidentally or designedly, there should be no recovery." Language of this kind created a condition subsequent (Western Assur. Co. v. J. H. Mohlman Co., 28 C. C. A. 157, 83 Fed. 811, 40 L. R. A. 561; Anthony v. Association, 162 Mass. 354, 38 N. E. 973, 26 L. R. A. 406, 44 Am. St. Rep. 367; Coburn v. Insurance Co., 145 Mass. 226, 13 N. E. 604; Van Valkenburgh v. Insurance Co., 70 N. Y. 605; Murray v. Insurance Co., 85 N. Y. 236), and as such imposed the burden on the association of bringing the case within it (Association v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160, and cases cited, supra). Such conditions may be waived by the insurer either before or after they are broken (Insurance Co. v. Wolff, 95 U. S. 326, 24 L. Ed. 387), or the insurer may be estopped from asserting any rights under such conditions by exacting from the assured, with full knowledge of the facts constituting the defense, technical compliance with the provisions of the policy relating to proofs of death, or by other facts imposing burdens or expense upon the assured (Insurance Co. v. Baker, 27 C. C. A. 658, 83 Fed. 647; Titus v. Insurance Co., 81 N. Y. 410, and cases cited). In the last-mentioned cases a large number of applicatory authorities are referred to, which fully support the proposition announced. It may be that in the case now under consideration there were facts known to appellee which would have entitled her to resist the forfeiture, provided the association saw fit to urge it in defense. If so, the allegations of her complaint in the action at law were not only true to an equitable, but to a strictly legal, intent, and the association was required to affirmatively plead the condition relied upon by it, and the breach of it. Appellee afterwards, and not till then, could appropriately, by her replication, allege waiver or estoppel, and thereby create an issue with reference to them. We may perhaps be, and probably are, justified in believing that facts entitling plaintiff to urge waiver or estoppel did exist, as defendant's counsel, learned in all the law governing waiver and estoppel, and its particular application to insurance contracts, and tenacious of the right of their client, have failed to negative them in their bill. From the foregoing, it appears that, even though the appellee did in point of fact know that her husband died as a result of taking poison with suicidal intent, she might nevertheless have had a meritorious cause of action against the association, and would have been fully warranted, both in law and morals, to institute her suit, and allege a cause of action under the general obligation of the certificate of membership, without alleging a defense which the appellant might either waive, or from the assertion of which it might well have been estopped.

We have so far treated the case from the standpoint of appellant's counsel, and have endeavored to subject it to the highest moral and equitable tests; but, in our opinion, we are not required to go to that length. Judge Thayer said in the case of U. S. v. Norsch, supra, as follows:

"Whatever a person's own opinion may be touching his right to relief in a given case, he is entitled to take the judgment of a court having jurisdiction

to hear and determine the cause, and in so doing he commits no fraud. A litigant in such case only crosses the line dividing legal frauds from conduct that is merely reprehensible from a moral standpoint when he resorts to false testimony, or to some trick or artifice, with a view of deceiving the court, and thereby obtaining a judgment to which he is not entitled."

To this proposition we fully agree. The courts of the land are open to all suitors to present their controversies and claims to the arbitrament of a constituted magistracy. A litigant has the undoubted right to present his own theory of a case, and, even though he may know facts which, in his opinion, would constitute a defense, he may confidently rely upon the defendant in the case—certainly when his interest dictates it—to perform his full duty, and is not required, under any recognized principle of law or equity, to anticipate him in so doing. He has a right to assume that the defendant will make all defenses available to him which he, in the exercise of his own judgment and discretion, deems wise and politic to make. We conclude from the foregoing that the fact that the plaintiff in the action at law failed to set forth facts which would have defeated her recovery, as hereinbefore detailed, affords no ground for a court of equity to vacate the judgment obtained by her in the action.

The last fact relied upon by the association to vacate the judgment in question is that Bass, the president and secretary of the subordinate lodge at Little Rock, by reason of failure on his part to appreciate the fact that he was served with process in the action, failed to communicate the same to the association, and as a result it was deprived of an opportunity of making a defense. The service, as made upon him, was good. He was the constituted agent of the association for receiving service of process. Association v. Gilbert, supra. The only question for consideration is whether it can complain of the accident, misapprehension, or negligence of its agent.

In Knox Co. v. Harshman, 133 U. S. 154, 10 Sup. Ct. 258, 33 L. Ed. 588, it is said:

"A court of equity does not interfere with the judgments at law unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

In Brown v. Buena Vista Co., 95 U. S. 159, 24 L. Ed. 423, which was a bill to enjoin the enforcement of a judgment because procured by fraud and conspiracy, the court, commenting on the relief offered in courts of equity against judgments procured by accident or mistake, says:

"But such relief is never given upon any ground of which complainant, with proper care and diligence, could have availed himself in the proceeding at law. In all cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. * * * Nothing can call forth a court of equity into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing."

In Creath's Adm'r v. Sims, 5 How. 192, 12 L. Ed. 111, the supreme court says:

A court of equity "will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. When-

ever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice."

See Sample v. Barnes, 14 How. 70, 14 L. Ed. 330.

In Skirving v. Insurance Co., 8 C. C. A. 241, 59 Fed. 742, Judge Caldwell, speaking for this court on the subject of jurisdiction of courts of equity to enjoin judgments, says:

"The jurisdiction is not favored, and the grounds upon which it will be exercised are narrow and restricted. It will not suffice to say that injustice is done by the judgment against which relief is sought, and that it would be a hardship to enforce it, or that the defendant had a good legal defense to the cause of action upon which the judgment was rendered, but it must also appear that the defendant was prevented from interposing his defense at law by the fraud or misconduct of the plaintiff, or by some accident or mistake occurring without any fault of the defendant or his agents, and that it would be contrary to equity and good conscience to enforce the judgment."

The standard fixed by the foregoing and many other authorities to which we might refer is perfectly clear. A defendant, to avail himself of the equity jurisdiction to be relieved of a judgment on the ground of fraud, accident, or mistake, must show that the fraud, accident, or mistake upon which he relies is "unmixed with negligence of himself or his agents." How do the facts of the case now under consideration square with this rule? Appellant's agent, constituted as such by the laws of the state of Arkansas, was duly served with process calling his principal into court to defend the action. This is equivalent in law to service upon the principal himself. This cannot be questioned. The only accident, mistake, or misapprehension stated in the bill to have been the occasion of failure to defend is as follows:

"The marshal [quoting now from the bill of complaint] of this district went to the secretary of the lodge [referring to the subordinate lodge in Little Rock] for the purpose of serving said summons [referring to the summons in the legal action], but the said secretary advised him that he was not the proper person to be served, and the said marshal then departed, as said secretary supposed, for the purpose of making a proper service."

It appears from the record of this case and the opinion in the former case that at the same time the transaction just quoted from the bill of complaint occurred the marshal did in fact deliver a true copy of the summons to the secretary. The facts of the case convince us that the appellant's agent voluntarily assumed to act upon his own judgment, and in so doing not to recognize the service of lawful process upon him. Inasmuch as legal service was made upon the association by leaving process with its agent, Bass, it imposed the legal duty upon it to appear and defend the action, if it had any defense to make, and the failure to do so, in view of all the facts disclosed by the record, in our opinion, amounts to culpable negligence. We are also of opinion that the misapprehension claimed to exist on the part of Secretary Bass was not such as justified him in not informing the proper executive officers of the pendency of the suit. Even if he did think the marshal would take his advice, and serve some other person, he, with the copy of the

summons in his possession, was not justified in the misapprehension claimed for him. He was clearly negligent in not apprising his superior officers of the service as made, and the association, being responsible for his negligence, cannot resort to a court of equity for relief.

This is not all. Section 4197 of Sandels & Hill's Digest of the Statutes of Arkansas makes the following provision:

"The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order for the following reasons: * * *

"Subd. 4: For fraud practiced by the successful party in obtaining the judgment or order. * * *

"Subd. 7: For unavoidable casualty or misfortune preventing the party from appearing or defending."

Section 4199, same digest, provides as follows:

"The proceedings to vacate or modify the judgment or order, on the grounds mentioned in the fourth * * * and seventh * * * subdivisions of section 4197, shall be by complaint, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On the complaint a summons shall issue and be served, and other proceedings had as in an action by proceedings at law."

Section 5843 provides that, when the grounds for a new trial are discovered after the term at which the verdict or decision was rendered, an application for a new trial may be filed with the clerk not later than the second term after the discovery. The last-mentioned section provides for the method of taking the evidence on such application, and provides that no such application shall be made more than three years after the final judgment was rendered. These provisions of the statutes of Arkansas, by force of the conformity act of June 1, 1872 (Rev. St. 1878, § 914), are applicable to and govern procedure in the federal courts in cases coming within their purview. In fact, it appears from the record that a proceeding under the statutes was resorted to by the appellant and denied. But, irrespective of that particular feature of the case, it is manifest that an ample remedy existed in favor of the appellant under the Arkansas statutes above alluded to. They not only gave the court jurisdiction to vacate or modify a judgment after the term at which it was rendered, but provided a full scheme for the trial of a proceeding for that purpose. We are unanimously of opinion that those statutes afforded the appellant a plain and adequate remedy at law for the wrong for the redress of which it now resorts to a court of equity, and effectually forecloses the relief now sought. This cannot be done. Rev. St. § 723; Deweese v. Reinhard, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757, and cases there cited. Such is the conclusion reached by this court in the case of Folsom v. Ballard, 16 C. C. A. 593, 70 Fed. 12, to which we adhere.

We are also of opinion that on the facts and circumstances disclosed by the bill, in view of the conclusions reached and principles announced in the foregoing opinion, the appellant had a full opportunity to present all the facts now claimed to invalidate the certificate of membership in the defense to the action at law, provided

it exercised reasonable care and diligence in preparing for and making such defense. In that opportunity, also, it had an ample remedy at law.

Other considerations which have been urged on us by counsel, not hereinbefore specifically referred to, have received our careful attention, and do not, in our opinion, militate against the conclusions reached.

The judgment of the circuit court in dismissing the bill was correct, and accordingly is affirmed.

THALLMANN et al. v. THOMAS.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

No. 1,539.

1. PUBLIC LAND—VALID LOCATION IMPOSSIBLE WHEN IN POSSESSION OF ONE HAVING SUPERIOR RIGHT.
   A valid location of public land cannot be instituted while another has the possession and right of possession under an earlier lawful location.

2. SAME—VALID LOCATION BY FORCIBLE ENTRY IMPOSSIBLE.
   A valid claim to public land cannot be initiated by forcible entry upon it, even while it is in the possession of one who has no right to the possession, and no lawful claim to secure the title.

3. SAME—VALID CLAIM MAY BE INSTITUTED BY PEACEABLE ADVERSE ENTRY UPON THE POSSESSION OF ANOTHER.
   Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry and location thereof while it is in the possession of those who have no superior right to acquire the title or to retain the possession.

4. EQUITY—MISTAKES IN PATENTS AND CONTRACTS MUST BE PROVED BEYOND REASONABLE CONTROVERSY.
   Patents, contracts, and conveyances, the accredited evidences of rights and titles, may not be set aside or modified for mistakes unless those mistakes are established by evidence that is plain and convincing beyond reasonable controversy.

5. FINDINGS AND DECREE OF LOWER COURT PRESUMPTIVELY CORRECT.
   Where a chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be deemed to be presumptively correct in an appellate court; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, they will not be disturbed.

(Syllabus by the Court.)

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

The Nellie lode mining claim, situated in the state of Colorado, is owned by the complainants, Ernest Thallmann and Hamilton F. Kean. It extends in a westerly direction from its eastern boundary up the side of a precipitous mountain, which has in some places a slope of 35°, for a distance of 1,368 feet, and its width is 300 feet. It was patented on July 18, 1890, and in the summer of 1898 the complainants were taking ore from it, and had driven some of their tunnels across its north line into adjoining territory that was a part of the unappropriated public domain. Their workings were many feet below the surface of the land, and they had never taken possession of this land above these underground workings. On June 28, 1898, the defendant, T. E. Thomas, peaceably entered upon and located the Thomas lode mining claim upon land adjoining the Nellie claim upon the north.

The patent to the claim of the complainants describes its north side line as extending from its northwest corner, which is corner No. 1 of the description, N., 76° and 5′ E., 1,368 feet, to corner No. 2, and it describes its south side line, which is parallel to the north line, as extending from corner No. 3 "S., 76° and 5 minutes W., 1,368 feet, to corner No. 4." The complainants alleged that there was a mistake in the description of these courses; that they should have read, respectively, N., 77° and 54′ E., and S., 77° and 54′ W.; and they prayed for a correction of the mistake, and for an injunction against the defendant from obtaining a patent to the land which would fall within the corrected description. The northeast corner of the description in the patent is indisputably located where it was placed at the time of the original survey, while the monuments which mark the westerly corners are gone, and their original locations are in dispute. The result is that the effect of correcting the description in the patent in the manner sought by the complainants would be to swing the west end of the Nellie claim in a northeasterly direction 43 feet, and to embrace within it a triangular tract of land north of the tract described in the patent 43 feet in width at its westerly end, diminishing to a point at its easterly end. A portion of this triangle which is within the Thomas claim is the land here in controversy. It comprises only about half an acre, but within this half acre it is claimed that the apex of a valuable lode of mineral crops out, and this is the real cause of the contest. The defendant denies that there was any mistake in the patent of the Nellie claim, and the circuit court rendered a decree in his favor. 102 Fed. 935.

Charles J. Hughes, Jr. (Gerald Hughes, on the brief), for appellants.

Charles S. Thomas (Wm. H. Bryant and Harry H. Lee, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

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

The first objection which counsel for the complainants urge to the decree below is that the defendant knew that the complainants were in possession of the half acre here in controversy when he made his entry upon it, and that in consequence of this possession and knowledge his location is void. This proposition rests upon the fact that Thomas worked in the mine of complainants for a few weeks in the winter preceding his entry in June, 1898, and that he probably suspected, if he did not know, that they had run their tunnels through and taken some ore from this tract of land north of the line of their patented claim. They had, however, never occupied the surface of this land. It appeared from their patent to be without the limits of their claim. That claim had been definitely located in 1881. It had been patented in 1890. The complainants had given no notice, brought no suit, made no motion to change its location, and the defendant made his entry and claim peaceably and without objection from any one. There was nothing in this state of facts to prevent him from initiating a perfect right to this land. A valid claim to unappropriated public land cannot be instituted while it is in possession of another who has the right to its possession under an earlier lawful location. Risch v. Wiseman (Or.) 59 Pac. 1111; Seymour v. Fisher, 16 Colo. 188, 27 Pac. 240. Nor can such a claim be initiated by forcible or fraudulent entry

upon land in possession of one who has no right either to the possession or to the title. Atherton v. Fowler, 96 U. S. 513, 516, 24 L. Ed. 732; Trenouth v. San Francisco, 100 U. S. 251, 256, 25 L. Ed. 626. But every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry upon it while it is in the possession of those who have no superior right to acquire the title or to hold the possession. Belk v. Meagher, 104 U. S. 279, 287, 26 L. Ed. 735; Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 673, 680. Any other rule would make the wrongful occupation of public land by a trespasser superior in right to a lawful entry of it under the acts of congress by a competent locator. There was nothing in the possession of the lode in this land by the complainants many feet below its surface, and their wrongful removal of ore from it, nor in the defendant's suspicion or knowledge of this trespass, nor in the fact, if it be a fact, that he learned of the trespass through his employment as a miner and shift boss of the complainants, to prevent him from making an honest and valid location of a mining claim upon this unappropriated portion of the public domain in accordance with the provisions of the acts of congress which offered him this privilege.

There is but one other complaint of this decree, and that is that the court below should have found and corrected the alleged mistake in the patent. The determination of the question which this objection raises has involved the careful perusal, digest, and analy- is of more than 400 printed pages of conflicting evidence. It is useless to do more here than to briefly state what is conceived to be the effect of the proofs, and the reasons which have led to the conclusion that has been reached. The real issue in the case is whether corner No. 1, the northwest corner of the description in the patent, was where that description locates it, or at a point about 43 feet northeast of its location by the patent, and this issue arises in this way: The true location of corner No. 2, the northeast corner, is known. If, therefore, one starts from that corner, reverses the first course, and runs S., 76° and 5′ W., 1,368 feet, he must come to corner No. 1, according to the description in the patent. There is no call in this description which is inconsistent with this location, and in the absence of other evidence the point thus found must be held to be the true position of this corner. The patent discloses the fact, however, that the original post set at corner No. 1 bore the marks 1+1902 on one side, and 1+1901 on the opposite side; and these marks indicate that this post marked the first corner of the survey or description of the Ella lode mining claim, as well as the first corner of the Nellie claim. The Ella claim adjoined the Nellie on the west, and corners 1 and 6 of this claim were identical with corners 1 and 4 of the Nellie. In the patent to the Ella which was issued on July 18, 1890, the statement is found that "an open cut at discovery bears south, 6 degrees and 52 minutes west, 180.7 feet distant" from the post at corner No. 1. This discovery cut is found, and its identity and loca-

tion are undisputed. If one starts from this cut, reverses this course, and runs N., 6° and 52′ E., 180.7 feet, he reaches a point about 43 feet northeasterly of the position of corner No. 1, according to the patent of the Nellie. Thus the question becomes whether the location of corner No. 1 of the Nellie shall be determined by the course and distance from corner No. 2, described in the patent of that claim, or from the course and distance from the discovery cut of the Ella found in the patent of the latter claim.

Counsel for complainants invoke the conceded rules that the most certain and reliable calls prevail over the more uncertain and unreliable, the shorter distances over the longer, the more permanent monuments over the more temporary, and the established marks of the boundaries over their courses and distances; and then they contend that there must have been a mistake in the first and third courses in the patent of the Nellie, because it is more probable that a mistake would creep into these courses than that it would occur in the short course and distance from the discovery cut of the Ella to corner No. 1. In support of their contention they produced at the hearing the engineers who surveyed the Nellie and the Ella for location in 1881 and for patent in 1883, and these surveyors testified that the proper way to locate corner No. 1 was to follow the course and distance from the discovery cut found in the patent to the Ella; that they believed that the place found in this way was the original corner; that, by starting from this point and following the courses and distances in the patent of the Ella, they found a stake and stones about 9 feet north of angle 2 of that claim, and another at angle 5 thereof; that the two first ties of corner No. 1 named in the patent of the Ella locate that corner 23 feet south of the position pointed out by the tie to the discovery cut; that in their opinion there is a mistake in the courses of the side lines named in the patent of the Nellie; and that this mistake was made in calculating out the length and direction of the center line of the claim which was originally found by means of a traverse. They testify that the courses and distances in dispute and the courses and distances of the ties of corner No. 1 which appear in the patents of the Nellie and of the Ella, including that to the discovery cut of the latter, were found either by means of traverses or by triangulation and the necessary calculations, and that none of them were run upon the ground when the original surveys were made. The evidence of these witnesses was supported by the testimony of several surveyors to the effect that in their opinion the tie to the discovery cut of the Ella ought to prevail in locating corner No. 1 over the other indicia in the notes of the surveys and in the patents, because this call contained the course and distance from corner No. 1 to the nearest and the most permanent monument. On the other hand, the courses and distances that are alleged to contain the mistake were found by the original surveyors who now attack them, and were declared to be the true course of the Nellie vein in 1881, when they first surveyed the claim for that lode for location, and again in 1883, when they surveyed the claim for patent. The chief purpose of the survey

for location was to determine the direction of this vein. If that direction was not correctly determined, it might run without the side lines of the claim, and be lost to the locator. They found and declared its direction to be, and it was described in the amended location certificate of September 26, 1881, based upon their survey, to be, "333.5 feet, running N., 76 degrees 5 minutes east, from center of discovery shaft, and 1,033.5 feet, running south, 76 degrees 5 minutes west, from center of discovery shaft." In 1883 they surveyed and laid the side lines of this claim parallel to the line which they had ascribed to the vein, and gave them the same course. In the latter survey they described two tunnels among the improvements upon the Nellie, and gave their bearings and distances from corner No. 1 of their survey of that claim. These tunnels are still there, and the approximate location of their mouths in 1883 is still discernible. Three surveyors testified that the lines described by the courses and distances which the original surveyors gave these tunnels from corner No. 1 as located by the patent of the Nellie strike within about 5 feet of the original mouths of these tunnels, while, if they are run from the point where the complainants seek to locate this corner, they will strike from 40 to 100 feet further up a cliff, where there is no vein of mineral, and where there never were any tunnels. On October 4, 1887, one of the original surveyors of the Nellie made a survey of and tied corner No. 1 of the Golden Cross lode mining claim to corner No. 1 of the Nellie claim at the place where it is located by the patent, and not at the place where he now claims it was established. In 1892 the Kokomo No. 2 lode claim, and in 1896 the Star Gazer lode mining claim, were surveyed by other engineers, and tied to this corner at the place where it is located by the patent of the Nellie. A portion of the triangle which complainants now seek to include within their patent was patented to the owner of the Star Gazer claim without any objection on their part. Many other facts were established and many were disputed in the voluminous evidence taken in this case, but none of them are of sufficient importance to modify the effect of those which have been recited. How can the decree of the court below be lawfully reversed, in the light of this proof? The tie on which the complainants rely was a calculated course and distance from the corner in dispute to a hole in the ground on another claim found in the patent of that claim. In the notes of the survey of this second claim this course and distance was not a tie of this corner, nor was it any portion of the survey of the boundary of the claim, but it was a mere description of an improvement upon it, and it was imported into the patent from these notes. In the notes of the survey of the Nellie the courses and distances of its side lines constitute a part of the boundaries of that claim,—a portion of its survey,—and they were imported from these notes into the patent under which the complainants claim. The testimony is that the location of improvements upon mining claims is not made with that care and accuracy with which the boundaries of the claim are measured, marked, and noted, so that there is less probability of a mistake in the lines

which mark the boundaries than in the location of the improvements. This consideration is much strengthened by the fact that the great desideratum in the location of a lode mining claim—the chief end of its survey—is to ascertain and declare the true course of its vein, and of the side lines of the claim which inclose it, and which are generally drawn parallel to it, so that it may not escape from the locators.

Again, the location of the tunnels mentioned among the improvements upon the Nellie in the notes of its survey correspond with the location of corner No. 1 according to the courses and distances of the patent of that claim; and it is less probable that a mistake was made in locating both these tunnels, in ascertaining the course of the vein of the Nellie, and in surveying its side lines, than that there was an error in the course and distance from corner No. 1 to the discovery cut of the Ella. When all these considerations, and the facts that the location of this mining claim was made in 1877, that it was surveyed and located in 1881, that it was again surveyed for patent in 1883, that it was patented in 1890, that other claims have been located adjoining and about it in reliance upon its record location, that under one of them a patent has issued to a portion of the triangle which complainants now claim should be placed within the boundaries of their patent, and that the courses, distances, corners, and boundaries of this Nellie mining claim remained unassailed for 16 years,—when all these facts and circumstances are reviewed the conclusion becomes unavoidable that the fact that the course and distance from one of the corners of this claim to an improvement in another claim found in another patent does not correspond with the description of the side lines in this patent establishes no probability that there was an error in the courses and distances of the lines which bound it, but renders it far more probable that there was a mistake in the location of the improvement with which it is assailed. The court below rendered a decree in accordance with this conclusion, and, even if there was a mere preponderance of evidence in favor of the theory of the complainants, the result below ought not to be disturbed, in the light of this testimony, under two well-established rules of equity jurisprudence. One of these rules is that patents, contracts, and conveyances, the accredited evidences of rights and titles, may not be set aside or modified for mistakes unless these mistakes are established by evidence that is plain and convincing beyond reasonable controversy. Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; U. S. v. American Bell Tel. Co., 167 U. S. 224, 251, 17 Sup. Ct. 809, 42 L. Ed. 144; Howland v. Blake, 97 U. S. 624, 626, 24 L. Ed. 1027; Insurance Co. v. Nelson, 103 U. S. 544, 549, 26 L. Ed. 436; Insurance Co. v. Henderson, 69 Fed. 762, 764, 16 C. C. A. 390, 392, 32 U. S. App. 536, 542; Railroad Co. v. Belliwith, 83 Fed. 437, 440, 28 C. C. A. 358, 361, 362, 55 U. S. App. 113, 120. Such evidences of the rights of parties bear with them a strong presumption of their correctness. They are generally prepared with deliberation, written with care, and made for the express purpose of solemnly record-

ing the established rights, titles, and interests of those whom they concern. Patents issued by the government after surveys of the land and examinations of the rights of the grantees and of the nation are buttressed by a presumption of exactness peculiarly strong. Every step in their preparation is required to be performed by disinterested officials in accordance with express provisions of statutes. They are issued by the United States to evidence the nature and the extent of its grants, and they bear its official seal. They evidence the decisions of a quasi judicial tribunal—the interior department of the government—upon the rights of all parties to the land or privileges which they describe. They are recorded in the registries of titles, and all the world relies, and has the right to rely, upon their statements of the character, and the limits of the rights of the grantees whom they name. In view of these well-known facts, no mere preponderance of evidence, no loose, uncertain, conjectural proof, ought to be permitted to strike down or change the nature or the extent of these solemn grants of the nation. Nothing should be permitted to reach that result but evidence so clear, unequivocal, and convincing that it does not leave the issue in doubt. The proof in this case lacks every element of this character. When considered in the most favorable light, it is nothing but the balancing of probabilities of mistake between the courses and distances in the survey of the boundaries of the Nellie lode mining claim, and the course and distance from one of the corners of that claim to an improvement in an adjoining claim. It is loose, uncertain, unconvincing, and conjectural, and solemn grants of the United States cannot be annulled or reformed upon evidence of this character.

The other rule to which reference has been made is that where a chancellor has considered conflicting evidence, and made his finding and decree thereon, they must be deemed to be presumptively correct; and unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, his findings should not be disturbed. Exploration Co. v. Adams, 104 Fed. 404, 408, 45 C. C. A. 185, 188; Mann v. Bank, 86 Fed. 51, 53, 29 C. C. A. 547, 549, 57 U. S. App. 634, 637; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110, 12 U. S. App. 591, 600; Plow Co. v. Carson, 72 Fed. 387, 388, 18 C. C. A. 606, 607, 36 U. S. App. 448, 456; Trust Co. v. McClure, 78 Fed. 209, 210, 24 C. C. A. 64, 65, 49 U. S. App. 43, 46. The able and persuasive arguments of counsel for complainants have not convinced us that the chancellor made any mistake of fact or fell into any error of law in his disposition of this case. The patent under which the complainants held their land threw the burden of establishing the alleged mistake in it, by convincing proof, upon them in the court below, and the decision of the chancellor cast upon them the additional burden of showing his mistake in this court. They have failed to successfully bear either burden, and the decree below must be affirmed. It is so ordered.

MICHIGAN PIPE CO. et al. v. FREMONT DITCH, PIPE LINE & RESERVOIR CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 7, 1901.)

No. 1,504.

1. EQUITY—COMPLAINANT MUST COME WITH CLEAN HANDS.
A court of equity will leave to his remedy at law—will refuse to interfere to grant any relief to—one who, in the matter or transaction concerning which he seeks its aid, has been guilty of bad faith, unrighteous dealing, or unconscionable acts.

2. SAME.
Courts of equity will not entertain bills to enforce forfeitures, but will leave the parties to their remedies at law.

3. SAME—COMPLAINANTS BARRED BY UNCONSCIONABLE ACTS.
Vendors sold and conveyed real property, water rights, and rights of way under a contract whereby the vendees agreed to pay the purchase price provided the vendors first paid off and satisfied the incumbrances upon the property, and whereby the vendees also agreed to retransfer the property if they failed to construct waterworks according to the provisions of a certain ordinance. They constructed the waterworks under other ordinances substantially but not completely in accordance with the provisions of the ordinance mentioned in the contract. The vendors did not pay off the incumbrances, but, without notice of their failure, foreclosed them, took the title under the foreclosures, and sold the property to a third party. The vendees brought suits and obtained decrees avoiding these foreclosures, and adjudging that the title under them was held in trust, and should be conveyed to the vendees. Thereupon the vendors brought a suit in equity to compel a reconveyance of the property from the vendees to the vendors because they had not constructed the waterworks in exact accordance with the contract, and because they had not paid the purchase price. *Held*, the vendors were barred from relief in equity, and remitted to their remedies at law, by their bad faith, sharp practice, and unconscionable acts in foreclosing the mortgages they had agreed to pay.

(Syllabus by the Court.)

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

On April 23, 1898, the complainants (the appellees here) exhibited their bill in the United States circuit court for the district of Colorado to compel the defendants (the appellants here) to reconvey to them certain land, water rights, and rights of way for a ditch and reservoirs pursuant to the terms of a contract of purchase thereof which had been made on January 27, 1893. The complainant the Fremont Ditch, Pipe Line & Reservoir Company was a corporation, which on January 27, 1893, owned this property, and the other complainants, J. C. Plumb, H. I. Reid, F. W. Howbert, H. C. McCreery, and S. H. Kinsley, owned the stock of this corporation, and also owned a large number of lots in the town of Crippie Creek, in the state of Colorado. The defendant the Michigan Pipe Company was a corporation, and the defendant Henry B. Smith practically controlled and acted for and with it. In December, 1892, one J. A. Jones had obtained from the town of Cripple Creek an ordinance granting to him the right to construct and maintain a system of waterworks in the town of Cripple Creek, and requiring him to locate 25 hydrants upon 3 miles of water mains within the limits of that town, and to complete his system by July 15, 1893, unless prevented by strikes, labor combinations, weather, or order of court of competent jurisdiction. The Fremont Company had 174 acres of land, certain water rights appurtenant thereto, and a right of way for a ditch, pipe line, and reservoirs, which the Michigan Company desired to obtain for the purpose of

constructing and maintaining this system of waterworks under the ordinance obtained by Jones, who was in fact the agent of this corporation. Thereupon the complainants other than the Fremont Company made a contract with the Michigan Company on January 27, 1893, which recited that they were the owners of the entire capital stock of the Fremont Company, that that company was the owner of the land, water rights, and rights of way which have been mentioned; that the Michigan Company had obtained through assignments from Jones the franchises to lay pipes and supply water to the towns of Cripple Creek and Fremont; that it was about to construct a pipe line and waterworks system to supply those towns over the course and rights of way of the Fremont Company; that, in consideration of the transfer by the complainants to the Michigan Company of this real estate subject to the incumbrances thereon, the latter company agreed to pay to the complainants other than the Fremont Company, not later than August 15, 1893, $5,000 of the first mortgage bonds and $5,000 of the capital stock of the company which should own and operate the waterworks system constructed under the franchises granted to Jones; that before the delivery of the stock and bonds the complainants other than the Fremont Company should pay off and satisfy all incumbrances on the property amounting to $1,400; and that, in case the Michigan Company should not construct the waterworks system under the franchises obtained by Jones, it should retransfer to the complainants other than the Fremont Company all the rights, real estate, and franchises obtained from them. The foregoing facts were conceded at the hearing, and the controversy was over the following averments of the parties: The complainants alleged in their bill that on February 13, 1893, the contract of January 27th was so modified that the Michigan Company agreed to immediately organize a corporation to own the waterworks, to dispose of its stock and bonds for cash, to pay the incumbrances upon the property out of the amounts realized from the $5,000 of stock and $5,000 of bonds owing to the complainants, and to remit to them the remainder of the proceeds of this stock and bonds; that thereupon the Fremont Company made a deed of the property in controversy, with full covenants against incumbrances, to Henry B. Smith, for the Michigan Company; that the Michigan Company proceeded to construct a pipe line and a system of waterworks to supply the town of Cripple Creek with water, but that it did not do so under the franchises granted to Jones; that, instead of placing within the corporate limits of Cripple Creek 3 miles of mains and 25 hydrants, it constructed less than 1 mile of water mains and no more than 12 fire hydrants; that instead of completing its system on July 15, 1893, as required by the ordinance in favor of Jones, it failed to finish the same until 1894; that the complainants paid all the incumbrances upon the property, but that the defendants never paid to the complainants the $5,000 in the first mortgage bonds or the $5,000 in the capital stock of the corporation which was to be organized to own and operate the system of waterworks referred to in the contract; that the failure of the Michigan Company to comply with the contract of January 27, 1893, as modified, inflicted great and irreparable damage upon the complainants, and they prayed that the defendants might be required to reconvey to them all the property which had been transferred to Henry B. Smith by the deed of February 13, 1893. In answer to this bill the defendants denied that there was ever any modification of the contract of January 27, 1893, whereby they undertook to sell the stock and bonds owing to the complainants, or to pay the incumbrances upon the property conveyed to Henry B. Smith by the deed of February 13, 1893. They denied that they ever agreed to form a corporation immediately after the execution of this deed, or at any time before the waterworks system was completed. They averred that the agreement was that the stock and bonds owing to the complainants should not be delivered until the complainants had paid off the incumbrances against the property referred to in the contract. They alleged that, while they had not constructed the waterworks under the franchises granted to Jones in 1892, the towns of Fremont and Cripple Creek were consolidated in May, 1893, under the name of the town of Cripple Creek; that thereafter they obtained a franchise from this town for the purpose of preserving the rights originally granted to Jones;

and that the Michigan Company complied with the terms of this franchise in the erection and completion of its waterworks. They alleged as another defense to the bill that the complainants, in violation of their contract, caused two foreclosure sales of the property in question to be made to satisfy the notes secured by the trust deeds which constituted the incumbrances which the complainants other than the Fremont Company agreed to pay and discharge by the terms of the contract of January 27, 1893; that in consequence of these acts the Michigan Company had been compelled to bring two suits in equity for the purpose of removing the clouds thus placed upon its title; and that it had actually been damaged by these foreclosures in the sum of $10,000. In view of these facts the defendants prayed that the bill of the complainants might be dismissed, that the rights of the parties under the contract might be determined by the court, and that the Michigan Company might recover damages of the complainants in the sum of $5,000.

Upon the issues formed by these pleadings the evidence was conflicting, but the result of it all was that the following facts were established: The contract of January 27, 1893, though dated on that day, was not completed and delivered until February 13, 1893, when the deed of the property from the Fremont Company to Smith, with full covenants against incumbrances, was delivered. The contract and the deed alike required the complainants to pay the incumbrances upon the property conveyed before they were entitled to the stock and bonds of the corporation to be organized by the defendants. The oral testimony in the case, to the effect that there was a verbal agreement made at the time of the delivery of these instruments to the effect that the plaintiffs should not pay, and the defendants should pay, these incumbrances, is in conflict with the written agreements, and is insufficient to prove their modification. So the contract stood that the complainants were to pay the incumbrances before they were entitled to the stock and the bonds. When the contract was made they represented that the aggregate amount of these incumbrances was $1,400, consisting of two trust deeds, one securing a note of $800 due July 1, 1894, and the other securing a note of $600 due March 1, 1893. The fact was that the incumbrances amounted to $1,900. The trust deed securing the note for $600 also secured another for $500. In 1895 the complainants caused both these trust deeds to be foreclosed, bid in the property for themselves, and sold and conveyed it to the town of Cripple Creek for the sum of $26,500 in warrants of that town. On July 13, 1895, the Michigan Company filed a bill in the United States circuit court against the town of Cripple Creek and the complainants in this suit to set aside the foreclosure of the trust deed which secured the note for $800; and on July 23, 1896, a decree for that relief was granted by the court below, and the town of Cripple Creek was directed to convey the property by a good and sufficient deed to the Michigan Company. On July 15, 1896, the Michigan Company filed another bill in the court below to avoid the trustee's sale under the deed which secured the payment of the two notes for $600 and $500, and at the hearing a decree was rendered avoiding that foreclosure and declaring the property free and clear of the incumbrance of the trust deed under which it was made. The defendants necessarily incurred and paid large amounts of money for witnesses' fees, traveling expenses of attorneys and witnesses, and services of counsel in prosecuting these suits to favorable decrees. The Michigan Company did not construct 3 miles of water mains in the town of Cripple Creek, but it laid about 2½ miles, and it erected 25 hydrants. It did not do this, however, under the franchises to J. A. Jones, but under the subsequent franchise obtained from the town of Cripple Creek in 1893. It did not lay all these mains nor erect these hydrants before July 15, 1893, but some of them were laid and erected in 1894. The system of waterworks was not completed until December in the latter year. The complainants never before the commencement of this suit made any complaint to the defendants, or any objection to the performance of the contract on the ground that the length of the mains or the number of the hydrants was less than that specified in the agreement. They commenced the foreclosure of one of the trust deeds in July, 1895. They never notified the defendants of either of the foreclosures, or of their inten-

tion to commence them, until after they began them. They never notified the defendants before July, 1895, that they deemed the contract forfeited, or that they would seek to enforce a forfeiture or reconveyance of the rights which they had conveyed to the Michigan Company under it. On the other hand, they had repeatedly demanded the payment of the stock and the bonds, and they had threatened a suit for damages for a failure to deliver them. In this state of the proofs, the court below rendered a decree that the complainants should recover of the defendants the sum of $5,000, interest from June 1, 1895, and the costs of the suit. The defendants appealed from this decree.

Charles M. Brown, for appellants.

John W. Sheafor (Joseph W. Ady, on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

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

A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion,—not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, "He who comes into a court of equity must come with clean hands," and "He who has done iniquity cannot have equity." A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit. 1 Pom. Eq. Jur. §§ 397, 398, 400; Medicine Co. v. Wood, 108 U. S. 218, 227, 2 Sup. Ct. 436, 27 L. Ed. 706; Marble Co. v. Ripley, 10 Wall. 339, 357, 19 L. Ed. 955.

How can the complainants in this case sustain their decree in the face of this indisputable rule? They sold and conveyed the property in controversy to the defendants on February 13, 1893, for the purpose of enabling them to lay water mains, to construct reservoirs upon it, and to use it to operate a system of waterworks for the town of Cripple Creek; and they agreed that their payment of the incumbrances upon it, which actually amounted to $1,900, although they were represented to be only $1,400, should constitute a condition precedent to their right to the receipt of the purchase price. The defendants undertook to construct the works and to deliver to the complainants on or before August 15, 1893, the bonds and stock to the amount of $10,000, on condition that the complainants first paid off and satisfied the incumbrances upon the property which they bought. They built the waterworks over, and operated them by the use of, the property conveyed to the Michigan Company. They

failed to complete them until about 17 months after they had agreed to finish them. They laid only about 2½ miles of water mains, while they had contracted to lay 3 miles. But the differences between promise and performance in the construction and operation of the works were so slight and insubstantial that the plaintiffs never mentioned or objected to them in the course of a long correspondence, continuing more than a year, in which they often demanded the delivery of the stock and the bonds and the completion of the purchase. The defendants never delivered either the stock or the bonds. The complainants never satisfied or removed the incumbrances upon the property. On July 1, 1895, this property had been enhanced in value by the construction and operation of the waterworks and the growth of the town until it was worth three times its value when the Fremont Company conveyed it to Smith in February, 1893. Meanwhile the complainants had given no notice to the defendants that they claimed a forfeiture of their rights or a retransfer of the property on the only ground upon which they were entitled to it under the terms of the contract,—because the defendants had not constructed the system of waterworks in accordance with the terms of the franchises granted to J. A. Jones. On the other hand, they repeatedly demanded payment of the purchase price, and had threatened an action for damages if the payment was not made, thus affirming the sale, although they knew that the works had been built, and that they had been constructed under the franchise granted in 1893, and not under those evidenced by the ordinances of 1892 in favor of Jones. This was the situation of the parties and of the property in July, 1895. In this state of the case the defendants caused the trust deeds which they had agreed to pay off and to satisfy to be foreclosed, sold the title which they acquired under these foreclosures to the town of Cripple Creek for $26,500, and compelled the defendants to incur the expense of two suits in equity to remove the clouds of these proceedings from their title. After the decrees had been rendered to the effect that these foreclosures were illegal, and that in equity and good conscience the title taken under them was held in trust for, and must be conveyed to, the Michigan Company, the complainants instituted this suit, and prayed a court of equity to retransfer to and vest in them the title to all this property, worth three times its value in 1893, because the defendants had not constructed the works in exact accordance with the terms of the grant to Jones, and because they had not paid the purchase price. Could effrontery go further? The payment and satisfaction of the incumbrances by the complainants was a condition precedent to their right to a payment of the purchase price of the property by the terms of their contract. They gave the defendants no opportunity to pay these mortgages, no notice that they had not paid them, no notice that they would not discharge them. Without notice of their failure to perform their part of the agreement, they sought to take advantage of their own wrong to rob the defendants of the property which they had purchased, and of that portion of the waterworks which they had placed upon it. They undertook to do this so secretly that the defendants should not become aware

of their purpose or of their proceedings until it would be too late for them to redeem from the incumbrances. They succeeded in effecting formal foreclosures of the two trust deeds, and in entailing upon the defendants the burden and expense of two suits in equity to avoid them. Their course of action constituted a bold endeavor to appropriate to themselves property of the defendants of the value of at least $20,000 by taking advantage of their own wrong,—by concealment, bad faith, and sharp practice. They failed in their endeavor, and this suit was an appeal to a court of equity to grant to them the same thing which they vainly sought to obtain by trickery and stealth. Their breach of good faith, their unconscionable attempt to take from the defendants their rights in this property by stealth and sharp practice, closed the doors of all courts of equity against their application for the relief sought in this suit, and perpetually repelled them from their precincts. They were perpetually barred by their own acts from obtaining any relief from a court of equity against the defendants relating to this property, or to the contract of the parties evidencing its sale.

The complainants are entitled to no relief in this suit for another reason. Their bill is an application to enforce a forfeiture, and that relief is never granted by a court of equity. The contract was an agreement of sale of the property, with a stipulation that, if the vendee failed to construct the waterworks under the franchises to Jones, it should reconvey the land, water rights, and rights of way for the ditch and reservoirs to the vendors. This was, in effect, a provision that the vendee should forfeit all its rights to the property if it failed to comply with the grants to Jones. The purpose and prayer of the complainants' bill is to enforce this forfeiture. They seek to enforce it for insubstantial failures to comply with the terms of the agreement, when the great desideratum of the contract, the system of waterworks for the town of Cripple Creek, has been obtained, when the property has been greatly enhanced in value by the labor and expenditures of the vendee, and when the provisions of the ordinances in favor of Jones have been substantially, though not exactly, complied with. Courts of equity uniformly decline to interfere to enforce forfeitures in such cases, and leave the complainants to their remedies at law. 1 Pom. Eq. Jur. § 459.

It is said that, although the complainants were not entitled to the specific relief for which they prayed, yet this was a case of equitable cognizance,—a suit for the specific performance of a contract,—and that the court, having obtained jurisdiction of the subject-matter, was warranted in investigating and determining the rights of the parties under their contract of sale, and in rendering a decree or a judgment for the recovery of damages according to the very right of the matter. The position is well taken, and its soundness is conceded. The answer to it is that under the proofs in this case, and according to the very right of the matter, the complainants are barred from any relief in equity by their bad faith, concealment, and sharp practice in their dealing with the subject-

matter of the suit, under the maxim that he who comes into a court of equity must come with clean hands.

Finally, this is not a case in which the title to the property sold should be transferred or conveyed back to the vendors, but it is one in which the legal injuries of the respective parties may be and should be compensated by damages. It is a case, therefore, peculiarly appropriate for disposition by one or more actions at law. This fact is emphasized by the objection strenuously urged by the complainants that the claim of the defendants to recover the expenses which they incurred in the suits to avoid the foreclosures cannot be considered in equity, because this claim is the basis of a cause of action at law. The objection may not be tenable, but in an action at law the claims of all the parties to the damages which they have suffered can be presented and tried upon their merits, while these claims cannot be considered in this suit in equity, because the plaintiffs are barred from all relief here by their own unconscionable acts.

The decree below will accordingly be reversed, and the case will be remanded to the court below, with directions to dismiss the bill without prejudice to the right of any party to the suit to litigate in any action at law any of the questions of law or of fact in issue in this suit. It is so ordered.

SCHMIDT v. TERRY.

(Circuit Court, S. D. New York. August 3, 1901.)

JUDGMENT—TIME FOR ENTRY—NECESSITY OF ORDER OVERRULING MOTION FOR NEW TRIAL.

Where a motion for new trial has been submitted and taken under advisement, the clerk is not authorized to enter judgment until a formal order has been made by the court denying such motion; and an opinion filed by the judge denying the motion is not equivalent to such an order.

On Motion to Vacate Judgment.

The grounds upon which the motion was based appear from the following affidavits, upon the filing of which the court entered an order to show cause:

"County of New York—ss.: Herbert C. Smyth, being duly sworn, deposes and says: That he is one of the attorneys for the defendants in the above-entitled action, and has full knowledge of the same. That this was an action to recover for the loss of the services of plaintiff's infant son, who was injured through the alleged carelessness and negligence of the defendants, and was tried before Mr. Justice Wheeler and a jury, at New York City, on February 9 and 10, 1899, and resulted in a verdict for plaintiff for the sum of one thousand dollars ($1,000). That upon the coming in of the verdict the following proceedings were taken, as appears from the stenographer's minutes: 'Mr. Jones: I move that the verdict be set aside, and a new trial granted, upon the evidence taken during the trial and exceptions, on the ground that the verdict is contrary to evidence, contrary to law, against the weight of evidence, and for excessive damages. I move to set the verdict aside, and for a new trial, on those grounds, and on the case and exceptions taken. The Court: You may have a stay of forty days now and pending the motion. The stay will last until the motion is disposed of, and will be for forty days anyway. Mr. Goeller: Does that stay the entry of

judgment? The Court: This stays entry of judgment. It stays everything right where it is.' That on April 26, 1899, your deponent argued a motion for a new trial and to set aside the verdict, decision on which was reserved. On March 29, 1901, the defendants' attorneys were served with a bill of costs and notice of taxation, returnable on April 1, 1901, and that this was the first notice that your deponent or defendants' attorneys had that the said motion had been decided. That on March 30, 1901, your deponent had an examination made of records at the clerk's office of this court, and found that an opinion denying the said motions was filed on November 18, 1899. That no notice of the said decision ever appeared in the New York Law Journal, in which paper are printed the decisions of all the courts of record in the county of New York, nor was any notice ever given or received by the defendants' attorneys of such decision; and your deponent is informed by the attorney for plaintiff that he had no notice of the said decision until he wrote to Mr. Justice Wheeler in March of 1901, and received a reply that the said motion had been decided on November 18, 1899. That judgment was entered herein on April 9, 1901, and a copy thereof served upon the defendants' attorneys by mail on April 10, 1901. That on May 11, 1901, the defendants served their proposed bill of exceptions, and received admission of service thereof from the attorney for plaintiff. That on May 10, 1901, a bond on appeal was approved and filed, and on May 12, 1901, a writ of error was issued returnable June 8, 1901. That on June 4, 1901, notice of settlement of the proposed bill of exceptions, returnable before Mr. Justice Wheeler at Brattleboro, Vt., on June 8, 1901, was served on the attorney for plaintiff, and due admission of service thereof given, and that on June 5, 1901, settlement of the said proposed bill of exceptions was adjourned by written consent of both parties to June 14, 1901, same hour and place. That on the same day the return of the writ of error was extended by the circuit court of appeals ten days from June 8, 1901, and that on June 13, 1901, the return day of the writ of error was again extended by the circuit court of appeals to and including July 8, 1901. That on June 14, 1901, the original bill of exceptions, with notice of settlement, etc., were mailed to Mr. Justice Wheeler at Brattleboro, Vt. That before sending the bill of exceptions to Mr. Justice Wheeler for signature the defendants' attorneys asked the attorneys for plaintiff if they had any proposed amendments to make to the proposed bill of exceptions, and offered to extend their time to serve the same, and to adjourn the settlement of the bill of exceptions, and were told by Mr. Goeller, the counsel having charge of this case, that they had no amendments to propose. That from an examination of the records of the clerk of this court it is found that no order has been entered, signed, or filed upon the opinion denying the motions for a new trial or directing the entry of judgment, but that on April 9, 1901, judgment was entered without any such order or direction. That the opinion denying the motion for a new trial was not signed by the justice delivering the same, and that submitted herewith is a certified copy of the said opinion, with a further certificate of the clerk of the court that it is 'the only paper filed in the foregoing case on the 18th day of November, 1899'; and that from an examination of a copy of a letter written by the clerk of this court to Mr. Justice Wheeler and from a statement of the clerk of the court your deponent is advised and verily believes that no order denying the said motion for a new trial or for judgment has been signed, entered, or filed since said November 18, 1899, to date, or ever has been signed, entered, or filed in this action. That submitted herewith is a certified copy of the judgment roll in this action. That your deponent has been informed by the clerk of this court that Mr. Justice Wallace is in the country for the summer. That Mr. Justice Lacombe will not be in the city until the latter part of July; and that Mr. Justice Shipman, whose residence is in Hartford, Conn., is not in the city, and that, therefore, an order to show cause is asked for, returnable before Mr. Justice Wheeler at his chambers in Brattleboro, Vt., or at the court house in the city of New York, should he so determine, why the said judgment entered herein April 9, 1901, and all proceedings founded thereon, should not be vacated and set aside, and why an order should not be entered denying the said motion for a new trial, and directing the entry of judgment, and grant-

ing to the defendants a reasonable time in which to prepare and serve and procure to be allowed their bill of exceptions on the writ of error, and for such other relief as may seem proper, and pending such motion for a stay of all proceedings. That no application for this order has been made to any court or judge. Herbert C. Smyth.

"Sworn to before me this 28th day of June, 1901.
"Edwin A. Jones, Notary Public, New York County."

"County of New York—ss.: Edwin A. Jones, being duly sworn, deposes and says: That he is an attorney at law associated with the attorneys for the defendants in the above-entitled action. That on July 2, 1901, your deponent called on Mr. Justice Wheeler at Brattleboro, Vt., in relation to the application for this order, and Mr. Justice Wheeler then stated to your deponent that he doubted very much whether he had authority to sign an order while he was not within the Southern district of New York, and requested your deponent to make application for this order to Mr. Justice Brown, and authorized your deponent, after an examination of the papers, to say to Mr. Justice Brown that he requested him to grant the order to show cause, and that he make it returnable before Mr. Justice Lacombe; and that Mr. Justice Wheeler stated to your deponent that it was his usual custom to let matters referring to practice be decided by the judges resident in the district in which the question of practice arose. That the bill of exceptions submitted to Mr. Justice Wheeler has not as yet been settled, or ordered on file. That, except as above, no previous application for this order has been made to any court or judge. Edwin A. Jones.

"Sworn to before me this 3d day of July, 1901.
"John W. Hutchinson, Notary Public N. Y. Co."

Robert Goeller, for plaintiff.
Edwin A. Jones, for defendant.

THOMAS, District Judge. The entry of judgment herein without an order denying the motion for a new trial was improper practice, and has resulted in the inability of the trial judge to sign the bill of exceptions. Unless the parties can correct the error by suitable stipulation, or an order entered nunc pro tunc, the judgment must be vacated.

UNITED STATES v. HOGG et al.

(District Court, W. D. Kentucky. January 5, 1901.)

EXECUTIONS—VALIDITY OF SALE AFTER RETURN DAY—KENTUCKY STATUTE.

The Kentucky statute of 1828, relating to executions (Morehead & B. St. p. 638), provided that "the officer may at any time before he returns the original execution sell any property taken by him in virtue of said execution, if the same shall have been levied upon before the expiration of the return day of the same, notwithstanding such return day may have expired before the day of sale." This provision was substantially carried into all subsequent revisions of the statutes, except that the words "the expiration of" were omitted. *Held* that, in view of the general rule of law that the life of an execution continues during the return day, and that a levy may be made thereunder during such day, which rule is not abrogated by the statute, it cannot be supposed to have been the intention of the legislature, by the omission of such words, to prohibit a sale after the return day, under a levy made on that day, while permitting such sale if levy was made on any other day during the life of the writ, but that such words must be deemed to have been omitted as unnecessary, and the statute construed the same as though they had been retained.

On Demurrer to the Showing in Response to a Motion for a Writ of Possession.

R. D. Hill, for the United States.
William B. Dixon, for defendants.

EVANS, District Judge. The United States, pursuant to the Kentucky statute, has moved the court for a writ of possession and for a judgment for the possession of the tract of land described in the motion. The United States had become the purchaser of the land under an execution issued from this court on a judgment rendered against Hiram Hogg. Some years before that, under writs of fieri facias issued upon judgments rendered in the state court, the respondents had become purchasers of the same land. The executions from the state court were returnable on the first Monday in March, 1892. It appears from the calendar that the first Monday in March was the 7th day of March in that year. The executions were levied by the sheriff, into whose hands they had come on that day. Subsequently the sales were made pursuant to that levy. The respondents, relying upon their previous purchase, claim that they are the owners of the land, and were such when the purchase was made by the United States, and show these facts for cause against the motion, and to this response the United States has demurred.

The question is whether the executions from the state court could lawfully be *levied* by the sheriff on the *return day* of the writs, and, further, whether the *sale* could lawfully be made of the property after the return day of the executions, the levy not having been made until on the return day. The original statute (Act 1828) applicable to the subject is found in the proviso near the top of page 638 of Morehead & Brown's Statutes of Kentucky, in this language:

"Provided, however, that the officer may, at any time before he returns the original execution, sell any property taken by him in virtue of said execution, if the same shall have been levied before *the expiration of* the return day of the same, notwithstanding such return day may have expired before the day of sale."

This provision was substantially carried into the Revised Statutes in 1860, except that the words, "the expiration of," were omitted. The applicable provision of the Kentucky Statutes now in force (section 1664, cl. 3) is substantially the same as that in the Revised Statutes, and the provision also stood substantially the same in the revision of 1873, known as the "General Statutes." There would, of course, be no difficulty in this case if the omitted words, "the expiration of," had been brought forward in the various revisions of the statutes of Kentucky, to which I have alluded, and their omission might be taken as indicating the legislative intention to change the statute so as to make an execution not leviable on the return day, or rather to make a sale invalid of property levied upon on that day. The effect of this would be to make the execution expire for all practical purposes before the return day, or, at least, with the beginning of the return day. But it seems to me

that that was not the legislative intention. It seems to me that it would lead to an absurd result to so hold, particularly in view of the fact that, under every decision and authority with which the court has become acquainted, the execution must be regarded as continuing in force during the entire return day. This being so, the court must conclude that the words alluded to were dropped by accident, or because, notwithstanding their literal import, they were supposed not to enlarge the meaning of the enactment. If it be true, as it is universally decided, that an execution remains *in force* during *all* of the return day, then the effect of the contention of the United States in this case would be that the legislature meant that, while it might be in force on that day, nothing could be done under it, or else, as already indicated, that the legislature meant to destroy the validity of the writ itself at the termination of the previous Saturday; the return day of such executions in Kentucky almost universally being Monday, and in this way the execution would have practically expired with the Saturday before the first Monday of the month, Sunday being dies non.

There are certain fundamental principles for the construction of statutes which seem to me to obviate a result which, I think, would, under the circumstances of this case, be such as was not contemplated by the legislature, and I think there is enough doubt in the case to make a resort to construction entirely proper.

1. The general and well-recognized principle is that the literal import of a statute should not be followed to an absurdity. Sams v. Sams' Adm'r, 85 Ky. 396, 3 S. W. 593; Bird v. Board, 95 Ky. 195, 24 S. W. 118; Feemster v. Anderson, 6 T. B. Mon. 538; Lau Ow Bew v. United States, 144 U. S. 59, 12 Sup. Ct. 517, 36 L. Ed. 340; Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

2. 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, and cases cited.

3. Cases within the reason, though not within the letter, of a remedial statute, are embraced in it. Watts v. Pettit's Heirs, 1 Bush, 157.

4. Every statute ought to be expounded, not according to its letter, but according to its meaning. The intention of the legislature is always the controlling principle, if it can be ascertained. Bailey v. Com., 11 Bush, 689.

5. It seems to the court that it would be an absurdity to say, in view of these suggestions, that the legislature intended that executions should not be levied on the return day of the writs, notwithstanding the fact that those writs were alive during that entire day. It seems to the court that it would be an absurd result to which we should be led by so construing the statute as to hold that it meant that the execution could not lawfully be *levied* on the return day, because under the statute a *sale* of the property levied on could not be made by reason of the fact that it was levied on the last day of its life. This conclusion would be inevitable, or else

we would be compelled to hold that, although a *levy* could be made under the execution on that day, there could not be a *sale* because the levy was made on the last day of the life of the writ, notwithstanding there might be such a sale if the levy was made on any previous day of its vitality. Unfortunately, the court of appeals of Kentucky has not passed upon this question, either since 1828 or since 1860, so far as the court has been able to find from the reported cases. In deciding the case before the court we must proceed upon the idea that the authorities universally hold that writs of fieri facias are executable, so far as levying the same are concerned, at all times up to the close of the return day, and that they do not become functus officio at the close of *the day before* the return day. This general principle being established as to the time of the expiration of the *life* of the writ, it would lead to an absurd result to say that a *sale* of property legally levied upon on the return day could not be made because the property had been taken (that is, levied upon) by the sheriff before the beginning of the return day. Such a construction would make a discrimination against levies made on the return day,—the last day of the life of the writ,—which would be unreasonable and absurd. The statute referred to nowhere provides that a *levy* is not good if made on the return day. It relates only to *sales* of property taken under the execution, and provides that there may be such sales notwithstanding the expiration of the life of the execution, so far as other objects are concerned. Its vigor is continued by the statute for the purpose of making the sale. If property may be taken or levied upon under the execution on the return day thereof, it would lead, as before stated, to an absurd result to hold that it could not be sold, after being thus lawfully taken under the writ, because the levy was made on the last instead of some earlier day of the writ's life. It seems to the court that there could be no reasonable grounds for prohibiting the sale under a levy made on the last day of the writ which would not as well apply to one made on any previous day. There being no reason for any discrimination in the premises as against levies upon one day rather than upon another, the court must hold that the legislature did not intend to provide that there might be a sale after the return day of property taken under a levy on one day any more than a sale of property taken under a levy on any other day.

The court does not mean to say that the case is free from difficulty. On the contrary, the court feels the stress of the argument that the words alluded to as having been omitted in the revision were so omitted for a material purpose. The court, however, does not yield to this argument, because, while literally it might appear to be sound, it does not enable the court to reach the sensible intention of the legislature, or any intelligent reason upon which it acted, otherwise than upon the lines suggested in this opinion. It seems to the court that if the *levy* in this case was valid, as all the authorities seem to indicate, there is no reason why the *sale* was not equally valid.

It results that the demurrer to the response must be overruled.

MEYER et al. v. RICHARDS.

(Circuit Court of Appeals, Third Circuit. November 4, 1901.)

APPEAL AND ERROR—REVIEW—INSTRUCTIONS.

Where the charge given by the court covers the entire case, and properly submits it to the jury, it is not reversible error to refuse further instructions requested.

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

John H. Backes and Michael Dunn, for plaintiffs in error.
Arthur J. Baldwin, for defendant in error.

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

ACHESON, Circuit Judge. Samuel W. Richards brought an action in the court below against Meyer Bros. to recover damages for a breach by them of a written contract, of which the following is a copy:

"Memorandum of agreement, made this 12th day of October, 1899, between Meyer Brothers, of Paterson, New Jersey, and Samuel W. Richards, of New York City, witnesseth: That said Meyer Brothers agree to employ said S. W. Richards as general manager of their department store in the city of Paterson, N. J., and said S. W. Richards accepts said employment, to begin October 12th, 1899, and to continue for the term of two years from that date, at the yearly salary of fifty-five hundred dollars ($5,500.00), to be paid in equal monthly installments of $458.33 per month, which said Meyer Brothers agree to pay. Said S. W. Richards agrees faithfully and diligently to discharge the duties assigned to him as such general manager by said Meyer Brothers. It is expressly understood and agreed, however, that either party may terminate this contract at the end of one year from its beginning by giving at least three months' notice in writing of the intention so to do.

S. W. Richards.
"Meyer Bros."

The plaintiff below recovered a verdict for $5,303.08, and judgment thereon was entered. This writ of error is brought by the defendants below to reverse that judgment.

It appeared that the plaintiff entered upon the discharge of his duties under the above contract on Monday, October 16th, and that he was discharged by the defendant at the end of two weeks, namely, on November 1st. The case turned upon the question (as to which the testimony of the parties conflicted) whether the discharge was for good cause. The assignments of error go to the refusal of the court to charge the jury in accordance with four special requests for instructions submitted on behalf of the defendants. The first of these requests was in the words following:

"If the jury believe that on October 31st, Leopold Meyer, one of the defendants, ordered the plaintiff to change their advertisement in the Paterson News of October 30th so as to advertise in the next issue of that paper the 'Alteration Sale,' then going on at the defendants' store, and the plaintiff disobeyed that order, the defendants were justified in dismissing him from their employ; and, if that was the cause, or one of the causes, for the discharge, the plaintiff cannot recover."

Now, while it is true that the court did not specifically answer this proposition, it was substantially affirmed in and by the general charge. Thus, in concluding a discussion of the alleged willful disobedience of an order to change the above-mentioned advertisement, the court said:

"On the other hand, a direct and deliberate disobedience of orders is a violation of the contract of service; and, when it is once made out under such circumstances as will justify the jury in believing it to be deliberate, then it warrants the conclusion that the other party is justified in discharging the one who is thus forgetful of his duty, and has so contravened the terms of his contract of service."

And again, at the close of the charge, the court said:

"I will only repeat that, in order to find a verdict for the plaintiff, you must be of the opinion that he was discharged without reasonable cause; that is, that there has been shown to you on the part of the plaintiff no incompetence for the special duties that he assumed, no specific, deliberate, and undoubted disobedience of orders, and no such conduct—no such acts—on his part from which you would be justified in inferring that he lacked those qualities which would be necessary to render him capable of performing the duties that he had undertaken."

The hypothetical statements upon which the other requests were based, namely, that the plaintiff's conduct towards the employés was coarse, abusive, and insulting, and humiliated them in the presence of the customers, and that he frequently neglected to perform the duties he had undertaken in respect to advertising, in our judgment, were not warranted by the evidence. But, finally, the general charge of the court was full and fair. The instructions given to the jury adequately covered the facts and law of the case, and the determination of the controlling issue of fact was left to the jury upon all the evidence. More than this the defendants had no right to demand, and no error was committed by the court in declining to answer the specific requests. Thus, in Railroad Co. v. Horst, 93 U. S. 291, 295, 23 L. Ed. 898, 899, the supreme court, speaking by Mr. Justice Swayne, said:

"It is the settled law in this 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 then 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."

We find no error in this record, and the judgment of the circuit court is therefore affirmed.

KALLMERTEN v. COWEN et al.

(Circuit Court of Appeals, Sixth Circuit. October 26, 1901.)

No. 892.

RAILROADS—ACCIDENT AT CROSSING—FAILURE TO LOOK.

A person who in broad daylight, without looking, and without any valid excuse for not looking, walked upon a railroad crossing with which he was familiar, and was killed by a passing train, when, if he had looked, he could have seen the train for several hundred feet before he

reached the crossing, was guilty of contributory negligence which precludes a recovery for his death.

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

H. E. Bell, for plaintiff in error.

J. H. Collins, for defendants in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

PER CURIAM. Conrad Kallmerten was killed at a point where one of the streets of Mansfield, Ohio, is crossed obliquely by a switching track of the railroad company. The court below, on the conclusion of the plaintiff's evidence, instructed the jury to find for the defendant by reason of the contributory negligence of the deceased, and this is the only error relied upon. The judgment must be affirmed. The accident occurred in broad daylight. The deceased was familiar with the crossing. He was walking in the street, and could have seen the approaching cars for several hundred feet before he reached the crossing, if he had looked. The evidence was conclusive that he did not look before going on the track, and no legal excuse appears which would justify or excuse his want of attention to his surroundings.

Judgment affirmed.

MOON-ANCHOR CONSOL. GOLD MINES, Limited, v. HOPKINS.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

No. 1,479.

1. APPEAL AND ERROR—EVIDENCE TO SUSTAIN VERDICT — GROUNDS EXCLUDED BY TRIAL COURT.

A verdict cannot be sustained upon grounds which the trial court explicitly excluded from the consideration of the jury by its rulings and instructions; nor can the appellee be heard to urge such grounds in the appellate court, where he took no exceptions to such rulings or instructions.

2. MASTER AND SERVANT—UNSAFE PLACE TO WORK—ASSUMED RISK.

The general rule in respect to the duty of a master to provide his servants with a reasonably safe place in which to work cannot be applied to a case where a servant when injured is engaged in performing such duty of the master, by making safe a place which has become dangerous during the progress of the work, or from the manner in which the work was done. In such case the relation between the master and servant is changed, and the servant assumes the risk incident to the dangerous condition of the place, as one of the hazards of the employment, if he knows of it, or should know of it in the exercise of ordinary care and observation; and in an action for his injury it is immaterial whether the place originally became dangerous through the negligence of the master or not.[1]

3. SAME—ACTION FOR DEATH OF SERVANT.

Defendant was engaged in excavating a chamber in its mine for a pump house about 30 by 50 feet in size, and plaintiff's son was employed in operating a car for removing the loose rock taken out to the elevating shaft. When he had been so employed about 4 weeks, and the room

[1] Assumption of risk incident to employment, see note to Railroad Co. v. Hennessey, 38 C. C. A. 314.

had been excavated to the required size, except in height, a pillar left to support the roof was removed; and large quantities of rock fell, and continued to fall at intervals thereafter, rendering the room unsafe to work in. Defendant then commenced timbering next to the entrance, removing the fallen rock as the work progressed; the men being supplied with long hooks to enable them to pull out the rock while remaining under the protecting timbers. They were warned by the foreman not to go beyond the timbers. Plaintiff's son, while so working with others 10 days after such work commenced, and while under the timbers, was killed by a piece of rock which fell outside the timbers, but, striking on a pile of rock, was deflected under them. The deceased was 20 years old, but was not an experienced miner. *Held*, that there was nothing in such facts to charge defendant with a failure to exercise reasonable care and precaution to render the place as safe as the nature of the work would permit, but that the cause of the death was one of the dangers of which deceased must have known, and of which he assumed the risk, as one of the hazards of the employment.

Thayer, Circuit Judge, dissenting.

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

This suit was instituted by Mary A. Hopkins, the defendant in error, against the Moon-Anchor Consolidated Gold Mines, Limited, plaintiff in error, to recover damages under the statute of Colorado for the death of her son Phineas Hopkins, alleged to have been caused by the wrongful act of the defendant. It is charged that in March, 1899, the defendant, a mining corporation, was engaged in excavating a pumping station or chamber at the sixth level of its mine, in ground liable to cave in unless supported by proper timbers; that deceased was working for defendant in the capacity of a trammer (that is, operating a car for the purpose of carrying away the loose rock and débris that might result from the excavating processes, along the drift to the elevated shaft of the mine); that while so engaged he was struck by loose and falling rock from overhead and instantly killed. The specific negligence charged against defendant corporation is that it knowingly failed and omitted to properly secure or timber the roof of the excavation so as to make it safe for employés working under it. This alleged negligence was denied by defendant, and further defenses were interposed: (1) That the risks and dangers which caused the death of plaintiff's son were necessarily incident to his employment, and were assumed by him; (2) that the station in question was at the time of his injury and death undergoing necessary repairs, and that all dangers incident to the place of work were obvious and known to him. The plaintiff at the trial introduced her evidence, and at its conclusion defendant moved the court to direct a verdict in its favor. The court declined to do so, and defendant, after saving proper exceptions, elected to introduce no evidence, but to stand on the case made by plaintiff. There were a verdict and judgment for plaintiff. Numerous errors were assigned, but the one chiefly relied on in argument, and which alone needs consideration at our hands, is that the court erred in not directing a verdict for the defendant.

O. L. Dines (Tyson S. Dines and Elmer E. Whitted, on the brief), for plaintiff in error.

W. O. Temple, F. P. Crews, and B. F. Montgomery, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The only question to be answered on this writ of error is whether there was any substantial evidence to support the verdict as rendered.

The uncontradicted facts of the case are substantially as follows: The deceased, although a minor, had passed his twentieth year, and was in full possession of well-developed faculties of body and mind. He had been at work as a trammer at the sixth level of defendant's mine for a period of four weeks or more, during which time defendant had been engaged in excavating the pumping station in question. He had witnessed and participated in the work from the beginning. During this time the narrow drift which run out from the shaft had been widened and extended so as to constitute a room of about 30 feet by 50 feet in dimensions. Prior to March 18, 1899, the work of excavating the pump station had progressed so far that it had then nearly reached the lateral dimensions intended for it, but had not been excavated to the height required. Occasionally during the progress of this excavation prior to March 18th rock had fallen from the roof, but there had been no substantial caving. During the progress of the work a supporting pillar of earth and rock, 8 or 10 feet in dimensions, had been left to support the roof of the station. On March 18th this pillar was cut or shot out. This occasioned a serious cave-in or dropping of a large amount of rock from the roof of the station to the floor, and necessarily stopped such further excavation as was necessary to complete the room as originally intended. Immediately thereafter all excavating work, except such as was necessary to permit timbers to be put in place, was stopped; and from that day until the day of the accident, which occurred 10 or 11 days thereafter, all work was directed to removing the fallen rock and débris, and timbering the roof of the station to prevent further falling of the same. The defendant began the work of timbering at that portion of the station nearest the shaft, and progressed outward towards the further end of the station. This was done to permit the workmen, after the first timbers had been put in place, to do the further work of removing the fallen and falling rock under the protection of supporting timbers. While this work was progressing, rock frequently fell from various parts of the roof of the station which remained untimbered. The work of removing the rock and débris and securing the roof with timbers continued uninterruptedly from March 18th to March 28th. During all this time plaintiff's son worked with the other men in the common purpose of cleaning out the chamber and putting it into a safe condition. The physical facts, as well as the undisputed testimony of the witnesses, in our opinion, clearly show that he was fully aware of the changed situation resulting from the cave-in of March 18th and of the character of the work and the dangers incident to it which ensued thereafter. The defendant on or before March 28th had provided hooks with long iron handles to be used by the workmen in pulling rock which had fallen outside of the screening of the timbers back underneath the same. On the morning of March 29th the midnight shift, as it was called, including the deceased, came on duty, and went down to the station to work. They were shown the hooks which had been provided, and told not to go beyond that portion of the station over which the timbers had been placed; the foreman designating the same as the "dead line." The deceased went to a point in the station under the

timbers, safely inside the dead line. He had a rope in his hand, and had just made a remark to the effect that he would lasso some of the loose rock lying outside, when a large rock fell from the roof of the station just outside the timbering, to the ground below, struck on a pile of rock formed by a cave-in of the night before, was deflected under the timbers and crushed the deceased, causing his death. A critical reading of all the evidence discloses no substantial fault or want of due care on the part of the defendant in conducting the work after the cave-in of March 18th. The trial court ruled out all evidence tending to show negligence in the manner of excavating the chamber prior to March 18th; but notwithstanding such ruling the facts and circumstances suggested by questions propounded to the witnesses, and appearing in the description of the locus in quo, tended to show that the defendant had not employed ordinary care in the excavation of the station prior to March 18th. Excavating so large a cavity without supporting the roof otherwise than by leaving one pillar of earth and rock, and subsequently cutting out that pillar without making adequate provision to prevent a cave-in, were circumstances which might have justified a recovery on the ground of negligence if any one had been injured by the cave-in of March 18th. It is upon evidence of this character, unavoidably permeating the record, although ruled out as incompetent by the court, that plaintiff's counsel rely in argument and brief to establish the requisite negligence on the part of the defendant. Without pointing out any substantial acts of negligence—any want of ordinary care—in the conduct of the work in hand after March 18th, counsel for plaintiff say in their brief and argument:

"It is true that the sole question of negligence submitted to the jury by the instructions of the court was whether the defendant company, after the cave-in of March 18th, proceeded with reasonable diligence, and as a reasonably careful person would have done under the circumstances, to timber the station for the purpose of making it as safe as it reasonably could be made under the circumstances. But the negligence of the defendant in suffering its premises to become dangerous is a factor which is conspicuous in the record in this case. It was an element which the jury doubtless did consider, and which they had a right to consider, notwithstanding the court's instructions, and we have a right to rely upon this fact in support of the verdict."

For two satisfactory reasons, we cannot agree with counsel. In the first place, the case was not tried on any such theory and defendant had no opportunity to meet any such issue, and no such issue was in point of fact tried. The learned judge who sat at the trial of the case charged the jury as follows:

"There is no testimony in this case showing that the defendant was negligent in making the original excavation in the manner in which it did. * * * [All testimony to that effect having been ruled out by the court.] That question, however, could not affect the question of the liability of the defendant, as it is clearly shown by the evidence that the original excavation was not the proximate cause of the injury, and it could not be held to be liable in this case even if in that portion of the work it had been negligent. On the 18th of March, several days before this accident occurred, several tons of rock fell from the roof of the excavation, thereby demonstrating that the premises were dangerous; and these men were engaged at the time of this accident in endeavoring to make a dangerous place safe. The

question, therefore, is whether or not the defendant used ordinary care in providing a reasonably safe working place for the deceased, under the circumstances as disclosed by the evidence. In other words, if you believe from the evidence that, after the cave-in on the 18th of March, the defendant, with reasonable diligence, and in a manner such as a reasonably careful person would have pursued under all the circumstances, proceeded to timber the station for the purpose of putting the station in a condition as safe as it reasonably could be put in under all the circumstances, and that the deceased, Phineas Hopkins, knew, or by the exercise of reasonable care could have learned, the purpose of the work, then you are instructed that he must be held to have assumed the increased hazards incident to putting the station in a reasonably safe condition, of which he knew, or of which one of his age, intelligence, and experience could have learned by the exercise of reasonable diligence."

During the progress of the trial plaintiff's counsel propounded questions to several witnesses relating to the proper method of excavating the chamber originally. The following question propounded to witness King is a fair sample:

"Q. Now, Mr. King, you may tell the jury whether or not, in your opinion, based upon your observation and experience as a practical timberman, this excavation could have been secured by timbering as the work progressed so as to have avoided the cave-in and the danger to the employés."

To this question, and all others of similar character, defendant's counsel objected, and the objections were sustained by the court.

From the charge and rulings just referred to, the theory of the trial is apparent. The court refused to permit any inquiry into the method adopted in making the original excavation as a basis of the charge of negligence, and explicitly took from the jury any consideration of the facts attending the same. Plaintiff's counsel, according to the record, stood silent, taking no exceptions either to the charge or rulings, or otherwise dissenting therefrom. Instead of saving proper exceptions, submitting to an adverse verdict, and duly prosecuting a writ of error to test the correctness of the court's rulings, as, in the light of the uncontroverted facts, showing no culpable negligence after March 18th, they should have done, they resorted to the highly-improper and indefensible practice of undertaking to secure a verdict in contravention of the law as laid down by the court. Not only so, but they boldly avow in their argument and brief before us, as already seen, that, notwithstanding the instructions of the court, the jury had a right to disregard them, and to consider facts explicitly taken from them by the court. They practically concede that they must rely upon the suggestions of facts so excluded by the trial court, if the verdict and judgment below are to be sustained. In other words, they propose to try in this court a case that was not tried below, and to try it, not on the record as made, but on a record counsel say would have been made if they had had their own way,—not on evidence duly taken and preserved, but on evidence not taken or preserved; not on exceptions duly taken or assignments of error properly filed, but on mere suggestions of error now for the first time made by them. The bare statement of the proposition condemns it as revolutionary and dangerous, and, if there were nothing else to justify our judgment, we would not hesitate to say that we cannot, on the record now

before us, give any consideration to the supposed facts showing negligence in the original excavation of the chamber in question. But, as the question relating to the competency of such evidence was fully argued by counsel on both sides, we have deemed it best to express our views concerning it, for the guidance of the trial court at the next trial.

We fully agree with the court in its holding that the method of making the original excavation was not the proximate cause of the injury to plaintiff's son. By "proximate cause" we mean that moving or actuating cause which in the natural and orderly sequence of events, and without the intervention of another, new, sufficient, and responsible cause, produces a given result. In our opinion, a new and adequate cause of the death in question arose after the original excavation was made. It consisted of the risks and hazards attending work in a dangerous place,—not one that had theretofore been dangerous, but one which by reason of the exigency of the occasion had become peculiarly hazardous and risky, and one which imperatively needed immediate attention to render it safe. The defendant was required, on account of the catastrophe of the 18th, to proceed immediately to make a place which had become dangerous, reasonably safe. Plaintiff's son voluntarily entered upon this new work. New relations arose between him and his employer, whereby the duties and obligations of the employer towards him had materially changed. In Finalyson v. Milling Co., 14 C. C. A. 492, 67 Fed. 507, this court had under consideration a similar question. That was a case where a miner was killed by a mass of earth falling upon him. This court, by Judge Sanborn, there said:

"It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the servant may perform his service. * * * But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and well-known dangers of such place, and by his acceptance of the employment the servant necessarily assumes them."

This court, also, in an opinion delivered by Judge Thayer in the case of Railway Co. v. Jackson, 12 C. C. A. 507, 65 Fed. 48, after enunciating the general rule of duty of a master to provide a reasonably safe place for his servants to work, says:

"It frequently happens that men are employed to tear down buildings or other structures, or to repair them after they have become insecure, or it may be that the work undertaken by the employé is of a kind that is calculated to render the premises or place of performance, for the time being, to some extent insecure." "In cases such as these the servant undoubtedly assumes the increased hazard growing out of the defective or insecure con-

dition of the place where he is required to exercise his calling, and the doctrine above stated cannot be properly applied."

In the case of Railway Co. v. Brown, 20 C. C. A. 147, 73 Fed. 970, in the circuit court of appeals for the Seventh circuit, a similar case was under consideration. It is there said:

"There is a duty on the part of a master to provide his servants a safe place in which to work, but manifestly that principle is not applicable to a case like this, where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done."

The foregoing decisions demonstrate that the measure of duty and obligation of a master to his servant, when the work voluntarily undertaken by the servant consists in making a dangerous place safe, is materially changed from that prevailing under the general rule. It may be that negligence in making the original excavation occasioned the new risks and hazards to which plaintiff's son voluntarily subjected himself, but it cannot, in our opinion, be true that the first-mentioned negligence, remote not only in time, but in connection with the injury, was the actuating cause, when it appears that the deceased of his own free will determined to cope with these risks and hazards, and, for a price satisfactory to him, assumed the liability incident to them. In this, his own voluntary conduct, is found the intervening proximate and responsible cause of his injury. As already observed, no substantial evidence is found in the record tending to show any want of reasonable precaution or care on the part of defendant in the performance of the difficult task rendered necessary by the casualty of the 18th of March. Indeed, ingenious counsel have suggested no expedients which might have been resorted to by defendant to have more safely done the same; but they practically rest their case, for negligence, upon the attempt to connect the injury with the original excavation. This having failed, nothing is left to show negligence on the part of defendant, such as to entitle plaintiff to recover; and under the authority of the cases of Finalyson v. Milling Co., Railway Co. v. Jackson, and Railway Co. v. Brown, supra, the deceased, by voluntarily engaging in the work of making a dangerous place safe, assumed all the risks attending it which were known to him, or which by the exercise of ordinary care and foresight might have been known to him.

An effort is made to justify sending the case to the jury on the issue whether the deceased knew, or by the exercise of ordinary care might have known, the dangers incident to the work in which he was engaged. The contention that he might have worked in this dangerous place from the 18th of March to the time of his injury on the 29th of March without being informed of the notorious and manifest danger attending the work, or that he might not have heard the plain and clear caution of the foreman, or the frequent comments of his co-employés about the danger, as well as other equally improbable hypotheses of counsel, are entitled to little consideration at our hands, when we bear in mind the great and undisputed facts already referred to. He was full grown, and possessed of the usual faculties of adult manhood. He had had at least four weeks' experience in and about the very place where he sustained his injury. He

had had at least one full week's experience, in connection with other workmen, in the performance of the dangerous work undertaken by him and them. He knew all of the physical facts constituting danger. He saw them with his eyes, and heard of them with his ears. There was nothing mysterious or scientific to prevent full appreciation on his part. Such being the facts, plaintiff will not be heard to say that deceased did not know or appreciate the danger. King v. Morgan (C. C. A.) 109 Fed. 446, and cases there cited. The trial court was so impressed with the conclusion last stated that it charged the jury as follows:

"As I view this testimony, it did not require an experienced miner to determine that this place was exceedingly dangerous. I think any man of ordinary intelligence, under the facts as disclosed in this case, could have ascertained that fact; and, indeed, in view of the precautions taken by the defendant company, not only by cautioning the men, but by providing these long iron hooks to be used by them in order that they might remain under the timbers, [they] could not help but know the dangerous character of the work in which they were all engaged."

The case is therefore one in which the deceased, without any protest or objection, entered upon and continued in an employment attended with well-known, constant, and continuing danger and risk to himself. The authorities hereinbefore cited and referred to abundantly show that he voluntarily assumed all such danger and risk. This conclusion renders it unnecessary to pass upon the question, elaborately argued by counsel, whether under the statutes of Kansas the mother could maintain this action without alleging in the complaint that her minor son was unmarried.

The judgment is reversed, and the cause remanded to the circuit court, with directions to grant a new trial.

THAYER, Circuit Judge. I am unable to concur in the foregoing opinion of the majority, and, in order to make the reasons for my dissent more clear, it is necessary to make a brief further reference to the facts as disclosed by the record: The work of excavating the pumping station, which is described in the majority opinion, had been in progress about six weeks prior to the accident; and during that period the plaintiff's son Phineas Hopkins had been employed merely as a trammer, or an ordinary laborer, to remove loose rock as it was broken down by the miners. He was not a practical miner when he was employed by the defendant company, but had been raised on a farm, and had worked for a time as a teamster in a lumber yard. Testimony was offered by the plaintiff and admitted by the trial court which established the following facts: The pumping station, which was 50 feet long, and from 30 to 35 feet wide and 10 or 12 feet high, was not excavated out of solid rock, but in rock which had fissures and fractures therein, through which water percolated. Nearly a month before the accident, and before the pumping station had been excavated to the full extent contemplated, and while the excavation was under way, the head timber man of the defendant company, King, after examining the premises, advised its general foreman, Sisk, that, owing to the slippery character of the ground, the excavation ought to be caught up with timbers before

it had proceeded too far, as otherwise it would be dangerous. The same foreman was advised by a practical miner by the name of Birdsall about the 8th of March that the excavation ought to be timbered before the work of excavation proceeded further, as it was very dangerous. These warnings were both disregarded, the work was allowed to proceed, and an excavation was made of the dimensions heretofore stated, leaving in the meantime nothing to support the roof but a single pillar of earth and rock about 8 by 10 feet in dimensions, which was left standing at the extreme end of the excavation immediately adjoining the shaft. Orders were eventually given to shoot out this support, and it was removed before any timbering was done; and when such order was given, or shortly prior thereto, the shift boss, Wilson, advised Sisk, the foreman, and Rickard, the superintendent of the mine, who gave the order, that the ground was dangerous, and that timbers ought to be put in before the support was removed, but this warning was also disregarded. Some rock fell out of place as the excavation progressed before it was fully completed, and shortly after the support at the end thereof was shot down a very large mass of rock fell; and it was not till then that any effort was made to support the roof of the excavation by timbers, although it was substantially completed, and nothing remained to be done but to dress down the side walls. The plaintiff below did offer to show by practical miners what was the proper way to make an excavation like this pumping station with reference to securing it overhead by timbers, but the first time a question to this effect was propounded to a witness (Birdsall) it was objected to by counsel for the defendant company as being a question "for the jury to decide," and the objection was sustained for this reason, whereupon the plaintiff, as the record shows, duly excepted. In view of the testimony aforesaid, the record, in my opinion, contains abundant evidence, which was admitted by the trial court as competent and relevant, to warrant the conclusion by any jury that the excavation was made in a negligent and reckless manner, which endangered the lives of all who were engaged in the work. This conclusion is reached substantially in the opinion of the majority. The majority opinion contains the statement that "the trial court ruled out all evidence tending to show negligence in the manner of excavating the chamber prior to March 18th." But this statement evidently refers to the action of the trial court in refusing to permit practical miners to testify how, according to the custom of miners, the excavation ought to have been timbered. The trial court in its charge remarked incidentally that it had ruled out testimony of that character, and the record supports that statement. It did not, however, exclude the testimony above alluded to, which was in itself sufficient to convince any jury that the excavation was carelessly made; and the trial court clearly erred in its charge when it made the remark quoted in the majority opinion: "There is no testimony in this case showing that the defendant was negligent in making the original excavation in the manner in which it did." That is an error, however, of which the defendant cannot be heard to complain, and from which it ought to derive no benefit. If it desired to show that

the excavation in question was properly made, it should have introduced evidence to that effect, as there was abundant proof to the contrary. Moreover, if, as the majority opinion suggests, the lower court tried the case on the theory that it was immaterial whether the pumping station had been excavated properly or improperly, and if that was an erroneous theory, the defendant ought not to complain because it induced the court to adopt that view by its objections to evidence, and by insisting that it was the correct view. It is very clear that the plaintiff's counsel did not bring the suit or prosecute it upon any such theory, and, even if the trial court did not admit all of the testimony which the plaintiff offered with a view of showing that the station was not excavated as it should have been, yet it did admit enough evidence to make it plainly apparent that the work in question was done carelessly, and that the excavation was rendered needlessly unsafe.

The principal proposition, however, which is enunciated in the majority opinion, is that the negligence of the defendant company, conceding it to have been negligent, was not the proximate cause of the injury. This proposition implies, of course, that, after having rendered the excavation needlessly unsafe by failing to shore up the roof with timbers as the work of excavation progressed, the defendant could then call upon its employés to make it safe, and, if they were hurt while so doing, assert that it was not its fault. I have not been able to conclude that this is either a sound or a just doctrine. The cases cited in its support are cases where the place was rendered unsafe without the master's fault, as where in doing some necessary work in a proper manner the place where the servant worked was rendered temporarily insecure. In the case in hand the place was needlessly made unsafe by the master's negligence. But, aside from this view, the question of proximate cause in a given case is ordinarily one for the jury. It is a question of fact to be determined in view of the circumstances of fact attending the particular occurrence, as was said by the supreme court in Railway Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256, and by this court in Southern Pac. Co. v. Yeargin, 109 Fed. 436, 439. Besides, in the case in hand nothing occurred after the defendant's negligence to break the natural sequence of events, and interpose some other efficient cause. The defendant made this place dangerous without any necessity for so doing, and immediately ordered its servants (the deceased among the number) to remedy the defect by shoring up the roof, that ought to have been shored up as the work progressed, and by removing the rock which had fallen from the roof onto the floor of the excavation. In the light of these facts, the only charge, as it would seem, that ought to be brought against the deceased, is that he was guilty of contributory negligence in consenting to work in such a place, rather than that his consenting to do the work which he was ordered to do was the sole efficient cause of his death. I am willing to concede that if the deceased had worked out in the open excavation, where stones were dropping from the roof, he would have been guilty of contributory negligence. But the proof shows incontestably that he was not so working; that he stood at the time he was

killed under a narrow covered way, protected overhead by timbers, where he was at least measurably safe, and was pulling in loose rock with an iron hook, and tramming them along the covered way to the shaft. He was a young man (not yet twenty-one years old), and inexperienced in mining; and he was in company with experienced miners, whose presence and example would naturally have much influence on the conduct of a young man of his age. Under these circumstances, no court ought to say, as a matter of law, that he was guilty of contributory negligence in being where he was at the time of his death. Whether he was thus guilty was, in my opinion, a question for the jury; and that question was decided by the jury in his favor, and, as I think, correctly decided. After a careful perusal of the testimony I am of opinion that the failure of the defendant company to shore up the excavation as the work progressed, thereby rendering it exceedingly dangerous, was the efficient cause of the death of the plaintiff's son; that the verdict was for the right party; that no errors were committed to the prejudice of the defendant of which it can be heard to complain; and that the judgment below ought to be affirmed.

SMITH v. CITY OF ST. PAUL.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

No. 1,489.

RES JUDICATA—CONCLUSIVENESS OF JUDGMENT—EFFECT OF INTERVENTION.

Under the statute of Minnesota (Gen. St. 1894, § 5273) which authorizes any person having an interest in the matter in litigation to intervene by joining the plaintiff in claiming what is sought by the complaint, "or by uniting with the defendant in resisting the claim of the plaintiff," or by demanding adversely to both parties, where taxpayers intervened in an action against a city, and resisted plaintiff's demand, obtaining a judgment dismissing the action on the merits, the city was a party to such judgment, and entitled to plead the same as an adjudication in bar of a second action against it on the same demand, although in its corporate capacity it was estopped to set up the defense pleaded by the interveners which prevailed in the former action.

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

Howard L. Smith and Marcellus M. Countryman, for plaintiff in error.

James E. Markham, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge. This was an action by Josephine M. Smith, the plaintiff in error, against the city of St. Paul, the defendant in error, to recover the sum of $2,650, which had been awarded to Howard L. Smith, the plaintiff's assignor, in certain condemnation proceedings, as compensation for a strip of land 30 feet wide lying on the easterly side and immediately in front of lots 7, 8, 9, and 10 of block 68 of West St. Paul, as said block was origin-

ally platted. At the date of the condemnation proceedings in question the strip of land in question was being used by the public as a street. To the complaint which was filed by the plaintiff the defendant city interposed an answer, which answer contained a plea that the plaintiff was barred of her right to recover by a former adjudication. The plaintiff demurred to the plea of res judicata, but it was overruled, whereupon a judgment was entered in favor of the city; the plaintiff having declined to plead further. The question to be determined by this court, therefore, is whether the defense of res judicata which was interposed by the city was properly sustained.

The plea aforesaid and the various records which were attached thereto as exhibits disclose substantially the following facts: Prior to the institution of the present action in the federal court, and on November 11, 1895, the plaintiff, Josephine M. Smith, as assignee of Howard L. Smith, filed a complaint, based on the very same demand which is sued upon in the present action, against the city of St. Paul, in the district court of Ramsey county, state of Minnesota. The city appeared and answered the complaint in the state court, alleging, in substance, that the condemnation proceedings under which the plaintiff claimed were utterly void, and that the award made therein in favor of the plaintiff's assignor was utterly void and made without jurisdiction. Thereafter two other persons, namely, Lucretia F. Sache and the St. Paul Trust Company, a corporation, intervened in the case, claiming the fund awarded in the condemnation proceedings, adversely to the plaintiff, and denying her right thereto. To these intervening complaints the plaintiff filed answers, and thereafter the case was duly tried in the district court of Ramsey county, Minn., resulting at first in a judgment in favor of the plaintiff against the city of St. Paul for the sum demanded by her, and in a further judgment that the interveners were not entitled to relief, and that their intervening complaints be dismissed. The interveners filed a motion for a new trial, but it was overruled; and from this order the interveners prosecuted an appeal to the supreme court of the state of Minnesota, which latter court adjudged that the order overruling the interveners' application for a new trial be affirmed, "but without prejudice, and with leave to appellants to apply to the court below to modify its conclusions of law and order for judgment in accordance with this opinion, or grant a new trial, if in its discretion it should see fit to do either." Smith v. City of St. Paul, 69 Minn. 276, 280, 72 N. W. 104, 210. On receipt of the mandate from the supreme court, the district court, on motion of the interveners, permitted them to amend their prayer for relief, and thereupon the district court modified its conclusions of law to the following effect: "That plaintiff is not entitled to any relief. Said interveners are entitled to judgment that said plaintiff take nothing by this action, and for a dismissal thereof on the merits." A judgment was entered in accordance with this order, from which no appeal has been taken. This latter judgment was entered prior to the institution of the case at bar.

The foregoing facts are disclosed by the defendant's plea of res

judicata, and, as a matter of course, were confessed by the demurrer. But as the opinion of the supreme court of the state of Minnesota was made an exhibit to the defendant's plea, and formed a part thereof, it will be proper to refer briefly to some of the facts recited in the opinion of that court on which its judgment was based. When the city of St. Paul sought to condemn the strip of land in controversy for street purposes, it was in use by the public as a street, and bounded block 68 of West St. Paul on the east. The strip was shown on the recorded plat of block 68 as a street, but the parties who filed said plat had no title thereto. In reality the strip of land in question belonged to a man by the name of Bell, who owned a considerable tract east of block 68, and had platted said tract as "Bell's Addition to West St. Paul." Bell's plat, as filed, did not include the 30-foot strip, however; and, in ignorance of his ownership of the same, he donated another strip 40 feet wide as a street, which lay immediately to the east of the 30-foot strip, which donation or dedication was shown by his plat. On discovering his ownership of the 30-foot strip, Bell filed an additional plat, which embraced both the 30-foot strip and the 40-foot strip, terming the same "Bell's Second Addition to West St. Paul." Subsequently one Rothhausen, who owned block 68, acquired title from Bell to the 30-foot strip in front of block 68. Thereafter Rothhausen conveyed lot 7 of block 68 to Lucretia F. Barrett, who has since become Lucretia F. Sache, one of the interveners, describing the lot so conveyed by reference to the recorded plat of block 68 in such a way as to estop himself and those who are privy with him in estate from denying that said lot 7 fronted on a public street 30 feet wide, as was shown by the recorded plat of block 68. Subsequently Rothhausen conveyed lots 8, 9, and 10 of block 68, except the westerly 40 feet of lots 9 and 10, to Peter Hansen, and Hansen's title thereto subsequently became well vested in the St. Paul Trust Company. While Hansen was the owner of lots 8, 9, and 10, he brought an action of ejectment against the city of St. Paul to recover the 30-foot strip of land lying in front of block 68, which was then used as a street, and on the trial of said action recovered a judgment against the city for the possession of the land sued for. After the recovery of this judgment in ejectment the city appears to have instituted proceedings to condemn the strip of land in controversy, and in the course of such proceedings the sum of $2,650 was awarded to Howard L. Smith, the plaintiff's assignor, inasmuch as he claimed to have succeeded to all of Hansen's right, title, and interest in the 30-foot strip of land which Hansen had recovered in the ejectment suit. The supreme court of the state of Minnesota, while conceding, apparently, that the city of St. Paul was estopped by the judgment in the ejectment suit from claiming that the 30-foot strip of land in question was a public street, nevertheless held that no such estoppel existed as against the interveners, Lucretia F. Sache and the St. Paul Trust Company; that they, not having been parties to the suit in ejectment, were entitled to assert that Rothhausen, by his conveyance to one of the interveners of lot 7 of block 68, and by the references therein made to the recorded plat of block 68 of West St. Paul, ratified said plat, and

dedicated the 30-foot strip as a public street; that all persons in privity with him, including Hansen and the plaintiff, were bound by such ratification and dedication; that the interveners had a right to use the 30-foot strip as a public street; that their rights as abutting proprietors were distinct and different from the rights of the general public; and that, as taxpayers who were not estopped by the judgment in the ejectment suit against the city, they had the right to object to the payment of the award by the city. Inasmuch, however, as the interveners had failed to suggest to the trial court the species of relief to which the supreme court held them to be entitled, and had prayed for different relief, the supreme court affirmed the order overruling their motion for a new trial, without prejudice, and gave the interveners leave to apply to the court below, in the manner heretofore stated, to modify its previous conclusions, and to enter judgment in accordance with the views of the court of last resort.

The question before this court is not whether any of the proceedings had in the former action were irregular, or whether the judgment rendered in that case was erroneous. But the question to be determined upon the present record is whether there was in fact in the former action an adjudication upon the merits of the plaintiff's claim of which the defendant city can avail itself as a bar; it being conceded that it was the same claim which is sued upon in the case in hand. The principal contention on the part of the learned counsel for the plaintiff in error seems to be that the judgment which is invoked as a defense was a judgment upon an issue between the plaintiff, on the one hand, and the interveners, on the other; that the city was in no sense a party to this controversy, and for that reason cannot invoke the former judgment as a bar to the present action. We are unable, however, to regard this view as tenable. The statutes of the state of Minnesota provide (Gen. St. 1894, § 5273) that:

"Any person who has an interest in the matter in litigation, in the success of either of the parties to the action, or against either or both, may become a party to any action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claim of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant, or either of them, either before or after issue has been joined in the cause, and before the trial commences."

The supreme court of the state seems to have been of opinion that under the terms of this statute the interveners had the right to unite with the city in making a defense; that they had an immediate interest in the controversy between the plaintiff and the city, since as taxpayers they would sustain a personal loss if a judgment was recovered against the city, to be paid out of its general funds; and that because of this personal or individual interest they had the right to make a defense which but for their presence as parties the city, acting merely as trustee for the general public, could not have made. In other words, the action was treated by the supreme court of the state as being a suit against the interveners indirectly, although it was brought against the city as sole defendant; and it was adjudged that the former were privileged to show the invalidity of

the award, and to demand that no judgment be entered against the city thereon, and that it go hence discharged without day. The district court acted upon this theory after the receipt of the mandate, and rendered judgment "that said plaintiff take nothing by this action against said defendant." Under these circumstances, it is impossible to admit that the defendant city was not a party to the issue which was tried, and that it is for that reason precluded from pleading the former judgment as a defense. All that the plaintiff sought in the former action was a judgment against the city on the award. It was this issue which was eventually tried, and the court found and determined "that plaintiff is not entitled to any relief." In view of the fact, then, that the highest court of the state held that the interveners had the right under the laws of the state to join as defendants, and to insist, for their own protection as taxpayers, that the city should not be made to pay a groundless claim, it follows, we think, that the judgment in favor of the city which was eventually rendered must be a complete bar to the present action. If such is not the result, the action which was taken by the interveners was vain and useless, and did not accomplish the object which they had in view, namely, the protection of the general funds of the city from an unjust claim.

In accordance with these views, the judgment below is affirmed.

PORTLAND GOLD MIN. CO. v. FLAHERTY.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

No. 1,501.

1. EVIDENCE—SUFFICIENCY—INFERENCES FROM FACTS PROVED.

Plaintiff, in an action to recover for an injury received in defendant's mine, alleged that, as he and another employé were climbing up the crossing stulls in an up-raise, the other man, who was above, was overcome by powder smoke, gas, and foul air, and fell, striking plaintiff, and causing him to fall and receive the injury complained of. The evidence showed that the up-raise was impregnated with foul air, the effect of which was to greatly weaken and debilitate any one inhaling it, and that this weakening and debility often came on very suddenly; that the other man was climbing ahead of plaintiff, and was an experienced miner, familiar with climbing stulls in up-raises; that something struck plaintiff, and caused him to fall; and that both men were found immediately after at the foot of the up-raise, one dead, and the other severely injured. *Held*, that it was a reasonable inference from such evidence that the injury resulted from the cause and in the manner alleged, which justified the submission of the question to the jury, and that such inference was sufficient to sustain a verdict so finding, rendered under proper instructions.

2. MASTER AND SERVANT—INJURY OF SERVANT—UNSAFE PLACE TO WORK.

A mining company violated its duty in respect to providing its employés with a reasonably safe place in which to work, where, through its foreman, it directed employés to go into an up-raise known to be filled with gas and foul air, and is liable for an injury resulting from the effect of such foul air to a workman who was not guilty of contributory negligence.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Plaintiff, who was inexperienced in mining, was employed by defendant as a "trammer," to load and unload and wheel away dirt and rock

in its mine. When he had been working in the mine three days, he was sent, with another workman, into an up-raise, known by the foreman to be filled with gas and foul air, to clear away dirt and rock. While climbing up, the other workman was overcome by the foul air, and fell, causing plaintiff to fall and receive severe injury. Plaintiff had been in the up-raise the day before, and knew that the air was bad, but also that there was a ventilating apparatus, which, when properly operated, clarified it so that it was not dangerous to work there. *Held*, that such facts shown by the evidence were sufficient to support a finding by a jury that plaintiff was not guilty of contributory negligence in obeying the orders of the foreman to go into the up-raise.

4. APPEAL—REVIEW—HARMLESS ERROR.
A statement in the charge, in an action by a servant for a personal injury, that "it was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work," while technically inaccurate, because it failed to limit the requirement to a "reasonably" safe place, did not constitute prejudicial error, where it was so explained by the context that the jury could not have been misled, and especially where defendant practically admitted that the place where plaintiff received his injury was not reasonably safe, and denied having sent him there for that reason.

5. SAME—WAIVER OF ERROR—REMARKS OF COUNSEL.
Counsel cannot necessitate a new trial by their own failure to interpose seasonable objection to remarks of adverse counsel; and where, on the first objection, the court excluded the objectionable remarks from the consideration of the jury, there was no reversible error.

6. SAME—ADMISSION OF EVIDENCE—HARMLESS ERROR.
It is harmless error to permit a question to be answered which calls for the conclusion of the witness, where the conclusion stated was conclusively established by other evidence introduced by the adverse party.

7. MASTER AND SERVANT—KNOWLEDGE OF DANGERS OF EMPLOYMENT—REPRESENTATIONS BY SERVANT.
A statement by an employé, when he was hired, that he was a miner, will not impute to him knowledge of dangers in a mine arising from the gross negligence of the master, but only those of a mine conducted with ordinary care and prudence.

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

This action was instituted by Anthony Flaherty, the defendant in error, against the Portland Gold Mining Company, plaintiff in error, to recover damages for injuries alleged to have been sustained by him while engaged in its service. The particular charge is that the defendant directed plaintiff to go up a certain up-raise, called the Four Queens up-raise, rising from the fourth level of its mine, to clear off rock and dirt which had fallen upon the lagging and stulls, at a time when the up-raise, by reason of an accumulation of powder smoke, gas, and foul air, was not a reasonably safe place, or in a reasonably safe condition, for any one to work in. It is alleged that one Harrington, another employé of defendant company, was directed to accompany the plaintiff, and that Harrington made the ascent, climbing up the crossing stulls in the up-raise, a little in advance of plaintiff, and that, when they had reached a point about 100 feet above the level from which they started, Harrington, suddenly overcome by the powder smoke, gas, and foul air, fell, and in falling struck plaintiff, and caused him to fall to the bottom of the up-raise, and to be greatly injured. Two defenses are interposed: (1) A general denial; (2) contributory negligence. There was a verdict and judgment for plaintiff, from which defendant prosecuted a writ of error to this court.

James L. Blair (James A. Seddon and Robert A. Holland, Jr., on the brief), for plaintiff in error.

R. S. Morrison (Scott Ashton, on the brief), for defendant in

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The first assignment of error is that the trial court erred in not directing a verdict in favor of the defendant. Learned counsel for defendant contend that such direction should have been given for two reasons: (1) Because there is no evidence that any negligence on the part of the defendant caused the injury to plaintiff; (2) because plaintiff assumed all risk attending and doing the work required of him.

In support of the first proposition, it is earnestly contended that no evidence is found in the record tending to show either that Harrington was overcome by powder smoke, gas, or foul air, or that plaintiff was struck by the falling body of Harrington, and thereby precipitated to the bottom, in the particular way and manner charged in the complaint; that, on the other hand, the verdict was based solely upon an unwarrantable conjecture by the jury without any substantial evidence to support it. If such were the case, it may readily be conceded that the verdict cannot be sustained.

The trial court, after having directed the attention of the jury to the particular negligent acts alleged in the complaint, charged as follows:

"The plaintiff has based his case on that state of facts in his pleading, and he is held to prove those facts. If he was injured in any other way, if Harrington was not overcome by powder smoke, gas, or fell (when the plaintiff fell) from some other means, and in his fall carried the plaintiff down, the plaintiff cannot recover. If Harrington did not strike the plaintiff at all, and did not cause the plaintiff to fall, the plaintiff cannot recover. That would be permitting the plaintiff to recover on a case he had not made; that he had not warned the defendant to meet."

From the foregoing it appears that the issue was clearly presented to the jury, and its verdict is responsive, to the effect that Harrington was overcome by powder smoke, gas, or foul air, and that as a consequence he fell, and in his fall struck plaintiff, and precipitated him to the bottom of the up-raise.

Is there any substantial evidence to support these findings? We do not mean direct evidence of a participant in the unfortunate event, or of an eyewitness necessarily, but is there any substantial evidence of any kind? Fair and reasonable inferences, drawn from facts and circumstances established by the proof, are always competent evidence, and, indeed, in many cases of disputed fact, furnish the most satisfactory solution. The record now before us, in our opinion, presents just such a case. There is abundant evidence that the up-raise in question was on June 8, 1899, when plaintiff was injured, impregnated with foul air, that its effect was to greatly weaken and debilitate any one inhaling it, and that this weakening and debility often came on very suddenly. In fact, the defendant's own witnesses satisfactorily prove that the air in the up-raise was so impure and deleterious that two men had been overcome by it on the morning of June 8th, just before plaintiff made the

ascent; that they became sick and unable to work longer; and that defendant company then concluded to do no more work on the up-raise until a certain drift could be completed so as to introduce air into it. On the question whether Harrington fell as a result of the impure air, as charged in plaintiff's complaint, the jury had before it the foregoing facts, well established by satisfactory evidence. The jury also had before it the undisputed fact that Harrington was an old and experienced miner, and probably so familiar with climbing up the stulls of up-raises as to be reasonably sure-footed and secure. From these facts the inference is not only permissible, but, in our opinion, altogether reasonable, that Harrington fell as a direct result of the weakening effect of the very bad and impure air of the up-raise. The jury was therefore fully warranted in finding, in response to the issue submitted to it by the court, that Harrington's fall was occasioned by the impure air in the up-raise, as alleged in the complaint.

We are also of opinion that the record shows sufficient evidence from which the jury could reasonably infer that plaintiff was struck by the falling body of Harrington, and thereby precipitated to the bottom. The undisputed facts disclosed in the proof on this point are that Harrington, in making the ascent, was necessarily immediately above the plaintiff, and five or six feet only in advance of him; that Harrington fell; that something struck plaintiff; and that the two men were found immediately thereafter at the bottom of the up-raise, Harrington dead, and plaintiff severely injured.

A fair inference to be drawn from these facts, in the absence of any evidence showing any other cause for plaintiff's fall, is that he was struck by Harrington's body, and thereby caused to fall to the bottom of the up-raise. We cannot agree with counsel for defendant that there is any ground for a reasonable inference that Harrington fell as a result of insecure footing or slipping on the stulls, or that plaintiff's fall was occasioned by the dropping of rock upon him. It would certainly be altogether conjectural to say that Harrington fell either as a result of slipping or insecure footing, or that some stone fell and hit the plaintiff, and caused him to drop to the bottom of the up-raise. There is no evidence tending to show that Harrington slipped, or that any stone fell, and therefore no ground to warrant an inference that plaintiff was injured thereby; whereas there are facts, fully established in evidence, that justify the inference that plaintiff fell as charged in the complaint.

The evidence, as already pointed out, substantially shows that the defendant did not provide a reasonably safe place for its servants to work in. Indeed, this is practically conceded. The stress of the defense is that the mining company did not direct plaintiff and Harrington to go into the up-raise to clear off the rock and dirt at all, but did direct them to go to the bottom of the up-raise, and take up and wheel away a large quantity of dirt, which in the progress of the recent drilling above had fallen and collected there. Ray, the foreman, gave the directions in the presence and hearing of De Camp, the superintendent of the company. Both his and De Camp's version is that the men were directed to go to the foot of

the up-raise, and take up and wheel away the dirt, and were cautioned under no circumstances to go aloft, because of the presence of bad air in the up-raise.

The fact fully recognized by them, that the up-raise was filled with bad air, was a reason assigned by them for confining the work to be done by the plaintiff and Harrington to wheeling away the dirt from the bottom. Plaintiff and several other witnesses testified positively that the foreman directed plaintiff and Harrington to go up the up-raise, and clean off the stulls and lagging, from the top to the bottom. The jury, under proper instructions, found this controverted issue in favor of the plaintiff. We are bound, therefore, to conclude from defendant's own evidence, not only that the place into which plaintiff was sent to work was a dangerous and unsafe place, but that defendant well knew it to be so, and we are bound to conclude from the verdict that the defendant ordered the plaintiff to do work in this dangerous place. It follows that in doing so the defendant did a wrongful and negligent act.

It is next contended that the court erred in not directing a verdict for defendant because the evidence conclusively shows that plaintiff well knew the dangerous condition of the up-raise, voluntarily entered upon the work there, and cannot recover for any injury sustained by him. We cannot agree to this proposition. It is undoubtedly true, and so axiomatic that it needs no citation of authorities to support it, that when a servant of mature understanding voluntarily and knowingly conforms to the direction of his master to perform work in a place rendered dangerous by the negligence of the master, and when the servant is fully aware of all the facts and circumstances constituting the danger occasioned by the negligence of the master, he himself is guilty of negligence contributing to any injury he may sustain while engaged in such work, and cannot recover from the master for such injury.

A brief reference to the admitted facts of the case, in our opinion, fails to bring the plaintiff within the principle just announced. The record shows that he was a man inexperienced in mining. The manner of giving his testimony indicates that he was an ignorant man. He was hired by the defendant only three days before the injury, and was hired, as Superintendent De Camp admits, to do the work of tramming; that is, simply to load and unload dirt and rock and wheel them away. This is the humblest kind of labor. He never had worked in a mine before. There is no evidence that he had any knowledge of underground mining operations, or any familiarity whatever with the properties or laws governing the action and effect of powder smoke, gas, or bad air, or any familiarity with the necessity for or manner of ventilating the mines. On the contrary, his inexperience and humble employment would tend to prove the contrary. It is true the evidence discloses that plaintiff on the day before his injury went up the up-raise to help Ferrens, another employé, to set up a machine for drilling purposes, and that he then noticed bad air, but he says: "It come all right after Ferrens [who was familiar with handling the machine and with the operation of compressed air] turned the air holes loose." It is also

true that plaintiff testified that, when he and Harrington got to the fourth level at the bottom of the up-raise, they sat around a little while, and that Harrington went up part way, and returned, saying: "It seemed a mean place to work up there; * * * that the air seemed bad." The evidence shows that they then waited about 15 or 20 minutes before undertaking to make the ascent, "to see," as plaintiff says, "if the place would clear up." Plaintiff testified that, as he was making the ascent, the air did not seem quite as bad as it was the day before. This, and evidence like this, is all the defendant relies upon to conclusively establish plaintiff's contributory negligence. The evidence shows that the mine was fully equipped with a circulatory system, consisting of a compressor at the top, with connecting air pipes going down to the lower levels of the mine, and back around to the fourth level, to reach the Four Queens up-raise, and that it extended to the top of that up-raise, with adjustable openings near the top and bottom, so as, when properly operated, to force the foul air down and clarify the up-raise. This was operated by a man in charge of the compressor at the top, and subject to the control of an experienced miner, and possibly others who might be familiar with its mechanism and operation in the Four Queens up-raise. Plaintiff, knowing, at least, as he says, that the proper operation of the air holes would clarify the up-raise, might reasonably expect that the men in control would do their duty, and operate the system so as to clarify the up-raise into which he had been ordered to work. He waited 15 or 20 minutes, expecting, doubtless, that the men in control would discharge their obvious duty.

In the light of these facts and others hereinbefore pointed out, we cannot say that the record conclusively shows that plaintiff had such knowledge of the facts and circumstances constituting danger and of the danger itself as to make him guilty of contributory negligence in entering upon the work as directed by the defendant. It is, in our opinion, an extremely conservative view to say that the facts and circumstances of the case render his knowledge of the danger uncertain and debatable. The issue was for the jury, and, after full and clear instruction by the court, it found against the defendant on the same. There being substantial evidence to support this finding, we cannot interfere with it.

Defendant next complains of the following portion of the court's charge to the jury, namely: "It was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work, so as not unreasonably to expose him to unnecessary danger in the doing of his work." Counsel contend that the court should have qualified the word "safe" as here employed by the adverb "reasonably," and, not having done so, it imposed the duty on the defendant of making the place absolutely safe, instead of reasonably safe, as the law only requires. Undoubtedly the criticism, technically speaking, is correct; but is this technical inaccuracy misleading? Does it affect the substantial merits of the case?

The court told the jury that the obligation resting on defendant was "to use ordinary care" to furnish a safe place so as not "un-

reasonably" to expose him to unnecessary danger. The liability of the defendant is here so carefully qualified by expressions denoting the requisite care that it is hardly conceivable that the jury could have been misled by the verbal omission. Moreover, the vice, if it be one, was cured by the immediately following context, namely: "This duty to use ordinary care, generally, is not equivalent to insurance. The defendant was in no sense an insurer of plaintiff's safety. Defendant had to use that care that a reasonably prudent man would use under similar circumstances." The charge, as a whole, on this point was, in our opinion, substantially correct.

Not only so, but the error, if any, was immaterial and unprejudicial. It already appears that defendant practically admitted at the trial that it did not furnish plaintiff a reasonably safe place to work in. As already observed, defendant made no issue of that kind, but contended that it never ordered plaintiff to work in the upraise, for the very reason that it was so filled with bad air as to be dangerous.

Defendant next contends that the verdict should be set aside and the cause remanded for another trial because of alleged misconduct of plaintiff's counsel in his closing argument in commenting upon the practice of taking affidavits of witnesses before the trial, and their influence upon the witnesses' testimony at the trial. Mr. Sausman, a witness for defendant, testified on cross-examination that he had made an affidavit with reference to the accident in question, and that the man who took his affidavit was in the employ of a guaranty and accident insurance company. In his closing argument counsel for plaintiff said:

"So soon as an accident happens, the man is turned over to the insurance department, and the way they do is this: They call up the men, every one that knows anything about it, and take affidavits not only before their attorney, but before the attorney of the insurance company, which steps into the shoes of the mining company. These affidavits are kept in store, and when you have a case ready for trial they turn to their witnesses, and are able to read them all those portions that are favorable, and can keep quiet all those portions that are not favorable; * * * and so this man, when this accident is referred to, has a mere reminiscence. All his life he pays for it, and we say the insurance company in this case should pay for that."

Counsel for defendant, so far as we can see from the record, waited until the close of the argument, when he said:

"I submit there is no evidence of insurance in this case. I object and except to this all through this argument. I except to all these references counsel has been making in his argument, with reference to insurance and insurance men, because there is no evidence in the case, and it has been expressly overruled, under objection, by the court."

Counsel for plaintiff responded:

"It has come out in the evidence that the affidavits to which I refer were taken before the agents of this insurance company."

Thereupon the court said:

"I do not care to hear arguments on that. I will exclude it from the jury. The argument is improper, even if the subject inadvertently came out in the evidence."

It may be conceded that this argument of counsel was improper, because it was not based upon any substantial evidence material to the cause; but what is to be done? Counsel for defendant, instead of seasonably interposing their objection, allowed the remarks to be made, and after the conclusion of the argument, as already seen, objected, and excepted to all the references which had been made to the subject throughout the lengthy argument. Counsel cannot necessitate a new trial by their own failure to interpose seasonable objections to remarks of adverse counsel. Argument in all cases should be confined to a legitimate discussion of the issues in the case on the evidence before the court, and it is the duty of the trial court in all cases, upon suggestion of unwarrantable departure, to immediately confine counsel to legitimate argument. In our opinion, this was done in the present case. The court acted, according to the record, immediately upon the first suggestion of counsel, and excluded from the jury any consideration of the argument objected to. There is no merit in this assignment of error.

There are two assignments of error challenging the correctness of the court's action in the admission of evidence offered by plaintiff. One was in permitting Ferrens, a witness called by plaintiff, and who had shown himself to be an experienced miner, to answer the following question: "Q. Was that dangerous employment [referring to the particular service required of plaintiff] for an inexperienced man on any account arising from foul air?" Defendant's counsel objected to this question because it was immaterial, irrelevant, and incompetent, and calls for a conclusion of the witness. The only one of these grounds of objection to which we can give any consideration is that the question calls for a conclusion. The other reasons assigned are so general as, under the established practice of this court, they cannot be considered.

It may be conceded that the question as put was technically improper, in that it called for a conclusion of the witness; but there was no prejudicial error in permitting the question to be asked, because the evidence for the defendant taken thereafter conclusively established that the service which plaintiff testified, and which the jury found, was required of him, was dangerous for any man, experienced or inexperienced. The other testimony alleged to have been objectionable, and to which exception was saved, consists of permitting witness Ray, called by the defendant, to answer the following cross-question put to him by plaintiff's counsel: "Q. How did it come that Flaherty was thrown down below the bulkhead, if rock would not come down?" It is sufficient to say concerning this that the connection in which the question appears renders it proper as a legitimate cross-examination of the witness.

It is next urged that the court erred in refusing to give certain specific instructions asked by the defendant. One was to the effect that if Flaherty, at the time of seeking employment, stated to the superintendent that he was a miner, "then he guarantied to the defendant that he was a miner, understood the business, and knew all the ordinary risks and dangers incident to the employment which he sought, and also all the dangers arising from the presence of

gas, foul air, and powder smoke." There was no error in refusing this instruction, because it satisfactorily appears from the superintendent's own testimony that Flaherty was hired to wheel and tram, and not to do the work of a general miner. According to the superintendent's own testimony, he knew that the work which Flaherty had formerly done (as detailed to him by plaintiff) was not mining. Moreover, the latter part of the instruction asked and refused contained an incorrect proposition of law. All that plaintiff could have guarantied by implication from the statement alleged to have been made by him that he was a miner was that he was familiar with all the usual dangers arising from the presence of such impurities in mines when conducted with ordinary care and prudence. The instruction requested was too broad. It imputed knowledge to plaintiff of all possible dangers, even those that might arise from gross negligence on the part of the owner. In the light of the undisputed facts, there was no error in refusing to give this instruction. The refusal by the trial court to give several other instructions requested by defendant is assigned for error, but we have not been favored in argument or brief with any particular discussion of them. This is probably because the principles involved in them were thoroughly argued by counsel on treating the propositions already fully considered. We have, however, carefully considered each and all of the instructions so refused, and find that, in so far as they embody correct propositions of law applicable to the facts of the case, they were fully covered by the general charge of the court. There was therefore no error in refusing to give them as requested.

We are unanimously of opinion that the verdict was for the right party, and that there is no substantial error found in the record of which the defendant can justly complain. The judgment must be affirmed.

McKENNA STEEL WORKING CO. v. LEWIS.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

No. 1,498.

1. MASTER AND SERVANT—INJURY OF SERVANT—UNSAFE PLACE TO WORK.
Plaintiff and three other workmen of defendant were engaged in transferring railroad rails from a car to the charger platform of a steel furnace. After pushing the car up abreast of the platform, which was six feet distant, they placed two skids, consisting of pieces of rails, from the car to the platform, and pushed the rails up such skids, two men standing at each end. The end of one of the skids, by reason of being insecurely fastened to the platform, slipped off, and a rail fell, striking plaintiff and breaking his leg. There was a shallow ditch or drain some six feet from the skid at which plaintiff was working, and parallel thereto, into which, as he claimed, he stepped and fell while attempting to avoid the falling rail. The ditch was plainly visible, and did not interfere with the work in pushing the rails up the skids, and no complaint had been made of it. *Held*, that it did not render the place to work unsafe, nor was defendant chargeable with negligence in permitting it to remain there which rendered it liable for the injury.

2. SAME—CONTRIBUTORY NEGLIGENCE.

Where it was the duty of plaintiff and his fellow workmen to adjust skids between a car and a platform upon which they were pushing railroad rails, and means were at hand by which such skids could have been made secure, but they were not securely fastened, as plaintiff knew, and by reason of the slipping of one of them a rail fell and he was injured, he was guilty of contributory negligence which precluded his recovery from the master for such injury, even though the latter was also negligent.

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

Amos H. Kagy and George Horn, for plaintiff in error.
Thomas A. Witten and Roland Hughes, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge. This is an action for personal injuries which was brought by Charles Lewis, the defendant in error, against the McKenna Steel Working Company, the plaintiff in error The record discloses the following facts: On the evening of September 8, 1898, the plaintiff and three other men were in the employ of the defendant company, and were engaged in moving old railroad iron from a place where it had been unloaded to what is known as the "charger platform" of the defendant's furnace, whence it was elevated and fed into the furnace. Rails to the number of about 15 or 18 were first loaded on a platform car. The car was then pushed along a railroad track until it was abreast of the charger platform, and about 6 feet distant therefrom. Two short skids, consisting of pieces of railroad iron, were then laid from the car to the charger platform, and along these skids the rails were pushed one at a time from the car to the charger platform; two of the men being at each end of the rail, one outside and one inside of each skid. As the party were pushing an iron rail along the skids in the manner aforesaid, one of the skids fell because the end resting on the charger platform was not properly secured, and by reason thereof the rail which was being moved fell, striking one of the plaintiff's legs and fracturing it.

In his complaint the plaintiff alleged that the defendant was guilty of negligence in two respects: First, that it failed to supply safe machinery with which to work; and, second, that it failed to provide a reasonably safe place in which to work. In support of the first of these claims he contended that the defendant should have fastened the ends of the skids where they rested on the charger platform so that they would not work off; and in support of the second claim he urged that the defendant had made a ditch or drain, or suffered one to form by the action of water, near one of the skids, into which he stepped and fell on the occasion of the accident in his effort to avoid the falling iron rail which he was assisting to move.

We are not concerned specially with the first of the above specifications of negligence, since the proof showed without contradic-

tion that the skids were put up and arranged by the men themselves, including the plaintiff, as each car was pushed up abreast of the charger platform to be unloaded; that it was their duty to see that the ends of the skids were made fast so that they would not fall, and that means were at hand or readily available to make them secure. If the plaintiff and his fellow workmen when they put up the skids, as it was their duty to do, did not see to it that they were made fast, it was their own fault, and they cannot charge the defendant with their own neglect. The trial court took substantially this view of the case, charging the jury that the plaintiff could not recover on account of any alleged negligence in fastening the skids to the charger platform; and in this respect its action was clearly right, or at least it cannot be made a subject of complaint in this court.

The issue, however, whether the defendant company was guilty of negligence in suffering the drain or ditch to remain in proximity to one of the skids, and whether that was a proximate cause of the injury, was submitted to the jury, and the point to be determined by this court is whether such action on the part of the trial court was justifiable. The evidence showed without contradiction that the alleged ditch ran parallel to one of the skids, that it was from five to six feet distant therefrom, and that it was used to drain waste water from the furnace. It ran from a cinder pile on the west side of the charger platform to the railroad track on which the push car was standing, being nothing more than a shallow depression in the cinders or ground along which some water flowed at times, and passed between the ties underneath the railroad track. The sides of this ditch were sloping, rather than perpendicular, and it appears to have been so far distant from the westernmost skid that it was not an obstruction in the way of the men when they were pushing rails along the skids to the charger platform. Moreover, no one had complained, so far as the record shows, that this drain rendered the work of pushing rails up the skids onto the charger platform dangerous, or that it increased the risks attending that work to any appreciable extent. It furthermore appeared (and this fact was not disputed) that, although the accident occurred about 8:40 p. m., yet the plaintiff had been at work at that place about two hours before he was hurt, and that electric arc lights were suspended outside of the furnace, as well as within, and that they lit up the yard where the plaintiff was working so as to render the drain and other objects in the yard plainly visible. Under these circumstances, we are at a loss to perceive how the conduct of the defendant in permitting this drain to form or exist as it did can be pronounced negligent. It was simply one of those drains which are to be found around steam boilers in all large plants for the discharge of waste water, and it was not in the plaintiff's way while he was doing his work in the ordinary manner. It is plainly inferable from the testimony that if the plaintiff stepped into this drain, and the drain caused him to fall, he did so by jumping to one side to get out of the way of the falling rail, but the fall of the rail appears to have been due to his own fault and that of his fellow

workmen in failing to properly secure the ends of the skids to the charger platform, as they might have done. We are of opinion that the record discloses no substantial evidence tending to show that the defendant company was guilty of negligence, and, even if we were able to take a contrary view and to hold otherwise, then it would be impossible to escape the conclusion that the plaintiff was guilty of such contributory negligence as should preclude him from recovering. He testified, in substance, that before the accident happened he observed how the ends of these skids were rested on the posts which supported the charger platform, and thought that they ought to be more securely fastened, but that he did not fasten them. Another witness for the plaintiff testified (and this fact is not denied) that one of the skids had fallen on the evening of the accident, before the accident occurred, and that the plaintiff and all of his fellow workmen knew that they were liable to fall, owing to the manner in which the ends were rested on the charger platform. As it was the plaintiff's duty and that of his fellow workmen to put up and adjust these skids as every car was pushed up abreast of the platform to be unloaded, it must be held that by failing to adjust them securely, and thereby becoming responsible for the fall of the rail, the plaintiff immediately contributed to the injury, and cannot recover.

For these reasons, we think that the trial court should have directed a verdict for the defendant company, as it was requested to do; and on that account the judgment below is reversed, and the cause is remanded for a new trial.

WEAVER v. CITY OF OGDEN CITY et al.

(Circuit Court, D. Utah. October 28, 1901.)

No. 453.

1. MANDAMUS — MUNICIPAL CORPORATIONS — COMPELLING PAYMENT OF JUDGMENT.

Petitioner prayed for a writ of mandamus against the respondent city and its mayor and council to compel them to appropriate money to pay certain judgments recovered against the city, or to levy a tax therefor. The return to the alternative writ showed that respondents had caused a warrant to issue in favor of petitioner for the amount of such judgments, which was tendered to him and refused. The statutes of the state provided that all funds of the city should be paid out by its treasurer on warrants, which should be paid on presentation if there were sufficient funds on hand, and, if not, that they should be registered, and paid in the order of registration. No power was given the city to levy a special tax for the payment of judgments, nor to make a special appropriation of funds for such purpose; nor was it shown that the indebtedness on which the judgments were rendered was one for which a special levy or appropriation could be made, nor that respondents had failed to levy taxes to the limit permitted by law. *Held* that, under the elementary rule that a mandamus can be issued against public corporations or officers only to compel performance of a plain duty imposed by law, no ground was shown for the granting of the writ.[1]

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[1] Enforcement of judgment against municipality by mandamus, see note to Holt Co. v. National Life Ins. Co. of Montpelier, 25 C. C. A. 475.

2. MUNICIPAL CORPORATIONS—RIGHT OF CREDITORS—ENFORCEMENT OF JUDGMENTS.

The fact that the holder of claims against a municipal corporation has reduced the same to judgment gives him no new right in respect to the means of enforcing payment, in the absence of a statute making special provision for the payment of judgments.

On Application for Writ of Mandamus.

A. Howat and L. R. Rogers, for petitioner.

H. R. Macmillan, City Atty., H. H. Henderson, and Ogden Hiles, for defendant city.

MARSHALL, District Judge. This is an application for a writ of mandamus requiring Ogden City, its mayor and city council, to make an appropriation for the payment of two certain judgments recovered by petitioner, and to pay the same if the city has sufficient funds for that purpose; otherwise to levy and collect a tax therefor. The petition for the writ alleges the recovery by the plaintiff in this court of two judgments against the defendant, aggregating $22,042.58, a demand on the mayor and city council of defendant for payment, and its refusal, the subsequent issue of an execution, and a return nulla bona thereon. An alternative writ was issued, to which Ogden City has made return:

"That on the 13th day of September, 1901, the city council of Ogden City passed a resolution, which resolution was thereafter signed by the mayor, authorizing the city auditor of Ogden City to issue a warrant payable to the order of William C. Weaver, receiver (being No. 40,871), for twenty-four thousand five hundred sixty-eight and $^{37}/_{100}$ ($24,568.37) dollars, which included the amount of the judgments, together with costs and interest, mentioned in said alternative writ of mandate. That thereafter, on the 14th day of September, 1901, said defendant tendered said warrant to William C. Weaver as said receiver, which said warrant said William C. Weaver then and there refused to accept. And this defendant says that at the time of the issuance of said warrant it had not sufficient funds on hand to pay the same, and this defendant further says that it has no power under its charter or the laws of the state of Utah to levy a special tax with which to pay said judgments, interest, and costs, as required by said writ."

This return has been treated by the parties as the return of all of the respondents.

A hearing was had, at which it appeared that, when the petition for the mandamus was filed, Ogden City had in the hands of its treasurer $18,500.85 of general funds, and on September 13, 1901, when the warrant described in the return was tendered, it had $24,042.56; that at the same dates there were outstanding warrants drawn on this fund, and theretofore presented to the treasurer for payment, and payment refused for want of funds, aggregating about $70,000.

As Ogden City is an instrumentality of the state in the government of the people, its revenues are not subject to seizure under execution. Its judgment creditors can have no recourse to such revenues, other than such as the statutes of the state have prescribed. It is elementary that the remedy by way of mandamus will only lie to enforce the performance of a plain legal duty upon the part of a public officer, and where the petitioner has no other ade-

quate remedy. The petitioner in this case must be able to point to a statute of the state which expressly or by implication imposed some duty upon the mayor and city council which they have failed to perform. The petition for the writ does not allege, nor was evidence introduced to show, the nature of the indebtedness for which the judgments were recovered. The case stands on the existence merely of the judgments. Board v. King, 15 C. C. A. 93, 67 Fed. 945. Hence we must look exclusively to the statutes of the state as they existed at the date of the judgments, in order to determine the rights of the judgment creditor. By those statutes the city council is given power to control the finances of the corporation, to appropriate money for corporate purposes, to provide for payment of corporate debts, and to levy and collect taxes for general and special purposes. Rev. St. Utah, § 206. But the general taxes which may be levied are limited in amount by statute, and the objects of special taxes enumerated. The payment of judgments against the city is not one of those enumerated objects. It is further provided that the city treasurer shall receive all money belonging to the city, and shall "pay no money out save upon lawful warrant, except bonds and interest coupons." Id. §§, 232, 233. And section 234 provides:

"All warrants shall be paid in the order in which they shall be presented, and the treasurer shall note upon the back of each warrant presented to him, the date of such presentation and when payment is made the date of such payment: provided, that any warrant shall be paid by the treasurer in case a sufficient amount of money shall remain in the treasury to pay all warrants issued previous to such warrant."

And section 230 provides:

"The city auditor, in cities having an auditor, and in all other cases, the city recorder, shall draw and countersign all orders upon the treasurer in pursuance of any order or resolution of the city council and keep a full and accurate account thereof in books provided for that purpose."

Taking these provisions of the statute together, it is evident that the power of the city council to pay the debts of the city is to be exercised by resolution that a warrant issue directing the treasurer to pay. The auditor then issues the warrant, and the treasurer is required to pay it upon presentation, if there be sufficient funds on hand for that purpose. If not, the warrant is ranked among the unpaid warrants in the order in which such warrants were presented, and is paid in its turn. The mere fact that the petitioner is a judgment creditor gives him no priority. As stated in U. S. v. Macon Co., 99 U. S. 582, 591, 25 L. Ed. 331, 333, "the judgment has the effect of a judicial determination of the validity of his demand and the amount that is due, but it gives him no new right in respect to the means of payment." He is still entitled to the right, and only to the right, given to him by the statute of the state in relation to cities and the disposition of their revenues. This statute, we have seen, provides a procedure by which he will be paid in his turn. The court is not authorized to change the order of payment. Bailey v. Lawrence Co. (S. D.) 51 N. W. 331, 332. So that, unless an additional tax ought to have been levied, it does not appear that the

respondents have failed to perform the duty incumbent on them under the statutes of the state. The power to tax is exclusively a legislative power. A court has no taxing power. It cannot coerce a levy in this case unless the statutes of the state have made it the clear duty of the respondents to levy a tax, and they have failed to perform this duty. But the petitioner has wholly failed to allege or prove that the city council have not levied for this year the maximum rate of tax authorized by law to be levied for general purposes, and there is no showing that the judgments in question were rendered upon a kind of indebtedness for the payment of which the law provides that a special tax shall be levied. Nor can the petitioner demand that a specific part of the general tax shall be levied to pay his judgments. Board v. King, 14 C. C. A. 421, 67 Fed. 202. For aught that appears, the respondents have discharged their full duty in this respect.

But it is argued that the return in this case is insufficient because it is to the effect that at the time the warrant in question was tendered to petitioner there were not sufficient funds on hand to pay the same, but omits to state that there were no funds on hand which could legally be applied in part payment of the warrant. If a mandamus had been sought against the city treasurer, and he had made this return, the criticism would be justified. But Ogden City, its mayor and city council, are the only persons sought to be mandamused. It was only necessary that the return should justify the acts or failure to act of the mayor and the city council. As it shows that they caused a warrant to issue and be tendered to petitioner, which would make it the duty of the treasurer to pay to him any money in the treasurer's hands legally applicable to the payment of the warrant until it was fully paid, it discloses that they have discharged their duty.

The peremptory writ will be denied.

WHELAN v. RIO GRANDE WESTERN RY. CO.

(Circuit Court, D. Montana. October 25, 1901.)

No. 150.

1. PLEADING—PLEA IN ABATEMENT—MONTANA CODE.

The liberal construction of pleadings required by the Codes renders it immaterial what name is given to a pleading, and, although pleas in abatement are abolished by the Montana Code, which provides (sections 680, 684) that objections on the ground of a defect or misjoinder of parties, not appearing on the face of the complaint, may be taken by answer, a rule of the circuit court of the United States in that district, requiring all matters in abatement to be set up by a separate preliminary answer, is not inconsistent with such provision, and a plea in abatement filed in that court will be treated as such an answer, where it is the same in substance, and will be considered on its merits.

2. WRONGFUL DEATH—ACTION BY HEIRS UNDER MONTANA STATUTE—NECESSARY PARTIES PLAINTIFF.

Under the statutes of Montana the property of a deceased intestate who leaves no issue or husband or wife goes to his father and mother in equal shares. A special statute of the state also gives a right of action

for wrongful death to the heirs of the person killed. *Held*, that such right of action was joint, and an action could not be maintained by the mother alone where the father was also living, even though at the time the question was presented by a plea in abatement the right of the father to bring an action was barred by limitation.[1]

Action at Law to Recover Damages for Wrongful Death. On plea in abatement.

John T. Casey, for plaintiff.
Robert Harkness and McBride & McBride, for defendant.

KNOWLES, District Judge. The plaintiff brought this action against the defendant to recover damages for the death of her son, alleging that the same was occasioned by the negligence of the defendant. She sets forth in her complaint that she is the mother of the said deceased and his sole heir at law. To the complaint defendant filed what is termed a plea in abatement, in words as follows:

"Now comes the above-named defendant, and not confessing or acknowledging all or any of the matters or things in said plaintiff's amended complaint contained to be true as therein set forth and alleged, for plea in abatement to said complaint denies that said Katie J. Whelan is the sole heir at law of James H. Whelan, deceased, but, on the contrary, alleges that William Whelan, father of said James H. Whelan, deceased, named in plaintiff's amended complaint on file herein, is now, and at all the times mentioned in plaintiff's amended complaint has been, a resident of the state of Colorado, and that the said William Whelan is equally and jointly interested with the plaintiff above named as heir at law of the said decedent, in any alleged cause of action which the said plaintiff may have or claim to have against this defendant, and that the said William Whelan is a necessary party to the matters sought to be litigated herein; wherefore defendant pleads the said nonjoinder of the said William Whelan in this action in abatement hereof, and prays this court that this action be dismissed, and that defendant recover its costs herein expended."

The plaintiff demurs to this plea in abatement, because:

"(1) That said plea in abatement does not state facts sufficient to constitute a defense to plaintiff's cause of action. (2) That said plea in abatement does not state facts sufficient to constitute a plea in abatement in said cause, or raise a material or relevant issue therein."

The facts stated in the plea are sufficient. Under the statute law of both Utah and of Montana it is provided that if a person dies leaving no issue nor husband or wife his estate must go to his father and mother in equal shares. They are his heirs under these circumstances. The statutes of both Montana and Utah provided:

"When the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." Code Civ. Proc. Mont. § 579; Rev. St. Utah, § 2912.

The damages in this case accrued to the father and mother. The plea shows that the father is a resident of Colorado, and denies that plaintiff is the sole heir. It is urged that the plea is not sufficient, because pleas in abatement have been abolished in Montana under the Code of Civil Procedure, and that in actions at law, such as this,

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

by virtue of an act of congress it is provided that the federal courts shall follow the practice which prevails in the states where such issue is tried. It is true that the statute of Montana provides that the pleadings on the part of the defendant shall be "the demurrer to the complaint, the answer, the demurrer to the reply." In section 680 of said Code it is provided that the defendant may demur to a complaint on the ground "that there is a defect or misjoinder of parties plaintiff or defendant"; and in section 684 of said Code it is provided that, where this defect does not appear upon the face of the complaint, the objection may be taken by answer. Now, what is termed above a plea in abatement may be considered an answer. In many decisions the old name is still applied to that portion of an answer which performs the office of a plea in abatement. This is frequently done in the courts of California. In the following cases it is so used: Primm v. Gray, 10 Cal. 522; White v. Moses, 11 Cal. 68; Leonard v. Flynn, 89 Cal. 535, 26 Pac. 1099. Rule 10 of this court provides:

"All matters in abatement shall be set up in a separate preliminary answer in the nature of a plea in abatement, to which the plaintiff may reply or demur; and the issue so joined shall be determined by the court before matters in bar are pleaded."

It is then provided, if such matter is coupled with matters in bar or to the merits, the matter pleaded in abatement should be waived. This rule is similar to one that was enacted by the circuit court of California. In the case of Bank v. Hamor, 1 C. C. A. 153, 49 Fed. 45, this question was presented to the circuit court of appeals of this circuit. In its opinion the court said:

"This defect [the nonjoinder of Kuntz] did not appear on the face of the complaint, and the case is provided for in section 191 [Hill's Code 1887], which reads: 'When any of the matters mentioned in section 189 do not appear upon the face of the complaint, the objection may be taken by answer.' This answer is a substitute for the common-law plea in abatement, and only differs from it in name."

Under the rules that prevail in interpreting under the Code, the court does not look to the name given to any pleading, but to the facts set forth therein. Pom. Rem. & Rem. Rights, §§ 71–80. Considering the pleading as an answer, it distinctly raises an issue upon the allegation that the plaintiff is the sole heir of the deceased, and sets forth that William Whelan, the father of the deceased, is a joint heir with her, and is a resident of Colorado. An issue may be raised by affirmative allegations. Churchill v. Baumann, 95 Cal. 541, 30 Pac. 770.

The cases relied upon by the plaintiff are Roberts v. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579, and Greene v. City of Tacoma (C. C.) 53 Fed. 562. The only point decided by these cases that has any bearing upon the case here presented is that in setting up matters in the answer which amount to a plea in abatement is not waived by answering to the merits or in bar; that the question of jurisdiction may be raised by a denial of the allegations in the complaint setting forth facts showing jurisdiction. Matters in abatement were required by the decisions in California to be set forth spe-

cifically as new matter. Such an issue could not be raised by a general denial. The practice in the California courts has, as a rule, been followed by the courts of Montana. The Code of Civil Procedure of Montana has been copied from the Code of California. The right of the court to require that matters in abatement should be set up in a supplemental answer has a considerable support. In the case of Leonard v. Flynn, 89 Cal. 535, 26 Pac. 1098, the supreme court of that state says:

"In a case such as we have under investigation here, where, in addition to the defense of abatement by reason of the pendency of another action, the defendant relies upon other defenses which go directly to the merits of the cause, it would seem to be the better practice for the trial court to require the defendant to present his evidence upon the plea in abatement at the opening of his defense; for, if proven to be meritorious, it would, in many cases, save much useless labor and great expense."

In the case of Gause v. City of Clarksville (C. C.) 1 Fed. 353, Judge Treat said:

"This case furnishes an apt illustration. The time of counsel and court has been occupied for a long period on the merits of this controversy, when, if a plea in abatement had been interposed, a few hours might have sufficed for its determination. If the court, through issues made by pleas in abatement or in bar, had ascertained that no jurisdiction exists, its judgment would be dismissed without passing on the merits."

If a court has the right to determine that an issue presenting matters in abatement should be tried before the issues upon the merits, it would seem that it should have the power to direct that this issue should be presented in a preliminary answer before an answer on the merits. Let the rule, however, requiring that matters in abatement should be set up in a preliminary answer, be set aside; still this answer does raise in this case a material question, namely, the right of plaintiff to maintain this action. It is a defense which goes to the whole case. Navigation Co. v. Wright, 8 Cal. 585. It is claimed, however, that the issue presented is not a material one, because, admitting that the husband and joint heir is alive, she can maintain this action alone as the right of the said William Whelan to maintain this action is barred by the statute of limitations. This question was presented in the well-considered case of Railroad Co. v. Needham, 3 C. C. A. 129, 52 Fed. 371. There it was held by the circuit court of appeals of the Eighth circuit, that it would not consider this point because the right to maintain that action by one of the heirs had been presented before the period of two years in which the statute provided the action could be brought had expired, and because, the other heir not being a party to the action, his rights could not be determined. The facts presented in that case are similar to those which confront the court in this case. It was also held in that case that, where a remedy was given for damages to heirs on account of the death of a party caused by negligence, and which remedy was unknown to the common law, all the heirs must join in the action. The statute of Montana gives a remedy to the heirs of a deceased person for negligence in killing him. It is a special statute. Under such circumstances the rule expressed in this special statute will be considered as an exception to any rule expressed

in a general statute. The heirs of the deceased, James H. Whelan, were given a joint right to recover damages for his death. This right can only be enforced by a joint action. One of such heirs had no right to such damages individually.

The answer setting up matters in abatement was not an immaterial pleading, but presented a substantial issue.

The order of the court therefore is that the demurrer to said preliminary answer be overruled, and that the motion of the plaintiff for a judgment on the pleadings be denied.

WEEKS v. SCHARER.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

No. 1,536.

1. INJURY TO EMPLOYE—NEGLIGENCE OF MASTER—COMPETENCE OF SERVANTS.
   It is the positive duty of the master, which he may not delegate so as to relieve himself from a failure to discharge it, to use reasonable care to place fit and competent persons in charge of his work.
2. SAME—NEGLIGENCE OF FELLOW SERVANTS.
   One who enters the employment of another thereby assumes the risk of the negligence of his fellow servants in the performance of all acts which they do while they are not discharging a positive duty of the master.[1]
3. SAME—WHO ARE FELLOW SERVANTS.
   All who enter the employment of a common master to accomplish a common undertaking are prima facie fellow servants, although their grades of service are different, and some direct and supervise the men subject to their command and their work, while others perform the labor. The subordinates assume the risk of the negligence of their superiors in their work of supervision to the same extent as that of those who work by their sides.[2]
4. SAME—RISK OF INCOMPETENCE OF FELLOWS KNOWN TO THEM.
   It is the duty of a servant to report to his master, or to those whom the master empowers to hire and discharge his workmen, the dangerous incompetence of his fellows known to him, and notice of such incompetence and a failure to report it entails upon him an assumption of its risk.
5. SAME—INCOMPETENCE OF SERVANT—NOTICE TO SHIFT BOSS NO NOTICE TO MASTER.
   A shift boss in charge of a gang of men, whose duty it is to direct the men when, where, and how to work, to supervise them and their labor, and to see that they properly perform it, but who has no authority to hire or to discharge employés, is a fellow servant of the men in his shift, the risk of whose negligence they assume, and notice to him of the incompetence of a fellow servant is not notice thereof to the master.

   (Syllabus by the Court.)

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

Charles F. Scharer and Albert Murcrey were fellow servants of H. T. Weeks at work in his mine in Colorado, when Murcrey carelessly dropped

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[1] Assumption of risk incident to employment, see note to Railroad Co. v. Hennessey, 38 C. C. A. 314.

[2] 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; Flippin v. Kimball, 31 C. C. A.

a jack screw down the shaft, and it broke Scharer's leg. Scharer sued his employer, and alleged that the injury was caused by his failure to adopt reasonable rules for the operation of the mine, and by his failure to employ and retain competent workmen. The averments of the plaintiff were denied by the defendant. Upon the second issue, which is the only one that it is necessary to consider, in view of the conclusion which has been reached, the evidence was that the defendant, Weeks, was the owner of the mine; that one Jenkins was his superintendent, and had and exercised authority to hire and discharge his employés; that among these employés were two shift bosses, who supervised and directed the work of the men under the orders of the superintendent; that the superintendent was the head man, and was generally present at the mine, overseeing the work; that Scharer and Murcrey were members of and had worked in a shift together for about six weeks before the accident; that Murcrey had at one time turned on the air improperly, and had thereby caused a hose to cut one of the workmen on the head; that at another time he threw a block and tackle upon another workman; that he was careless in this way; that, if he threw anything down, he was as likely to throw it on his partner as to throw it to one side; that his partner, one Medaris, who had worked by his side for about 10 weeks before the accident, told his shift boss on February 10 or February 12, 1899, that he could not make him hear; that he had turned the air on at an improper time, and had hurt him,—and asked that he might be changed to another shift, so that he should not work with him. But no change was made, and Medaris worked on by the side of Murcrey until March 20, 1899, when the plaintiff, Scharer, was injured. There was no evidence that this shift boss had any authority to employ or to discharge men for the defendant. Upon this evidence the court charged the jury that notice to this shift boss of the incompetence of Murcrey was notice to the defendant, if the shift boss was charged with the duty of supervising the work of Murcrey, and this instruction is assigned as error. There were a verdict and a judgment for the plaintiff for $8,000 damages, which this writ of error challenges.

William J. Miles, for plaintiff in error.

H. N. Hawkins (T. M. Patterson and E. F. Richardson, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

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

The evidence discloses no authority in the shift boss to hire or to discharge men for the defendant. His power was limited to supervising the work of the employés intrusted to his care, and to directing them when, where, and how to do their work. There was no evidence of any negligence in the selection or employment of the workman whose carelessness caused the injury. Was notice to the shift boss of the incompetence of this servant notice to his master? Counsel for the plaintiff contend that this question was properly answered in the affirmative by the court below, and cite in support of their position the following authorities: Railroad Co. v. McDaniels, 107 U. S. 454, 459, 2 Sup. Ct. 932, 27 L. Ed. 605; Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Railroad Co. v. Henthorne, 73 Fed. 634, 638, 19 C. C. A. 623, 627, 43 U. S. App. 113, 122; Laning v. Railroad Co., 49 N. Y. 521, 534, 10 Am. Rep. 417; Railway Co. v. Collarn, 73 Ind. 261, 272, 38 Am. Rep. 134; Coppins v. Railroad Co., 122 N. Y. 557, 565, 25 N. E. 915, 19 Am. St. Rep. 523; Railroad Co. v. Nuck-

ol's Adm'r, 91 Va. 193, 195, 208, 21 S. E. 342; 1 Shear. & R. Neg. § 192; Gilman v. Railroad Co., 13 Allen, 433, 90 Am. Dec. 210; Shanny v. Androscoggin Mills, 66 Me. 420; Holland v. Railroad Co., 91 Ala. 444, 451, 8 South. 524, 12 L. R. A. 232; Railway Co. v. Patton (Tex. Sup.) 9 S. W. 175; Railroad Co. v. Gilbert, 46 Mich. 176, 180, 9 N. W. 243; Whittaker v. Canal Co., 126 N. Y. 544, 550, 27 N. E. 1042. The decisions in these cases declare that the duty of using ordinary care to provide competent servants is a positive duty of the master, which he cannot so delegate as to relieve himself from liability to discharge it; that officers and agents of a master who are empowered to hire, discharge, or suspend employés are authorized to discharge this positive duty; that notice to them of the incompetence of a servant is notice to the master; and that the jury may infer from notorious, long-continued, and habitual acts of recklessness that such officers or agents and the master knew, or by the exercise of ordinary care would have known, that the servant guilty of them was not competent. But there is nothing in any of these opinions to the effect that notice of the incompetence or of the habitual negligence of a servant to one charged with the duty of directing and supervising him and his work, but who is without authority to hire, discharge, or suspend such workman, is notice to the master, or to the effect that such a superior or supervising employé is discharging the positive duty of the master in this regard. In Railroad Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 27 L. Ed. 605, no question of notice to those supervising the work of an employé was in any way involved, and all that is said upon this subject is obiter dictum. The only issue there was whether or not the chief train dispatcher, who employed the reckless servant, exercised reasonable care in the act of selecting and hiring him. In Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, the charge against the company was not the employment of an incompetent servant, but the negligence of a superior servant in the discharge of his duty of operating an engine. On the other hand, the charge of the trial court in the case upon which counsel seem to place their chief reliance (Railroad Co. v. Henthorne, 73 Fed. 634, 639, 19 C. C. A. 623, 628, 43 U. S. App. 113, 123) was that "it was necessary for the plaintiff to show that the incompetency of Harrison, the engineer, was known, or ought to have been known, to those officers of the company who were given authority to employ, discharge, or suspend him, in order to charge the company with the same knowledge"; and the only question in that case was whether or not the power to suspend for incompetence vested an agent of the company with authority to receive notice of his shortcomings for his master. The opinion and the argument in the Henthorne Case concede that notice of incompetence to one who has no authority to hire, discharge, or suspend employés is not notice to the master. In Coppins v. Railroad Co., 122 N. Y. 557, 565, 25 N. E. 915, 19 Am. St. Rep. 523, the verdict against the company was sustained on the express ground that there was evidence from which the jury might have lawfully inferred that the division super-

intendent, who had authority to hire and discharge servants, had actual knowledge of the habitual incompetence of the employé whose negligence caused the accident. In Railroad Co. v. Nuckol's Adm'r, 91 Va. 193, 21 S. E. 342, there was no question of negligence of the defendant in the employment of its servants, and the judgment below was reversed because the court had refused to charge that an engineer of a locomotive and a track repairer were fellow servants. In Laning v. Railroad Co., 49 N. Y. 521, 534, 10 Am. Rep. 417, the foreman, who was authorized to hire and discharge employés, was aware of the incompetence of the workman whose negligence caused the injury. Nor is there anything in the other authorities cited by counsel for the defendant in error but statements of general and conceded rules of law, nor anything in conflict with the position that no agent or employé is competent to receive notice of the shortcomings of a servant which will charge his principal or master with liability unless he is authorized to hire, to discharge, or to suspend the employé,—unless he is delegated by the grant of that power to discharge this positive duty of the master,—while this position is sustained by many respectable decisions. Railroad Co. v. Baugh, 149 U. S. 369, 387, 13 Sup. Ct. 914, 37 L. Ed. 772; Reiser v. Pennsylvania Co. (Pa. Sup.) 25 Atl. 175, 34 Am. St. Rep. 620; Smith v. Railroad Co. (Mo.) 52 S. W. 378, 383, 48 L. R. A. 368; Railroad Co. v. Eckols (Tex. Civ. App.) 26 S. W. 1117; Railway Co. v. Benford (Tex. Sup.) 15 S. W. 561, 563, 23 Am. St. Rep. 377.

The nature and the limits of the liability of the master for the incompetence of his servants is stated by Mr. Justice Brewer, in the latest decision of the supreme court upon that question which has been called to our attention, in these words:

"It may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken to place fit and competent persons in charge." Railroad Co. v. Baugh, 149 U. S. 387, 13 Sup. Ct. 921, 37 L. Ed. 781.

In Reiser v. Pennsylvania Co. (Pa.) 25 Atl. 175, 34 Am. St. Rep. 620, the chief train dispatcher of the railroad company was aware of the incompetence of one Crossman, a local operator working under his supervision and direction, but he had no power to hire or to discharge employés for the company; and the claim was that notice to him was notice to the corporation. The supreme court of Pennsylvania overruled this contention, and said:

"This might be so if he was clothed with the power of employing and discharging such servants. But he was not charged by the company with its duty in reference to the selection and retention of its employés."

In Smith v. Railroad Co., 52 S. W. 378, 383, 48 L. R. A. 368,—a case which was decided in 1899 by the supreme court of Missouri,—the head master of a roundhouse of a railway company was charged with notice of the habitual negligence of an engine wiper who

caused the accident. This head master had the supervision and direction of this wiper, of his co-workmen about the roundhouse, and of their work, but he had no authority to hire or to discharge them. The court held that notice to him was not notice to the corporation of the incompetence of the men subject to his command. In Railroad Co. v. Eckels, 26 S. W. 1117, 1118, the court of civil appeals of Texas held that a foreman who had the supervision and direction of men and of work, but who had no power to hire and to discharge employés, was not authorized to receive complaints or to make promises for the master relative to the incompetence of the servants under him, and that the employer was not charged or bound thereby.

The rule announced and illustrated in these decisions furnishes the only line of demarkation between the duty and liability of the master and the duty and liability of the servants in such situations. It is the master's duty to use reasonable care to provide competent servants. Servants assume the risk of the negligence of their coworkmen. Their interest prompts them and their duty calls them to report the known incompetence of their fellows. This interest and duty rest alike upon the superior servants—those who supervise and direct the work—and their subordinates, for they are all alike fellow servants. Strike down the rule which charges the master with and limits his knowledge to the knowledge of those whom he has empowered to discharge his duty of employing and discharging, and no guide or measure of the respective liabilities of master and servant remains, and they are left to the varying opinions of judges and juries, without compass to direct or principle to control them. Nor is this rule inconsistent with the general principles of the law of negligence. On the other hand, it is a necessary corollary of the established rules of that branch of the law. One who enters the service of another assumes all the ordinary risks and dangers of that service. One of these risks is the danger of injury from the negligence of his fellow servants. His association with his co-workmen is necessarily closer, his knowledge of their character, habits, and competence more intimate and more exact, than that of the master can be. As he has a better knowledge of their character and of their negligence, he is better able to protect himself against it than his master can be, and for this reason the law charges him with its risk. All who enter the employment of a common master to accomplish a common undertaking are prima facie fellow servants, and each assumes the risk of the other's negligence. The duties of coworkmen engaged in a common undertaking are necessarily diverse, and their grades of service different. On some is imposed the duty of superintending the work, and directing their associates when, where, and how to do it, while it falls to the lot of others to obey the directions of their superiors and to perform the labor. But this difference of duties and of grades of service neither abrogates nor affects the relation of fellow servants. The foreman, the boss, or the superintendent of a gang of men is a fellow servant of those under him to the same extent that they are co-workmen of each other. Each one of the subordinates assumes the risk of the negligence of

his superior in the discharge of his duty of supervision and direction to the same extent that he assumes the danger of the carelessness of the servant who works by his side. To this general rule there is this exception: A servant is not, and a master is, liable for the negligence of a fellow servant while he is engaged in discharging the personal duty of the master to use ordinary care to provide a reasonably safe place, reasonably safe tools and appliances, and reasonably competent servants. An employé frequently acts in a dual capacity,—at times a fellow servant, at times a vice principal,—and the line of demarkation between the negligence whose risk the servant assumes and that for which the master is liable is this: If the act is done in the discharge of a positive duty of the master, then negligence therein is the negligence of the latter. If it is done in the discharge of any other duty of the employé, it is the negligence of the servant, the risk of which his fellows have assumed.

Some of the rules which we have thus briefly restated have been the subjects of volumes of debates and conflicting decisions, but they have at last become established beyond doubt or cavil by the repeated decisions of the highest court in the land. Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Railroad Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994; Railroad Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848, 40 L. Ed. 999; Railroad Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; City of Minneapolis v. Lundin, 58 Fed. 525, 527, 7 C. C. A. 344, 346, 19 U. S. App. 245, 249; Coal Co. v. Johnson, 56 Fed. 810, 6 C. C. A. 148, 12 U. S. App. 490; Railway Co. v. Waters, 70 Fed. 28, 16 C. C. A. 609, 36 U. S. App. 31; Balch v. Haas, 73 Fed. 974, 979, 20 C. C. A. 151, 156, 36 U. S. App. 693, 700; Bridge Co. v. Olsen (C. C. A.) 108 Fed. 335, 337; Railway Co. v. Elliott, 102 Fed. 96, 111, 42 C. C. A. 188; Millsaps v. Railway Co., 69 Miss. 423, 13 South. 837; Railroad Co. v. Hoover, 79 Md. 253, 29 Atl. 994, 25 L. R. A. 710, 47 Am. St. Rep. 392; Blessing v. Railway Co., 77 Mo. 410; 2 Bailey, Pers. Inj. §§ 2061, 2190; Railroad Co. v. Poirier, 167 U. S. 48, 17 Sup. Ct. 741, 42 L. Ed. 72; Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. 345, 41 L. Ed. 746; Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. Ed. 755; Randall v. Railroad Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; Farwell v. Railroad Co., 4 Metc. (Mass.) 49, 38 Am. Dec. 339; Holden v. Railroad Co., 129 Mass. 268; Clifford v. Railroad, 141 Mass. 564, 6 N. E. 751; Sherman v. Railroad Co., 17 N. Y. 153; Besel v. Railroad Co., 70 N. Y. 173; De Forest v. Jewett, 88 N. Y. 264; Weger v. Railroad Co., 55 Pa. 460; Coal Co. v. Jones, 86 Pa. 432.

It is an indisputable deduction from these rules that a superior servant charged with the duty of supervising the men under him and their work, but unauthorized to hire or to discharge them, is performing the duty of a fellow servant, and not that of a master. His acts, his knowledge, and his negligence are those of the servant, and not of the employer. If through his culpable carelessness the incompetence of a servant is not reported to the superintendent, who has

the power to discharge him, that carelessness is the negligence of a fellow servant, the risk of which each of his subordinates has assumed to the same extent that he has assumed the danger from the negligence of his co-workmen in the same grade with himself. Indeed, the duty of reporting the known incompetence of fellow workmen to those who have power to discharge them rests upon those who work by their sides as heavily as it does upon those who supervise their work.

Much has been said in argument about the duty of the master to inspect his workmen, and to keep informed respecting their competence after they have been employed; and the assumption is indulged that every one who is empowered to supervise their work is authorized to make this inspection, and to receive notice of their competence which would charge the employer. The assumption is unwarranted, and the argument loses sight of the fundamental principles of the law of negligence. The liability of the master here rests upon and is measured by the rules of the law of agency and of negligence. The agent or officer whom the employer appoints to select, discharge, or suspend the servants in his service, and that agent alone, may charge his master by his acts or by his knowledge of their character. Those whom he employs for other purposes have no authority to select or discharge their fellows, and hence their knowledge and their negligence regarding the competence of their coworkmen in no way charge their employer.

The presumption of law always is that the master has discharged his duty, and has employed fit and competent servants. That presumption, unlike the presumption that he has furnished reasonably safe machinery, increases in strength with the lapse of time, because workmen grow more skillful and competent, while machinery deteriorates by use. The duty of the master is discharged when he has taken reasonable precautions to place fit and competent servants in charge of the work. One who would charge the master with negligence here must therefore prove not only that the servant was incompetent, but that the master knew, or by the exercise of ordinary diligence would have known, of his unfitness. The servant, not the master, assumes the risk of the negligence of those who work with him. He is in constant and close association with his co-workmen, and it is his duty to report to the agent whom the master has appointed to hire and discharge them any incompetence of which he learns. The employé who knows, or by the exercise of reasonable diligence would have known, of the recklessness and incompetence of his fellow servant, and who still neglects to report his shortcomings to the proper superior, assumes the risk of that negligence and incompetence. Railway Co. v. Peavey, 34 Kan. 472, 479, 8 Pac. 780; Brick Co. v. Kenyon, 57 Ill. App. 640, 646; Mining Co. v. McIver, 5 Colo. App. 267, 280, 38 Pac. 596; McCharles v. Smelting Co., 10 Utah, 470, 37 Pac. 733; Davis v. Railroad Co., 20 Mich. 105, 4 Am. Rep. 364; Railroad Co. v. Geary, 110 Ill. 383. These principles of law are indisputable. In view of them it is difficult to perceive how notice of the habitual recklessness of a fellow servant can be successfully

charged upon a master whose agents to provide servants had no actual knowledge of it, without also charging those who have worked in the same gang with him for weeks, and who assumed the risk of his negligence when they were employed, but who have never reported it, with a knowledge of it fatal to their recovery on its account. In the case in hand the shift boss and the members of the shift to which the plaintiff belonged, who knew of the acts of negligence of Murcrey, were fellow servants of the plaintiff. If those acts were of such a character that it was their duty to report them to the superintendent, the risk of their negligence in failing to report was necessarily assumed by the plaintiff. Notice of these acts to the shift boss was notice to a fellow servant, and not to the master, and the charge of the court to the contrary was fatal to this verdict.

The judgment below is reversed, and the case is remanded to the court below for another trial.

THAYER, Circuit Judge, and ADAMS, District Judge. We concur in the reversal of the judgment in this case on the ground stated in the foregoing opinion,—that the instruction given by the trial court that notice to the shift boss of Murcrey's incompetency or careless habits was notice to the defendant was an erroneous instruction, because there is no evidence in the record tending to show or warranting the inference that the shift boss either had power to hire or discharge the incompetent employé or any other employés. There are some other general propositions of law stated in the opinion concerning which we would not be understood as expressing any opinion.

FIDELITY & CASUALTY CO. v. HAINES.

(Circuit Court of Appeals, Eighth Circuit. October 7, 1901.)

No. 1,482.

1. RES GESTÆ.
   A statement which is detached from the material act pertinent to the issue, and which constitutes a mere narrative of a past transaction, is not a part of the res gestæ, but is hearsay, and incompetent as evidence.

2. INSURANCE—RES GESTÆ—ADMISSIONS OF AGENT AFTER ALLEGED CONTRACT.
   The admission by the local agent of an insurance company on the day after the alleged making by him of an oral contract of insurance, that the claimant was insured, is not a part of the res gestæ, and is hearsay evidence as against his principal.

3. SAME—AGENCY—OPINION OF AGENT—EVIDENCE AGAINST PRINCIPAL.
   The opinion or conclusion of an agent relative to the legal effect of acts and transactions is not binding upon his principal unless the latter has authorized his agent to form and express an opinion on his behalf. A statement by the agent of an insurance company that a claimant is insured is such an opinion, and is incompetent evidence against his principal.

4. SAME—LOCAL AGENT'S AUTHORITY TO ADJUST ALLEGED LOSSES.
   A stipulation in the contract of appointment of a local insurance agent that he shall receive as his compensation for all his services, including those adjusting losses, a certain commission on the premiums

he secures, and that he will render these services, does not authorize him to adjust alleged losses or to admit the liability of his principal therefor, unless he is otherwise empowered so to do.

(Syllabus by the Court.)

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

James C. Jones and H. C. Smyth (William C. Jones and Wash Adams on the brief), for plaintiff in error.

Edward L. Scarritt (Thomas Dolan, John K. Griffith, and Elliott H. Jones, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

SANBORN, Circuit Judge. This was an action upon an oral contract to insure against burglary. There are two classes of such insurance. One consists of the insurance of personal property while in a safe, and is denominated safe-burglary insurance, while the other comprises the insurance of such property when it is not within a safe, and is called store or residence burglary insurance. The rates and contracts of the two classes of insurance differ. The controversy here arises over an alleged oral agreement to make a contract of safe-burglary insurance whose existence was denied by the company. At the trial it appeared that one Bigley was the local agent of the company at Joplin, in the state of Missouri, to procure safe-burglary insurance according to the rules and instructions contained in the company's manuals and rate books, but that he had no authority whatever to procure any insurance, make any contracts, or do any other acts relative to store-burglary insurance. There were two issues,—whether Bigley's conversation with the plaintiff related to safe-burglary insurance or to store-burglary insurance (the plaintiff testified that it related to the former, Bigley testified that it related to the latter); and whether or not the conversation was a contract of insurance or a mere negotiation preliminary to a written contract to be subsequently issued.

At the opening of the trial, without any evidence that Bigley was actually or apparently authorized to make any contracts or do any acts for the company, the defendant in error proceeded to testify that he had a conversation with him relative to safe-burglary insurance. Objection was made to this testimony that it was incompetent without proof of the authority of Bigley. The court so held, but nevertheless overruled the objection with the remark that he would strike out the testimony if the authority of this agent was not established. Thereupon the defendant in error testified, in effect, that on June 29, 1899, Bigley solicited him to take safe-burglary insurance, stated the rates, the amount of insurance he was to have, the length of the term, and the amount and time of payment of the premium, and made a memorandum of various facts about his stock of goods, from which Haines expected a policy of insurance to be forwarded to Bigley at Joplin, Mo., by some general agent of the company at St. Louis, to be delivered to the defendant in error. On

the night which followed the day of this conversation the safe of the defendant in error was burglarized. Two witnesses were permitted to testify that on the following day Bigley admitted to them that the defendant in error was insured. This testimony was expressly objected to on the grounds that the agent's authority had not been shown, and that it was only his conclusion, by which the company could not be bound. The court below held that the testimony was incompetent to prove a contract, but nevertheless admitted it "for the purpose of corroborating, if the testimony is to that effect, the witness Haines in regard to the conversation had between himself and Bigley." This ruling is assigned as error, and it is difficult to perceive how this testimony could corroborate Bigley without tending to show that the contract to which he testified was made, and without thereby becoming incompetent, even in the view of the court below. The ordinary and logical sequence of proof required that the power of the agent should be established before his acts and admissions were received as evidence against his principal. Nor is the case of the defendant in error improved if the concession be made that the ruling upon the objection of want of authority went merely to the order of proof, and was therefore discretionary. If the authority of Bigley to make the contract had been previously proved, the fatal objections would still remain that the testimony of these witnesses was mere hearsay, the simple narration of what Bigley said the day after making the agreement, and that this was nothing but his individual opinion or conclusion, which he was neither authorized to make, to form, or to express for his company. If any contract to insure was ever made, it was made on June 29th, before the burglary, and while the stock was in the possession of the defendant in error. When Bigley and Haines parted on that day, the agreement upon which this action must stand either was or was not in existence. No story that Bigley subsequently told, no opinion that he afterwards formed or expressed, could either make or destroy, strengthen or weaken, the agreement. When he made this statement that Haines was insured on the day after the burglary, he was not engaged in negotiating this contract. What he said was not a part of things done in closing the agreement. It did not even rise to the dignity of a narrative of a past event. It was nothing but his conclusion or opinion as to the legal effect of the things that had been said and done by the company, Haines, and himself at some time before the burglary.

An effort is made to escape from this conclusion on the ground that Bigley was the agent of the company to adjust this loss, that he was investigating it preparatory to adjusting it, and was therefore acting within the scope of his authority when he made the statement under discussion. But the only evidence of Bigley's authority to adjust the loss consists of the fact that in his contract of appointment it is recited that the company has appointed him its agent for Joplin, Mo., and vicinity; that it is agreed that his compensation for all services rendered by him in procuring insurance, collecting premiums, adjusting losses, rendering accounts, and performing generally the duties of agent, shall be a certain commission on the

net premiums received on all the policies issued by him under the contract; that he agrees to perform such services, and to obey the rules and instructions contained in the company's manuals and rate books, with reference to the conduct of the business as such agent; and that such rules and instructions may be modified in writing by the proper officer or agent of the company. But this contract must be read in the light of our common knowledge that local insurance agents are not generally adjusters, and that they have authority to adjust losses only when specially directed so to do. The meaning of the agreement regarding the adjustment of losses was that the agent, when specially directed to do so, would render his services in adjusting losses in consideration of the commission specified in the contract of appointment, and without other charge. It gave him no authority to render unrequested services concerning or to adjust alleged losses without an express request to do so. Much less did it empower him to bind the company by an admission of a contract and a loss which the corporation denied. Its only effect was to entitle the company to call upon the agent to render services adjusting any loss it specified, and to provide that he should, when called upon, render such services as well as all his other services for the fixed commission named in the agreement and without other compensation. The result is that this agent had no more authority than a stranger to adjust this alleged loss of the defendant in error, and his admissions, opinions, and conclusions the day after the burglary was committed were not those of the company, and constituted no evidence against it. His statement on that day that the defendant in error was insured was not competent evidence against the company, because it was not a part of the things done in making the contract, and a statement which is detached from the material act pertinent to the issue, and which constitutes a mere narrative of a past transaction, is nothing but hearsay (Association v. Shryock, 73 Fed. 774, 778, 20 C. C. A. 3, 8, 36 U. S. App. 658, 667; Insurance Co. v. Mosley, 8 Wall. 397, 405, 416, 19 L. Ed. 437; Railroad Co. v. O'Brien, 119 U. S. 99, 104, 7 Sup. Ct. 118, 30 L. Ed. 299; Fordyce v. McCants, 51 Ark. 509, 513, 11 S. W. 694, 4 L. R. A. 296, 14 Am. St. Rep. 69; Railway Co. v. Becker, 128 Ill. 545, 21 N. E. 524, 15 Am. St. Rep. 144; Railway Co. v. Ivy, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758; Adams v. Railroad Co., 74 Mo. 553, 41 Am. Rep. 333; Tennis v. Railway Co., 45 Kan. 503, 25 Pac. 876; Railway Co. v. Holland, 82 Ga. 257, 10 S. E. 200, 14 Am. St. Rep. 158); because he had no authority to adjust the alleged loss, and he was not engaged in the discharge of any duty of his agency when he made the statement, so that it was not the act or admission of the company (Railroad Co. v. McLelland, 62 Fed. 116, 10 C. C. A. 300, 27 U. S. App. 71; Clunie v. Lumber Co., 67 Cal. 313, 7 Pac. 708; Walker v. Insurance Co., 51 Iowa, 679, 682, 2 N. W. 583; Worden v. Railway Co., 72 Iowa, 201, 33 N. W. 629); and because the statement was the mere individual opinion or conclusion of Bigley as to the legal effect of certain transactions, and a principal is not bound by the opinions or conclusions of its agents, which it does not empower them to form or express on its behalf

(Insurance Co. v. McMaster, 87 Fed. 63, 69, 30 C. C. A. 532, 538, 57 U. S. App. 638, 648; Insurance Co. v. Henderson, 69 Fed. 762, 764, 768, 16 C. C. A. 390, 391, 393, 395, 32 U. S. App. 536, 540, 543, 547; Laclede Fire Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Insurance Co., 60 Fed. 351, 353, 358, 8 C. C. A. 1, 3, 8, 19 U. S. App. 510, 515, 521; Casualty Co. v. Teter, 136 Ind. 672, 673, 676, 679, 36 N. E. 283; Worden v. Railway Co., 72 Iowa, 201, 33 N. W. 629).

Many other questions are presented by the assignments of error, but it is unnecessary to a decision of this case to discuss or determine them, because the ruling already considered was material, erroneous, and fatal to the verdict. The judgment is accordingly reversed, and the case is remanded to the court below, with directions to grant a new trial

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CITY OF CLEVELAND, TENN., et al., v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1901.)

No. 934.

1. MANDAMUS—MUNICIPAL CORPORATION—COMPELLING LEVY OF TAX.
   A mandamus cannot be awarded to compel the officers of a municipal corporation to levy a tax unless the duty to make such levy is imposed, either expressly or by implication, by some statute of the state from which the corporation derives its powers.

2. MUNICIPAL CORPORATIONS—POWER OF TAXATION—IMPLICATION FROM AUTHORITY TO CREATE DEBT.
   Authority to a municipal corporation to levy a tax to pay debts whose creation is authorized by law may be implied when no mode for their payment is prescribed, and there is no limitation upon the power of taxation which repels such an inference, and where the debt is for an extraordinary purpose, requiring special authority for its creation, a general limitation upon the power of taxation for ordinary municipal purposes will not exclude such inference; but if the act conferring the power to create the debt, or any other law in force at the time, contains provisions for a tax to meet such obligations, no extraordinary power of taxation can be implied therefrom.

3. SAME—DEBTS FOR ORDINARY EXPENSES—WATER AND LIGHTS.
   Current debts incurred by a municipal corporation for water furnished for public uses and for the lighting of public streets are for ordinary expenses, which may be incurred without special legislative authority; and the fact that the power to contract for water and lighting is among those specially enumerated in the city's charter does not imply any special and additional power of taxation to meet such expense, beyond the limitation imposed by the charter upon taxation for general municipal purposes.

4. SAME—CHARTER LIMITATION OF POWER OF TAXATION—MANDAMUS TO COMPEL PAYMENT OF JUDGMENT.
   The charter of the city of Cleveland, Tenn. (Acts 1893, c. 184, § 23), provided that the board of mayor and aldermen should have power "to levy taxes for town and school purposes upon all taxable property * * * not exceeding in the total levy for all general purposes in any year seventy-five cents on one hundred dollars of the total assessment of said property for town and school purposes of that year." Among the other provisions of the charter was one expressly authorizing it to contract for water and lights for public purposes. *Held*, that the latter provision carried no implication of power to levy a special tax to pay for water and lights, which were an ordinary municipal expense, to be paid

from the taxes authorized to be levied for "general purposes," the amount of which was expressly limited, and that the officers of the city could not be compelled by mandamus to levy a tax in excess of such limitation to pay a debt contracted for water and lights, or a judgment rendered thereon, in the absence of statutory authority to lay a special tax for the payment of judgments.[1]

5. SAME.
Where the charter of a city places a limitation upon the total levy of taxes for all general purposes in any one year, the fact that in past years it has not made the full levy does not authorize it to make a levy in excess of the limitation in a subsequent year.

6. MANDAMUS—SUFFICIENCY OF RETURN.
The return made by a city to an alternative writ of mandamus to compel the levy of a tax to pay a judgment in favor of relator, which alleges that taxes have been levied for the current year to the full limit permitted by its charter, and that the entire proceeds of said levy will not be sufficient to pay current expenses, and no part of it can be devoted to the payment of relator's judgment without seriously impairing the efficiency of the city government, cannot be held insufficient on demurrer, when no motion was made to compel it to be made more specific, because it does not show in detail the purposes to which the levy has been apportioned, nor show the details of the city's expenses and liabilities.

7. SAME—MUNICIPAL CORPORATIONS—CONTROL OF DISCRETION OF CITY OFFICERS.
A court in a proceeding for a writ of mandamus to compel a city to pay a judgment in favor of relator has no power to control the discretion of the city authorities in making appropriations from the taxes collected for current municipal expenses, although it may compel the application of any surplus remaining after the payment of such expenses upon relator's judgment, rather than upon other debts previously contracted.

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

In 1895 the plaintiff in error contracted for a supply of water for public uses, and for the lighting of its streets by electricity. The tax budget for that year included a tax of 22 cents on each $100 of assessable values for the purpose of paying for the water supply so to be provided, and of 18 cents to meet the expenses of public lighting. This tax was collected, and a part applied on the current contracts, but the remainder has never been so used, but remains in the city treasury or unaccounted for. Subsequently the power of the city to so contract was denied, and the liability repudiated. Suit was thereupon brought to recover upon the contract so far as executed, which resulted in a judgment against the city for $9,852.12 and costs. The questions upon which the city resisted payment, and the grounds upon which it was held liable, appear in the opinion of this court, reported under the style of Cunningham v. City of Cleveland, 98 Fed. 657, 661, 39 C. C. A. 311. Judgment final was rendered in 1899. Execution issued, which was returned nulla bona. Thereupon a petition for a writ of mandamus was duly filed in the court below. To the alternative writ a return was made in substance insisting that the city had exhausted its power of taxation for the current year by assessing a tax of 75 cents on the $100, and that the whole of this tax was essential to the maintenance of its governmental functions, and that no surplus would remain after providing for municipal necessities. A demurrer to the return was sustained. The court below was of opinion that the power to create a debt for water and light implied the power to levy a special tax to pay the judgment rendered upon the debt thus created, and that the limit placed upon the city's power of taxation was inapplicable to a

[1] Mandamus to enforce payment of judgment against municipality, see note to Holt Co. v. National Life Ins. Co., 25 C. C. A. 475.

judgment upon a debt so made. It was also held that the return was insufficient in not setting out the several purposes for which the city had levied a general tax. From this judgment the city has sued out this writ of error.

Pritchard & Sizer, for plaintiffs in error.
Brown & Spurlock, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

What are the limitations upon the taxing powers of the plaintiff in error? The return shows that a tax aggregating 75 cents had been laid and was in process of collection when the alternative writ issued. The insistence of the city was and is that no authority exists for the levy of any greater rate of tax, and none for any special tax to pay judgments upon claims of the character of that represented by relator. The question as to whether the whole or any part of the fund arising from the tax so already assessed can be appropriated to the payment of the relator's judgment may be postponed, for the first and most important question is whether the limitation set up by the return is applicable in the circumstances of this case. The relator's debt was incurred in 1895, and is for rent of water hydrants and for public street lighting. At that time the city was controlled by the provisions of a special charter granted by the Tennessee legislature April 7, 1893, being an "Act to amend the charter of Cleveland, Tennessee," etc. Chapter 184, Acts 1893. The subsequent amendments of that act are of no importance, since they do not enlarge the taxing powers of the corporation, and could not effectually deprive the relator of any remedy which he had under the law existing at the date of the contract. Seibert v. Lewis, 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. Ed. 1161. Legislation which lessens the efficacy of the means for enforcing the obligation of a contract in existence when the obligation was incurred would conflict with the provision of the constitution prohibiting the impairment of the obligation of contracts. Louisiana v. City of New Orleans, 102 U. S. 203, 26 L. Ed. 132; City of Memphis v. Bethel, 3 Tenn. Cas. 205.

It must, at the outset, be conceded that a mandamus cannot be awarded to compel the mayor and council of the plaintiff in error to levy any tax which they were not authorized to levy by the law of the state from which they derive their powers. The office of such a writ is not to create new duties, but to compel the discharge of those already imposed by the municipal law of the state. In other words, the power to levy the tax which the relator seeks to compel must exist in some legislation, or be plainly implied from some local statute or charter. Carroll Co. Sup'rs v. U. S., 18 Wall. 71, 77, 21 L. Ed. 771; U. S. v. Macon Co., 99 U. S. 582, 591, 25 L. Ed. 331. The limitation set up by the city upon its taxing power is found in section 23 of the charter. That section reads as follows:

"That the board of mayor and aldermen shall have power and authority to levy taxes for town and school purposes upon all taxable property, real, personal and mixed, within the limits of the town, not exceeding in the total levy for all general purposes in any year seventy-five cents on one hundred

dollars of the total assessment of said property for town and school purposes of that year."

It is difficult to misread this provision. It is a plain limitation whereby the taxing power for "town and school purposes" is limited to a "total levy for all general purposes in any year" to "seventy-five cents on one hundred dollars of the total assessment" of city property. By the twenty-eighth section of the same act power is granted to levy and collect taxes upon all property and privileges within the limits of the town, and which are taxable by the state. By the fourteenth section of the act the recorder is constituted the assessing officer, and it is made his duty to assess taxes and deliver to the city "a tax list" which shall be the authority of the city for collecting the taxes of this city. This "tax list" is the document referred to in the last two lines of section 23, above set out, as the "total assessment of said property for town and school purposes of that year." Section 27 is supposed to confer an additional power of taxation. It is as follows:

"That the board of mayor and aldermen may levy a tax, not exceeding fifteen cents on the hundred, upon all property subject to state taxation, and a street tax of two dollars on all male persons between the ages of eighteen and forty-five years of age within the corporate limits of said city for streets, alleys and sidewalks, and a tax not exceeding twenty-five cents on the hundred upon all property subject to state taxation, and a poll tax not exceeding the state or county poll tax on all male persons between the ages of twenty-one and forty-five years of age within said corporation limits, exclusively for common school purposes."

It will be observed that no language is used indicating that this street and school tax shall be in addition to the "total levy" authorized by section 23. Schools and streets are within the "general purposes" covered by section 23, and "town and school purposes" are specifically mentioned as purposes provided for by the "total levy" authorized by section 23. We can but conclude that the power conferred by section 27 must be construed as subject to the general limitations of the twenty-third section. Weber v. Traubel, 95 Ill. 427; People v. Lake Erie & W. R. Co., 167 Ill. 283, 47 N. E. 518. The cases of Nashville, C. & St. L. R. Co. v. Franklin Co., 5 Lea, 707, and Same v. Hodges, 7 Lea, 663, turned upon the particular terms of the two acts construed. The question is one of legislative intention, and we find no difficulty in reaching the conclusion that the street and school tax authorized by section 27 was not intended as a tax in addition to the "total levy" authorized by section 23, but as subject to the general limitation of that section.

But it is insisted that express power was given to the city to contract for water and lights for public purposes, and that therefore the city has the power by implication to levy a tax to meet such contract. Authority to levy a tax to pay debts whose creation is authorized by law may be implied when no mode for their payment is prescribed, and there is no limitation upon the power of taxation which repels the presumption. This rule was thus stated in Citizens' Savings & Loan Ass'n v. City of Topeka, 20 Wall. 660, 22 L. Ed. 460:

"It is to be inferred, when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

In U. S. v. City of New Orleans, 98 U. S. 381, 393, 25 L. Ed. 225, 226, it was held that authority to issue bonds to pay for stock subscribed in a railroad implied power to levy a tax to pay the interest and principal of the bonds so authorized. Said the court in the case cited:

"The authorization without providing the means for such expenditures would be an idle and futile proceeding." "Their authorization therefore implies and carries with it the power to adopt the ordinary means employed by such bodies to raise money for their execution, unless such funds are otherwise provided. And the ordinary means in such cases is taxation. A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose."

The principle is an old and familiar one, and has been applied in a variety of instances. Thus, where a thing is granted, such as an estate or franchise, there passes by necessary implication a right to those incidents which are essential to the enjoyment of the principal subject of the grant. In constitutional law it is a familiar principle that the grant of a power, when the mode of its exercise is not defined, implies authority to exercise it in the mode and manner reasonably necessary for its enjoyment. Upon this general principle limitations upon the taxing power of counties and towns have often been held to apply only to debts and expenses for ordinary municipal purposes, and not to those extraordinary debts, such as subscriptions to railroads, which can be incurred only by special legislative authority. Ralls Co. Ct. v. U. S., 105 U. S. 733, 26 L. Ed. 1220; City of Quincy v. Jackson, 113 U. S. 332, 5 Sup. Ct. 544, 28 L. Ed. 1001. "It is now well settled," said the supreme court in Ralls Co. Ct. v. U. S., cited above, "that, when authority is granted by the legislative branch of the government to a municipality or a subdivision of a state to contract an extraordinary debt by the issue of negotiable securities, the power to levy taxes sufficient to meet at maturity the obligation to be incurred is conclusively implied, unless the law which confers the authority, or some general law in force at the time, clearly manifests a contrary legislative intention." But although the debt incurred be of an extraordinary character, requiring special authority, any implication of power to levy a tax to meet the extraordinary burden will be repelled if the act conferring the power, or any other law in force at the time, contains a provision providing for a tax to meet such obligations. This is well illustrated in U. S. v. Macon Co., 99 U. S. 582, 590, 25 L. Ed. 331, 333, where it was sought to compel the levy of a special tax for the purpose of meeting the interest upon bonds issued to pay for stock in a railroad. By the law of Missouri, county taxation for general purposes was limited to one-half of 1 per cent. on the taxable value of the property in the county. By a special act, counties were authorized to subscribe for stock in a particular railroad, and to issue bonds to meet such subscription. If there had been nothing more

in this latter act, it might have been presumed that it was the intention of the legislature to grant full power to levy the tax necessary to meet this extraordinary debt. "This implication," said the supreme court, "is, however, repelled by the special provision for the tax of one-twentieth of one per cent., and the case is thus brought directly within the maxim, 'Expressio unius est exclusio alterius.'" Continuing, the court said:

"Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act and such other taxes applicable to the subject as there were, or might thereafter by general or special acts be, permitted."

Applying the principle of these cases to the case in hand, we are met at once by the manifest proposition that current bills for rent of hydrants and for street lighting are not extraordinary expenses, in any sense. Expenses incurred for water furnished for public uses and for the lighting of public streets are ordinary expenses, and debts incurred for current water or lighting purposes are debts contracted within the scope of ordinary municipal purposes, and no special legislative authority is necessary to justify expenditures for such purposes. Dill. Mun. Corp. (4th Ed.) §§ 146, 443, and notes; City of Memphis v. Memphis Water Co., 5 Heisk. 495; Stewart v. Town Co., 50 Kan. 553, 32 Pac. 121; Grant v. [illegible] of Davenport, 36 Iowa, 396. That the procurement of water for public purposes and the lighting of the city streets are specially mentioned as among the powers of the city of Cleveland is of no significance. Obligations incurred for those purposes would not be extraordinary debts, justifying a presumption of a special and additional power of taxation. The power to maintain a police force, to abate nuisances, to provide for a quarantine, to establish markets, and a score of other ordinary municipal purposes are likewise specifically authorized in the same section authorizing the rental of water hydrants and the lighting of streets. If the special mention of a power to incur an obligation for water and light justify a presumption of a power to levy a special and additional tax to that authorized for all town and school purposes by the twenty-third section, a like presumption would arise in respect of every other expenditure authorized in terms, and the limitation upon the power of taxation to a total levy of 75 cents would have nothing to operate upon. The case of U. S. v. Town of Cicero (C. C.) 41 Fed. 83, 85, is particularly applicable to this line of argument. Power to issue bonds for the purpose of erecting public buildings, erecting gas works or an electric light plant, and to take stock in any new railroad is conferred by another section upon condition that the ordinance is submitted to a popular vote. But the same section provides for an additional limited tax to meet the extraordinary debts so incurred. No bonds or negotiable securities were issued under the contract with relator, and none were contemplated. The city contracted to pay an annual rental for so many hydrants and so many electric street lights. The debt was not in any sense an extraordinary one, but an ordinary municipal expense, such as

might well be met out of the total levy authorized for all general purposes. No implication of power to levy a special tax to meet a debt of this character arises, in view of the express power to levy and collect a tax not exceeding three-fourths of 1 per cent. upon the assessed value of property subject to city taxation. The fact that the debt of the city has been reduced to a judgment does not help the relator. We have been referred to no legislative power authorizing the imposition of a special tax to meet a judgment against the plaintiff in error. The only power to assess and collect a tax is that found in the provisions of the city charter already discussed.

We have been referred to the case of Butz v. City of Muscatine, 8 Wall. 575, 19 L. Ed. 490. The case has no bearing, inasmuch as we find no statute of the state of Tennessee requiring cities or towns to levy a tax to pay judgments. Such a provision does exist in relation to counties, but it has never been extended to cities, so far as we have been able to find. The case of Mayor, etc., of Town of Bristol v. Dixon, 8 Heisk. 864, was referred to as justifying the levy of a tax to pay a judgment upon a debt incurred by authority of the city charter. The case is not in point. There was no limitation upon the taxing power of Bristol for general purposes. The limitations supposed to apply were those found in Chapter 50, Acts 1870–71, being section 491c of Thompson & Stegers' Tennessee Code, and section 1361 of same Code. The first limited the amount of taxes leviable to meet the extraordinary class of debts described in the act of 1870–71, and the last applied only to taxes levied for educational purposes. The ruling in Fulgum v. Mayor, etc., of City of Nashville, 8 Lea, 635, was to the same effect in respect to Nashville. There is, as we have seen, an express limitation upon the taxing power of the city of Cleveland for general purposes. The debt for which the relator has recovered his judgment, being an ordinary and not an extraordinary debt, must be paid out of the proceeds of the taxes leviable for general purposes.

It is next insisted that the judgment should be affirmed because the return is insufficient, in that it "makes no statement of fact showing to what purposes the levy as made has been apportioned," and because said return shows "no facts or account of the city's revenues and liabilities from which the court can determine whether or not an additional levy may be made for the payment of relator's judgment, or whether or not a portion of the assessment as already levied may not be devoted to its payment." The sixth paragraph of the return, in substance, states that prior to the filing of said petition the defendant had made a levy of 75 cents on the $100 on all property subject to taxation, and also upon all privilege, poll, and other taxes which it has power by law to levy and collect for the current year, and was diligently proceeding to collect same. The same section of the return further states, in substance, that the entire proceeds of said levy and assessment will not be sufficient to pay current expenses, and that "it will be impossible, without serious impairment of the efficiency of the city government, to devote any part of the tax levies for the present year to payment

of petitioner's said judgment." The relator specially demurred to this part of the return:

"First, because it does not show that taxes have been levied to the full extent authorized by the charter and general law of the state; second, because said section contains no statement of fact showing to what purposes the levy as made has been apportioned; third, because said section contains no statement of facts or account of the city's revenues and liabilities from which the court can determine whether or not an additional levy may be made for the payment of relator's judgment, or whether or not a portion of the assessment as already levied may not be devoted to its payment; fourth, because it does not appear from said section or any part of respondent's return what taxes were levied for the years 1896, 1897, 1898, and 1899, during which time suit was pending in which said judgment was rendered."

The first ground of demurrer is bad. We have already determined that the city had no power under its charter or any law of the state to levy any higher rate of tax than that which the return shows has been levied. The taxing power of the city for the current year was therefore exhausted, and no power exists in this court to compel the levy of a tax in addition to that already levied for the purpose of paying the relator's judgment. The fourth ground of demurrer is also bad. The failure of the city to levy the full tax it might have levied for past years does not enlarge its power in subsequent years. The limitation is to a "total levy for all general purposes in any year" of 75 cents on $100 of the assessed values of that year. The remedy afforded by the writ of mandamus is prospective, and the failure of the city in past years to exert its entire taxing power will not justify a levy in any year in excess of the charter limitation.

The second and third grounds of demurrer go to the sufficiency of the return, in that it does not show in detail the purposes to which the levy made has been apportioned, and does not show the details of the city expenses and liabilities. It is clear that no additional levy can be compelled, whether this part of the return be good or bad. It may be that, after providing for the ordinary annual expenses of the city government out of the tax levy already made, a surplus may remain, which should be applied to the payment of the relator's judgment. But the mere fact that the purposes to which the levy made has been apportioned are not specifically stated, and that no itemized statement of the city expenses and income is given, would not justify the court in compelling the levy of a tax additional to that already levied, when it is clearly shown that the total levy already made for general purposes is the maximum tax which the city can levy for any one year. But is this part of the return so insufficient, as matter of law, as to authorize the court to ignore the averment that no part of the tax levied can be applied to the payment of relator's judgment without impairing "the efficiency of the city government"? No motion was made to compel a more detailed or specific answer in this respect. The return is, in substance, identical with the return in Clay Co. v. U. S., 115 U. S. 616, 618, 6 Sup. Ct. 199, 200, 29 L. Ed. 482. The return in the case cited was:

"That the maximum levy for said purpose for the year 1882 will not be sufficient to pay the ordinary current expenses of said county, and that no

part thereof can be applied for the payment of said judgment without seriously impairing the efficiency of said county government."

To this answer the relator demurred, and upon the hearing the court below ordered a definite proportion of the tax so levied paid over on the relator's judgment, and that a like proportion should be levied and collected each year until relator's judgment should be paid. The supreme court, conceding that such part of the full lawful levy as was not required to defray the current expenses chargeable upon the ordinary revenue should be applied to the payment of the relator's debt, said:

"But here the answer shows affirmatively that the whole of the six-mill levy of 1882 will not be sufficient to pay the ordinary current expenses of the county. No effort was made to have the answer more specific and certain, so as to show what the whole amount of the tax would be, and in what way it was to be expended, but the relators were content to go to a hearing upon a general demurrer to the answer as it stood. We must therefore assume the fact to be that a special tax cannot be levied to pay the judgment without embarrassing the county in the administration of its current affairs. It was held in City of East St. Louis v. U. S., 110 U. S. 321, 4 Sup. Ct. 21, 28 L. Ed. 162, decided since the judgment in this case below, that 'the question what expenditures are proper and necessary for the municipal administration is not judicial. It is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion; much less, to usurp and supersede it. To do so in a single year would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service. To do it for a series of years, and in advance, is to attempt to foresee every exigency, and to provide against every contingency that may arise to affect the public necessities.'"

The proper judgment is this: (1) That the defendant below be required to pay over the sum of $402.20, which the answer shows was levied and collected in 1895 for the specific purpose of complying with this contract, and which has been since held as a water and light fund. (2) That the defendant below be required to diligently proceed to the collection of any uncollected tax so assessed in 1895 for water and lighting purposes, and to pay over such taxes, as collected, upon the judgment of relator. (3) That the defendant below be directed to pay over any surplus which may remain from the proceeds of the total levy made for all purposes in 1900, after defraying the current expenses chargeable upon the ordinary revenue of the city, and that it make a further return showing the amount of the tax so collected, and how same has been applied. (4) That the defendants below be commanded to levy for each year succeeding the entry of this judgment the full tax of 75 cents on the $100 of assessable city property, and the full poll and privilege taxes permitted by the charter of 1893, until the judgment of relator, with interest and costs, shall be fully paid; and, after defraying all ordinary expenses payable out of the revenue so raised each year, it will pay over to the relator any surplus remaining each year, until his judgment shall be paid; and that it make all such other returns as shall be required by the court below, showing how it has obeyed this judgment.

The administrative discretion in respect to expenditure for current municipal expenses will not permit the payment from current

revenue of claims for past expenditure in preference to the judgment of relator. The surplus applicable to this claim is that which remains after providing for those current expenses proper for the maintenance of the city government, and chargeable against current revenue. The situation of the present case will not permit of a more definite order. That the city cannot reduce its surplus by preferring other debts to that of the relator is plain. Current revenue not properly used for current municipal expenses will constitute a surplus applicable to the relator's judgment. When the return shall be made as to income and expenditure for 1899, it will be the duty of the court below to ascertain the surplus properly applicable to this judgment, and order same paid thereon. In the present situation of this petition, we can make no more definite judgment.

The judgment below is reversed, and the cause remanded, with direction to enter a judgment in accordance with this direction.

GAGE, Secretary of Treasury, v. JUDSON et al.

(District Court, D. Connecticut. September 18, 1901.)

No. 1,159.

1. EMINENT DOMAIN—PROCEEDING BY UNITED STATES—VALIDITY OF AWARD.
In a proceeding brought by the secretary of the treasury to condemn land for an addition to a post office, the court was required under the local statutes of the state to appoint a committee of three to appraise the land and assess the owners' damages, subject to the approval of the court, which had power to set aside their award for irregularity. The district attorney and the attorney for defendants stated to the court that they had agreed upon two members of the committee and would agree upon the third, and they were directed by the court to notify the clerk. The names of the persons agreed upon were not reported to the court or clerk, and no further action was taken by the court until the filing of a report and award signed by three persons, designating themselves as arbitrators and so designated in a written submission signed by counsel. The district attorney had no special authority from the department to agree to an arbitration. *Held*, that the award was not binding on the United States, either as an award of arbitrators or of a committee, since the district attorney had no authority to submit to an arbitration or to select a committee, which could only be appointed by the court, whose action was not a delegation of authority to counsel to make such appointment, nor an appointment of unknown persons to be thereafter selected by counsel.

2. SAME—POWERS OF COMMITTEE OF APPRAISAL—ADMISSION OF EVIDENCE.
A committee appointed under the Connecticut statute to value land condemned for public use does not act strictly as a judicial tribunal, to find facts merely from evidence, but its members are selected largely with reference to their competency to appraise real estate and to form their conclusions from inspection and their own knowledge of values; and they must be allowed a wide discretion as to the kind of evidence they deem helpful and will receive.

3. SAME—EVIDENCE OF VALUE—PROFITS FROM PARTICULAR USE OF PROPERTY.
An award made by a committee appointed to appraise land condemned for public use will not be set aside because the committee refused to

receive evidence intended to show the probable profit which could be derived from the property by the erection of a particular kind of building thereon, where it admitted evidence to show that the location was suitable for such a building.

4. SAME.

The award of a committee fixing the value of land condemned for public use will not be set aside because of the exclusion of testimony offered by the owner as to the additional value of the land by reason of its surroundings or appurtenances, such as easements for right of way or the nearness of other property owned by him, which could be improved in connection with that taken, where the facts were shown, and may be presumed to have been duly considered by the committee.

This was a proceeding by the secretary of the treasury for the condemnation of land as a site for an addition to the post-office building in Bridgeport, Conn.

Francis H. Parker, U. S. Dist. Atty., and Allan W. Paige, for petitioner.

De Forest & Klein and Stiles Judson, Jr., for respondents.

TOWNSEND, District Judge. The respondent has remonstrated against the report of the committee finding the value of the land of the respondent sought to be taken. A writ of error was taken to the United States circuit court of appeals, and there dismissed on the motion of the petitioner. 39 C. C. A. 156, 98 Fed. 540. Afterwards a bill of exceptions was allowed and signed, which is as follows:

"Bill of Exceptions.

"(1) Upon the return of the mandate and summons upon the plaintiff's application to this court for the condemnation of the defendants' land, as appears by the files and records of this court, the parties appeared by attorney; the plaintiff appearing by C. W. Comstock, the United States attorney for the district of Connecticut. (2) On May 28, 1898, which was the day assigned for the appointment of the committee as prayed for, Mr. Comstock, the United States attorney, and the attorneys for the defendants Judson and Hicks, appeared and informed the court that the case would furnish no business at that time, as the parties would probably reach an agreement as to a committee. No action was taken by the court at that time. (3) On August 10, 1898, counsel for the plaintiff and the defendants Judson and Hicks, filed in court an agreement to submit the case to arbitration, dated June 8, 1898, and signed by C. W. Comstock, United States attorney, and by Robert E. De Forest, attorney for R. M. Judson, and also an award purporting to have been made by the arbitrators therein named, dated August 8, 1898. These papers are on file, and are, by reference, made a part hereof. (4) On October 4, 1898, an entry of the discontinuance of the case as to the defendants Hicks and Bishop was entered. (5) On October 5, 1898, counsel for the plaintiff appeared in court and stated that the government was satisfied with the award of the arbitrators, and moved that the award be accepted as to the said Judson, and that the case be discontinued as to the other defendants. (6) Thereupon I made entries in my private minute book as follows: 'Oct. 5. 517. Gage, Sec'y Treasury, vs. Judson. Award of $32,000 in favor of Judson, and U. S. is satisfied with award, and asks report be accepted and discontinue as to others. Order discontinuance granted. Balance continued.' 'Oct. 7. U. S. Gage vs. Judson. Award approved and accepted, $32,000.' (7) No entry was made on the docket of the court on either October 5th or 7th, no judgment or order was entered up at either of these dates, nor was the clerk instructed to enter up any such judgment or order. (8) Afterwards, during the following term, to wit, on the 3d day of January,

1899, upon the motion of the plaintiff's attorney, judgment was rendered, and the formal judgment file was signed by the court, as appears on file. (9) No objection was ever made, in this court or elsewhere, so far as appears, by the plaintiff, or any one else representing him or the government, to said award, or to any of the proceedings in the cause, until the 8th day of February, 1899, when the plaintiff brought his petition to reopen said judgment as on file. (10) On February 15, 1899, plaintiff amended his said petition, and on February 25, 1899, he filed a substituted petition as on file. (11) Upon motion of the defendant Judson, the court ordered the plaintiff, if he proposed to offer evidence in support of the allegations of paragraph 5 of his petition, dated February 6, 1899, and filed two days later, to state the names of the witnesses there referred to. (12) The case subsequently came on for a hearing upon the questions of fact and law presented by the plaintiff's substituted motion, dated February 24, 1899, and filed the next day. (13) After hearing the parties, by their witnesses and by their counsel, I find that the only authority given to Mr. Comstock in relation to this case was as set forth in the correspondence annexed to said substituted motion as an exhibit; and I find that no authority, other than as set forth in said correspondence, was ever conferred upon Mr. Comstock to submit this case or any part of it to arbitration, as agreed to by him in the paper dated June 8, 1898. (14) The plaintiff at no time introduced any evidence in support of the allegations of paragraph 5 of his original motion to reopen the judgment, or in support of the allegations of the corresponding paragraph of his said substituted motion.

"Upon the foregoing facts the defendant claimed: (1) That the award of the arbitrators had been presented to and accepted by the court at its previous term, and therefore it was not within the jurisdiction or legal power of the court to entertain the plaintiff's motion and petition to open said judgment, or to open the same or make any alteration therein; (2) that, if the court had power to entertain said motion, no cause was shown for opening said judgment; (3) that, upon the facts proved and found, the said arbitrators, so agreed upon by the parties, became and were the committee of the court for the purposes of said appraisal and assessment, and that the plaintiff, by his conduct through his attorney, had estopped himself, as against the defendant, from questioning the validity of the appointment of said arbitrators.

"The court overruled the said claims of the defendant and opened said judgment. Thereupon the defendant, on the 27th day of April, 1899, moved the court to accept the award of said arbitrators as being the report of the committee. The attorney for the plaintiff not being present, the court continued the case, with leave to the attorney for the plaintiff, if he saw fit, to file a remonstrance to the acceptance of the award, or any other motion, within five days from said 27th day of April, 1899, and appointed the 5th day of May, 1899, at half past 2 o'clock in the afternoon, for further hearing upon the defendant's said motion for the acceptance of said award. Thereupon the parties appeared by attorney in court on said 5th day of May, 1899, at the hour appointed, to be heard on said motion. No remonstrance was filed by the plaintiff, but he claimed and urged that, inasmuch as no committee had ever been appointed by the court and the court had never ratified said arbitration agreement, the court had no jurisdiction to accept said award, and moved that the award be set aside. Defendant claimed that said award should be accepted, that no cause to the contrary had been shown, and that upon the facts already proved and found by the court, as appear of record, as matter of law, the defendant was entitled to have said award accepted as the report of the committee. The court took said claims into consideration, and on May 23, 1899, overruled the defendant's said claims, found the facts to be as above stated, and ruled that no committee had ever been appointed by the court; that said award did not entitle the defendant to a judgment in said action for the amount thereof; that no judgment had been rendered in said action until January 3, 1899; and, acting at the same term as that in which January 3, 1899, occurred, vacated said judgment of January 3, 1899. William K. Townsend, Judge."

The arbitration agreement and the report thereon, referred to above, are as follows:

"Lyman Gage, Treasurer, vs. R. M. Judson.

"District Court of the United States, Second Judicial District, District of Connecticut.

"Know all men that we, Charles W. Comstock, United States attorney for the district of Connecticut, and Robert E. De Forest, of Bridgeport, attorney for the said R. M. Judson, do hereby promise and agree to and with each other to submit, and do hereby submit, all questions and claims between the United States and the said R. M. Judson, in the action above mentioned and pending in said court, to the arbitrament and determination of Alex. C. Robertson, of Montville, Conn., Charles B. Marsh, of Bridgeport, Conn., and Frederick A. Bartlett of Bridgeport, Conn.; and a decision and award of a majority of said arbitrators shall be final and conclusive, upon the approval of the award so made by the court. The hearings are to be in Bridgeport.

"In witness whereof, we have hereunto set our hands and seals this 8th day of June, A. D. 1898.

"C. W. Comstock, U. S. Attorney. [L. S.]
"Robert E. De Forest, Atty. for R. M. Judson. [L. S.]"

"Lyman Gage, Treasurer, vs. R. M. Judson.

"District Court of the United States, Second Judicial District, District of Connecticut.

"Whereas, by a certain agreement in writing, bearing date the 8th day of June, A. D. 1898, made between Charles W. Comstock, United States attorney for the district of Connecticut, and Robert E. De Forest, of Bridgeport, attorney for R. M. Judson in the county of Fairfield, and state of Connecticut, reciting that all questions and claims between the said United States and the said R. M. Judson, in the above-mentioned action and pending in said court, were submitted to the arbitrament and determination of Frederick A. Bartlett, of said Bridgeport, Alexander C. Robertson, of Montville, Conn., and Charles B. Marsh, of said Bridgeport, to whom it was agreed that the said questions should be referred to the final determination of said arbitrators, a copy of which submission is hereunto annexed: Now we, the said arbitrators, having been duly sworn, having heard the witnesses on behalf of the said United States and also witnesses of the said R. M. Judson, and having viewed the premises and property owned by the said R. M. Judson and sought to be condemned for public purposes by the said United States, to wit, the enlargement and extension of the government building, and having heard the arguments of counsel thereon, do award the sum of thirty-two thousand dollars to the said R. M. Judson for damages sustained by him by reason of the proposed enlargement of the said government building and the condemnation of his property, to be paid to the said R. M. Judson by the said government of the United States; and we do hereby direct the said government of the United States to pay to the said R. M. Judson the amount of the award in a reasonable and proper time. In witness whereof, we have hereunto set our hands and seals this eighth day of August, A. D. 1898.

"Frederick A. Bartlett. [L. S.]
"Alex. C. Robertson. [L. S.]
"Charles B. Marsh. [L. S.]"

The present remonstrance undertakes to allege facts not contained in said bill of exceptions, and respondent has taken evidence as to the truth of his allegations. The principal allegations of the remonstrance, not included in the bill of exceptions, state an agreement by remonstrant and his attorneys and Charles W. Comstock, United States district attorney (representing the petitioner), upon two members of a committee; a report thereof to the court by said counsel, and that they would agree upon a third member of the committee; that the court made no objection thereto; that the clerk of said court

made an entry thereof upon the record; that they thereafter agreed upon the third member of the committee, and executed the agreement, Exhibit A, referred to in said bill of exceptions; that said committee viewed the premises and heard the parties. And the respondent claims that, upon the facts alleged, the persons agreed to become a committee of the court, and that, in the absence of any proof of irregularity or improper conduct, their report was binding upon the court. Upon the hearing, it was not proved or claimed that any names whatever were reported to the court by counsel. The entry as originally made by the clerk upon the record of the court did not conform to the fact, even as claimed by respondent. There is no claim that the court was ever informed in any way that the whole committee had been agreed upon up to the time of filing the award. The facts claimed to have been proved are, then, these: (1) That the respondent and the district attorney, at the time set for the appointment of the committee, agreed upon two members of the committee, and, without stating their names, informed the court that they had so agreed and that they would agree upon a third, and that the case would furnish no business for the court; (2) that the court directed them to notify the clerk and made no further comment; (3) that afterwards a hearing was had and a report filed, no order of appointment of a committee ever having been made by the court or signed by the clerk or court, and neither the court nor clerk having ever known the names of the persons acting as committee.

The position of respondent is that the judge of a court may delegate to counsel the appointment of a committee; that thereupon they may agree upon such committee, and such committee may act, without the names of the persons agreed upon ever having been approved by the court. Respondent, in support of his position, quotes a large number of Connecticut cases. In Andrews v. Wheaton, 23 Conn. 112, the case was tried before an auditor. After his report, it was claimed not to be a proper case for an auditor. In Crone v. Daniels, 20 Conn. 331, two auditors were appointed and the hearing was had before one. In Post v. Williams, 33 Conn. 147, the committee had not been sworn. In Sherwood v. Stevenson, 25 Conn. 431, the recorder and one alderman, instead of two, acted as a city court. In White v. Fox, 29 Conn. 570, after hearing and award, the defeated party claimed that the agent who signed the award on his part was not duly authorized. In Smith v. Town of New Haven, 59 Conn. 203, 22 Atl. 146, a committee of only two acted, when the statute required three. In State v. Tuller, 34 Conn. 280, objection of disqualification of a juror was not taken before the verdict. In Kimball v. Society, 2 Gray, 517, hearing had been had before an auditor, and the defeated party then claimed that it was not a proper case for an auditor. In Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085, the arbitrators were not sworn.

In all of these cases it was held that the party had waived objection by not taking it until after the conclusion of the trial and decision against him. In all of these cases the party had a right to waive the objections. In all, except the criminal case, the party might have submitted his claims to a tribunal, or agreed upon the question

at issue, without the aid of the court. The district attorney had no such right. He could not legally agree upon any sum to be paid for the land. He could not agree to submit the case to arbitration. He could not bind the United States by agreement upon a committee. The United States cannot be estopped by his act in such a matter. While a committee nominated or assented to by a district attorney might have been appointed by the court upon motion, it would have been the duty of the court to satisfy itself that the committee was a proper one before appointing it. It is possible that the court, if informed that certain persons had been agreed upon, might have considered the assent of the district attorney sufficient evidence of their fitness without further inquiry. It is possible, and perhaps probable, that the court would have made some further inquiry, of counsel or otherwise, in regard to the qualifications of the committee agreed upon, before appointing them. However this may be, the court certainly never did appoint them, unless it be law that the judge, when informed that counsel would probably agree upon a committee, can then and there appoint such a committee as the counsel may thereafter agree upon.

The essential fact not contained in the bill of exceptions, claimed to have been proved, is that the counsel agreed on May 28, 1898, upon two members of the committee, and thereafter upon a third member of the committee, and they were agreed upon as a committee under the statute, and not as arbitrators. The written agreement is for a submission to arbitration. The decision filed is in form an award of arbitrators, not the report of a committee. To find the fact claimed, namely, that they were agreed upon as a committee of the court, it must be found that able and experienced attorneys believed that the court could delegate to them the power to appoint a committee under the statute, and that they by mistake drew up and signed an agreement for arbitration, instead of an agreement appointing a committee of the court, and presented to the court an award, instead of a committee's report. Written documents are more certain than oral testimony, and the court is unable to find the fact desired by the respondents. The United States district attorney and counsel for respondent did, on May 28, 1898, agree upon two of the names mentioned in the arbitration agreement, and afterwards appeared before said two persons, with the third afterwards agreed upon, and were heard, with witnesses and arguments, in regard to the premises in question; but it is not found that the three were agreed upon as a committee under the statute, and not as arbitrators. On the whole evidence, there appears no occasion for changing the finding on the bill of exceptions as to what was done on May 28, 1898, so far as the court is concerned, to wit:

"The attorneys for the petitioner and defendant appeared and informed the court that the case would furnish no business for the court at that time, as the parties would probably reach an agreement as to a committee. No action was taken by the court at that time."

It is further claimed that the report of the committee should be rejected for errors in rulings upon evidence. A large number of questions, both upon the direct and cross examinations, were exclud-

ed. A considerable part of these related to the probable cost and income of an office building erected upon the land in question and the probable profit to be derived therefrom. The respondent was allowed to ask upon cross-examination whether the lot was suitable for an office building, and to show to the witnesses for the government plans of a proposed building, and they uniformly testified that the land was suitable for that purpose and for such a building as was shown by the plans; but questions as to whether the witnesses had taken into consideration the productive capacity of such an office building as was shown or the site would warrant; what, in their opinion, would be the probable rental value of such an office building; whether there was a usual and approved mode of ascertaining the value of an office building on a site peculiarly adapted to such purpose, or of ascertaining the value of such a site; whether the rental capacity of a site adapted to such a building had been considered by the witnesses, and what it would be; and, of a witness testifying that offices upon the fourth story of such a building would be in demand if there was an elevator, what rents he had in his mind as appropriate for that story; whether a building would pay 5 per cent. net; whether witness would regard a building that would pay 5 per cent. net as a good investment; whether witness had taken into consideration the uses to which such a site was adapted, and the probable expense of adapting it, and the expense of adapting it to any special use, and the probable income from such use,—were excluded. One Longstaff, an expert witness for the respondent, having testified on his direct examination that a method of establishing the value of business property, where such property was increasing in value, was to ascertain its productiveness or earning capacity, was asked:

"By application of this method to the case in hand, what would be the value of this property? and, in your opinion, could an office building of five stories be profitably erected on this site?"

It did not appear that the value of the property was increasing. Experts for the respondent were asked what kind of an office building could be profitably erected upon the ground; whether there was any well-known or commonly employed rule, custom, or practice in estimating business property of the kind; what was the rental capacity of the lot, taking into consideration all the matters we have spoken of. Respondent, testifying as a witness, was asked:

"State what improvement in the property you had projected." "With your knowledge of what this property cost you, the price which has been attached to it since you bought, with reference to its location, adaptation to improvement, and of its advantages, state what, in your opinion, the property is worth in the market?"

All these questions were excluded, and exception taken. Even if it be admitted that the report of the committee would not have been set aside for irregular and improper conduct, if all these questions had been allowed, it does not necessarily follow that it should be set aside by reason of their exclusion. The committee to value land, under the Connecticut statute, is not the ordinary committee to find facts merely from evidence, in the place of a judge. They are selected as men acquainted with the methods of valuing and competent

to appraise real estate, from their conclusions largely from inspection, and must be allowed a wide discretion as to the kind of evidence which will be helpful to them in the particular case under consideration. The duties of a committee in a case like the present are very similar to those of a committee on the laying out of highways under the Connecticut statute. In such cases, the committee find whether the way sought for is of common convenience and necessity, and also assess benefits and damages. The supreme court of Connecticut says of such a committee, in Bristol v. Branford, 42 Conn. 321, 322, in reference to the issue of common convenience and necessity:

"It is not a court in the strictest sense, and has not, in all respects, been made subject to the technical common-law rules of evidence by which courts are governed."

And in Bryan v. Branford, 50 Conn. 246, 250, where the error urged was as to the qualification of experts on the cost of a bridge:

"In this discussion we have assumed, contrary to several decisions in this state, that the strict rules of evidence apply in full force to trials before committees in highway cases."

In Railway Co. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51, the court says:

"How much latitude should be allowed the parties in the way of bringing out in the testimony collateral, or perhaps we should say cumulative, facts to support the estimates made by witnesses, is a matter that must be left very largely to the discretion of the presiding judge. We would not undertake to fix the limits of a discretion so necessary to be exercised. We deem it proper, however, to say that the presiding judge should not allow collateral issues to spring up and multiply, or a jury to be taxed with facts and figures which could throw no appreciable light upon the question in hand, namely, the market value of the property."

The cases cited by respondent do not seem to furnish any clear precedent for setting aside the report of a committee on value of the land because of the exclusion of such evidence. In Railroad Co. v. Jacobs, 110 Ill. 416, it was held that, where land had been highly fertilized for gardening purposes, the value of the compost on the land might be shown; but it was also held that, where the land in its then condition had a market value, the award should be on the basis of the market value, and that the jury should not attempt to determine the actual value of the property for a special use. In Haslam v. Railroad Co., 64 Ill. 353, it was held that evidence in regard to the existence and value of a water power and mill site on the property should have been received, although not then utilized for that purpose; but it does not appear that there was any attempt to show the probable profit which could be obtained by utilizing the water power. In Johnson v. Railway Co., 111 Ill. 413, it was held that the fact that the land had a special value for railway purposes, and of offers received within a few months, should have been admitted. The opinion gives no reasons or authority for the admission of these offers. In Lake Shore & M. S. Ry. Co. v. Chicago & W. L. R. Co., 100 Ill. 21, it was held that evidence of obstruction to the use of other property than that taken should be allowed, and that, as some of the property was specially adapted to railway uses, and in its situation was not available for use for general purposes, the fact of

its adaptability to railway uses should have been admitted by the trial court, and that estimates of its value with reference to such uses should also have been admitted. In that case, however, the property was applied to railway uses only at the time of the appraisal. In Railroad Co. v. Blake, 116 Ill. 163, 4 N. E. 488, it was held that the judgment should not have been set aside because the court allowed the owner to exhibit a plan for proposed improvement, inasmuch as it was exhibited merely as illustrating the capability of the property, although it was intimated that the court should be very cautious in allowing such evidence. In Gardner v. Inhabitants of Brookline, 127 Mass. 358, the owner was allowed to show that the soil was especially adapted to the raising of cranberries; but he was not allowed to show the price of the cranberries, or the probable profits, the court holding that this would open up too wide a field of inquiry. In Re New York, L. & W. R. Co., 27 Hun, 116, it was held that where a strip of land, formerly a canal site, was specially adapted for railway purposes, had various improvements upon it tending to fit it for that purpose, and was held by a railroad which intended it for that purpose, its special adaptability and value for that purpose might be shown. It does not appear to have been fit for any other purpose. In Russell v. Railway Co., 33 Minn. 210, 22 N W. 379, it was held that the fact that land was bounded on three sides by railroad tracks, and was convenient for elevator, manufacturing, or warehouse purposes, might be shown. In Watson v. Railway Co., 57 Wis. 332, 15 N. W. 468, it was held that it might be shown that the property was suitable for division into village lots and the probable value of such lots. Lewis, Em. Dom. § 480, says that showing the probable value of such lots "is clearly going one step too far. The probable value of village lots which do not exist is too speculative." In Railway Co. v. Woodruff, 49 Ark. 381, 5 S. W. 792, 4 Am. St. Rep. 51, the owner was allowed to show the eligibility and value of the property for bridge purposes. In that case the property was specially valuable for that purpose and worth little for any other. In Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, the jury found the value of the land to be $9,358.33, but that its value aside from boom purposes was $300. The court ordered a new trial, unless the owner would reduce the verdict to $5,500, which the owner did, and judgment was rendered for that amount, which judgment was affirmed on appeal. In that case, the owner could not avail himself of the value for boom purposes, and the company could; and the court seems to have considered that the advantage of its value for that purpose should be apportioned between the two, endeavoring to get somewhere near the probable purchase price in case of sale.

From the cases taken together, it is difficult to deduce any general rule applicable to all situations. Estimates of probable profit from a particular use of the property contemplated, but not yet actual, have generally been excluded. Where there is special need for property for some particular purpose, and the property in question is the only one available for that purpose, evidence as to its value for such purpose may, perhaps, be gone into with more particularity and detail than in ordinary cases; but the extent of such inquiry must be

left very much to the judgment of the triors. Thus, if there had been a special demand for a site for an office building in this locality, and this had been the only site available for that purpose, there would have been more reason for admitting computations for possible profit from such a building.

The principal street of Bridgeport is Main street, running nearly north and south. Cannon street runs westerly from Main street, across Broad street, which is the next street parallel to Main street. The post-office and custom-house property is at the corner of Cannon and Broad streets, being south of Cannon street and east of Broad street. The property sought to be condemned is south of Cannon street, next east of the government property. The Messrs. Bishop some years ago opened a passway, called the "Arcade," south of Cannon street, extending from Main street through the middle of the block to the government property, and had erected buildings for business purposes on the south side of it, and, for a part of the way, on the north side. Next easterly of respondent's property are some dwelling houses, called the "Hicks Block," and a building belonging to the Post Publishing Company. A right of way 10 feet in width extends along the rear of these buildings, including the respondent's, adjoining the Arcade, so called, and thence, between the post-office property and the Bishop Block, to Cannon street; thus giving the respondent and the owners of the Hicks Block and of the Post Building access to the rear of their buildings. The respondent's property has a right to pass over this right of way. If the right of way were extinguished, the owners of the Hicks Block and of the Post property could, apparently, erect stores over their rear land and adjoining said Arcade. Said Arcade is very generally used by the public. There are gates between the Arcade and the government property, which were sometimes closed, and a gate between the Arcade and the gangway of Cannon street, which was sometimes closed. Respondent inquired of petitioner's expert on cross-examination:

"Did you take into account, in estimating the Judson property, the value of the right of way in rear of Hicks' property, with a view to the benefit that would be derived to the adjoining property by the extinguishment of that right of way?" "Did you take into consideration, in estimating the value of the Judson property, the right of way with reference to the Arcade privilege?" "Assuming that the extinguishment of this right of way would enable the owners of Hicks Block and the Post Building to extend their buildings to the Arcade, and assuming that the Arcade was a thoroughfare for pedestrians, how much would that add to the value of the Hicks and Post properties?" "What, in your opinion, would it be worth to the owners of the Hicks property and the Post property to have this right of way extinguished?" "What, in your opinion, is the proper method of computing the south half of the Judson lot per front foot, assuming that it has a right of access upon the Arcade, and that the Arcade is a permanent thoroughfare by dedication?" "Would the method described by you this forenoon be the correct method to apply to property on Arcade, assuming its permanence as a thoroughfare?"

Other similar cross questions and a similar question to an expert witness of the defendant were excluded, as was some evidence that the gangway from Cannon street had immemorially been a driveway extending across the right of way in question, and across the

Arcade; thus giving access from the right of way in the rear of respondent's land to the Arcade. It does not appear to have been proven that there was an irrevocable dedication of the Arcade to the public. Apparently it was private property, and the owners might have closed it. If stores had been built over the right of way in question, and adjoining the Arcade, perhaps the Messrs. Bishop, who own the soil of the Arcade, might have enjoined the owners of the stores from using it. In Terry v. City of Hartford, 39 Conn. 286, a street was laid out through a lot, leaving a narrow strip on each side. These narrow strips could not be benefited except by buying or selling the land adjoining, and the land adjoining could not have access to the street laid out, and could not be benefited thereby, except by purchasing the narrow strips. Benefits were assessed against both, and the assessment sustained. It was presumed that the owners of the adjoining land would buy or sell, so as to get the benefit of the street. In like manner, it would seem that if, by extinguishing this right of way, the owners of the Hicks Block and the Post Building might build upon the Arcade, probably some arrangement would be made, even if the Arcade were private property, to the mutual advantage of all parties, and that the probability of such an arrangement would increase the value of the property, so that this right of way might be worth more for the purposes of sale to the owners of the Hicks Block and Post Building properties than its value merely for the purpose of access to the respondent's property. The ground upon which the evidence was excluded is not stated. It may be that the committee considered the situation too plain to make evidence necessary, or that, upon a view of the situation, the advantage was considered trifling.

It was also shown that respondent owned other real estate upon the south side of the Arcade, the two pieces being separated only by the Arcade. The question was asked:

"Assuming that Judson owns property south of the Arcade, and situated with reference to the property under discussion as indicated on map before you, would you say they could be advantageously developed together, so that that feature would give enhanced value to the property under discussion?"

The respondent, testifying, was also inquired of:

"Property on the south side is directly opposite the Arcade. Is value of that property involved in value of this?"

Also:

"Did your plan of improvement include both pieces?"

These questions were excluded. Where part of a piece of land is taken, and the whole piece can be most advantageously used together, the injury to the whole should be included; and the fact that the two pieces are separated by a narrow strip of land hardly excludes the operation of this rule, if it were the fact that they could most advantageously be used together. In all the cases cited bearing upon this subject, however, the whole property was in fact so used.

Evidence was also offered as to offers which respondent had refused, and especially one of $37,500, which was excluded. While offers have been admitted in some cases, and one Illinois case, re-

ferred to above, seems to intimate that a bona fide offer ought to have been admitted, the weight of authority is contrariwise to this, on the ground that evidence of offers is too easily manufactured. On the face of the record it would seem as if there were several questions which might better have been admitted. At the same time, the committee could see the whole situation. It was their duty to value the land according to their best judgment, giving only such weight to the evidence as they considered it to be entitled to.

The question as to the condemnation proceedings preventing improvement, or profitable use of the land by respondent during the proceedings, is not referred to in his brief. There is no evidence that the fact that the land of the United States government adjoining the respondent's would, under the statute, continue to be kept free from buildings, was not considered by the committee. If this report is accepted, there will certainly be an appeal by the respondent. If the report should be rejected by reason of the alleged errors in the rulings of the committee, the acceptance of the next report, however free from errors on this ground, would, unless favorable to the respondent, certainly be appealed from on the ground that the decision of the arbitrators who first acted was final. On the whole, it seems best to accept the report and give the respondent an opportunity to appeal now, and have the main question in dispute decided, rather than to put the parties to the delay and expense of a new trial, which would, unless favorable to respondent, result in further delay.

The motion to amend by making the United States of America the formal petitioner is allowed. The motion for notice to the City Savings Bank of Bridgeport, and for payment of the bank's mortgage on the property out of the sum awarded the defendants, is denied. Let an order be entered in accordance with this opinion.

HARGADINE-McKITTRICK DRY GOODS CO. v. HUDSON (SIMMONS HARDWARE CO., Garnishee; WITBECK, Interpleader).

(Circuit Court, E. D. Missouri, E. D. October 24, 1901.)

No. 4,357.

1. BANKRUPTCY—DEBTS RELEASED BY DISCHARGE—JUDGMENTS.
   A judgment rendered on promissory notes cannot be brought within Bankr. Act 1898, § 17a, cl. 2, excepting from the provable debts released by a discharge debts which "are judgments in actions for frauds," by evidence that the debt was fraudulent in its inception; the creditor being conclusively bound by his election to waive the fraud and sue on the contract.

2. RES JUDICATA—DECISION OF BANKRUPTCY COURT DISALLOWING CLAIM.
   The decision of a court of bankruptcy that a claim presented for allowance against the estate of a bankrupt was barred by limitation renders such question res judicata between the parties, and it cannot be again litigated in a subsequent action brought on the claim against the bankrupt.

At Law. On motion to strike out parts of reply.

Johnson & Richards, for plaintiff.
A. & J. F. Lee, for defendant.

ROGERS, District Judge. This is an action of debt on a judgment rendered in a state court in Texas. The defendant pleads his discharge in bankruptcy granted in the district court of the United States for the district of Colorado, of which state he was at the time of filing his petition and at the time of his discharge a citizen and resident. The plaintiff replies, saying that it has no information, sufficient to form a belief, whether or not the defendant was ever a citizen of the state of Colorado, or resident of the city of Denver, in said state, or whether the defendant was duly adjudged a bankrupt in the district court of the United States in the district of Colorado, or that said court ever had jurisdiction over the defendant, or that, thereafter, to wit, on the 17th day of April, 1900, defendant was duly discharged, by order of that court entered of record, from the payment of all debts provable against his estate on the 26th day of January, 1900, and therefore denies said allegations in defendant's answer. For a second reply the plaintiff alleges that it presented its claim for the amount of the judgment sued on to the referee in bankruptcy of the district court of the United States for the district of Colorado, and the same was disallowed by the referee because it was barred by the statute of limitations of that state; that an appeal was had to the district court, and the opinion of the referee was confirmed, and said claim was disallowed; that, when such action was had whereby said claim was disallowed, said judgment was not barred by the statute of limitations either in the state of Texas or in the state of Missouri. And for a third reply defendant says that the debt which was the foundation of the judgment sued on in this case was created by the fraud of the defendant, and sets out the facts constituting the fraud. The motion in this case is to strike out the second and third pleas.

The real question involved in this case is whether or not the discharge in bankruptcy operated as a release of the defendant from the judgment sued on. It was conceded in argument, and it affirmatively appears by the last paragraph of the reply preceding the prayer thereof, that the judgment sued on was obtained upon promissory notes, and was not in an action for fraud. The question, in the opinion of the court, turns upon the peculiar language of the statute. It is well enough to compare the provisions of the present bankrupt law with the provisions of the bankrupt law of 1867. Sections 5117, 5118, and 5119 of the Revised Statutes of 1878 are as follows:

"Sec. 5117. No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt.

"Sec. 5118. No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise.

"Sec. 5119. A discharge in bankruptcy duly granted shall, subject to the limitations imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy. It may be pleaded by a simple averment that on the day of its date such discharge was granted to

the bankrupt, setting a full copy of the same forth in its terms as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands. The certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge."

If the question at bar had arisen under the sections just quoted, a decided conflict of authority might readily be cited; but the present bankrupt law reads as follows (section 17a):

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The difference in the language is striking. Under the old law "no debt created by the fraud or embezzlement of the bankrupt" was discharged by the proceedings in bankruptcy, but in the present act it is "judgments in actions for fraud, or obtaining property by false pretenses or false representations or for willful and malicious injuries to the person and property of another," which are not released by the discharge in bankruptcy. There is no pretense that the action in which judgment was rendered was an action for fraud. It was a simple action upon a promissory note. The legislature had some object in view in making this change. It is presumed to have known what the old law was upon the subject, and to have legislated with reference thereto. Its object, therefore, must have been to change the law in this respect. There are two canons of construction which can never be overlooked: Primarily, the effort is to get at the intent of the legislature; and, secondly, in doing so, the whole act must be construed so as that every word thereof shall have its appropriate meaning. To say that an action on a promissory note, in the usual and ordinary form, is an action for fraud, is not tenable. Where a note is founded in fraud, two remedies exist. The holder may waive the contract and sue for the fraud, or he may sue upon the note and waive the fraud. The plaintiff in this case chose the latter course, and took its judgments on the notes. Under this statute it must be bound by that record, and cannot go back of it. The motion, therefore, to strike out, should be sustained. In re Rhutassel (D. C.) 96 Fed. 597; In re Blumberg, 1 Am. Bankr. R. 633, 94 Fed. 476; Coll. Bankr. pp. 154–194; Burnham v. Pidcock, 5 Am. Bankr. R. 590, 68 N. Y. Supp. 1007; Id., 3 N. Bankr. N. 342, 66 N. Y. Supp. 806; In re Whitehouse, Fed. Cas. No. 17,564.

It is said that, while the judgment sued on was barred in Colorado, it was not barred in Texas, where it was recovered, nor in Missouri, where the debt was contracted. It is sufficient to say that upon that question the lex loci must govern, and, secondly, that the statutes of limitation govern only in the states which enact them, but the statute releasing claims in bankruptcy emanates from

the congress, and is as wide in its operation as all the states and territories. The power to enact such a statute was delegated to the congress by the states in the constitution. The result follows that the bankruptcy act is paramount in its operation to all state statutes in conflict therewith. This question, however, cannot be raised in this court. The question was raised in the district court of Colorado, from which no writ of error appears to have been sued out, and that question between the parties is res adjudicata.

The motion is sustained.

In re BULLWINKLE.

(District Court, S. D. New York. November 1, 1901.)

BANKRUPTCY—DISCHARGE—CONCEALMENT OF ASSETS.

An insolvent, within four months prior to his bankruptcy, organized a corporation, to which he transferred certain of his property and assets. He also paid in some money and withdrew about an equal amount. The greater part of the stock was issued to him, and he transferred the same to others to whom he claimed to be indebted, but the evidence justified an inference that such transfers were not bona fide. *Held*, that his failure to mention such stock or the property transferred to the corporation in his schedules constituted a concealment of assets, and his verification of such schedule a false oath, which defeated his right to a discharge.

In Bankruptcy. On motion for confirmation of referee's report recommending the bankrupt's discharge.

Jeroloman & Arrowsmith and Kurzman & Frankenheimer, for opposing creditors.

Goepel & Wahle, for bankrupt.

ADAMS, District Judge. This is a motion for confirmation of referee's report, as special commissioner, finding the creditors' specifications not sustained, and recommending the discharge of the bankrupt. It appears that in 1900 the bankrupt was engaged in business as proprietor of the Hotel Aulic, at Thirty-Fifth street and Broadway, New York, and was conducting a restaurant business at 524–526 Columbus avenue. He filed his petition for discharge from his debts on the 7th day of January, 1901, and was duly adjudicated a bankrupt. Specifications in opposition to the discharge were filed, and referred to the referee for investigation and report. The specifications were definite in form, and alleged concealment of assets and false oaths in connection with various transactions of the bankrupt, among others that during 1900 he had disposed of the properties mentioned, and concealed the proceeds thereof, and made false oaths in such connections. There was a further charge to the effect that the bankrupt caused a corporation to be formed in his own interest, called the Bullwinkle Purveying Company, which absorbed, to some extent, the assets of his estate, and that he omitted such assets from his schedules, and made false oaths concerning them. The only witnesses in the matter were the bankrupt and his son, George Bullwinkle, Jr. Their testimony had been

taken at a meeting of the creditors. The testimony of the bankrupt was admitted before the referee under the authority of In re Wilcox (C. C. A.) 109 Fed. 628, and that of the son by stipulation between the parties.

The corporation mentioned was organized on the 22d of October, 1900, to engage in the business of selling bottled liquors. It was capitalized at $10,000, in 100 shares of $100 each. During November and December $1,075 were paid into the corporation in part payment for 36 shares of the stock subscribed for by the bankrupt's two sons and his wife's sister, persons of small, if any, means, who were apparently dependent, to a great extent, at least, upon the bankrupt. The remaining 64 shares were taken by the bankrupt himself, for which he paid nothing, unless by the transfer of a lease, liquor license, and some merchandise. Shortly prior to the formation of the corporation, the bankrupt had leased the premises No. 2056 Eighth avenue for a term of five years for the purpose of going into the business there himself. This is the lease mentioned. It was informally transferred to the corporation, and the corporation went into the business, with the bankrupt solely in charge. On the 29th of August, 1900, he had applied to the excise board for a license for the same business. This was issued to him on the 8th of November, but about a week afterwards was transferred to the corporation, which paid $250, the fee therefor, with a check signed by the bankrupt as treasurer. In September the bankrupt had in his possession some $2,200 worth of liquors, which had been sold and delivered to him on credit. These liquors he transferred to the corporation. He claimed that the corporation assumed liability therefor, and the creditors accepted such liability in lieu of his own. In November and December he paid into the corporation some $525 in cash, and drew the same, or a little more, out again for his own use. He said he had transferred 62 shares of the stock he received to some of his creditors. At first, he testified that the transfers were in payment partly for goods sold to him prior to the formation of the corporation and partly for goods sold to the corporation. This he afterwards qualified, and said the transfers were in payment of his own debts, partly to a former barkeeper for wages due May 1, 1899, and for money loaned since that time, during which time the bankrupt said he was solvent. Looking through the whole case, I think the circumstances justify the inference that the transfers were not bona fide. He further said the company's business was run at a loss of about $50 per week, and that up to the time of the filing of his petition, when he withdrew from the corporation, it had paid him a salary of $25 per week as secretary and treasurer, and afterwards as an employé.

None of the facts concerning the Bullwinkle Company are stated in the bankrupt's schedules. The only mention there of the corporation is in Schedule B(3), where two shares, subsequently surrendered to the trustee, are described. The bankrupt's Schedule B(6) gives a list of the books used by him in conducting the Aulic Hotel and the restaurant in Columbus avenue, but does not mention the corporation books, in which appear the payments, here-

tofore mentioned, made by him to the corporation in November and December, and withdrawn for his own use from November 14, 1900, to January 30, 1901,—one sum, at least, after he had filed his petition.

In view of these facts, I cannot agree with the learned referee that the bankrupt is entitled to be discharged. It seems to me that the corporation was a mere device to enable the bankrupt to conduct business in his own interest, principally with the assets belonging to his creditors and to their exclusion. He has therefore concealed assets and made false oaths, within the meaning of the law. In re McNamara, 2 Am. Bankr. R. 566; In re Hoffmann, 4 Am. Bankr. R. 331, 102 Fed. 979; In re Bemis, 5 Am. Bankr. R. 36, 104 Fed. 672; In re Kamsler (D. C.) 97 Fed. 194; In re Horgan, Id. 319; Id., 39 C. C. A. 118, 98 Fed. 414; In re Wilcox (C. C. A.) 109 Fed. 628.

The motion to confirm the report is denied. Discharge refused.

STUBBS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

No. 1,328.

1. PUBLIC LANDS—PROSECUTION FOR CUTTING TIMBER—INFORMATION.
   An information charging the unlawful cutting of timber on public lands, although drawn to conform to the requirements of Rev. St. § 2461, and intended to charge an offense thereunder, may be treated as drawn under section 4 of Act June 3, 1878 (20 Stat. 90), where it contains all the averments necessary to charge an offense thereunder.
2. SAME—TRIAL—DEFENSES.
   In a prosecution under Act June 3, 1878 (20 Stat. 90, c. 151), for the unlawful cutting of timber on public lands, the burden rests on the defendant to establish the defense that such cutting was lawful under the act of the same date (20 Stat. 88, c. 150), which authorizes the cutting of timber from mineral lands for certain purposes and under prescribed regulations, and where he introduces no evidence showing a compliance with such regulations in material respects, or that the timber was in fact cut for the prescribed purposes, it is not error for the court to charge the jury that it was immaterial whether the land was mineral or nonmineral.

On Rehearing.

For former opinion, see 104 Fed. 988.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge. This case, which is a criminal prosecution for cutting timber on government lands, was argued and submitted at the May term, 1900, and an opinion by Judge Caldwell, who took part in the first hearing, was filed at that term, the judgment being reversed and the cause remanded for a new trial. Stubbs v. U. S., 44 C. C. A. 292, 104 Fed. 988. The judgment below was reversed at that time solely because counsel representing the government failed to call the attention of this court to an act

of congress approved August 4, 1892. 27 Stat. 348, c. 375. The case was decided in ignorance of the provisions of that act. As the information was drawn under section 2461 of the Revised Statutes, while the sentence was imposed and the trial was apparently conducted on the assumption that the prosecution was under section 4 of the act of June 3, 1878 (20 Stat. 90, c. 151), which act did not in terms apply to the state of Colorado, where the offense was committed, and as other laws were in force in the state of Colorado which rendered it lawful, under certain conditions, to cut and remove timber from mineral lands there situated, it was deemed necessary by the majority of the court to reverse the judgment, and such an order was accordingly entered. 44 C. C. A. 292, 104 Fed. 988, 992. Afterwards counsel for the government corrected certain erroneous references that had been made in their first brief, and by so doing called our attention to the second section of the act of August 4, 1892, supra, by virtue of which the fourth section of the act of June 3, 1878, had been extended to and put in force in all the "public land states," embracing, of course, the state of Colorado. Thereupon the original order of reversal was set aside, and the cause was restored to the docket for reargument. It was reargued at the present May term.

The principal question arising upon the reargument is whether the information, though professedly drawn under section 2461 of the Revised Statutes, contains the requisite averments to charge an offense under section 4 of the act of June 3, 1878, which was in force in the state of Colorado when the acts complained of were committed. Under the latter act it is made an offense "to cut, or cause or procure to be cut, * * * any timber growing on any lands of the United States * * * or remove, or cause to be removed, any timber from said public lands with intent to export or dispose of the same." Now, the information on which the conviction was had charges that the defendant and E. L. Walker and Lewis C. Jackway "unlawfully did cut and cause and procure to be unlawfully cut upon certain nonmineral public lands of the said United States, * * * being the southwest quarter of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-two (22), and the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section twenty-one (21), in township thirty-seven (37) north, range thirteen (13) west of the New Mexico principal meridian, and other portions of the public lands of the United States * * * a large amount of timber, consisting of white pine, yellow pine, and black pine, and other timber, * * * to wit, five hundred thousand (500,000) feet, board measure, which said timber was then and there standing and growing upon the said public lands, and was then and there the property of the said United States of America, * * * and of the value of five thousand dollars ($5,000), they, * * * so cutting and causing and procuring to be cut the said timber, with intent then and there unlawfully to export, dispose of, use, and employ the same for purposes other than for use in the navy of the United States." We think it manifest from a comparison of the allegations

of the information with the statute that the former contains all of the averments necessary to describe an offense under the act of June 3, 1878, and, that being so, it is quite immaterial that the pleader had before him section 2461 of the Revised Statutes when the information was drawn, and may have supposed that he was stating an offense under that section, rather than under section 4 of the act of June 3, 1878.

The charge of the trial court was excepted to at the trial for the reason that the jury was told, in substance, that it was not important whether the land on which the timber was cut was mineral or nonmineral, and that "if the defendant is guilty in one case he is guilty in the other." This court has recently held in the case of U. S. v. Price Trading Co. (C. C. A.) 109 Fed. 239, 246, 247, 248, that the privilege conferred by the act of June 3, 1878 (20 Stat. 88, c. 150), upon citizens of the United States residing in Colorado, Nevada, and certain territories therein named, to cut and remove timber for building, agricultural, mining, and other domestic purposes, provided the timber is growing on mineral lands or on lands not subject to entry except for mineral entries, was not repealed by section 4 of an act passed on the same day (20 Stat. 90, c. 151), nor by the act of August 4, 1892 (27 Stat. 348, c. 375); but that, notwithstanding the two later acts last mentioned, the privilege exists, and may be exercised on certain conditions prescribed by the secretary of the interior. Conceding such to be the law, we do not perceive that the instruction of the trial court in the present instance was prejudicial to the defendant, or that he is entitled to complain of the same. The proof which was introduced by the government showed that the timber in question was cut on land that had been entered as a homestead and prima facie was not mineral in its character. It further showed that the land in controversy was covered with timber, and that a homestead entry had been made on it, at the instance of the defendant, by one of his employés, and that the filing fee had been paid by the defendant, and that the purpose of filing on the land was to remove the timber to a sawmill some two miles distant, of which the defendant was one of the proprietors. The evidence which was adduced by the defendant with a view of showing that the land was chiefly valuable for minerals was speculative and highly vague and inconclusive. No veins of ore had ever been opened on the land; no minerals had ever been taken therefrom; and the most that any one could say was that a blanket vein that had been discovered several miles distant from the land probably extended in its direction and underlaid it. Moreover, the defendant did not claim that he had kept any books and had entered therein a description of the kind and amount of timber cut and a description of the land from whence it was taken, as the regulations of the interior department required him to do if it was in fact taken from land which the defendant in good faith believed to be of a mineral character. It is plain, therefore, that the defendant did not take the timber in the exercise of the privilege conferred by the act of June 3, 1878, supra, that he made no pretense of so doing, and that he did not regard the land as being chiefly valuable for minerals. The instruc-

tion in question, therefore, was not prejudicial to the defendant, nor would the evidence have justified the lower court in permitting a jury to determine whether the land was of a mineral character.

It being conceded that the fourth section of the act of June 3, 1878, was applicable to Colorado when the alleged offense was committed, we have no doubt that the conviction was right and that the judgment ought to be affirmed. It is so ordered.

SANBORN, Circuit Judge (concurring). I concur in the view that the information was sufficient, for the reasons stated in the foregoing opinion, and in the view that there was no error in the charge of the court below that it was not important under the evidence in this case whether the lands were mineral or nonmineral, for the reasons stated in my former opinion in this case published in 104 Fed., at page 992, and in 44 C. C. A., at page 295.

UNITED STATES v. BARRETT.

(District Court, D. North Dakota. November 4, 1901.)

1. COUNTERFEITING—UTTERING INSTRUMENT IN SIMILITUDE OF GOVERNMENT OBLIGATION—CONFEDERATE NOTES.

   The passage of a Confederate bill as money is not a violation of the fourth clause of Rev. St. § 5430, which makes it an offense for any person, except under authority of a proper officer, to have in his possession "any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same"; but, to constitute a violation of such provision, the instrument used must in its inception have been intended to simulate some obligation or security of the United States. The general likeness which one form of paper money bears to another is not sufficient.

2. SAME—USE OF INSTRUMENT TO PERPETRATE CHEAT.

   The use as money of an instrument which does not possess the requisite similitude to some national obligation or security to perpetrate a common-law cheat is not an offense against the United States, but is solely within state authority.

On Motion to Quash Indictment.

P. H. Rourke, U. S. Atty., and Edward S. Allen, Asst. U. S. Atty.

Newton & Smith, for defendant.

AMIDON, District Judge. The defendant is charged in the indictment with the violation of that provision of section 5430 of the Revised Statutes which reads as follows:

"Every person who has in his possession or custody, except under authority from the secretary of the treasury or other proper officer, any obligation or other security, engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same, shall be punished," etc.

The instrument which is the ground of the prosecution is a facsimile of a Confederate bill of the denomination of $50, a copy of which is set out in the indictment. The defendant moves to quash the indictment upon the ground that it does not charge any offense against the laws of the United States. In support of the motion

it is urged that neither Confederate bills nor the facsimile mentioned in the indictment were criminal in their inception, nor intended to simulate any security or obligation of the United States, and that the passing of such an instrument at most would amount only to the offense which was known at common law as a cheat by means of a false token, and that such an offense is solely within state authority. On the part of the government it is contended that a violation of the statute in question is made out if the instrument bears such a likeness to any of the genuine obligations or securities of the United States as to be calculated to deceive an honest, sensible, and unsuspecting man, of ordinary care and observation, dealing with a supposed honest man, and that whether this Confederate facsimile bears such a likeness is a question of fact for the jury. At the hearing of this motion the instrument which is the subject of the indictment was submitted to the court for its consideration. It is in the usual form of Confederate bills, except that near the bottom thereof, and in type somewhat smaller than the rest of the instrument, are the words "Confederate facsimile." The authorities on the subject presented by the motion are not harmonious, and the case calls for a careful consideration of the statute and the circumstances under which it was passed.

The first clause of section 5430 covers the unauthorized use of plates made and owned by the government for the printing and engraving of its obligations. Clauses 2 and 3 cover in general the unauthorized making, selling, or having in possession of plates in the similitude of those used by the government. Clause 4, the one in question in this suit, seems to cover only such instruments as are the product of the unauthorized use of the lawful plates of the government specified in clause 1, or of the unlawful plates specified in clauses 2 and 3. The earlier statutes on the same subject point plainly to this interpretation. The first federal law dealing with the matter embraced in section 5430 is contained in section 19 of the act incorporating the second United States Bank, found in 3 Stat. 275. It reads as follows:

"And be it further enacted, that if any person shall make or engrave or cause or procure to be made or engraved, or shall have in his custody or possession, any metallic plate engraved after the similitude of any plate from which any notes or bills issued by the said corporation shall have been printed with intent to use such plate or to cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by the said corporation; or shall have in his custody or possession any blank note or notes, bill or bills, engraved or printed after the similitude of any notes or bills issued by said corporation with intent to use such blanks or cause or suffer the same to be used in forging or counterfeiting any of the notes or bills issued by the said corporation; * * * every such person being thereof convicted," etc.

It will be noticed that the clause which corresponds to clause 4 of section 5430 relates only to blank notes or bills. The reason for this will be found in the other provisions of the act, which required that all such notes and bills before their issuance should be signed and countersigned by the proper officers of the corporation. The notes when they came from the plates were blank as to

signatures. It is manifest, therefore, that the clause which corresponds to the clause in question in section 5430 was intended to cover only the output of the forbidden plates mentioned in the first part of the section or similar blank instruments wrongfully obtained from the bank before they were signed by the proper officers. In Act Oct. 12, 1837, authorizing the issuance of treasury notes, the provision above quoted from the act incorporating the United States Bank was copied with only such immaterial changes as were necessary to adapt it to government obligations. It continued to be thus copied in each of the subsequent statutes authorizing the issuance of treasury notes. See 5 Stat. 201, § 11; 9 Stat. 118, § 10; 11 Stat. 257, § 13. The last reference is to Act Dec. 23, 1857, which was a revision of previous statutes on the subject of treasury notes, and is frequently referred to in later enactments. Section 13 of that act reads as follows:

"And be it further enacted, that if any person shall make or engrave, or cause or procure to be made or engraved, or shall have in his custody and possession any metallic plate engraved after the similitude of any plate from which any notes issued as aforesaid shall have been printed, with intent to use such plate, or cause or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid, or shall have in his custody or possession any blank note or notes engraved and printed after the similitude of any notes issued as aforesaid, with intent to use such blanks or cause or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid, * * * every such person being thereof convicted," etc.

In the first act authorizing the issuance of greenbacks, being Act Feb. 25, 1862 (12 Stat. 345, § 7), this section was expanded so as to assume nearly the same form as section 5430 of the Revised Statutes. The clause in question, however, still dealt only with "blank note or notes, bond or bonds, coupon or coupons, or other security or securities." This was the form of expression in all previous laws to which reference has been made. The reason for it will be found in the other provisions of the statutes, which required all treasury notes to be "signed in behalf of the United States by the treasurer thereof, and countersigned by the register of the treasury." It will, therefore, be seen that the obligations of the government when they came from the plates were blank, and that the clause of the statute in question was designed to cover only such blank instruments. In the course of the Civil War, however, the treasury notes and obligations of the government came to be issued in such vast volume that it was found to be wholly impracticable to have each of them signed by the hand manual of any officer of the treasury department. For this reason the practice of using engraved signatures was adopted. Section 6 of the Act of June 30, 1864, reads as follows:

"And the treasury notes and United States notes authorized by this act shall be in such form as the secretary of the treasury shall direct, and shall bear the written or engraved signatures of the treasurer of the United States and the register of the treasury, * * * and shall bear as a further evidence of lawful issue the imprint of the seal of the treasury department, to be made under the direction of the secretary of the treasury as before directed." 13 Stat. 220, c. 172.

Owing to this change as to the manner of signature, a corresponding change was made in section 11 of this act of June 30, 1864, which has since become section 5430 of the Revised Statutes. The word "blank" is omitted, for the reason that the instruments, when they came from the plates, contained the engraved signatures of the proper officers of the treasury department. The scope of clause 4, however, was not enlarged, and in the act of June 30, 1864, as in previous acts, it was intended to cover only such instruments as are the output of the plates mentioned in the earlier provisions of the section. Notwithstanding this meaning of the statute, as evidenced by its history, it has sometimes been held that clause 4 was intended to reach all instruments bearing such a general similitude to federal obligations as to make them fit means of deception. U. S. v. Fitzgerald (D. C.) 91 Fed. 374; U. S. v. Stevens (D. C.) 52 Fed. 120; U. S. v. Wilson (D. C.) 44 Fed. 751, quoted in U. S. v. Kuhl (D. C.) 85 Fed. 631. That cannot be the proper construction of the statute, for several reasons: First. By its express language it relates only to such instruments as are "engraved and printed" in the similitude of government obligations. The engraving and printing is the only feature which the language of the section covers, and the only feature which, as the history of the statute demonstrates, it was intended to cover. Second. If the clause be expanded to cover any instrument made in the similitude of any government security or obligation, then it embraces the same subject as is covered by the next preceding section of the act, which has since been distributed into sections 5414 and 5431 of the Revised Statutes. This section dealt fully with counterfeits, and covers all such instruments, as to their making, possession, and transfer. But what is a counterfeit? It is an instrument falsely made in the similitude of a genuine instrument. If the clause in section 5430, therefore, relates to all instruments bearing a similitude to any obligations of the government, it must necessarily cover counterfeits of those obligations. Under this construction section 10 of the act (sections 5414 and 5431 of the Revised Statutes) would completely cover the subject of counterfeit instruments, and section 11 of the same act (section 5430 of the Revised Statutes) would likewise cover the same subject; the one section uses the generic term "counterfeit" and the other section, under this construction, uses the distinctive words of the definition of that term, "made after the similitude of." It is therefore manifest that, if clause 4 be held to cover any instrument bearing a similitude to any government obligation or security, it exactly duplicates the earlier provision of the same statute. Third. The words "sell or otherwise use," found in the fourth clause of section 5430, are peculiar, and seem to have been employed to distinguish the instruments covered by that statute from counterfeit or altered obligations of the government. The words of transfer properly applicable to the latter class of instruments had become words of art. They appear in section 5431 of the Revised Statutes and in all earlier laws dealing with this subject from the beginning of the government. They are "pass, utter, publish, or sell." This difference of

language points clearly to a difference of subject-matter. The word "use" probably finds its full significance in the earlier statutes on the same subject, where the language is "with intent to use such blank or blanks or suffer the same to be used in forging or counterfeiting any of the notes issued as aforesaid." The word "sell" is intended to cover the transfer of these imperfect obligations as they come from the plates, and not their passage or utterance as counterfeit instruments. Fourth. Section 10 of the act of 1864 (which has since become sections 5414 and 5431 of the Revised Statutes, as already explained), deals with the subject of counterfeit instruments. To constitute the possession of such instruments a crime, the possessor must be actuated by a criminal intent in two particulars—First, he must have the intent to defraud; second, he must have the intent to pass, publish, utter, or sell the instrument. It will be noticed, however, that an intent to defraud is no part of the offense created by clause 4 of section 5430. Why this difference, unless there is a difference in the instruments dealt with? It is not reasonable that congress intended to make the mere possession of an instrument, engraved and printed in the similitude of some obligation or security of the government, a crime, without proof of any fraudulent intent on the part of its possessor, and at the same time and by the same statute require proof of an intent to defraud, to make the possession of a counterfeit instrument a crime, unless there is such a difference between the instruments themselves as to make mere possession in the one case evidence of a wrongful purpose which in the other case would not be indicated by such possession.

The construction thus justified both by the history of the statute and its language is proven to be correct by other considerations. To hold that the statute forbids the use of any instrument which bears such a likeness to the obligations of the government as to make it a ready means of cheating would render criminal the use of any currency other than that authorized by the United States; for all forms of paper money will necessarily bear a general similitude to each other. The promise to pay inscribed upon them will be substantially the same. The words and figures indicating their face value must in all cases be their most prominent feature, as these alone are chiefly observed in their actual use. All such instruments must further contain such markings and vignettes and be printed on such paper as to make their counterfeiting difficult. As a rule persons passing and receiving paper currency look only at the figures which express its value. They do not read the writing nor study the vignettes. If the instrument has the general appearance of paper money, and is for the intended amount, it is accepted. I am informed by the treasury department at Washington that the various instruments issued under authority of the national government which are now in circulation as money bear approximately 100 different designs. The most common devices are pictures of distinguished men of the republic and reproductions of famous paintings. These various issues of currency are engraved upon paper ranging through all the colors reasonably fit for the

purpose, and have, of course, acquired still other shades by the stains of actual use. Now of this great variety of paper money two things may safely be said—First, the ordinary business man neither knows nor observes their distinctive designs; second, no paper currency could be made reasonably fit for circulation which would not bear, in general, a close similitude to one or more of the 100 different varieties now in use under national authority. To hold, therefore, that the statute forbids the use of any instrument which bears such a similitude to any of the national securities as to make it a fit means of deception would necessarily make criminal the use of any paper currency except that authorized by the general government. But it can easily be shown that this was not the intent of congress in passing section 5430. First. Instead of prohibiting the use of state bank currency, the national government imposed a tax of 10 per cent. upon its circulation. The act prescribing this tax was approved on March 3, 1865, nearly a year after the act of June 30, 1864, was passed, from which section 5430 was taken. The very form of this restriction by taxation clearly shows that congress contemplated as lawful the continued use of the state bank currency. Second. On the 1st day of July, 1864, the day after section 5430 took effect as a law, the amount of state bank notes which were in actual circulation was $179,157,717. A year later, on the 1st day of July, 1865, the amount of this state bank currency in actual circulation was $142,919,638. On July 1, 1876, 12 years after this criminal law took effect, there was in actual use, of this paper currency, $1,047,335. (See Report of Monetary Commission of 1898, page 549.) Now, even a casual inspection of the currency issued by the state banks will show that it bore quite as close a similitude to the national securities as the instrument complained of in this action. It certainly bore such a similitude to the national currency as to make it an easy means of deception. It necessarily follows that if the use of this state bank currency was not within the prohibition of section 5430 the instrument set out in the indictment cannot constitute a violation of that statute. My attention has been called by the government to certain newspaper clippings relating to recent prosecutions of parties for passing certain of the notes of the State Bank of New Brunswick, N. J., and it appears from these clippings that some of those prosecutions have resulted in convictions. It is difficult, however, to see how such convictions can be sustained. At the time section 5430 became a law the use of the notes of that bank certainly was no violation of its provisions, and there has been no change either in the notes or the statute since that time to justify any different holding now. If the notes of the New Jersey bank have become worthless, and were used by the parties for the purpose of perpetrating a common-law cheat, or what is known under modern statutes as obtaining money or property by false pretenses, that offense is solely within state authority. U. S. v. Wilson (D. C.) 44 Fed. 751; U. S. v. Kuhl (D. C.) 85 Fed. 624. It should never be overlooked that the cheating is no part of the violation of section 5430. The similitude of the engraving and printing on the instrument used to the

engraving and printing upon national securities is the sole ground of criminal liability under the federal statute. Neither the worthless character of the instrument nor the intent to defraud are elements of the offense. If a person were to sell or otherwise use an instrument within its prohibition, and at the same time expressly declare its character, his act would come as clearly within the provisions of the statute as if done clandestinely. It is likewise true that the instrument might be as valuable as the genuine instrument in the similitude of which it was engraved, and still the defendant would be guilty, if it was engraved in the similitude of a security or obligation of the United States. Third. At the present time and at all times since the passage of the act of June 20, 1864, at points in this country within 100 miles of the national boundary line, Canadian paper currency has found a considerable circulation. An examination of any of these bills will show that they bear such a likeness to the paper currency of this country as not to be distinguished by the general public in the ordinary transactions of business. It is a matter of common knowledge that they are frequently passed and received as American money. If the construction contended for by the government be adopted, every person who has in his possession a Canadian bill, with intent to sell or otherwise use the same, is guilty of a crime; for the fact that the bill is worth its face is wholly immaterial under the statute. The fact that for more than 25 years no prosecution was ever instituted for the use of state bank or Canadian bills furnishes convincing proof that the construction now urged by the government is wholly unwarranted.

The only conclusion, it seems to me, which can be drawn from the history of the statute and from the considerations above adverted to is that, to bring an instrument within the provisions of the clause of section 5430 under consideration, such instrument must, in its inception, have been engraved and printed with an intentional design to simulate the engraving and printing upon some obligation or security issued under the authority of the United States. Something more than general appearance or adaptability to deceive is required. The court must be satisfied that the instrument in its inception was designed to be in the similitude of the engraving and printing upon some United States obligation or security. In other words, the similitude must not be simply incidental, and such as arises from the fact that the instrument in question was intended to subserve the same purpose as some obligation or security of the United States, but must be specific and direct and such as arises out of an intentional design to copy such obligation or security of this government. Of course I do not mean that, in prosecutions for the violation of this statute, it is incumbent upon the government to prove by extraneous evidence that the instrument complained of was originally designed to simulate some obligation or security issued under the authority of the United States. The instrument itself is to be looked at, and if it bears such a similitude to the obligations of the government as to indicate that it was designed to simulate those obligations, or even

if it should bear such a close resemblance as instruments usually do which are intended to simulate the obligations of the government, although the resemblance were accidental, the offense would be made out. But that incidental similitude which arises from the fact that the instrument complained of was intended to subserve the same purpose as national obligations and securities is not sufficient to make its possession a crime, if, in its inception, the instrument was lawful.

It follows that the indictment charges no offense, and the motion to quash must therefore be granted.

HALSTEAD et al. v. HOUSTON.

(Circuit Court, E. D. Pennsylvania. November 6, 1901.)

No. 20.

UNFAIR COMPETITION—CIRCULARS ADVERTISING BOOK—USE OF GARBLED LETTER TO MISLEAD.

Complainant published a letter announcing to the public that he was engaged in writing a life of President McKinley, and giving the name of the publisher. He further stated that there was being advertised another "Life of McKinley," purporting to have been written by him; that in 1896 he had prepared a campaign publication regarding the then Republican candidates for president and vice president, which he understood was being changed, and sold as his "Life of McKinley," but that he had not had anything to do with such book since its first publication. Defendant, who was publishing and selling still another book on the same subject, issued a circular in which he copied that part of complainant's letter which denied his connection with the second work mentioned therein, but omitted the portion relating to complainant's new work, and added an indorsement, which, in connection with the extract printed, was calculated to mislead the public by inducing the belief that any book offered as complainant's was fraudulent, and not authentic. The proofs showed that such circular in fact created the confusion in regard to complainant's book which it was the purpose of his letter to prevent. *Held*, that such circular was constructively fraudulent, even if not so intended, and its promulgation caused an injury to complainant, against which he was entitled to protection of injunction.[1]

In Equity. On motion for preliminary injunction.

Hector T. Fenton, for complainant.

Joseph T. Bunting and Wm. C. Hannis, for defendant.

DALLAS, Circuit Judge. If the proofs upon the present motion for a preliminary injunction disclosed nothing which was not before the court when a similar application was recently denied by Judge McPherson in Halstead v. John C. Winston Co., 111 Fed. 35, I would simply follow the ruling which was then made; but, as facts have been shown in this case which did not appear in that one, I have felt it incumbent upon me to independently consider the question as now presented, and, so considering it, have been constrained to reach a different result. The alleged wrongful use of an extract from Mr. Halstead's announcement to the public, which was com-

[1] Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper, 30 C. C. A. 376.

plained of in the case of Halstead v. John C. Winston Co., is also complained of now; but the present defendant has indorsed upon that extract a printed statement, and this the defendants in the former case had not done. The extract and indorsement referred to are as follows:

(Extract.)

"Auditorium Hotel. Annex.

"Chicago, Sept. 21, 1901.

"To the Public: * * * I prepared a campaign publication six years ago regarding the Republican candidates then for president and vice president. I understand it is undergoing further change, and purported to be my 'Life of McKinley.' I have had nothing to do with it since 1896, and I want this clearly understood. It is a back number, and I trust will be looked upon as such. Murat Halstead."

Extract from letter in which Mr. Halstead wishes to warn the public against buying his old "Campaign Book" now being sold as a new "Life of McKinley."

(Indorsement.)

"A Big Fraud Exposed. A Scheme to Swindle the American Public Uncovered.

"The unprecedented demand for an authentic life of President McKinley has induced certain unscrupulous publishers to bring forth a number of inferior books on the life of the late president. These books are mostly made up of newspaper clippings, or are old campaign books rehashed, with an extra chapter added, and are being palmed off on the public as 'authentic,' when exactly the opposite is true. The publishers of some of these so-called 'Lives of McKinley' are claiming that their book is written by Murat Halstead. On the front of this circular is an extract from a recent letter which Mr. Halstead has addressed to the public on this subject, which speaks for itself. When you come in contact with persons who have already subscribed for one of these fake Halstead books, or for some other unreliable Life of McKinley, show them this circular, and the result will be that they will promptly cancel the orders that they have already given, and at once subscribe for a copy of your book. Everybody wants the 'Authentic Life of President McKinley,' with introduction and biography by Col. A. K. McClure, life and public services by Charles Morris, and memorial tributes by members of Mr. McKinley's cabinet and other distinguished persons from different parts of the world. This is the book with which you are prepared to supply them, and with such ammunition as this to help fight your battles you should simply sweep the country. Take special notice that Mr. Halstead's letter is under date of September 21st, 1901, at Chicago. It sounds the 'death knell' to a further sale of the so-called 'Life of McKinley' which it is intended to suppress, and effectually 'heads off' all competition from agents engaged in handling such fraudulent books. The Publishers."

It appears that Mr. Halstead issued two announcements, each of which included the identical text of the above extract, but which slightly differed from each other in the omitted preceding matter. This preceding matter is, in each instance respectively, as follows:

(1) "I am writing 'The Illustrious Life of William McKinley, our Martyred President,' and hope to make it worthy. There is advertised another 'Life of McKinley,' entitled 'Life and Distinguished Services of William McKinley,' retailing for $1.00, alleged to be by me."

(2) "I am writing 'The Illustrious Life of William McKinley,' which is being published by the World Publishing Co., of Buffalo, N. Y., and hope to make it worthy. There is advertised another 'Life of McKinley,' entitled 'Life and Distinguished Services of William McKinley,' alleged to be by me."

It will be observed that in both forms it was plainly stated that Mr. Halstead was then writing a life of William McKinley, and that in both of them attention was pointedly directed to the fact that his new book was not to be confounded with another "Life of McKinley," alleged to be by him. Hence, from either announcement, when read in its integrity, it clearly appeared that the object in view was to prevent the other "Life of McKinley," alleged to have been written by Mr. Halstead, from being confounded with the "Life" which he was then writing; whereas the extract, when separated from its context, and read in connection with the indorsement placed thereon by the defendant, palpably tends to create the very confusion which the plaintiffs, for the protection of their property in the new work, had rightfully sought to avoid. Moreover, the confusion, which in the former case appeared to be a "possibility," has in the present one been shown to be an actually existent fact, and the consequence is, whether fraudulently intended or not, that an injury is done to the plaintiffs, the infliction of which the defendant might readily forbear without foregoing the exercise of any right of his own. It is of no avail to say that the injurious result occasioned is not designed. It should be avoided. The defendant's circular is misleading; and persistence in its promulgation, even if not an actually purposed fraud, certainly amounts to such a constructive, legal fraud as a court of equity is in duty bound to repress. Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Manufacturing Co. v. Hipple (C. C.) 109 Fed. 152.

Accordingly, it is ordered that a provisional injunction issue, restraining the defendant, his servants, agents, and employés, in the terms of the first prayer of the bill; said injunction to continue in force until the final hearing of the cause, or the further order of the court.

CODDINGTON v. PROPFE.

(Circuit Court of Appeals, Third Circuit. November 6, 1901.)

No. 24.

PATENTS—INFRINGEMENT—MACHINE FOR MAKING WAXED TAPERS.

The Coddington patent, No. 303,984, for machinery for manufacturing waxed tapers and coated strings, claims 2, 3, 4, and 14, *held* not anticipated, and valid, but not infringed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

E. Hayward Fairbanks, for appellant.

Hector T. Fenton, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by the complainant from so much of the decree of the circuit court as dismissed the bill in respect to letters patent No. 303,984, for improvements in machinery for manufacturing waxed tapers and coated strings, granted on August 26, 1884, to George W. Coddington. The pat-

ent has no less than 37 claims, but a reversal of the decree is asked only as to claims 2, 3, 4, and 14, which are as follows:

"(2) A machine for coating strings with wax, consisting of a pan, B, in which to melt the wax, and mechanism substantially as described, for retaining the strings in said pan, and drawing them horizontally through the same, substantially as and for the purpose specified. (3) The combination of the vessel for holding the cord-coating material, devices for immersing the cord therein, drum or roller, C, and feed rollers, d and d^1, all supported in an appropriate frame and mechanism, substantially as described, for causing said rollers to revolve, substantially as and for the purposes specified. (4) The combination of a vessel for holding the melted cord-coating material, staples, or guiding devices having openings b^1 and b^2, and means for drawing the strings through the staples or guides, b^1, b^2, substantially as and for the purposes specified." "(14) In a machine for coating strings, the roller, C, provided with a porous exterior, substantially as and for the purposes specified."

Upon the proofs in this record touching the prior art it may be said correctly that these specific claims were not anticipated, and that they are respectively valid. The real controversy, however, arises upon the question of infringement. In the court below the case (as to this patent) was ruled upon that question, and adversely to the complainant. The circuit court made the following specific findings of fact:

"It was not new with Coddington to provide machinery or mechanical apparatus to cover wick or strings with a waxing or coating composition, and to cut off the same in definite lengths; the ancient wax tapers and wax matches having been so made. It was not new with Coddington to provide a mechanical structure to deliver sheets of paper or a series of cords or wicks to a waxing or coating pan, means to keep the cords submerged therein, means to strip off the surplus coating, driven rollers to draw the paper or cords from the waxing pan, and means to wind up the waxed paper or cord, or to deliver it to other devices for further treatment. The prior patents to Bancroft of 1882, Page of 1881, Montgomery of 1849, and McPhetridge of 1856, each show and describe some or all of this mechanism, substantially as stated in the preceding paragraph. It was not new with Coddington to provide, in a single apparatus or machine, mechanisms operating automatically and in unison, whereby a string was fed forward, coated with wax or like composition, cooled, drawn forward by driven rollers, delivered to cutting devices and cut off in definite lengths, in one continuous operation, such a machine or apparatus being described in prior McPhetridge United States patent of 1856."

Our own independent investigation of the proofs confirms these findings, and leads us to the conclusion that Coddington disclosed no such feature of novelty as entitled his claims to any broad construction. Beyond the specific devices shown, and colorable changes therein, the claims are not to be carried. The drum or roller, C, of the patent, to which our attention is particularly called by the appellant's counsel, is shown and described as driven by belting, and is further referred to in the specification thus:

"This drum, C, is covered with cloth, which is kept constantly moistened by water from the trough, F, the preferred means for conveying the water from the trough to the drum being a strip of cloth, 5, one edge of which is in the trough, and the other edge resting on the drum. This strip, 5, acts on the principle of a siphon, and keeps the cloth on the drum, C, moist, and the strings, b, are thus drawn between two moistened surfaces, and are thus cooled and moistened."

We do not find in the defendant's machine the roller or "drum, C," of the patent. The defendant's rollers here complained of are merely guide rollers to guide the strings to and through the cold water in the cooling pan. They revolve freely, but are not driven. They are plain wooden rollers, without any covering whatever. In construction, operation, and function the defendant's rollers differ materially from the roller or drum, C, of the Coddington patent. In respect to each of the four above-cited claims, now in question, it is our judgment that the defendant's machine differs substantially from the apparatus and devices shown and described by Coddington, and that upon the issue of infringement of the machine patent No. 303,984, the court below rightly dismissed the bill.

The decree of the circuit court is affirmed.

DIAMOND STONE SAWING MACH. CO. OF NEW YORK v. DEAN et al.

(Circuit Court, E. D. New York. October 10, 1901.)

PATENTS—VALIDITY AND INFRINGEMENT—STONE SAWING MACHINES.

The Williams patent, No. 429,874, for improvements in diamond stone sawing machines, and in methods of operating the same, while describing a machine in which theoretically there is an exact correspondence between the feeding movement and the progress made by the saw blade through the material, cannot be limited to one in which there is such exact correspondence at all times in practical operation, which would be impossible of attainment with the machine shown, in which there is no such unyielding fixity of the parts as would prevent the yielding of the saw blade by reason of its resiliency or the elasticity of the frame, and its cutting with greater rapidity at some times than at others. Such patent construed, and *held* not anticipated, valid, and infringed, as to claims 1, 2, and 3.

In Equity. Suit for infringement of patent. On final hearing.

Benjamin F. Lee and Charles C. Protheroe, for complainant.

Edwin H. Brown and James C. Chapin, for defendants.

THOMAS, District Judge. The complainant is the owner of letters patent No. 429,874, issued to George N. Williams, Jr., under the date of June 10, 1890, pursuant to an application filed November 29, 1886, for "improvements in diamond stone sawing machines and in methods of operating the same," and alleges infringement by the defendants of claims 1, 2, and 3. The answer denies infringement and invention, and alleges prior knowledge and use. The Williams mechanism, as illustrated by the letters patent, is a modification of what were known as "Young's Diamond Saws," by the elimination of certain parts thereof, and the addition of certain other parts. The defendants' saw is also of the Young manufacture, modified, as alleged, so as to bring it within the patent. On November 17, 1886, an application for the same invention was filed by Henry Rudolph, and an interference between this and the Williams application was declared on the 5th of September, 1887. On the 31st of December, 1889, the commissioner of patents affirmed the decision of the board of examiners in chief, which found priority of invention in Williams.

Thereafter Rudolph filed a bill against Williams in the Southern district of New York, under section 4915 of the Revised Statutes, and on the 6th day of December, 1893, Judge Coxe found priority of invention in Williams. (C. C.) 62 Fed. 577. Previous to the Williams invention the Young's diamond saw, above mentioned, cut during one movement, because it was pressed down upon the stone, and was inoperative during the opposite movement by reason of the fact that a lift mechanism relieved the downward pressure, and allowed the saw to spring out of contact with the stone. Williams eliminated the lift mechanism, thereby permitting the saw to cut on both strokes. Williams used the existing feeding mechanism, but made such duplication of the parts actuating the same that the saw was fed to the stone during both its movements with intended correspondence to the speed at which the saw blade moved. These changes, illustrated by the Williams patent, went into general use, and were adopted by the defendants.

The claims involved are as follows:

"(1) The herein described method of feeding the reciprocating saw blade of a stone sawing machine, which consists in imparting to said saw blade during its forward and backward movements a forward or feeding movement during both its backward and forward strokes, said feeding movement corresponding in extent to the speed at which the saw blade is moving forward or back at all times, substantially as set forth. (2) In a stone sawing machine, the combination, with the diamond-toothed saw blade and its sash, of means for imparting to said sash a reciprocating movement in a straight line throughout its entire stroke, a screw mechanism for positively feeding the saw blade up to its work, and means for actuating said feeding screws during both the forward and backward strokes of the saw, whereby the saw blade is fed up to its work intermittently during both its reciprocating movements. (3) In a stone sawing machine, the combination, with the saw blade and its sash, of means for imparting to said sash a reciprocating movement in a straight line throughout its entire stroke, a ratchet mechanism operating means for feeding the saw blade up to its work during its forward stroke, and a ratchet mechanism operating means for feeding said blade up to its work during its backward stroke, substantially as set forth."

Do the defendants' machines fall within the Williams patent? A distinction is claimed to be found, in this: that Williams provided for a rigid blade to which is applied a positive feed, while the defendants' blade is elastic, so that a positive feed is not and cannot be applied to it. Respecting this, defendants' expert states that in the defendants' machine the saw is supported at the end in such a manner as to afford an elastic or yielding support, so that by placing levers beneath defendants' saw blade, and bearing down the blade thereon with moderate force, the blade could be lifted about a quarter of an inch, and would afterwards spring back to its original position; that, while the saw was at work, if the feed were thrown out of operation the saw would continue to cut the stone for forty strokes; that "the feed screws were not then being turned at all, the saw then being pressed against the stone by its own elasticity or that of the support or both, and by this means only was caused to do effective cutting." This witness further states that he observed that upon starting the saw, and during 100 strokes, the amount of the descent of the saw was about one-quarter of an inch, and during the following 100 strokes the saw descended a half inch, illustrating that

during the first 100 strokes "there was apparently a quarter of an inch of the motion imparted by the feed taken up by the saw and its support, through their elasticity." He adds this comment:

"The effect of an elastic feed instead of a positive feed in such a stone sawing machine is, in my opinion, practically to destroy any correspondence between the extent of feed and the extent of speed, such as is referred to in the first claim of the patent in suit. No matter how carefully the operating mechanism may be organized for the purpose of causing such a correspondence, the result sought, if the saw is not fed positively, will not be gained. The elastic part of the mechanism (saw blade or support) becomes a reservoir in which the applied force is accumulated, and the expenditure afterwards of this force to produce effective cutting is then regulated not by control directly exerted by the force-conveying mechanism, but by the resistance which the saw is called upon to meet. If, for example, the work cut happens to be of varying density and hardness, the softer portion of the stone will be more readily overcome and cut, and the feed will be more rapid, and hence greater in extent per given time, than when the saw encounters harder portions of the same stone. This will serve as an illustration of how the feed may vary in an entirely irregular way in point of extent, and bear no relation to the extent of variation of the speed, which is due simply to the arrangement of the sash-driving mechanism. It will be seen, therefore, from the foregoing, that the presence of the elastic feed in the defendants' machine not only distinguishes it from the structure of the second claim, in which a positively feeding mechanism is essential, but that because of that fact, also, the correspondence of extent of feed and extent of speed which is essential to the method of the first claim is also in defendants' machine practically eliminated."

The defendants use the foregoing evidence to illustrate that their machines do not fall within the invention in suit, which, as they urge, provides for a mechanism "where the ratio of feed at any given time always corresponds with the speed of the saw in its reciprocation," and one "where the downward pressure on the blade on each stroke at any time is equal to the downward pressure of the blade on that stroke at any other time, and the aggregate downward pressure on one stroke is equal to the aggregate downward pressure on the other stroke," and that this describes proportionate feed to the saw blade, and renders the same inelastic and positive in its action. That such is the meaning of the Williams invention is shown by the evidence of Williams, the inventor. The defendants also elicited evidence from Hugh Young, the inventor and builder of the defendants' saws, and of the saws upon which the improvement is claimed by Williams, that the proportionate feed, as above described, is impracticable, because the elasticity claimed for the defendants' machine must to some extent exist in the machine for which the invention intends to provide. It would thus appear that both the defendants' machine and the machine purporting to be covered by the patent may feed more on one stroke than on the other. A test made by the complainant's expert upon a machine as illustrated in the following evidence leads to the same conclusion:

"Q. 6. Subsequent to your examination of the Dean machine referred to in your last answer, did you make any experiments with the Hogan saw upon the same general lines as the experiments made by Mr. Benjamin with the Dean saw; and, if so, please state the results of such experiments? A. I made such experiments with the Hogan saw on December 17, 1896, and again on June 29, 1899. I found it took a perceptible period of time at the beginning of the operation of the saw before the machine got to its normal

working tension. After that it did uniform cutting. I had the feed thrown off, the machine being kept in motion, and I found that there was a corresponding period of time during which the saw continued to cut after the feed ceased. My figures would average about one-quarter as large as those given by Mr. Benjamin. In repeating his crowbar experiment, with three men working it, got one-eighth of an inch, instead of his one-quarter inch."

He further states that:

"The positive feed referred to in the patent is obviously of such a nature as the machinery is capable of. The word 'positive,' when used in this connection, is therefore used in a practical sense. I do not understand that any definition of the word 'positive' in this connection precludes the idea of elasticity of the parts through which the motion is positively transmitted. The operation of the machine, like the Hogan saw as it now exists in the Williams yard, and of the Dean machine spoken of by Mr. Benjamin and examined by me, is such as to have a positive feed, in the proper sense of the term. When the machine is first put in operation, the force, for a certain period of time, is expended in overcoming the elasticity of the parts. When this force has effected a proper working tension, the parts, including the saw blade, become inelastic and positive in their action. I therefore find the positive feed of the patent in suit in the defendants' machine, as well as in the Hogan saw in the Williams' yard, and I disagree with the views of Mr. Benjamin expressed on that subject. I have not overlooked what Mr. Benjamin has stated in regard to the drawing Fig. 1 of the patent in suit, in which he says: 'The saw blade is secured to these blocks by bolts, which in Fig. 1 of the drawing appear to be imbedded in the material of the blocks. There is therefore a rigid connection between the blade and block, so that when the blocks are moved by the feeding screw the saw must go with them.' I find that nothing of the kind is indicated in the drawing. The specification is wholly inconsistent with what Mr. Benjamin says on this subject. The then familiar Young diamond stone saw of the Hogan type is clearly referred to in the specification, and the parts referred to by Mr. Benjamin form parts of that old machine. What is described in the specification and drawings of the patent where these parts are referred to is shown in Complainant's Exhibit Saw Blade and its Supports."

The fact seems to be that the defendants' mechanism in all essential particulars is that described by the specifications, nor does it appear that the claims are limited to a saw that is so fixed at its extremities that in practical operation there must be an exact correspondence between the feeding movement and the movement of the blade. The evidence tends to show that such a condition would be practically impossible of attainment, and, if the claims necessarily involve a machine of that kind, there can be no fulfillment of the claims, and defendants' machines do not come within them. It is thought, however, that, while it was the intention of the claims to secure a patent for a device that would theoretically produce this result, it was not contemplated that there should be such nice and fine adjustment and unyielding fixity of material and parts that such result must inevitably ensue. The first claim states, "said feeding movement corresponding in extent to the speed at which the saw blade is moving forward or back at all times." The second claim provided for a mechanism whereby the saw blade is fed up to its work intermittently during both its reciprocating movements. And the third claim uses similar language. The force conveyed from the feeding mechanism to the saw may press the saw directly upon the stone, so that the force is spent uniformly, or the resiliency of the saw blade or the elasticity of its adjustment and the yielding of the

structure to the strain may interrupt temporarily the uniform consumption of force, thereby storing, to a degree, the same, with the result of giving it forth during the progress of the work, or the saw may be continued out of its right line of action for a greater or less period. Nevertheless during such suspension of normal operation the feed is communicated to the saw and its supports with a general uniformity, producing in its then condition the positive feed for which it is contended the claims provide, but at all times keeping the saw up to its work. The fact that the feed is not consumed as delivered, and as fast as it is delivered, by reason of the yielding of the machinery by the varying obstructive force of the stone, does not take the defendants' machines out of claim 1, and claims 2 and 3 do not require it. Therefore it is concluded that the defendants' machines infringe the patent, and the remaining questions relate to the validity of the patent.

Does the Williams device show invention? The conclusion is reached that Williams provided a mechanism to "feed the saw to the stone during both its strokes in a positive and regulated manner, so that it cuts when moving in either direction," whereas previously the saw formerly operated successfully in one direction, being fed either in a forward or a backward stroke. To accomplish this result, Williams removed the lifting appliance, and left the immediate feeding device intact, but duplicated its actuating mechanism. These changes resulted not only in the saw cutting in both directions, but in greater uniformity, continuance, and completeness of action during the stroke. However, the great practical gain was in the operation of the saw in both directions. It is urged that the removal of the lift and such duplication of the actuating mechanism as was had did not amount to invention; but such claim cannot be supported, in view of the fact that with all practicable speed the improvement was adopted, and has been generally and persistently continued, and that with the obvious advantage of increasing the capacity of the saw. Moreover, no earlier successful conception and adoption of the device is shown. The evidence on this subject sufficiently favorable to the defendants to demand discussion relates to patent to Luce & Green, No. 85,317, and to certain Young patents, and the Foerster patent of 1886, No. 340,205, of April 20, 1886. The Foerster letters state that:

"The invention consists of a machine for sawing stone, in which a reciprocating sash that supports the saw blade is raised by suitable mechanism at the end of each stroke, and lowered at the beginning of the next stroke, so that the kerf can be cleaned of débris, while the saw exerts a cutting action on both the forward and return stroke. The invention consists, further, of a mechanism for feeding the saw blade forward at the end of each stroke and of a novel construction of sash, as will be more fully described hereinafter, and finally pointed out in the claims. * * * The eccentric portions of the toothed flanges, b_1, b_1, are so arranged that when the sash arrives near to the end of each stroke it is lifted by the eccentricity of the flanges sufficiently to withdraw the blade from the kerf of the stone and permit the débris to be washed away by the water supplied to the kerf. At the beginning of the next stroke the sash and its blade is lowered again. * * *

"The operation of the machine is as follows: When the block of stone has been placed in position on its carriage, the blade is adjusted in proper

position thereto by the shaft, F_1, and its transmitting gearing. The driving shaft is then started, so that the sash commences its stroke. When arriving nearly at the end of the forward stroke, it is lifted by the toothed eccentric flanges of the rollers, so as to clear the kerf sufficiently for removing the débris. The saw commences then its return stroke, and is lowered again into the kerf, exerting a cutting action thereon until it arrives nearly at the end of its return stroke, when it is lifted again to give a clearance for the removal of the débris. At the end of each stroke the blade is fed forward by the alternating action of the pawls, h_2, h_4, on the ratchet wheel, h_3. By lifting the saw at the end of each stroke and lowering the same at the beginning of the next stroke, and by imparting a forward feed to the saw at each end of the stroke, the saw exerts a cutting action during the forward stroke and return stroke, and accomplishes thereby the sawing of the stone in a quicker and more effective manner than when the saw is lifted from the kerf and moved clear of the same during the return stroke, as heretofore."

The complainant points out the following alleged differences in the Foerster device from the patent in suit: The Foerster machine (1) does not reciprocate in a straight line throughout its entire stroke, nor is there means provided for such action; (2) the sash is raised near the end of each stroke, so that the blade is inoperative during the feeding operation; (3) the feed is delivered at the end of each stroke, and not through the entire stroke, and no means is provided for actuating the feeding movement otherwise than at the end of the stroke. The complainants' contention is well founded. Foerster provided for cutting on two strokes and for feeding at the end of the stroke, but feed through the entire stroke is absent, and there is no proportionate feed. It is apparent that the Foerster machine is quite distinguishable from that of Williams. Letters 85,317, issued to Luce & Green in 1868, provide for a machine that met with no specific and practical adoption. The construction of four machines, as claimed, was undertaken, although all do not seem to have been completed, in general conformity to the Luce & Green patent, and one of these was operated for a few weeks; but there is much conflict of evidence respecting the means by which the feed was delivered, and whether it operated on both strokes and was positive. The uncertainty of the evidence is such that it is quite sufficiently favorable to conclude that they fell within the specification of the Luce & Green patent. Therefore to such specification resort must be had. Such specifications provide (1) for a diamond reciprocating saw, for the cutting of the blade in both directions; (2) for a cross head or pressure bar to transfer the necessary feeding movement to the saw. Neither the description, diagram, nor claims illustrate that there was positive feed, although its presence might be established by argument and inference; and it is certain that there is no suggestion "of means for imparting to said sash a reciprocating movement in a straight line throughout its entire stroke," as provided in the second and third claims of the letters to Williams. This state of the record would not justify the conclusion that the letters issued to Luce & Green, or the machines built pursuant thereto, anticipated the patent in suit. Letters No. 107,847, of 1870, and No. 224,760, of 1880, issued severally to Hugh Young and to James L. Young and Hugh Young, do not appear to the court to show prior use.

After a somewhat prolonged study of the record and the considerations presented by the parties, the conclusion is reached that complainant's claims Nos. 1, 2, and 3 are valid, and that they are infringed by the defendants' machines, and that the complainant should have the injunction relief asked, with an accounting. In reaching this conclusion, the various contentions of the defendants have not been denied attention.

A. R. MILNER SEATING CO. v. YESBERA.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1901.)

No. 931.

1. PATENTS—PATENTABLE INVENTION—DETERMINATION ON DEMURRER.
A patent should be declared void on demurrer only when there is no room for thinking that any evidence could be adduced which would alter the clear conviction of the court that there is no patentable invention in the production patented, and especially where the presumption of invention arising from the granting of the patent is reinforced by the fact shown that the application was seriously contested in the patent office in interference proceedings.

2. SAME—COUNTER SEATS FOR STORES.
The device shown in the Milner patent, No. 597,686, for counter stools or seats for stores, is not so manifestly lacking in patentable invention as to justify a court in declaring the patent void on demurrer.

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

Thomas B. Hall, for appellant.

Almon Hall, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. The bill filed in this case complains of the infringing by the defendant of rights secured under letters patent No. 597,686, of January 18, 1898, to Albert R. Milner, as assignor to the complainant, for certain improvements in counter stools or seats, the object of the invention being to provide a seat in front of the counter, which, when not in use by customers, would automatically swing up to the counter in front of it, and which could be easily moved back to its place by the hand when wanted for use. The useful purpose which the invention was intended to subserve is thus stated by counsel for complainant in error:

"The aisles of stores can thereby be materially widened, as compared with width possible when using any prior kind of stool. Large dry goods stores are usually oblong, so as to save as much frontage as possible; and the counters usually run along such length, with stools in front of each counter. On our leading shopping thoroughfares each inch of store width commands a heavy rental. The patent stool enables any given number of shoppers to be accommodated in a store of less width than heretofore possible. Especially at crowded seasons, such as Christmas holidays, not only is the capacity of the store thus materially enlarged, but the comfort of the shoppers is correspondingly increased, because less crowded together, such shoppers being mostly ladies and children; and the time of such shoppers also correspondingly saved, because of freer opportunity to pass by each

other. Moreover, the store floor can be swept and cleaned at night quicker and better, because the stool arm brackets, as well as the stools, are against the counter."

The details of the parts employed in the combination by the invention are a recessed bracket resting upon the floor, and fastened on its perpendicular face to a counter, a curved stool arm extending into the recess of the bracket and pivoted near its lower end by a bolt running through the side walls of the bracket and of the stool arm, and engaging the rear wall of the recess in the bracket, which (the rear wall) forms a stop to limit the outward movement of the arm, a spring curled around the pivot of the arm having extensions engaging the stool arm and bracket, respectively, to throw the stool arm up, and a seat plate on the upper end of the arm so formed as to present a horizontal seat plate, which, when the arm is folded up against the counter, is nearly perpendicular to the floor. The following illustration, which is Fig. 3 of the drawings, taken in connection with the foregoing description, will indicate the character of the device:

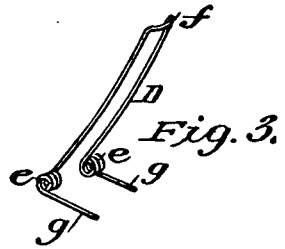

Fig. 3.

The pivot extends through these springs at e, e, through the walls of the bracket and the lower end of the stool arm. The back of the stool arm rests against the curved connection between the upper end of the spring at f. The spring normally holds the seat arm up against the counter, but yields to pressure applied to the upper part of the stool arm or seat when the latter is brought down for use. The following is the first claim, and discloses the substance of the invention:

"(1) In a counter stool, a recessed floor bracket, a curved stool arm pivoted in the bracket and engaging one of the walls of the bracket to form a stop to limit the outward movement of the arm; a spring encircling the pivot of the arm, having extensions engaging, respectively, the stool arm and bracket; a seat plate formed on the upper end of the stool arm, and disposed in a plane substantially at right angles to the upper end of the stool arm when the latter is in a folded position, whereby the seat of the stool will fold close against the counter, the said angle of the seat plate with the stool arm being such as to cause the seat to lie in a horizontal plane when the latter is in position for use; and a seat secured to the seat plate."

Upon amendment to the bill it was made to appear that while the application for the patent was pending in the patent office it was put into interference with the invention of another party of a stool somewhat different in its mechanical construction. The result of the examination made in the office upon this interference was in favor of the application for the patent here relied upon. The de-

fendant demurred to the bill upon the ground that the patent in suit was void upon its face. This demurrer was sustained by the court, and the bill, as amended, was dismissed. The complainant brings the case here upon appeal.

We think the court erred in holding upon demurrer that the patent was void upon its face. It may be admitted that the invention is one of narrow limitations, but we are not prepared to hold that in the circumstances, which may be susceptible of proof, the patent should be held void in the absence of any anticipation, and supported, as it is possible it may be, by evidence that it fulfills a useful purpose, and has been extensively adopted by the public in practical use, and further supported by the presumption of validity arising from the allowance of the patent by the patent office, the force of which presumption is augmented by the fact that there was a serious contest in the office, which must have developed the characteristics of the patent, and brought them pointedly into view. It is undoubtedly established law that the court may, in a clear case, dismiss, upon demurrer, a bill filed to establish a patent and to enforce a remedy for its infringement. Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991. But this court has on former occasions in substance said that this ought only to be done when there is no room for thinking that any evidence could be adduced which would, if put into the case, alter the clear conviction of the court that there is no patentable invention in the production patented. American Fibre Chamois Co. v. Buckskin Fibre Co., 18 C. C. A. 662, 72 Fed. 508; Manufacturing Co. v. Scherer, 40 C. C. A. 491, 100 Fed. 459. Applying these rules to the present case, we are unwilling to sanction the summary dismissal of the bill, for we think it possible that the merits of the case might be more clearly discerned in the light of facts which the evidence may bring out.

The decree will be reversed, with the costs of this court, and the cause remanded, with direction to overrule the demurrer, and permit the defendant to answer under the rules.

SPERRY MFG. CO. v. J. L. OWENS CO.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1901.)

No. 1,415.

1. PATENTS—INVENTION—EVIDENCE OF UTILITY AND EXTENSIVE USE.
   To entitle evidence of the utility of a patented machine and of its extensive use to consideration on the question of invention, it must clearly show utility superior to that of other like machines, and a more extensive use.

2. SAME—FANNING MILLS.
   The Sperry patent, No. 267,032, for a fanning mill, shows only a combination of old appliances and devices previously used in such mills, in a manner which produces only old results and evolves no new functions, and is void for lack of patentable invention.

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

For opinion below, see 96 Fed. 975.

A. C. Paul (C. G. Hawley, on the brief), for appellant.

Charles S. Cairns, for appellee.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge. This was an action brought by the appellant, which was complainant below, against the appellee, which was defendant below, for infringement of letters patent of the United States No. 267,032, for improvements in grain cleaning and separating machines. The invention described in the specification consists of a certain combination and arrangement of screens and conductors in the usual fanning mill, by which the separation of different materials fed into the machine is effected, and the same, when separated, are delivered outside of the machine so as to reduce the labor attending it. The peculiar arrangement of the screens and conductors is substantially as follows: The feed hopper is located on the top of the machine to receive the material to be treated. Underneath the hopper, and inclining downward from it towards the back of the machine, is a screen, G, having a mesh of suitable size to permit the passage of large and perfect grain like wheat, and terminating at its lower end in a continuing screen, J, having a coarser mesh, through which large grain, like oats, can freely pass, and over which straw and chaff can be discharged at the back end of the machine. Beneath the upper part of screen, G, is located in the same shoe or shaker, another screen, K, inclining in the opposite direction towards the front of the machine. The lower end of screen, G, projects beyond the upper end of the reverse screen, K, so that what is discharged through the lower portion of screen, G, falls beyond or outside of the reverse screen, K. Screen, K, has a finer mesh than screen, G, so as to arrest the wheat or other large grain which falls through screen, G, upon it, and carry it down the incline to be deposited, thoroughly cleaned and separated, in a receptacle at the foot or front of the machine. The shaking motion of screen, K, with its finer mesh, permits the grass seeds and other impurities which fall upon it from screen, G, to pass through and fall upon an inclined conducting board, L, which is attached to the shoe immediately under and parallel with screen, K. The shaking motion of this board carries the grass seed and other impurities down the incline into a proper receptacle under the machine. Under the coarser screen, J, is located an inclined spout, D, running transversely the machine. Through this coarser screen, J, and into this spout, D, is delivered the large grain, like oats, which by reason of its size cannot pass through the mesh of screen, G; and when so delivered it passes down the incline of the spout, and out at the side of the machine into a receptacle provided for that purpose. At the upper end of screen, K, and beneath the lower end of screen, G, is

located spout, E, running transversely the machine, and inclining to the side of the machine opposite the exit of spout, D.

The patentee in his specification says:

"Of the material which passes through the upper screen, * * * that portion escaping near the tail will be found to contain a greater or less percentage of impurities, requiring to be again passed through the machine."

For the purpose of capturing this mixed grain, spout, E, is located at the upper end of screen, K, which, by being slid along grooves endwise, can be so adjusted as to cover spout, E, to a greater or less extent, as circumstances may require, according to the character and quality of the grain, and its impurities, which are being treated. By this device the patentee claims he is able to accomplish a perfect separation of the cleaned and uncleaned grain, and deliver the cleaned grain, like wheat, over the inclined screen, K, the uncleaned grain into and through spout, E, to the side of the machine ready to be returned to the hopper for a second treatment through the machine, and the oats which pass through screen, G, into trough, D, which delivers them at the opposite side of the machine. The result of the process is claimed to be the thorough separation of wheat, oats, and mixed grains. The claims of the patent alleged to be infringed are as follows:

"(1) In combination with a hopper, the upper grain-receiving screen, G, the lower and coarser screen, J, the adjustable lower screen, K, inclined in the opposite direction, and the spouts, D and E, arranged, the former beneath screen, J, and the latter beneath the screen, G, as described. (2) The combination of the screen, G, the coarser screen, J, adapted to receive the tailings therefrom, the spout, D, located beneath the screen, J, a second spout, E, inclined in the opposite direction, and arranged to receive the material passing through the lower end of the screen, G, and the bottom screen, K, inclining in the opposite direction from the upper screen, G, and arranged to receive the material passing through the upper end of said screen. (3) In a grain separator, the vibratory shoe or shaker, B, the two oppositely inclined spouts, D and E, attached to the foot of said shoe and partaking of its movements, in combination with the screens, G and J, and longitudinally adjustable screen, K, arranged in the relative positions described. (4) The combination of the screen, G, coarser screen, J, spouts, D and E, longitudinally adjustable screen, K, and board, L, arranged with respect to the inner spout and the adjustable machine as described and shown."

The main defense relied upon is that complainant's patent is void for want of patentable novelty, and in support of this defense a large number of patents are pleaded as anticipations. These patents clearly show that in 1882, when complainant's patent was applied for, the field of invention in this art had been very exhaustively worked, and was at that time very narrow. Screens or sieves properly adjusted in a vibratory frame so as to separate fine from coarse grains and free them from impurities, and conducting spouts so applied as to carry off the grains and impurities when separated, are devices which have been for a long time familiar to all. So true is this that the patentee was compelled by the patent office to disclaim any novelty in either of them. He says in his specification:

"I am aware that machines have been variously constructed with double conducting spouts therein, said spouts inclined in opposite directions. I am also aware that coarse and fine screens have been employed in various combinations under various arrangements, and I make no claim thereto."

Under this state of facts, the patentee's invention must rest solely on the proposition that he has discovered a new arrangement or combination of old and familiar elements whereby a new and useful result is secured. Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Gould v. Rees, 15 Wall. 187, 21 L. Ed. 39; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 45 C. C. A. 544, 106 Fed. 693–707. We are thus led directly to the first inquiry,—whether the patent in suit shows any new combination of old elements, within the meaning of the rule just announced, and within the accepted meaning of the word "new" in patent law, namely, patentable or inventive novelty. Our attention has been called to a large number of patents which contain some one or more of the elements of the patent in suit. These have thrown much light on the state of the art, and have been duly considered in reaching the conclusion arrived at; but we do not deem it profitable to specially advert to many of them, because we find, in those to which specific reference will be made, sufficient material to control the judgment of the court. The patent issued to Elijah Youngs, dated June 30, 1863, and numbered 39,090, was for a new and improved grain separating apparatus. It presupposed the existence and use of the ordinary fanning mill, and relates chiefly to the arrangement of sieves and screens for the separation of different kinds of grain. In that patent is found the upper screen of the patent in suit, made of two sections: (1) The perforated plate forming the upper end; (2) the wire gauze or screen, E, forming the lower end. Beneath this upper screen is found the inclined screen, adjustable in grooves, corresponding to the reverse screen, K, of the patent. Plate, F, underneath the wire gauze, E, or the "chess box" placed beneath the rear end of screen, K, corresponds to spout, E, of the patent. The adjustability of screen, K, in its grooves serves the same purpose in effecting a perfect separation of the cleaned from uncleaned grain as the similar provision of the patent in suit. The patentee, Youngs, says:

"A small portion of oats mixed with grains of wheat which owing to lightness or other causes have not fallen through the upper part of the sieve will fall through the meshes near the rear end of the sieve. This mixed portion either falls upon plate, F, which, if perforated, acts as a second sieve, or it falls in the direction of the mingled red and black arrows past the rear end of the screen, K, which has been adjusted by sliding it forward in direction of black arrows sufficiently to allow all the impure grain to fall past it."

The patentee, Youngs, further says, in describing the operation of his machine, as follows:

"It will now be clearly seen that the grain is divided in three separate and distinct parcels: First, that portion consisting of pure, sound wheat, which, passing through the plate, D, and upon portion of the wire gauze, falls upon the adjusted screen, K, and is received in its proper receptacle at the lower or front end of the same, as shown by the black arrows; second, that portion of pure oats which passing over the rear end of the sieve, as seen by red arrows, is received and secured in any desirable manner; third, that portion of mixed grain which passes through the meshes of the sieve nearest the rear end of the same, and is caught upon the plate F, or falls into the chess box placed beneath the rear end of screen, K, and shoe, as shown by

the mingled red and black arrows. This latter portion may be placed in the hopper and passed again through the mill to secure further separation."

From the foregoing analysis of Young's patent, it appears that he employed substantially the same combination of elements, with the exception, possibly, of the provision for screening and conducting away the oats, which will be hereafter considered, and produced the same three general results as are claimed for the patent in suit. The wheat passes through the upper portion of the upper screen, and falls upon the reversely inclined screen, and finds its exit at the front end of the machine, in both patents alike. The mixed grain, which falls through the meshes nearest the rear end of the sieve or screen, is conducted into a chess box located underneath, ready for the repeating process, which is accomplished by substantially the same devices in both patents. There being nothing new, as admitted by the patentee, in the spouts, the substitution of a chess box or any other convenient receptacle for the spout is of no significance. The arrangement for adjusting the end screen so as to allow all the impure grain to fall past it, and thus separate the cleaned from the uncleaned wheat, is substantially the same in both patents. So far, both in the mechanism and in the results achieved by its operation, the two patents present the same invention.

But it is earnestly contended by counsel for the appellant that there is found in Youngs' patent no provision for screening the oats or conducting them away from the machine, like those which are found in the patent in suit, and this contention has received our serious consideration. It is true, there is no specific provision made in Youngs' patent for screening the oats through a larger mesh located at the lower end, and in continuation of the upper screen; but the oats, according to Youngs' patent, pass over the rear end of the sieve, and are "received and secured in any desirable manner." This is the direction of the patentee in his specification. This general direction is equivalent to an instruction to any one desiring to practice the invention of Youngs' patent to adopt any known method of receiving and securing the oats, or any new method which ordinary skill in the art would suggest. By reference to prior patents it is found that an old method existed. One had been specifically pointed out in several of them. In the Higley patent, No. 33,833, of date December 3, 1861, is found a nest of sieves, e, f, g, inclining rearwardly from the mouth of the hopper. Higley says in his specification as follows:

"The back end of these sieves empty into the inclined troughs, A' B'. * * * Trough, A', is covered with a sieve for the purpose of separating the oats that escape over the sieve, e, from straw and other refuse matter; the oats passing out of the same spout with those which pass through the sieves; the straw and other refuse matter passing out of the trough."

Higley, in his second patent, of date June 7, 1864, No. 43,026, also distinctly points out the use of a spout under a large screen to carry off oats which would pass through the screen. He says in his specification:

"The grain passes from the hopper through screens, 4 and 5, and falls upon t, where the wheat falls through, and larger seeds, as oats, pass over and through the screen, 6, and fall into and are discharged through a spout, A'."

A more suggestive reference is found in the Ehle patent, of date August 7, 1866, No. 56,912. Here, like similar provisions in many other patents, there is an inclined screen or sieve, called "perforated screen board, J," over which the grain first flows from the hopper. The straw, chaff, oats, light grain, etc., pass down along the board, J, to its lower edge. "At this point," says the patentee, "the oats, light grain, and the heavier parts of straw drop down upon the sieve, P, whence the straw, etc., pass out of the mill; but the oats and light grain pass through into the trough, R, whence they pass through the spout into bags attached to the outer end of the spout."

In the light of these patents, and several others to which specific attention need not be called, it is apparent that at the time Youngs secured his patent the method of driving oats, found in grain, over a sieve of greater mesh, so as to permit it to pass through and into a receptacle leading out of the machine, was not only a desirable manner of receiving and securing it, but a well-known and ancient manner of doing it,—so well known, in fact, that it could be readily read into Youngs' patent, and comprehended within the provision there made for passing the oats over the rear end of the sieve, and "receiving and securing it in any desirable manner." Any one skilled in the art, possessing knowledge which must be imputed to him of the devices of the Higley and Ehle patents, would in 1882 readily and almost irresistibly, in our opinion, have seized upon the devices there pointed out to make provision for separating the oats and chaff which come over the end of the screen of the Youngs' patent,—especially so when Youngs instructed the public in such suggestive language that they might adopt out of the many obvious expedients some desirable one for receiving and securing the oats. Such being the case, there was no inventive skill displayed by the patentee of the patent in suit in specifically calling for a coarser mesh in the lower end of his screen, G, so as to permit oats to pass through the same into a receptacle located under it. The conducting board, L, located under the upper part of reverse screen, K, in complainant's patent, which is not shown in Youngs' patent, is, in our opinion, an obvious device for capturing the small grass seed which falls through screen, K, and conducting it to a convenient receptacle. The prior art as disclosed in the Burr patent of date December 16, 1862, as well as in several others to which our attention is called, clearly taught the function of this device, and any person at all familiar with the operation and prior use of fanning mills would in 1882 have readily resorted to it as a suggestion of common mechanical expediency.

It results from the foregoing that the patentee of the patent in suit neither discovered a new combination of old elements, nor produced any new and useful result, but, on the contrary, practically adopted the combination shown in the Youngs patent, with the addition only of certain mechanical contrivances, involving no in-

ventive skill, but obviously adopted from the prior art, and, in the main, broadly suggested by Youngs, and at best produced only the results which Youngs distinctly pointed out.

So far we have treated the patent in suit as if it clearly contemplated the separation and cleaning of oats when grown together with wheat, and in so doing have given to the complainant the most favorable construction that can possibly be placed upon the patent sued on. We have met the argument of complainant's counsel to the effect that the patent in suit was intended to provide a method of handling and separating succotash; that is, wheat and oats when grown together. But a careful scrutiny of the patent itself discloses that the mind of the inventor was not particularly directed to this purpose. The separation of wheat from oats is nowhere specifically suggested, and in point of fact the word "oats" nowhere appears in the specification of the patent. The mind of the inventor was obviously engaged upon the principal object of providing a means for separating and cleaning one certain kind of grain. For example, he says in describing the operation of the machine as follows:

"The straw, chaff, and heavy materials are retained upon the surface of the screen, G, and passed over the same onto the screen, J, which in turn carries them over the spout, D, and discharges them from the machine. That small portion of large grain which may be carried with the chaff and straw over the surface of the screen, G, will pass through the coarse screen, J, at the foot, and be received in the conducting spout, D."

It is altogether likely that the words "large grain," here employed, refer to the same object as the words used by the patentee in the immediately preceding context. He there says:

"The large and perfect grain, accompanied by small impurities, will pass mainly through the screen, G, to the surface of the lower screen, K."

The words "large grain," as employed in the first excerpt from the specification above quoted, probably refer to the overgrown grains, which by reason of their size could not pass through the meshes of the screen, G; and the two portions of the specification, taken together, disclose the patentee's primary meaning to be that although the large and perfect grain will mainly pass through screen, G, small portions of the same, which are likely to be carried along with the chaff and straw, will pass through the coarser meshed screen, J, and be carried off through spout, D. It is sufficient for the purpose of this opinion to say that, if this interpretation of the patent is correct, it affords additional reason for the conclusion already reached and stated.

It was seriously contended in argument that complainant's machine was of superior utility, was the first that successfully separated wheat from oats, and had, by reason of its superiority, gone into very general use; and counsel urge that from these facts patentable novelty should be accorded to the invention, as one producing a new result, in that it produced the old result in a "more facile, economical, and efficient way." National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., supra. It is true, when invention is doubtful, facts like those adverted to, if they

exist, often turn the scales; but in this case it cannot, in the light of what has already been said, be conceded that the issue of invention is at all doubtful. In the next place, a careful and critical reading of the evidence found in the record fails to disclose with any degree of certainty that complainant's machine is either superior to others, or that it has gone into any more general use than others, or that it was the first to successfully separate oats from wheat. The evidence relating to superior utility is chiefly to the effect that complainant's mill had a good general reputation, but in connection with this kind of testimony it clearly appears that there were several other mills used for separating succotash that had equally as good reputations. The evidence relating to general use is also unsatisfactory. Complainant's secretary says that during the last seven years his company has sold in the neighborhood of 2,000 mills. Complainant's president says that during the lifetime of the patent, which has now expired, some 6,000 or 7,000 mills have been sold; but neither of these witnesses furnishes any data to show the proportion of their machines sold to all the machines sold. In like manner, also, the proof that complainant's machine was the first to successfully separate oats from wheat is uncertain and evasive. This proof is confined to a single question put to witness Sperry, who is president of complainant company, and also the patentee of the patent in suit, and to his answer thereto, as follows:

"Q. Do you claim, Mr. Sperry, that you invented the first machine for cleaning succotash, as you call it? A. I claim that I made the first mill that cleaned it successfully, but there were other mills before I made any that they claimed did clean succotash."

Testimony of this general, uncertain, and equivocal character is of no value whatsoever on the issue of invention, and certainly in this case cannot disturb the conclusion reached on that issue.

Several other propositions were urged upon us by counsel, and have each received due consideration, but the conclusion already reached dispenses with the necessity of any reference to them in this opinion.

The decree of the circuit court must be affirmed.

EXPANDED METAL CO. et al. v. BOARD OF EDUCATION OF CITY OF ST. LOUIS et al.

(Circuit Court of Appeals, Eighth Circuit. October 7, 1901.)

No. 1,500.

1. PATENTS—ANTICIPATION.
Letters patent No. 297,382, April 22, 1884, to John F. Golding, for a metallic screening, are anticipated by English provisional specification No. 2,125, July 26, 1862, by Thomas Long, for open metallic work.

2. SAME—CLAIM LIMITED BY REFERENCE TO SPECIFICATION.
A claim for an article of manufacture formed substantially as set forth in the specification is limited to an article made substantially in the way described in the specification, and such an article formed by a substantially different process is not an infringement of the claim.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

John W. Munday, for appellants.
Geo. H. Christy and Geo. H. Knight, for appellees.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree which dismissed a bill for the infringement of letters patent No. 297,382, issued April 22, 1884, to John F. Golding. 103 Fed. 287. The claim of this patent was in the following words:

"As an article of manufacture, metallic screening formed of slashed and stretched metal, substantially as hereinbefore set forth."

The method set forth in the specification by which the slashed and stretched metal was formed was this:

"In the manufacture of my slashed metallic screening, I take a blank piece of sheet metal of the required size and thickness, and at intervals I slash or cut it as shown in Fig. 1; the slashes or cuts in each line of cuts being opposite to the spaces between the slashes or cuts of the adjoining line or lines. These slashes or cuts are made of the required lengths to form the proper-sized meshes. After the metallic sheet is cut or slashed as above described, it is stretched in a line transversely to the length of the slashes or cuts, thus forming meshes as shown in Fig. 2. The act of stretching causes the metal forming the boundaries of each mesh to take an oblique position, amounting nearly to a perpendicular line, thus presenting the cut edges of the metal to the surface of the screening. Between the ends of the slashes or cuts are spaces of metal uncut which hold the strands of meshes together."

The defendants pleaded and proved that on July 26, 1862, Thomas Long left at the office of the commissioner of patents of Great Britain a provisional specification wherein he described the nature of his invention in these words:

"This invention relates to an improved manufacture of open metal work, or metal trellis or lattice work, intended to be used as an economical substitute for ordinary wire netting or perforated metal, and applicable also to the manufacture of bird cages, basket stands, and supports for flowers, fire guards, and other purposes where wire work has hitherto been employed. According to this invention, it is proposed to make open metal work or trellis or lattice work by making a number of slits in a flat sheet of metal, such slits being made in straight or curved lines or rows, the slits in each line or row being made to break joint with the adjoining lines or rows; a small portion of the metal being left intact or uncut between the ends of the several slits. The sheet, having been thus slit, is now stretched out so as to open the slits, whereupon a perfectly formed trellis, having hexagonal openings, will be produced. In order to form a finish to and strengthen the edges of this open metal work, it is proposed to turn the edges of the plate before it is stretched, and to insert therein a length of wire, which, when the metal is stretched, will remain threaded through each of the end tongues of the metal work. The slitting of the metal sheets may be effected either by suitable slitting rolls, stamping apparatus, or by hand cutters or tools, as preferred."

This specification of Long contains a perfect description of the manufactured article, and of the method of manufacturing the article, described and claimed in the patent to Golding. The only essentials for the manufacture of this article, according to the patent, are a sheet of metal, slits made therein so that they will break joints with

each other, and the stretching or expanding of the metal in a direction transverse to the length of the slits. These essentials are as clearly portrayed in the specification of Long as in that of Golding. The only distinctions between the two specifications to which counsel for the appellants has been able to call our attention are that Long's does not state that the metal forming the boundaries of each mesh takes an oblique position amounting to nearly a perpendicular line when the sheet is stretched, while Golding's makes this averment, and that Long suggests the turning of the edges of the sheet and the insertion of a length of wire therein to finish and strengthen them, while Golding is silent upon this subject. But these are distinctions without a difference. The article patented is the metallic sheet slashed by slits which break joints with each other, and stretched in a direction transverse to the slits, and this article is as perfectly described in the specification of Long as in that of Golding. The fact that in order to make Golding's article the sheet must be so slit that the width of the strands of metal shall be greater than the thickness of the sheet is no answer to the specification of Long, because his description covers a sheet slit in that way as completely as it does one in which the strands are narrower or wider, and because Golding has not specified or claimed as his invention a sheet of metal so slit that the width of the strands shall exceed the thickness of the sheet. Nor does the addition to the description of the screening and the method of its construction of the suggestion that it may be strengthened by turning the edges of the sheet of metal over a wire detract from its clearness or its effect. It was a complete portrayal of the article which Golding claims without the clause which mentions the strengthening wire, and the addition of that clause took nothing from it. The patent to Golding cannot be sustained, in view of the provisional specification of Long.

There was another defense to the bill, and that was that the defendants below did not infringe because they did not construct their metallic screening substantially as described in the patent to Golding. The method described in that patent, as we have seen, consisted of the slitting of the sheet of metal so that the slits would break joints, and then the expansion of the sheet in a direction transverse to the slits. The method adopted by the defendants was to cut a small strip from near the edge of the metal, and then open it by forcing it downward in a line at right angles to the plane of the sheet. In other words, the sheet was not first slashed, and then drawn out so as to separate the strands, but the meshes were made by a machine which cut a small strip near the edge of the metal, and then opened it so as to form the meshes. The claim of the patent is expressly limited to a metallic screening formed of slashed and stretched metal substantially as set forth in the specification. General language in a claim which points to an element or device more fully described in the specification is limited to such an element or device as is there described, and this claim is limited to a screening slashed and stretched substantially as set forth in the specification. Smith v. Vulcanite Co., 93 U. S. 486, 493, 23 L. Ed. 952; Adams Electric R. Co. v. Lindell R. Co., 77 Fed. 432, 449, 23 C. C. A.

223, 240, 40 U. S. App. 482, 512; Mitchell v. Tilghman, 19 Wall. 287, 22 L. Ed. 125. The defendants manufactured a metallic screening without slashing and stretching it substantially as set forth in the specification of the appellants' patent, and consequently they did not infringe the latters' monopoly.

The decree below is affirmed.

STAR BRASS WORKS v. GENERAL ELECTRIC CO.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1901.)

No. 984.

1. PATENTS—INVENTION—EVIDENCE OF COMMERCIAL SUCCESS.
   Where, in the device of a patent, the departure from former means is small, yet the change is important, the doubt as to whether the inventive faculty has been exercised is to be weighed in view of the fact that the device in question has displaced others which had previously been employed for analogous uses, and this may decide the issue in favor of invention, especially where other inventors, of experience and skill in the art, had unsuccessfully attempted to solve the problem presented.

2. SAME—ELECTRIC RAILWAY TROLLEYS.
   The Anderson patent, No. 412,155, for improvements in trolleys for electric railway service, claim 8, which covers the combination with a trolley wheel of metallic conducting brushes between the hubs of the wheel and the frame, the purpose being to provide a conductor which should be within the frame, and thereby protected from external injury, and also to prevent the current from passing through and destroying the lubricant upon the journal of the wheel, must be conceded to show invention, in view of the immediate adoption and wide use of the device, although the elements of the combination were old and well known in other branches of the electrical art. Such claim also *held* infringed.

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

Fred L. Chappell, for appellant.

James R. Sheffield and F. L. Betts, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case involves the validity of the eighth claim of the Anderson patent, No. 412,155, for improvements in trolleys for electric railway service. A consideration of the record in this cause shows that with the advent of the under-running trolley, now in common use in propelling street cars, there arose the necessity of devising a means by which the current of electricity could be readily and safely transmitted from the conducting wire down the swinging arm of the trolley, thence to the motor beneath the cars. The top of this swinging arm had been provided with a frame or harp within which was the trolley wheel held in contact with the transmitting wire by the pressure exerted by the spring attached to the opposite end of the trolley pole at the top of the car. The electrical current in the propulsion of the car passes from the wire to the wheel, thence to the frame or harp, and down the trolley pole. It was found in practical operation highly necessary to accomplish this purpose in such manner as to prevent in-

jury to the wheel and connecting devices by "arcing" when the wheel was for any cause off the wire, and from mechanical injury in coming in contact with switches, etc., in the operation of the cars. It was also demonstrated that the electrical current, in passing through the lubricant upon the journal of the wheel, was retarded in its transmission, and the lubricant itself destroyed. It was desirable, therefore, to conduct the current by some means which would protect the apparatus and avoid passing the current through the lubricant. Anderson, in his eighth claim, states his invention to be: "The combination with a trolley frame and trolley wheel of metallic, conducting brushes, g^2, between the hubs of the trolley wheel and said frame, to operate substantially as described." The means of accomplishing this result are shown to be in the location of the contact spring or brush within the trolley harp in such wise as to cause the least friction and consequent retarding of motion. That this device has merit as a practical solution of the problem is demonstrated in the fact that upon its production it went into immediate use, and has remained from that time to this the practical arrangement of brush and harp in general use upon the street railway systems of the country. It is urgently insisted that the alleged improvement of Anderson is only such a step forward as a mechanic skilled in the art would readily take, and that there is, consequently, no patentable novelty in the improvement in question. This brings up for consideration the often-mooted question as to whether an alleged inventor has crossed the shadowy line which divides mere mechanical advance from meritorious invention. It must be conceded that others had preceded Anderson in the field upon which he entered in making the improvement in question. Brushes for making contact in the transmission of a current are old and well known. Such spring brushes as Anderson uses had long been in common use on electrical machines. They are often seen in connection with dynamo electric machines and electric motors. We do not deem it necessary to review the patents showing these constructions. It may be that, broadly speaking, these inventions are in the electrical art; but the particular art with which the inventor was dealing in this case had to do with the construction of a successful means of transmitting electricity in the operation of cars by means of a trolley. Mr. Van Depeole, who is said to have invented the under-running trolley, and to be a man of capacity in this field of mechanics, essayed the solution of the problem more than once. In his patent No. 396,310, issued January 15, 1889, he shows a device for transmission of the electrical current consisting of metallic spring fingers, one end being in contact with the periphery of the wheel, the other connected with the frame carrying the wheel. By this method the current is transmitted without passing through the lubricant, but the defects in the apparatus are now apparent. The contact is made by the fingers upon the lateral surfaces of the wheel, causing friction. The springs are all on the outside of the harp in a position rendering them liable to be destroyed or injured in the operation of the trolley. In his patent No. 408,638, of August, 1889, Mr. Van Depeole shows another mechanism having the same purposes in

view. He here shows two hinged pieces or blocks bearing upon opposite sides of the hub, held together by a small spring of coiled wire at the top. Experience showed this mechanism to be objectionable in the constant breaking of the spring at the top, it being exposed to arcs, and liable to be injured in operation, and making poor contact between the shoes and the wheel. With this much accomplished in the solution of the problem, Anderson, using a brush in common use in electrical appliances, places it entirely within the frame, where it is protected, serving the purpose intended with the least possible friction as the spring bears upon the end of the hub, and not upon the wheel or the periphery of the hub. Is this invention, or only the obvious improvement which would suggest itself to a mechanic skilled in the art? It is too well settled to need extended citation of authorities to support the proposition that a new combination of elements old in themselves, producing a new and useful result, entitles the inventor to the protection of a patent. Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177. It may be true that Anderson has only taken the familiar contact spring or brush, and placed it in a protected position, but this change seems to have made the difference between a defective mechanism and a practical method of attaining the desired end. Where, as in this case, the departure from former means is only small, yet the change is important, the doubt as to whether the inventive faculty has been exercised is to be weighed in view of the fact that the device in question has displaced others which had previously been employed for analogous uses, and this may decide the issue in favor of invention. Krementz v. Cottle, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; Consolidated Brake Shoe Co. v. Detroit Steel & Spring Co. (C. C.) 47 Fed. 894. It is a fact entitled to serious consideration in determining whether Anderson's improvement was so obvious as to be one which would occur to a mechanic skilled in the art that Van Depeole, with his conceded skill, did not attain the desired end. His mechanisms were faulty in exposing the brush to injury and retarding the wheel in operation by friction. Anderson's device does away with the objectionable features of Van Depeole in so satisfactory a manner that it was at once adopted, and has remained in general use. His change seems simple enough now, but it was the first to combine comprehension of the problem to be solved with a practical arrangement of parts for its solution. This entitles his advance to the merit of invention. The result is new in furnishing a brush of practical utility protected in operation. Its usefulness is demonstrated in its wide-spread adoption and use. We therefore reach the conclusion that Anderson's improvement rises to the dignity of invention, entitled to the protection of the patent law. The infringement of complainant's invention is obvious. The change from a circular end of the brush to one with a fork is merely colorable. The Anderson patent is not for the form of the brush, but is a combination patent, in which the location of the brush is the leading conception.

We find no error in the decree of the circuit court, and the same will be affirmed.

NATIONAL AUTOMATIC MACH. CO. v. AUTOMATIC WEIGHING, LIFTING & GRIP MACH. CO. et al.

(Circuit Court of Appeals, First Circuit. October 22, 1901.)

No. 381.

1. PATENTS—INVENTION—DESIGN FOR WEIGHING MACHINE.
The Patterson design patent No. 20,660, for a design for a case for weighing machines, is void for lack of patentable invention.

2. SAME—INFRINGEMENT—WEIGHING MACHINE.
The Smith & Washburn patent, No. 392,698, for a coin-controlled electrical weighing scale, claim 5, construed, and *held* to belong to the subclass of automatic weighing machines in which is employed the impulse of gravity to move the indicator, and, in view of the state of the art, to cover a narrow invention, not infringed by a machine using a different method of employing the impulse of gravity than that pointed out by the specification of the patent in suit.

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

See 105 Fed. 670.

A. Parker-Smith, for appellant.

Frederick P. Fish and William K. Richardson (J. F. Stackpole, Jr., on the briefs), for appellees.

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

PUTNAM, Circuit Judge. This appeal arises from proceedings on a bill asking relief for alleged infringements of several patents for designs, and also of certain mechanical patents, all concerning automatic weighing machines. The decree below was a final one. The present appeal relates only to the ninth paragraph thereof, which denied relief with reference to a patent for "a design for a case for weighing machines," issued to Herman E. Patterson on April 7, 1891 (No. 20,660), and to a mechanical patent for a "coin-controlled electrical weighing scale," issued to William R. Smith and Albert L. Washburn on November 13, 1888 (No. 392,698).

As to the design patent, the court is so clearly of the opinion that it contains nothing patentable that at the hearing it stopped the appellees, and there is no occasion for any further observation in reference thereto.

Of the mechanical patent, only claim 5 is in issue, as follows:

"(5) The combination of a weighing scale, indicating mechanism, a rack, connecting mechanism between the rack and the indicating mechanism, the frame, b, and means for suspending the rack after the weight on the platform has carried down said frame, b, and connecting mechanism with said frame, b, substantially as described."

The title of the patent, as well as many things in the specification, indicates that the inventors intended that an electric circuit, which should be completed by the coin falling through the slot, should be an element in their machine. This is not enumerated in the claim;

but we are clear that, even after broadening the claim by disregarding that element, the respondents below do not infringe the claim in issue.

The complainant (now the appellant) undertakes to give a broad construction to claim 5 by insisting that its was the first machine in which the indicator was moved by "stored energy"; but the expression "stored energy," which is not used in the claim, though it appears in the specification, gives an erroneous impression, because what is in fact availed of is, so far as this case is concerned, not stored energy in any peculiar sense. It is merely the ordinary impulse of gravity. The substantial truth as to this is well described in the opinion filed in the circuit court to the effect that it amounts only to the use of an "independent falling weight." This falling weight is what is specified in the claim as the "rack," which is the ordinary mechanical toothed rack. After the person to be weighed has taken his position on the platform of the scale, so that the weighing mechanism becomes operative, this mechanism bears down what is called in the claim "frame, b," which, in its normal position, holds up the rack. The rack is still retained by a catch, or indent, which we understand is covered by the expression in the claim "means for suspending the rack." This catch, or indent, when the nickel is dropped into the slot, is thereby withdrawn. Thereupon the rack falls by gravity, engaging with the mechanism which operates the indicator. As the weighing mechanism is moved only proportionately to the weight of the person on the platform, and thus permits the "frame, b," to be drawn down only a corresponding distance, the rack falls correlatively, and at the end of its fall the indicator stops, and, of course, shows the proper weight on the face of the machine. All this is simple and quick in action, and positively regulated, and it has those advantages over the prior art.

The machines in question, so far as this case is concerned, belong to what we may properly describe as the class in which the indicator is moved by gravity. In the prior art it was moved by the weight of the coin dropping through the slot upon a counterpoise. In the complainant's device it is moved by the impulse of the weight of the rack falling through space. In the respondents' it is moved by the weight of the person weighed, which pulls down a spring connected by a cord with a drum, the cord turning the drum, and, with it, the indicator. To sum up: In the prior art the weight which moved the indicator was the coin itself. In the complainant's device it is that of the rack falling, and in the respondents' it is the weight of the person standing on the platform. As, in view of the nature of the particular art, the complainant's invention, so far as it is covered by claim 5, is very narrow, and consists only in a special manner of employing the impulse of gravity to move the indicator, it cannot be held that either of the two other methods named is its equivalent.

The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellees.

HOBBS MFG. CO. v. GOODING et al.

(Circuit Court of Appeals, First Circuit. October 17, 1901.)

No. 366.

1. PATENTS—INFRINGEMENT.
Where a feature of a patented machine is not referred to in the specification or claims of the patent, but is an essential element of the machine, so that the patent can only be sustained on the ground that it is one which would be supplied by any person ordinarily skilled in the art, it is immaterial on the issue of infringement.

2. SAME—ANTICIPATION.
With reference to patents for improvements in machines for pasting paper boxes, the question of anticipation depends in part on the nature of the paper box to be finished, and the method of finishing it.

3. SAME—PAPER-BOX MACHINES.
The Damren patent, No. 423,415, for a machine for making paper boxes,—its special feature being the mechanism for attaching the ends to the body of the box, which has been previously formed,—was not anticipated, and is valid. Claim 1 *held* infringed, and claims 3 and 5 not infringed.

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

Edward S. Beach, for appellant.
William A. Macleod, for appellees.

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

PUTNAM, Circuit Judge. The application for the patent in suit was filed on September 21, 1888, by Damren, who was the inventor, and to whom the patent issued. The specification states that the invention relates to machines for making paper or pasteboard boxes, and more particularly to the operation of securing the two ends to the body of the box, the body having been previously formed. It is with reference to this particular only that we have to consider the case.

The circuit court dismissed the bill. While there are five claims, there are only three in issue, namely, 1, 3, and 5, as follows:

"(1) In a machine for making paper boxes, the combination of a form for receiving the box bodies, and a reciprocating carrier for conveying the box ends thereto, said form having a rearward recess or opening to admit the end of said carrier, substantially as shown."

"(3) In a machine for making paper boxes, the combination of a reciprocating carrier for conveying the box ends, having an extensible end, and a form for receiving the box bodies, having a rearward recess or opening to admit the extensible end of said carrier, substantially as shown."

"(5) In a machine for making paper boxes, the combination of a receptacle for the box ends, a form for receiving the box bodies, and a reciprocating carrier for conveying the box ends to said form, and provided with an extensible end, substantially as shown."

At the front of the machine are the box form and presser plate, constituting the co-operating press members for affixing the box end to the box body. Back of the presser plate is located the hopper. This is open at the bottom, and the lowermost box end rests upon the

upper surface of the carrier. A row of short spurs projects above the surface of the carrier, and in the forward movement thereof the spurs strike against the rear edge of the lowermost box end and push it out from under the hopper, and forward into a position beneath the presser plate, and in registration with the box body. The box form meanwhile rises, and, when it reaches its highest point, holding on it the body and the box end, it compresses these parts together against the presser plate. The reverse movement of the carrier withdraws it from the box form. When the carrier is at the forward extreme of its travel, it is interposed between the box form and presser plate, and if no provision otherwise existed it would be nipped between them. Accordingly the box form is provided with a rearward recess, which the carrier enters in its forward movement.

There are many references to a proposition that the carrier not only carries forward the box end, but also thereafter "stands and holds" it during the operation of pressing. There is, however, nothing in the specification which relates to a proposition of this character, and no specific mechanism is shown with regard thereto. The parties on both sides, however, refer to this as an element in the device. If for the carrier to stand and hold during the pressing operation is an essential part of the device, either the three claims in question are invalid because they do not point out the means of accomplishing this, or it is to be assumed that this is an element which will be supplied by any person ordinarily skilled in the art. Neither party, however, maintains that there is any invalidity in the claims on this account, so that we have no occasion to consider them from that point of view. The complainant, however, maintains that this standing and holding is a peculiar feature of his device which the respondents have adopted, so that, applying the rule of equivalents, they infringe on this account; but in view of the fact that nothing relating thereto is developed in the patent, so that, therefore, as we have said, it must be held, in order to save the claims, that this would be supplied by any person reasonably skilled in the art, it cannot be regarded as a special feature of such a character as to enlarge the scope of the device with regard to infringement.

The respondents claim that a great variety of box machines is within the prior art to which this patent appertains. In Machine Co. v. Goddard (decided by this court on June 1, 1899) 37 C. C. A. 221, 95 Fed. 664, we showed generally what was old in the class of box machines involved in this case, namely, box rests and presser plates co-operating together for compressing blanks upon the box body, receptacles for holding the box ends, automatic pasting mechanism, and everything in the machine shown by the patent to George H. Cushman to which that suit related, except an automatic feeding mechanism. The latter we said was common in the arts, and was not unknown in paper-box machines, though never used in a machine for pasting box ends. Cushman introduced an automatic feeding mechanism for this precise purpose, and he was prior to the patent in suit.

It does not follow that, so far as concerns the precise purpose to which the claims in issue here relate, the various prior devices re-

ferred to by the respondents are properly in the same art merely because they are in the box-machine art. In Machine Co. v. Goddard we pointed out that a prior patent issued to Beach was not for that case in the same art as Cushman's device, because it concerned staying the corners of paper boxes by pasting strips over their edges. The general art relates to mechanism for affixing the ends of paper boxes to their bodies, and the mechanism required for this purpose varies intrinsically according to the nature of the box to be finished and the method of finishing it. For the case at bar, the only patent which relates to the precise subdivision of the art now involved is that to Cushman.

Coming now to claims 3 and 5, they are, for our purpose, practically the same; and each includes the extensible ends, which clearly have the function of preventing two or more box ends from starting forward simultaneously. The testimony of the patentee assigns an additional function. He says that, when the machine was constructed without these extensible ends, the carrier came back so rapidly that it was liable to break the machine. Aside from these two functions, the carrier with the extensible ends serves in the patented machine exactly the same purpose as the carrier without the extensible ends. It enters the box form in such way as not to interpose between it and the presser plate, leaving the pasted edges of the box ends to overlap the end of the carrier at all points, so that they can be pressed upon the box form without the carrier being nipped in the operation.

The case shows several machines used by the respondents, of which some are described in the record as the "Glazier Machine" and the "Glazier and Metcalf Machine," and others as the "National Machines." It is only with the latter that we have to do, so far as the third and the fifth claims are concerned, because it is admitted that neither of the others has the extensible ends, or anything which corresponds to them. The National machines, so far as their apparent construction is concerned, do not have extensible ends; but the complainant claims they have what are the equivalents thereof, and what perform the same functions.

Damren admits that the National machines do not require the extensible ends for the purpose of properly selecting the end blanks from the receptacle, and that what they use in lieu of the extensible ends has nothing to do with the feeding mechanism. Their device grips the box ends after they are in place in the box form, and is called "gripping fingers." Their operation is thus explained: The reciprocating carrier delivers the box end inside of the box form to the grippers, which seize the box end and hold it, and press it against the presser plate until the box form comes up and presses the box body against its pasted edges. After carrying the box end into the box form, the reciprocating carrier has no further use in the National machines. It is so plain that the gripping fingers are not the equivalent of the extensible ends that this point requires no further discussion. It is therefore clear that claims 3 and 5 are not infringed.

With reference to claim 1, the construction of the box forms in the National machines is the same as in the complainant's device;

and, although perhaps not functionally necessary, the National machines have all the elements of this claim, namely, the reciprocating carrier, and a box form with a rearward recess to admit the carrier. So far as the case shows, though this construction may not be functional, any other may be inconvenient and expensive. However this may be, the respondents in fact have all the elements of the combination covered by claim 1, and this in a machine devised and used to accomplish the same general result as the complainant's. Infringement, therefore, necessarily follows, if that claim covers a patentable invention.

As we have already stated, the only prior device was the Cushman machine. Cushman was the first person to struggle with the precise subject-matter of claim 1 with regard to the particular class of box machines in issue; that is to say, with a reciprocating carrier which would automatically take the box end from the hopper and deliver it upon the box form under such circumstances that the box form might hold it while the pasted edges were pressed by the presser plate upon the box body. Instead, however, of using a box form with an open rearward end, Cushman used a box form whose upper end had a plane surface. Therefore any ordinary reciprocating carrier was in danger of being nipped. Consequently we said in the opinion in Machine Co. v. Goddard, 37 C. C. A. 221, 95 Fed. 664, "At this point, however, it is evident that the inventor met his difficulty, which was overcome with a considerable degree of ingenuity." Then we described the method by which Cushman did this. His carrier consisted of parallel rails, which in a normal condition would prevent a union between the box end and the box body. Cushman broke the parallel rails transversely into two sections, the forward section extending under the presser plate, and the other section under the hopper. The two sections were so located that, so far as the forward movement of the box ends was concerned, they were in horizontal alignment. The section under the hopper remained as ordinary parallel rails, but that under the presser plate was constructed with groved guide rails, pressed inward by springs. The grooves were so adjusted that the box ends were received in them as pushed forward by the feeder; and as, in their normal position, the springs were pressed inward, the guide rails opened as they were crowded down on the box body, leaving the box ends on the ends of the box body while they were being pressed into position by the presser plate. All this, as is easily seen, was a complicated and delicately adjusted contrivance. The advance over Cushman by the substitution of a box form with a rearward opening so simplified the construction as for that reason alone to be of very considerable utility, and to raise a very strong presumption in favor of patentability. In addition to this, there is much ground for claiming that the Cushman device in this particular was never practically useful. It was found difficult to entirely clear the box end if constructed of the full width of the box body. Therefore in the Cushman device the box body slightly overlapped the box end at the edges where they were pasted together. This perhaps did not affect the utility of the box, but it undoubtedly diminished its commercial value.

Although the commercial success of the complainant's machine does not bear positively on the question of patentability, because it came from the machine as a whole, and not from the particular parts covered by the claims in suit, yet that Damren invented the first practically successful machine of this class is clearly established. The respondents claim otherwise, but the complainant's evidence on this score clearly preponderates. That this grew in part out of the combination in claim 1 can hardly be doubted, especially in view of the contrast with Cushman's machine.

Under these circumstances, it is clear that the combination in claim 1 was useful, and not anticipated. Can it be held to be patentable? Doubt on this point arises from the fact that it is so common in the arts to have receptacles constructed with open ends, like the box form in this case, adapted to receive articles through the open ends, that to use this for any particular purpose would seem, prima facie, not to be patentable. Nevertheless in this case it aided to make a successful machine; and the fact that Cushman failed to accomplish that result, notwithstanding his ingenuity, weighs strongly in favor of the patentability of the complainant's box form, simple as it is. On the whole, the presumption in favor of the patentability of claim 1 arising from the issue of the patent, in the light of the rules for determining invention stated by this court in Watson v. Stevens, 2 C. C. A. 500, 51 Fed. 757, 759, 760, cannot be overcome.

The respondents refer to the file wrapper, but there is nothing in it which can affect claim 1, when limited, as we limit it, to its plain mechanical meaning.

A question is made as to who was the inventor. The respondents claim it was one Jones, and not Damren. The rule laid down by this court in Brooks v. Sacks, 26 C. C. A. 456, 81 Fed. 403, 405–407, disposes of this matter in favor of the complainant.

The circuit court held that the bill could not be maintained for several infringements by portions of the respondents because they are described as a copartnership. Nevertheless it sets out that they infringed "jointly and severally," so that the reference to them as copartners is merely descriptio personarum, which cannot override a positive allegation. In view of that fact, the opinion of this court in Simonds Rolling Mach. Co. v. Hathorn Mfg. Co., 36 C. C. A. 24, 93 Fed. 958, 963, applies, and the bill is not multifarious.

We conclude that claims 3 and 5 are not infringed, and that claim 1 is valid, and is infringed by all the respondents' machines, including the Glazier, the Metcalf, and the National.

The decree of the circuit court is reversed, and the case is remitted to that court, with directions to proceed in accordance with our opinion passed down this day; and the appellant recovers its costs of appeal.

SWAIN v. HOLYOKE MACHINE CO.

(Circuit Court of Appeals, First Circuit. September 20, 1901.)

No. 353.

PATENTS—PRIOR PUBLIC USE—EVIDENCE OF EXPERIMENTAL CHARACTER.

Where it is shown that an inventor installed a machine embodying his complete invention, for practical use by a purchaser, more than two years before his application for a patent therefor, the burden rests upon him to sustain a claim that such use was experimental by proofs that are full, unequivocal, and convincing; and his own unsupported testimony, given 20 years afterwards, that the installation was for experimental purposes only, is insufficient.

On Petition for Rehearing. For former opinion, see 109 Fed. 154.

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

PUTNAM, Circuit Judge. I agree that the complainant's petition for a rehearing in this case should be denied, but I desire to express my special reasons for that conclusion. The opinion passed down on May 24, 1901, contained the following:

"In the case at bar the patentee has failed to show, by the clear and convincing proofs required, that the sale of the Moodus machine was for experimental use. The only evidence in support of such use is Swain's testimony."

In this connection the opinion observed that:

"If Swain had supplemented his testimony by showing that he at once proceeded, after the Moodus machine was installed, to test its efficiency, as compared with outward-discharge machines or inward-discharge machines, without his central partition; if he had made such experiments as he has conducted since his suit was begun, or the best tests he was able to, under the circumstances,—the case would be different."

The brief supporting the petition for rehearing apparently fails to apprehend the effect of this observation. It was the usual one, that, if Swain had been able to support his testimony, and had supported it, by some concrete act, he might thus have afforded the kind of proof required to establish the proposition on which he relied. It did not necessarily have any connection with the question whether it was practically possible for him to make experiments; but it pointed out that, because he did not do so or could not do so, his oral testimony was not supplemented. His lack in that respect was the same whether it arose from inability or indisposition, so that the observation applied equally to one alternative as to the other.

The application for the patent in issue was filed on January 10, 1881, and the installment at Moodus of the machine which the complainant claims was experimental was a few days more than two years earlier. Swain testified in reference to the Moodus installation in June, 1899. This was more than 20 years after the event. The rule of law applicable under these circumstances has been positively stated in Smith & Griggs Mfg. Co. v. Sprague, 123 U. S. 249, 264, 8 Sup. Ct. 122, 31 L. Ed. 141, as follows:

"In considering the evidence as to the alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation

that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing."

Under the circumstances of the case, this not only throws the practical burden on the complainant, but it also requires that the proofs offered by him should be "full, unequivocal, and convincing." The strictness with which this rule is applied, and the unwillingness of the courts to regard unsupported oral testimony, given after a lapse of many years, as constituting "full, unequivocal, and convincing" proof, are practically illustrated by the supreme court in Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 492, 11 Sup. Ct. 846, 35 L. Ed. 521; The Barbed Wire Patent, 143 U. S. 275, 284, 12 Sup. Ct. 450, 36 L. Ed. 154; Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; and Deering v. Harvester Works, 155 U. S. 286, 301, 15 Sup. Ct. 118, 39 L. Ed. 153; and by this court in Brooks v. Sacks, 26 C. C. A. 456, 81 Fed. 403. It is quite probable that, if this were the usual case of determining by a mere preponderance the result of a civil suit, the proofs and circumstances might take on such an aspect as to be sufficient to justify a conclusion favorable to the complainant; but, looking at the authorities which we have cited, we would not have been justified in so determining the issue of experimental use.

It is urged, however, in the brief accompanying the petition for a rehearing, that what was installed at Moodus was not the complainant's entire invention; and the petitioner relies very much on an accompanying diagram, showing the portion of the educt supplied by him, and also the portion of the old draft tube which he found on the premises. This proposition could in no event be supported, except in connection with the second claim of the patent, which was rejected as invalid. In that claim the draft tube is described as having a vertical partition throughout its entire length, and this was properly held not to contain any distinguishing feature which could be the basis of invention. The installation at Moodus did have a draft tube constructed by Swain, though connected with the portion of the old one which was already on the premises, so that in any event every element of Swain's invention was present, and the machine was complete. It is plain, therefore, that the conditions at Moodus were properly described in the opinion passed down on May 24, 1901, to the effect that a complete Swain machine was installed.

MASSETH v. LARKIN et al.

(Circuit Court W. D. Pennsylvania. September 24, 1901.)

1. PATENTS—CONSTRUCTION OF CLAIMS.
An express functional limitation in a claim cannot be ignored in its construction to determine infringement.

2. SAME—INFRINGEMENT—DEEP-WELL PACKER.
The Masseth patent, No. 439,166, for a packer for deep wells, claims 1 and 2, construed, and *held* not infringed.

In Equity. Suit for infringement of patent. On final hearing.

Bakewell & Bakewell, for complainant.
Kay & Totten and George H. Christy, for respondents.

BUFFINGTON, District Judge. Benjamin Masseth files this bill against William H. Larkin et al., charging infringement of claims 1 and 2 of patent No. 439,166, granted to him on October 28, 1890, for a packer for deep wells. A statement of the general art involved will be found in Masseth v. Palm (C. C.) 51 Fed. 824, and of the particular device disclosed by this patent in Masseth v. Palm (No. 18, May term, 1891). The validity of Masseth's patent is not questioned, but infringement is denied. After careful consideration, we are of opinion this defense must be sustained. In the combination of each claim we find the element of "arms adapted to engage with the sides of the hole, and to hold the casing to afford resistance to the packer." Engagement of the arms with the well sides was by bowed springs on the outer arm side. The functional purpose of these springs was twofold. One is specified in the patent, viz.:

"When it is desired to expand the packer, the casing is lifted somewhat, and the friction of the springs, 8, against the sides of the hole causes the casing to rise within the collar, 6, and the ends of the arms, 7, to draw out from the grooves."

The other is set forth in the opinion of this court in the case noted above in discussing the device infringing this patent, viz.:

"The wedge arms are normally in loose engagement with the well walls by the outward spring of their upper ends, instead of by leaf springs on the wedge arms, as in the Masseth and Black devices. It is this normal engagement in all three with the well walls which affords the purchase or base by which the ring and wedge arms are kept in one position while the casing is moved within them and the apparatus locked or unlocked."

Now, in respondent's device we not only find no arms such as are specified, but we further find an entire absence from the device anywhere of one of the functions effected by the springs. Moreover, while the other function is used, it is in a different manner, and in combination with different means. The arms of the respondent have no springs, and they do not normally engage the wall sides. Respondent's device does not involve the mere absence of springs on the arms, but its construction is such that if springs were placed on the arms they would make the packer inoperative. Owing to this functional wall engagement, the slips in Masseth's device had to be positively restrained or locked, and this necessitated another element in the combination, viz. "a lock for holding said arms." In the respondent's device the arms are on a loose ring, and not only is no "lock for holding said arms" provided, but independently and of themselves they normally remain out of operative relation. Then, too, as to the other function of the Masseth bowed springs on the arms, viz. as a "purchase or base by which the ring and wedge arms are kept in one position while the casing is moved within them and the apparatus locked or unlocked," while it is made use of in principle in the respondent's device, it is used in a way substantially different. In the latter, bowed springs in loose engagement with the well walls are mounted on a sleeve which internally engages with the casing by screw threads. When the casing is turned, the

ring and wedge arms are free to turn with it. Such turning of the ring and wedge arms was prevented in Masseth by the wall engagement of the bowed springs. It is obvious, therefore, that packing—the desired result in both—must be secured by different means. The bowed springs of respondent's device serve to prevent the sleeve responding to the turn of the casing, but cause it to mount on the screw thread and push the loose arm-carrying ring into engagement with the well walls. While the result obtained is the same, we think the means by which such result is accomplished are mechanically diverse. In Masseth we have bowed springs mounted on the arms and in normal engagement with the well walls. We find such functional engagement, thus secured by springs mounted on the arms, essential to the operation of his device. We find his spring arm positively held from responding to such frictional engagement by a controlling lock. We find, when the arms are free to respond to their own frictional relation, packing necessarily results when the casing is lowered. In Larkin we find no bowed springs on the arms, and, if placed there, that they would make the device worthless. We find no lock restraining the movement of Larkin's arms. We find, further, if the ring carrying Larkin's arms were attached to the mechanism which communicates motion to it, the device would not be operative. The lock of Masseth's device freed the spring arms (the words of the patent are, "so as to disengage the spring clamps and to free them"), and permitted them to do that which they were able to do by virtue of their own construction, namely, to mount the cone by friction. In Larkin's device we find no such releasing lock, and the arms mount the cone, not by any inherent capacity, but are forced to do so under stress of a power exerted upon them by the lower sleeve. In Masseth, cone mounting results from a spring arm plus an enabling functional capacity, which is made an element of the claim, viz. arms "adapted to engage with the sides of the hole." In Larkin we have an arm minus such functional capacity. In Masseth we have latent functional power positively restrained by a lock. In the other no such power exists. In Masseth the lowering of the casing, in Larkin the turn of the casing, spreads the grips. We are therefore of opinion that by the use of the combination of the loose, independent, non spring-bowed arms, the lower actuating sleeve, in screw-threaded engagement with the casing, Larkin has reached the same result as Masseth, but by a different mechanical path. To ignore the express functional limitation of the claim, viz. "arms adapted to engage with the sides of the hole," would be to create a new claim, not interpret the one granted. Anthony Co. v. Gennert (C. C. A.) 108 Fed. 396. Let a decree be drawn dismissing this bill.

McCALDIN et al. v. CARGO OF SCRAP IRON.

(District Court, S. D. New York. October 26, 1901.)

1. SHIPPING—DEMURRAGE—EXTRA EXPENSE OF LOADING AND DISCHARGING.
A steamer was chartered to carry a cargo of iron shot, "consisting of pieces averaging in weight about 100 pounds"; the cargo to be "received and delivered alongside of the vessel, where she can load and discharge always safely afloat, within reach of her tackles; and lighterage, if any, to be at the risk and expense of the cargo." It was also provided that

the cargo should be furnished as fast as she could load the same, and that in discharging it should be received as fast as she could deliver it. The cargo furnished consisted of miscellaneous scrap iron; the pieces varying from small shot to cannon balls weighing 250 to 300 pounds, and broken beams and gun carriages weighing up to 1,600 pounds. She was unable to lie safely at the wharf where she was required to load, because of insufficient depth of water, and a considerable delay occurred in obtaining lighters. Delay was also caused in both loading and discharging by reason of the variation in the character of the cargo from that specified in the charter. *Held*, that her owners were entitled to demurrage at the charter rate for all delay so caused.[1]

2. SAME.

A steamer 310 feet long, and having three hatches, entitled under her charter to be furnished with cargo as fast as she can load the same, and where she can safely lie afloat, which is required to load at a wharf having a frontage of 40 feet, only a part of which has a depth of water sufficient to float her while loading, cannot be required to submit to the danger and inconvenience of breasting out at such wharf in order to load without the aid of lighters.

In Admiralty. Action against charterer to recover for demurrage and extra expense in loading and discharging.

James J. Macklin, for libelants.

Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. This is an action brought to recover demurrage and extra expense of the steamer Lassell, incurred by her in receiving and discharging cargo, under a charter party made between the libelants, as owners, and the Columbia Smelting & Refining Works, dated, "New York, February 19, 1901." The charter provided that a cargo should be furnished to the steamer of at least 1,200 tons of iron shot, consisting of pieces averaging in weight about 100 pounds, to be loaded at a dock at Ft. Morgan, Mobile, Ala., and discharged at a wharf in New York, as ordered by the charterer, or so near thereunto as she could proceed and always float with safety. "The cargo or cargoes to be received and delivered alongside of the vessel, where she can load and discharge always safely afloat, within reach of her tackles; and lighterage, if any, to be at the risk and expense of the cargo." It was further provided that the cargo should be furnished the steamer as fast as she could load the same, and, in discharging, that it should be received as fast as the steamer could deliver it. A rate of demurrage of $175 per day was agreed upon. The steamer proceeded to Pensacola, Fla., where she took aboard a stevedore with 15 men for the purpose of loading, and thence to Ft. Morgan on the 16th day of March, 1901. She arrived there on the same day, and reported to an agent of the claimant, who pointed out a wharf at which the vessel was to load. She hauled there the next day (Sunday) at 5 o'clock in the morning. The loading was commenced the 18th, but was discontinued the 19th, because the vessel struck the bottom; and she was obliged, for safety, to haul out in the stream, where she was loaded, after considerable detention, by means of lighters. The cargo furnished was not in accordance with the provisions of the charter party, but

[1] Definitions and general principles of demurrage, see notes to Randall v. Sprague, 21 C. C. A. 337; Hagerman v. Norton, 46 C. C. A. 4.

consisted of a variety of scrap iron, in pieces varying from small shot, grape or canister, weighing a few pounds, to large cannon balls, weighing 250 or 300 pounds, and broken beams, cannon, and gun carriages, weighing up to 1,500 or 1,600 pounds. This variation in the character of the cargo caused the vessel much greater expense in loading than if it had been furnished as agreed upon. When the steamer reached New York, there was further delay in providing her with a wharf at which she could discharge, and additional expense incident to the kind of cargo she had been furnished with.

It is urged in defense that the provision of the charter concerning the character of the cargo was not a warranty, but a mere promise, which could be and was waived by the master of the vessel receiving it without protest. The master, however, in signing the bill of lading, indorsed it, "Signed under protest for settlement of dead freight and demurrage." If a protest were necessary, this language would seem broad enough to protect the owners of the vessel. In any event, I am satisfied that there was no waiver on the master's part, even if he had authority to relieve the charterer from its contract with the libelants, which is doubtful. Gracie v. Palmer, 8 Wheat. 604, 639, 5 L. Ed. 696; Steamship Co. v. Grace, 22 C. C. A. 7, 75 Fed. 1017, 1019.

It is further urged that as the libelants, before signing the charter party, made inquiries concerning the draught of water at Ft. Morgan, and found, as they thought, that there was sufficient water for her to lie safely at the wharf, they should not now be permitted to rely upon the terms of the charter party, in the absence of a warranty as to the depth of water, but assumed the risk of being able to lie safely and load at the wharf. The facts seem to be that the brokers who were negotiating the contract between the parties telegraphed to the charterer's agent at Ft. Morgan, asking if steamer could load to "eighteen-foot draught," and received a favorable reply, after which the owners executed the contract. The information was correct as to there being such a depth of water at a part of the wharf, but it was not a fact that a vessel of such a draught could lie there safely, or load there with dispatch. The steamer was 310 feet long, and the wharf had an available face or end of about 40 feet, at a part of which, only, was there a sufficient depth of water. Moreover, the steamer had three hatches, which she was entitled to use under the stipulation for the receipt of cargo as fast as she could load (Hine v. Perkins, 5 C. C. A. 377, 55 Fed. 996), and could only use one at this wharf. The terms of the contract were not complied with by the charterer when it furnished such a wharf, even if its contention could be otherwise sustained. Burdge v. 220 Tons of Fish Scrap (D. C.) 2 Fed. 783; Belmont v. Tyson, 3 Fed. Cas. 150.

It is further contended that the steamer should have breasted out, so that she could have been loaded in that way, but I do not think she was required to submit to such danger and inconvenience. The Glenfinlas, 1 C. C. A. 85, 48 Fed. 758.

My conclusion is that the libelants are entitled to recover for detention at Ft. Morgan and New York; also for the extra expense

of loading and discharging caused by the difficulty of handling the cargo provided. But as the evidence before me does not satisfactorily establish the amounts recoverable, particularly with reference to the time lost at Ft. Morgan, there must be a reference to determine them.

Decree for the libelants, with an order of reference.

THE MAJOR REYBOLD.

(District Court, E. D. Pennsylvania. October 25, 1901.)

No. 34.

COLLISION—LIABILITY OF CITY—RELATION OF MASTER AND SERVANT.

A municipal corporation is liable in a court of admiralty for a collision caused by the negligence of its servants in charge of a vessel of which it is owner, who were operating the same under the directions of the corporation; and it is immaterial whether the vessel was employed in a municipal service or under orders which were ultra vires, the relation of master and servant being sufficient to render the corporation responsible under the rule of respondeat superior.

In Admiralty. Suit in personam for collision. On final hearing.

Francis S. Laws and John F. Lewis, for libelant.

John L. Kinsey, Leonard Finletter, and Chester N. Farr, for respondent.

J. B. McPHERSON, District Judge. This suit was begun by a libel in personam, wherein damages for a collision are sought to be recovered against a municipal corporation.

The Major Reybold is a steamship plying upon the Delaware river between the city of Philadelphia and the town of Salem. Between 4 and 5 o'clock on the afternoon of September 8, 1899, she backed out into the stream towards the east shore from the north side of Arch street wharf, where she had been lying, intending to turn towards the south, and proceed upon a voyage to Salem. The battleship Indiana was anchored nearly opposite the wharf, and the Reybold backed as near to this vessel as it was prudent to go, and then reversed her engines for the purpose of stopping her way before turning down stream. She might, perhaps, have gone somewhat nearer to the Indiana, if it had not been for the approach of a revenue cutter that was coming down the river, and evidently intended to pass between the battleship and the Reybold. At, or shortly before, the stopping of the Reybold, Ice Boat No. 3, belonging to the city of Philadelphia, which was coming up the river not far below, in charge of employés of the city, blew two blasts of her whistle, signifying that she would pass between the bow of the Reybold and Arch street wharf. To this signal the Reybold answered with two blasts, thus giving assent to the ice boat's course, and thereupon remained at rest upon the water, save as the ebb tide may have moved her slightly. The ice boat had ample room to pass in safety, but apparently miscalculated the distance between the Reybold and herself, for the starboard guard of the ice boat struck the stem of the Reybold upon the port side, and thus inflicted

the injury complained of. The day was clear, and there was no obstruction to the view from either vessel.

These being the facts, the Reybold was not to blame, and the fault of the ice boat is clear; the remaining question being whether the city is liable for this negligence. The offending vessel was not being used as an ice boat at the time of the collision, and therefore no question arises concerning the city's liability for a collision that might be due to the fault of the boat while engaged in the duty of breaking ice in order to aid navigation. The principal defense is that the boat was being used by the city's permission for purposes that were not municipal, and that such permission was, therefore, an ultra vires act that can furnish no ground for recovery. It appeared from the evidence that a meeting of the Grand Army of the Republic was being held in the city at this time, and that upon the day in question a naval parade took place upon the Delaware river. In the preceding June the councils of the city passed the following resolution:

"Resolved, * * * that * * * authority is hereby granted for the use of the city ice-boats to participate in the celebration of Naval Day, Friday, September 6, 1899, during the thirty-third national encampment and reunion of the Grand Army of the Republic, to be held in this city commencing September 4, 1899, and that the department of public works be and is hereby authorized and instructed to do all that is necessary to carry this resolution into effect."

In pursuance of this resolution, ice boat No. 3 took part in the naval parade, and, the parade being over, and her passengers having been put ashore, she was on her way elsewhere at the time the collision took place. These are the facts upon which the city relies to support the legal position above stated, citing several decisions in the state courts, of which Smith v. City of Rochester, 76 N. Y. 506, may be taken as an example. In that case the city councils, desiring to take part in a celebration of the one hundredth anniversary of national independence, directed the fire department to assemble at midnight in front of the city hall, not for the purpose of extinguishing a fire, but in order to take part in a parade. While going to the place of meeting, one of the engines ran over the plaintiff, and injured him. The court decided that the city was not liable, saying:

"No reported case sustains the principle that when the common council of a municipal corporation exceed the powers conferred by the charter of the city they represent by using the property of the city, as was done in this case, for purposes not recognized by law, that the corporation is answerable for negligence in the management of such property. Such a rule would place in the hands of the members of the common council of a municipal corporation a power to create liabilities of the taxpayers, which is without any precedent or authority of law, and which might be liable to great abuse."

In reply to the respondent's position, it is, I think, only necessary to say that the supreme court of the United States, in Workman v. City of New York, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, has decided, in effect, that such a defense is not valid in the courts of admiralty of the United States. The court there holds that the legal decisions of a state court cannot, as a matter of authority, abrogate the maritime law, and that under the general maritime law,

where the relation of master and servant exists (as it did exist in the case now before the court), an owner of an offending vessel committing a maritime tort is responsible under the rule of respondeat superior, although the owner may be a municipal corporation. The case decides that a city is liable in a court of admiralty for the negligence of its servants operating a fire boat, although the boat was engaged in the duty of putting out a fire at the time the injury was done. The defense that the servants of the city were discharging one of its governmental functions, and therefore that the municipality was not liable for their negligent conduct, was not allowed to prevail, and the decision rests broadly upon the principle that the relation of master and servant existed, and that this is enough, in a court of admiralty, to make the master liable for the servant's default. The court say:

"By the general admiralty law of this country, subject to the exemption from process possessed by the national government, a ship, by whomsoever owned or navigated, is liable for an actionable injury resulting from the negligence of the master and crew of such vessel. The John G. Stevens (1898) 170 U. S. 113, 120, 18 Sup. Ct. 544, 42 L. Ed. 969, and cases cited page 122, 170 U. S., page 548, 18 Sup. Ct., and page 973, 42 L. Ed. A liability of the owners in personam, however, is not dependent upon ability to maintain a proceeding in rem because of the maritime tort. A maritime lien may not exist in a cause of collision, for instance, when the thing occasioning the tort was not the subject of a maritime lien (The Rock Island Bridge [1867] 6 Wall. 213, 18 L. Ed. 753); or such a lien, if it exist, may not be enforceable, and so may be said to render the offending thing not the subject of a maritime lien, because of the ownership and possession of such thing being in the government of the nation (The Siren [1868] 7 Wall. 152, 19 L. Ed. 129); or the remedy in rem may not be available owing to the offending thing being actually in another country, or because of its loss intermediate the collision and the institution of legal proceedings. A recovery can be had in personam, however, for a maritime tort when the relation existing between the owner and the master and crew of the vessel at the time of the negligent collision was that of master and servant. Thorp v. Hammond (1870) 12 Wall. 408, 20 L. Ed. 419; The Plymouth (1865) 3 Wall. 35, 18 L. Ed. 125."

As I understand the scope of this authority, it is as fatal to the defense of ultra vires as to the defense that the servant is exercising a governmental function of the city. In both cases the servant acts by the direction of the master, and in a court of admiralty this is sufficient to establish the master's liability, whether or not the direction be ultra vires.

In the present controversy it is not denied that those in charge of the ice boat were servants of the city, and as such servants were managing and operating the boat in discharge of their duty. The relation of master and servant existed, therefore, although it may be assumed (without deciding the point) that the purpose for which the boat was being used was not within the corporate powers of the city. Upon the reasoning above referred to, the respondent is responsible in a court of admiralty, even if the order to the offending servant transcended the city's charter authority.

The libelant is entitled to a decree. If the parties cannot agree upon the amount of damage, a commissioner will be appointed to take testimony upon this subject.

W. B. CONKEY CO. v. RUSSELL et al.

In re BESSETTE.

(Circuit Court, D. Indiana. October 19, 1901.)

1. JURISDICTION OF FEDERAL COURTS—DIVERSITY OF CITIZENSHIP—COLLATERAL ATTACK.

Where the requisite diversity of citizenship to give a federal court jurisdiction appears on the face of the bill, the jurisdiction cannot be attacked by evidence dehors the record in a collateral proceeding by one who was not a party to the bill.

2. CONTEMPT—CONSPIRACY TO DEFEAT INJUNCTION — JURISDICTION TO PUNISH.

Where a federal court has issued an injunction directed against the defendants in the suit, and which has been served upon them, such court has jurisdiction to punish for contempt any person who, with actual knowledge of the injunction and of its scope and effect, combines and confederates with defendants who were enjoined for the purpose of violating and resisting it, and who, in pursuance of such conspiracy, aids and assists in the commission of acts which were enjoined. This jurisdiction exists by reason of the conspiracy to defeat the process of the court, and although such person is a stranger to the suit, and, by reason of his citizenship, could not have been made a defendant therein.

On Proceedings for Contempt against Edward E. Bessette for conspiracy with defendants to defeat the restraining order issued therein.

Newman, Northrup & Levinson, Benjamin V. Becker, and Morris & Newburger, for complainant W. B. Conkey Co.

W. V. Rooker, for respondent Edward E. Bessette.

BAKER, District Judge (orally). I am ready to dispose of this matter now. I feel that I am as sufficiently advised as I would be by giving the matter further reflection. I desire to commence by saying that there is a vast deal of evidence that has been introduced that is totally immaterial to the matter that the court has in hand for decision. The court is not concerned with the organization of the labor union. It is immaterial to the court what the people may think about it,—whether it is right or wrong. That is not in the case. Men have a right to organize into unions if they choose to do so. Nor is it a matter of any moment as to whether or not the original controversy that was started a long time ago between the Chicago Typographical Union and the Conkey Company was founded in justice or injustice. That is of no consequence. The court cannot try that, and the court does not know enough about it to form any judgment about it one way or the other. It is immaterial to the court whether or not Mr. Conkey was arbitrary and niggardly in his dealings with his employés. That is not before the court. The court has nothing to do with it. It is not a matter of any concern to the court. The court has nothing to do with the question as to whether or not Mr. Alting, who appears by the evidence to be the head and front of the original trouble resulting in the strike, was insolent and lazy and incompetent, and unfit to be employed in any decent establishment. That is immaterial. He was discharged,—whether rightly or wrongly discharged is imma-

terial to this case. The court cannot try that question. But there was started a strike; and parties have a right to quit, leave their work, if they choose to do so, just as an employer has the right to lock up his establishment and refuse to give labor to men then in his employ. The court has nothing to do with that. I make these observations for the purpose of stripping this case of matters that are extraneous; that are totally foreign to the question that is on trial here. The merits of the controversy between the Conkey establishment and its employés, the merits of the controversy between the Typographical Union of Chicago and Mr. Conkey, the question as to whether or not the 20,000 men who are said to have voted against Mr. Bryan because a history of his life prepared by somebody was printed at the Conkey establishment,—all that is matter that is foreign to any issue that we have here.

Now, what have we to deal with in this case? We have in this case, simply this,—nothing more: We have a petition and information, as it is styled, containing a large number of charges, that sets out that on a certain day (the 24th day of August) the circuit court of the United States for the district of Indiana issued a temporary restraining order enjoining and restraining all of the defendants named in that bill from doing certain specified acts. They were enjoined from interfering with the prosecution by the Conkey Company of its legitimate and lawful business. They were forbidden to trespass upon its premises. They were forbidden to interfere with people who were either in the employ of the Conkey Company, or others who might engage in their employment. They were prohibited from committing acts of violence, of intimidation, or of interference with them. That was the nature and scope, in a few words, of the original writ of injunction. The original writ of injunction, in addition to specifying the parties defendant in that bill, also contained statements that all other persons, either as agents, servants, employés, or attorneys, should be restrained, and also every person, under the phrase "and any and all persons aiding and abetting said defendants," is enjoined and restrained from conspiring with, aiding, and abetting the men who were named in the bill, and who are charged with committing acts of violence and wrong against the business of the Conkey Company. Such, in a few words, was the general scope of the restraining order.

Now we come to the information or petition that was filed on which Mr. Bessette has been on trial. That starts out by referring to the original bill, and stating in general terms the character and scope of that bill, the purpose for which it was filed, and by reference to the original bill on the files of the court it makes that original bill a part of the information, for greater certainty. It then proceeds to set out in general terms the character of the restraining order that was issued, and the persons against whom it was issued. It then proceeds to allege that Mr. Bessette, among others who are named, who are not parties to the original bill, has conspired, confederated, and combined with the parties, or some of them, who were specifically enjoined by name, for the purpose of violating that injunction; and then it alleges that, having joined that conspiracy, confederation, and combina-

tion of men who were directly enjoined, he aided and assisted in defeating and disregarding the authority and lawful order of the court in its execution. It then goes on and specifies a large number of instances. It does not confine itself to the general character of them, but it specifies a large number of particular instances of intimidation, of violence, of outrage, of insult, and of the oppression that was practiced by men who were enjoined, and by Mr. Bessette and others who united themselves to this combination. Now, on that the question has been made as to whether or not Mr. Bessette, not having been made a party to the original bill, and it being shown that his citizenship was in the state of Illinois,—the same state of which the corporation plaintiff in the original bill was a citizen,—this court can take jurisdiction of him for the purpose of punishing him as a co-conspirator and aider and abettor of the men who were enjoined by name, in trampling under foot the order of the court. The court has read the cases that were cited by counsel yesterday, which struck the court, if they were to be carried to the extent that counsel asserted, as being revolutionary of all the learning that the court had ever acquired on the subject of the meaning, effect, and scope of an injunction. And the court was, by the oily and persuasive tongue of counsel in reading particular sentences, somewhat impressed with the fact that it might be that nobody could be punished for a violation of an injunction except the men who were named as defendants in the bill in which the injunction was issued, and against whom, by name, a restraining order had been granted. But on reading the cases the court finds that its comprehension of what the law was on that subject was not at fault.

The English case that is referred to (Seaward v. Paterson [1897] 1 Ch. 545) was a case in which a landlord had leased a large room in a very large building. The building was occupied by a large number of tenants of the landlord, and in the lease to a man by the name of Paterson, which was a lease for the purposes of a private club, there was a covenant providing that the lessee should not use or occupy the demised premises in any such way as created noise or a nuisance, or to interfere with the comfortable enjoyment by other parties of the rooms that they had rented. Mr. Paterson had permitted boxing games to be carried on, crowds of people to come there, betting and drinking to take place, and a bill was filed by the landlord (Seaward, I think his name was) against this tenant, in which these acts were charged; and it was alleged that they were in violation of the covenants of the lease, and that they were injurious to the landlord; that they were a nuisance to his other tenants; and that the continuance of them threatened serious loss to the landlord in the enjoyment of the residue of his building. An injunction was issued against Paterson, the lessee, by name, and he was restrained, and his agents and servants were restrained. That was the scope of the injunction. On two occasions after this injunction had been issued, boxing games, betting, and drinking were carried on in this club room in violation of the terms of the injunction, and a motion, as it is called (that is to say, a statement under oath, verified by somebody, setting out the facts constituting

a violation of the restraining order), was filed with the court against the lessee and against two other men (Sheppard and Murray), charging Sheppard and Murray with being the parties who were really running things. They were called "servants" in the motion. They were called "aiders and abettors" in the motion. Judge North, who tried the case, was of opinion from the evidence that the head and front of the concern was one or the other of these two men, who are not named in the injunction at all; but he ruled that they could be punished for the contempt, and the contemptuous disregard of the order of the court, on the ground that they were aiders and abettors, and by so doing they made themselves responsible precisely the same as the party originally restrained.

Now, the Reese Case (In re Reese [C. C. A.] 107 Fed. 942): I will not say whether I regard that decision as sound or not. It is an extreme case in its views, and in a court in which the law is not as rigorously administered in such matters as it is in some other courts of the United States, or in the supreme court of the United States. But in that case there is nothing decided, nor anything that fairly could be construed as stating, arguendo, in the opinion of the judge, anything that tends to support the theory that, where a number of people are restrained by the order of the court, others who are not so restrained by order of the court, but who know of the order of the court, may not be punished, if it is shown that they combined, confederated, and conspired with the party or parties who are restrained, and aided, abetted, and assisted the restrained party in doing the acts forbidden. That case does not hold that. It is very careful to say that that does not appear in that case. It says that, so far as Reese was concerned, it did not appear that he was acting in conjunction with the men who were enjoined, as a conspirator, as an aider, or an abettor, or otherwise; that he had done the things prohibited by the restraining order independently of the parties restrained, and as an original wrongdoer. The court admits that even then, on a proper proceeding, he might be punished.

In the case of In re Lennon, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, Mr. Justice Brown, delivering the judgment of the court (and it was the unanimous judgment of nine learned justices of the supreme court of the United States), said:

"The only question which can properly be raised upon this writ is whether the circuit court exceeded its jurisdiction in holding the petitioner for a contempt, and in imposing upon him a fine therefor."

Now it goes on and says:

"The original bill averred the complainant, the Toledo, Ann Arbor & North Michigan Railway Company, to be a corporation and citizen of the state of Michigan, and the several railway companies defendant to be citizens either of Pennsylvania or Ohio, and there is nothing in the record of that case to show that this averment was not true."

That is to say, the jurisdiction in the original case of the Toledo, Ann Arbor & North Michigan Railway Company against the other railway companies—the ground of jurisdiction set up in the bill as stated by the learned judge who delivered the opinion of the supreme court—was a diversity of citizenship; that the complainant,

the Toledo, Ann Arbor & North Michigan Railway Company, was a citizen of Michigan, and the other railway companies that were sued, and against whom a mandatory injunction was issued, commanding them to receive from the Ann Arbor Company its cars, were citizens of other states. The sole ground of jurisdiction was diversity of citizenship. "And there is nothing," says the court, "in the record of that case to show that this averment was not true. It only appears to be otherwise by an allegation in the petition for the habeas corpus; and the question at once arises whether, where the requisite citizenship appears upon the face of the bill, the jurisdiction of the court can be attacked by evidence dehors the record in a collateral proceeding by one who was not a party to the bill,"—just as it is sought to be raised here by an answer saying that certain men named in the original bill are citizens of Illinois, and not citizens of Indiana, as alleged in that bill. I am reading from the Lennon Case, in 166 U. S., at page 548, 17 Sup. Ct. 658, 41 L. Ed. 1110. Now, in the writ of habeas corpus that was sued out in the supreme court of the United States the averment in the original bill that was filed by the Ann Arbor Company was traversed and denied, but that is a question that the court say cannot be collaterally raised. It was held that it could not be collaterally raised in that case, and it cannot be in this case. Notwithstanding parties here in this case say that the allegation is false that certain of the defendants are citizens of Indiana, that issue cannot be tried, except upon a proper issue, and proof being made in that case, and not in this case. "It only appears to be otherwise by an allegation in the petition for the habeas corpus; and the question at once arises whether, where the requisite citizenship appears on the face of the bill," as it does in the Conkey Case, "the jurisdiction of the court can be attacked by evidence dehors the record in a collateral proceeding by one who was not a party to the bill. We know of no authority for such action." Mr. Bessette is a stranger to the bill. He seeks collaterally, being a stranger to the bill, to raise an issue that can only be raised in the original suit by the very parties to the bill. I agree with the supreme court of the United States that I know of no authority, and never heard of one, that would authorize a stranger to a bill in equity (a man who is not a party to it) to raise a question as to whether or not the averments in the sworn bill (sworn original bill) were true or false. It cannot be done. In other words, a stranger cannot fight a battle or wage a contest for the parties to the bill. That cannot be done. "The general rule is that parties to collateral proceedings are bound by the jurisdictional averments in the record, and will not be permitted to dispute them, except so far as they may have contained a false recital with respect to such parties." Of course, if in this petition or information they had stated who were the parties in the original bill, and stated that falsely, that could be met. "Doubtless the averments with regard to citizenship might have been directly attacked by any one who was a party to that suit. Irrespective, however, of this, we think the bill exhibited a case arising under the constitution and laws of the United States."

Now we come to another point,—the second point decided by the court:

"The facts that petitioner was not a party to such suit, nor served with process of subpœna, nor had notice of the application made by the complainant for the mandatory injunction, nor was served by the officers of the court with such injunction, are immaterial, so long as it was made to appear that he had notice of the issuing of an injunction by the court. To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor that he should have been actually served with a copy of it, so long as he appears to have had actual notice."

That I understand to be the law. Nor do I understand that this application for the punishment of Mr. Bessette and the other parties against whom a rule was issued by the court to show cause why they should not be punished for the matters and things set out in the petition and information against them asks for any relief in the way of damages or otherwise in favor of the Conkey Company. So far as I read it, the whole scope of it, the sole purpose of it, is the complaint of the Conkey Company, in the nature of a petition and information advising the court that the conspirators uniting with the parties who were enjoined by the court had combined and confederated and proceeded to defy the order of the court, and it prays that they may be punished. It is punishment that is asked for,—that they may be punished. Now, I have said enough to indicate that I think, under the law, the court has jurisdiction to do that thing, if the proofs sustain the charges, not on the ground that Mr. Bessette and the other conspirators who are named, but are not parties to the original bill, are directly restrained, but because they have made themselves amenable to the process for contempt by combining and confederating with those who were enjoined, and by aiding and assisting them in the violation of the injunction of the court. And the court, if it should assess a punishment against Mr. Bessette, would assess it on the theory—and such would be the finding that the court would make in passing its judgment—that, with full knowledge of the scope and effect of the restraining order, he did wrongfully and unlawfully unite, combine, and confederate with the defendants named in the bill, and who were by name restrained, for the purpose of thwarting and defeating the effect of the writ of injunction issued by the court, and that he did, in pursuance of such conspiracy, aid, abet, and assist them in acts of violence in violation of the injunction. That I understand to be the scope and character of the charge, or charges, rather, that are made against Mr. Bessette, with others. And such I understand to be the law applicable to those charges. Now, did Mr. Bessette know of the restraining order? The evidence in this case shows that Mr. Bessette is a member of the Typographical Union No. 16, of Chicago, Ill. The evidence before the court shows that on the 24th, I think it was, of August,—but the precise date is not very material,—a restraining order was issued, forbidding the acts that I have heretofore generally indicated; that on Sunday, the restraining order having issued on Saturday, the restraining order was actually served either on the whole or a large number of the parties defendant to the orig-

inal bill. The evidence shows that at least 500 copies of that order were posted in conspicuous places in and about the city of Hammond, in the roadways leading to the Conkey plant, and around the entrance to the Conkey plant. The evidence also shows that the substance and scope of the order itself was published in a large number of papers in the city of Chicago, and in at least two papers in the city of Hammond. It appears that this man, Bessette, was sent down by the Chicago Typographical Union at a wage of $3.50 per day, and his spending money for incidentals and necessaries to the amount of $7 or $8 a day. He came down there on Tuesday, the second day after the writ had been served. If there was no other evidence to show Mr. Bessette's full knowledge of the scope and effect of the restraining order, the court would have no trouble whatever in finding that he was chargeable with notice of the restraining order even before he left Chicago. It appears that there was a conference about it at that typographical union, and that the executive officers acted on that injunction. It does not appear that the Chicago Typographical Union had conceived any such affectionate regard for the people who did not belong to their organization at all, and who were working for Conkey, and who had as early as the 20th or 21st of August gone out on a strike, until after the court had issued a restraining order which was calculated to tie the hands of those strikers, nor feel that it was incumbent to send down a lot of missionaries for the purpose of aiding the strikers. It seems that the Chicago Typographical Union and its executive officers were entirely content until the complainant had got a restraining order restraining acts of lawless violence and terrorism and depredation, and were content to let the Conkey Company fight it out with the strikers without any interference on the part of the Chicago Typographical Union. But as soon as the executive officers of that concern had learned of the injunction, and doubtless anticipating that the men who were enjoined would not want to run into the peril of being sent to jail for violations of the order, they felt that it was necessary to come to the rescue. Bessette is chargeable with knowledge of all that. I cannot conceive that the Chicago Typographical Union, or its executive officers,—because it is said that what was done by that union was done by these executive officers,—in view of the fact that they had not hired men like Mr. Bessette and Harding and Colbert to go down there and help these strikers until after the injunction was issued, that they had the sinister purpose of attempting to thwart the order of the court in sending them down there immediately after its issuance. They doubtless thought that the fight had become unequal, when the court had intervened for the purpose of protecting the employés and the property rights of Conkey, and that the time had come for the typographical union to take a hand in the fight, in order to equalize the balance of power. That is the way it looks to me. I cannot conceive any other purpose that they could have had. Now, this man knew before he went down there—before the Tuesday following the Sunday on which it was served—he knew of the injunction. He was hired to go down there. Mr. Colbert and some of the other witnesses pretend that

it was for the purpose of getting these men (discharged men, men that had been run out of the typographical union) to apply, and giving them cards, so that they might apply at the meeting that would be held a month later at Chicago, for reinstatement. But, if they were animated by that compassionate view after the restraining order was issued, how does it happen that their bowels of compassion were not moved by these same men who were out and fighting before the restraining order was issued? I think that is a circumstance that throws a flood of light on the whole history of the conduct of these men who were sent by the typographical union to this contest at Hammond. They would have been very foolish to have sent men down there for that purpose; very foolish. The men there knew where the Typographical Union of Chicago was. They could have sent their cards down to Hammond without sending men down at an expense, as Mr. Bessette has said, of $10 or $12 a day to his concern. And what the expenses of the other people were, the evidence does not show; but there was a half dozen of them, more or less, that were running back and forth almost daily, and stopping a large part of the time at Hammond. There was a man by the name of Spires. He was down there at the Monon Hotel, where the striker Alting, who was the president of the strikers, was dwelling and made his habitat. Of course, these men would have the court believe that that was all purely accidental; that they all had their rooms, and slept, if they did sleep, and took their meals at the same place as the president of the strikers who had been enjoined. While such things do sometimes happen accidentally, the accident ought not to continue too long, or else people would be disposed to suspect that, instead of being an accident, it was intentional, and that it was for some purpose that was to be accomplished. Now, the Chicago Typographical Union had no interest, even as a labor organization, with the people down there in the Conkey plant. They were not members of the typographical union. Most of them, as Mr. Colbert admitted, had been at one time members of that union, and for some infraction of the rules of the order had been expelled. There was no member of the Chicago Typographical Union down there to be protected. They were strangers. They were aliens to the household of faith consisting of members of the Chicago Typographical Union. He went down there as a hired man, and, if we are to believe the excuses that have been offered by his counsel and by Mr. Colbert, he went down there practically to accomplish nothing. The court cannot believe that the sole purpose of having half a dozen members of the Chicago Typographical Union down there, one of them paid $3.50 a day, and with $7 or $8 a day for expenses added, was simply to have them hand out cards notifying these strikers that they might apply either for reinstatement or for admission, on the 29th of September following, into the typographical union. It taxes human credulity to believe that that was the purpose. The court must believe that the purpose was to do just what the evidence in this case clearly and indisputably shows was done. This defendant, without any excuse or any valid reason, with his eyes wide open, with perfect knowledge of the order of the court,

did unite, combine, confederate, and enter into a conspiracy with the very men that this court had enjoined, with the deliberate purpose of defeating and thwarting the restraining order of the court. It would be idle to recapitulate the evidence. The whole of it, on both sides, when fairly construed, has an irresistible tendency leading in one direction. This defendant made himself a party to that conspiracy. The evidence shows a violation of the order of the court by these strikers, and whatever was done by these strikers was done by those who were not present, but who have combined and conspired and confederated together to do these things, because it is a rule of law—it is a rule of eternal justice and right—that every man who conspires with another man to do an unlawful act shall be held answerable for that act when it is done by his co-conspirator, although he be not personally present. Men are hanged on that theory, they are sent to prison on that theory, they are punished by courts on that theory, and the fabric of human society would be dissolved on any other theory than that in the administration of justice.

I shall not recapitulate the items of evidence in this case establishing the defendant's guilt. One witness, at least, has testified—I don't know but more, but one uncontradicted witness has testified—that this man Bessette, when a train came in with men employed and under the charge of the young man by the name of Hunt for the purpose of going up to the factory to work, this man Bessette, when he raised his hand or crooked his finger, a mob of strikers would run to intercept these men. Oh, they say, they did not use force. But numbers, with their minds concentrated on the accomplishment of a given purpose, constitute force. As I had occasion to say the other day, if I should be met by half a dozen men on a lonely road in the dead of night, and they would say in the politest language that ever was used by a man that cut a throat or scuttled a ship, "We beg of you to be so kind and considerate as to give us your watch and purse," I should naturally feel that it was my duty to give them. But there is proof of actual violence. Men employed there were beaten by this combination of men, assaulted, knocked down. Their lives were imperiled. They were warned that their heads would be knocked off, with indecent epithets and vile and profane language. They were enjoined not to picket the works, and not to interfere with men who wanted access to and from the works in their lawful employment. The testimony shows that this man, as a co-conspirator with men who were enjoined against doing that thing, on more than one occasion did that thing. The evidence shows that a body of unknown men—the evidence does not show who they were, but thugs from Chicago—were brought down, and they were called a "wrecking crew." A crew to wreck what? Is it to be supposed that these thugs, these bullies, came down from Chicago simply from motives of love and affection for the strikers, without invitation from any one that was interested in defeating and thwarting the order of the court? Or is it to be supposed that if Mr. Bessette, Mr. Colbert, Mr. Spires, and others connected with the typographical union were honestly desirous of seeing that the lawful order of this court was

carried out, they would not have taken steps, active and efficient, to see to it that those thugs were sent back to their dens and places of infamy in Chicago, instead of being kept at Hammond for the purpose of terrifying not only men, not only women in their homes with their babes and children, but for the purpose of terrorizing and applying epithets to mere girls of 14 and 15 years of age, unfit to be repeated not simply in the presence of women, but in the presence of decent men?

I have thus said enough to indicate that I think this court has jurisdiction under this petition to punish this man, and that, with full knowledge of the restraining order, he flagrantly, and for a price, with the silver pieces in his hands, went down there to Hammond for the purpose of defeating the restraining order of the court. The only question is, what punishment ought to be inflicted? The punishment ought not to be inflicted on the basis of cruelty or severity. It ought not to be inflicted for any other purpose than that of reforming the man and restraining him who is punished, and for the purpose of furnishing an example to others who may be disposed to commit like offenses. I think in this case that the ends of justice would be served by inflicting a fine; and the judgment of the court is that the defendant be fined, for the contempt charged, in the sum of $250 and the costs of prosecution, and that he stand committed to the jail of Marion county, Ind., until the fine and costs are paid, or until he is discharged by due course of law; and the marshal is charged with the execution of this sentence.

TORTAT v. HARDIN MIN. & MFG. CO.

(Circuit Court, D. South Dakota, W. D. October 30, 1901.)

1. REMOVAL OF CAUSES—TIME FOR APPLICATION—VOID SERVICE OF SUMMONS.
Where the service of summons on a corporation in an action in a state court is void, the time limited by the state statute for the defendant to appear and plead, and within which it may file a petition for removal, does not begin to run from such service, and it may appear for the purpose of filing such petition at any time, even after judgment has been rendered against it by default.

2. SAME — EFFECT OF FILING PETITION AS APPEARANCE — MOTION TO QUASH SERVICE.
The filing of a petition and bond for removal is not such an appearance as precludes the defendant from moving to set aside the service of process after removal, and such a motion filed in the state court before removal, and not acted on, is properly before the federal court for decision after removal.

3. PROCESS—SERVICE ON CORPORATION—COLLUSION.
One H., who was resident manager in South Dakota of an Illinois corporation, in which he was also a director, assigned a cause of action existing in his favor against the corporation to a friend without consideration for the purpose of having suit brought thereon by the assignee for his benefit, and by his direction such suit was brought in a state court, and the summons was served on him as manager of the corporation. *Held*, that such service was void, H. being the real party in interest as plaintiff.

On Motion to Remand to State Court, and on Motion to Set Aside or Vacate Service of Process.

McLaughlin & McLaughlin, W. R. Steele, and Hiram T. Gilbert, for defendant.

Chambers Keller, for plaintiff.

CARLAND, District Judge. On the 25th day of July, 1901, Henry A. Tortat commenced an action in the circuit court for the county of Lawrence, state of South Dakota, against the Hardin Mining & Manufacturing Company, wherein the plaintiff sought to recover from the defendant the sum of $11,000, with interest at the rate of 7 per cent. per annum from July 1, 1901. The plaintiff claimed to be a creditor of the defendant company in the amount stated by reason of an assignment to him by one James D. Hardin of certain indebtedness claimed to be due from the defendant company to said James D. Hardin for work and labor performed for said defendant company, and for moneys advanced. Upon the summons issued in said action appears the following return:

"State of South Dakota, County of Lawrence—ss.: I hereby certify and return that the within summons came into my hands on this 25th day of July, 1901, and I have served the same upon the within-named defendant by leaving a copy of said summons and complaint with James D. Hardin, one of the managers and directors of said company, by delivering to and leaving with him and each of them personally a true copy of the same at Deadwood, Lawrence county, South Dakota, on the 25th day of July, 1901, and that I know the person so served to be the same mentioned in said summons as defendant.

"Fred Doten, Sheriff of Lawrence County, South Dakota,
"By Fred W. Cindell, Deputy.

"Fees, $1.80."

Under the laws of the state of South Dakota the defendant company were required to answer the complaint attached to the summons in said action within 30 days after the service of the summons, exclusive of the day of service. On the 27th day of August the court in which said action was commenced, upon proof that no answer, demurrer, or appearance had been made in said action by the defendant, upon the sworn complaint of the plaintiff made and entered a judgment in favor of the plaintiff, Henry A. Tortat, and against the Hardin Mining & Manufacturing Company, in the sum of $11,117.55, together with the costs and disbursements in said action, amounting in the whole to $11,127.35. On the 26th day of September, 1901, the defendant, Hardin Mining & Manufacturing Company, a corporation organized and existing under the laws of the state of Illinois, filed in the circuit court for the county of Lawrence, state of South Dakota, its petition and bond for removal of said action to this court, on the ground of diversity of citizenship, Henry A. Tortat being a citizen of the state of South Dakota. The defendant accompanied said petition and bond for removal with a motion to set aside and quash the service of the summons and complaint in said action upon the defendant for certain reasons specified in said motion, which motion was supported and accompanied by the affidavit of Hiram T. Gilbert. Upon the filing of said petition

and bond for removal, the circuit court for the county of Lawrence, state of South Dakota, made an order transferring the cause to this court, and directing the clerk to make up the record for that purpose. The state circuit court did not act upon the motion to quash and set aside the service of process in the action. A transcript of the record was duly made by the clerk of the state circuit court, and was filed in this court on September 27, 1901. On the 12th day of October, 1901, the defendant, by its counsel, served proper notice upon counsel for plaintiff that the motion made in the state court at the time of the removal of this cause would be brought on for hearing before this court on the 18th day of October, 1901, at the hour of 2 o'clock p. m., or as soon thereafter as counsel could be heard. In addition to the affidavit of Hiram T. Gilbert filed with the motion, other affidavits and proof have been submitted, both in support and in opposition to the granting of said motion. The plantiff, by his counsel, on the 14th day of October, 1901, made a motion in this court to remand said cause to the state circuit court for the reason that the time in which the defendant could have removed the cause had expired prior to the filing of the petition and bond for removal, and also for the reason that there was no action or controversy pending between the parties that could be removed at the time the order of removal was made by the state circuit court. The motion filed by the defendant in the state circuit court was special, and for the purpose only of moving to set aside and to quash the service of process. The petition for removal also refers to the character of the appearance. However, under the authority of Railway Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, the filing of a petition and bond for removal in general terms is not such an appearance as would preclude the defendant from moving in this court to quash and set aside the service of process. If the case is properly removed, the motion which was filed in the state court, and not there determined, is properly before this court for decision, but the motion to remand raises the question as to whether or not the cause is properly here. On the face of the record the time in which the defendant could appear and plead to the cause of action of the plaintiff had long expired before the petition and bond for removal was filed in the state court. In support of the motion to vacate and quash the service of process, however, there is submitted undisputed evidence that James D. Hardin, the assignor of the plaintiff, Tortat, was a director of the defendant, and the only director or officer thereof residing in South Dakota; that in order to sue the defendant company, of which he was a director, for certain demands which he claimed were due to him by the defendant company, he assigned, without any consideration whatever, to the plaintiff, Henry A. Tortat, the claims for which Tortat brought this action, with the distinct understanding between Hardin and Tortat that when Tortat should recover judgment the judgment should be assigned to Hardin, or whomsoever he should name. Tortat testifies that he had no interest in the matter whatever, and simply allowed his name to be used as plaintiff to accommodate Hardin. Tortat did not employ the attorneys who brought the action or pay any of the expenses of the

suit. It appears that the process issued, and was served by the sheriff upon Hardin. Hardin, in the testimony used in support of the motion to quash, testified as follows:

"Q. Mr. Tortat had no personal interest in the suit, did he, Mr. Hardin? A. None only through me as a friend. Q. Just as a friendly accommodation to you he brought the suit? A. Yes, sir. Q. Do you remember whether or not, after the papers were signed, you took them over to the sheriff's office, requesting the sheriff to serve you at that time? A. I remember I took the papers over, but whether Mr. Tortat went over when I did I do not know. Q. You went over there? A. I went over to the sheriff's office to be served. Q. And were served there? A. Yes, sir; if I remember right."

I think that the weight of the testimony introduced in support of the motion is to the effect that the defendant company had no other notice of the pendency of the action than the service of the summons and complaint upon Hardin, as appears from the return of the sheriff. If the time in which the defendant was required to answer or plead to the plaintiff's cause of action had expired at the time of the filing of the petition and bond for removal in the state court, then the cause must be remanded. Whether or not the time had so expired depends on the further question as to whether the service of the summons in the action upon the defendant was void. If valid, the time had expired; if void, it had never commenced to run, so that the determination of one motion involves the determination of the other. If Hardin had commenced the suit himself against the defendant company, and had himself served with process, the service would certainly be void, and would have conferred no jurisdiction upon the state court to render the judgment that it did. Is the case any different where, by collusion, Hardin assigns his claim against the company merely for the purpose of having a suit brought, and the service in the action is made upon him as a director? In the opinion of this court, this circumlocution could give no validity to the service. It was and is void. Buck v. Manufacturing Co., 4 Allen, 357; Mining Co. v. Edwards, 103 Ill. 472; St. Louis & S. Coal & Mining Co. v. Sandoval Coal & Mining Co., 111 Ill. 32; Hemmer v. Wolfer, 124 Ill. 435, 16 N. E. 652; 6 Thomp. Corp. § 7528; 4 Thomp. Corp. § 5205. Hardin was the real party in interest, and under the code practice prevailing in this state he was the plaintiff, as the state law requires all civil actions to be brought in the name of the real party in interest. The reason why the law holds a service of process upon the person who brings the action void applies equally strong in a case like the one at bar. The interest of Hardin, who, as the real party in interest, is plaintiff, was so antagonistic to his duty as an officer of the defendant company to defend the suit as to render any service upon him void. The plaintiff being a citizen of the state of South Dakota, and the defendant an Illinois corporation, and the amount involved being sufficient, defendant had a right to remove this action into this court by making timely application therefor in the state circuit court. Can the state court, by rendering a judgment upon a service which is void, deprive the defendant of its right to remove the action to this court? If so, then the state court has the power to deprive the defendant of a right granted to it by

an act of congress. It is elementary that no state court can, by its action, abridge a right granted under a constitutional law of the United States. The defendant not having been served with process, the time in which it should answer or plead never did begin to run.

No case exactly like the one at bar has been cited by counsel, nor has the court been able, on its own investigation, to find any case exactly parallel. The case of Youtsey v. Hoffman (C. C.) 108 Fed. 693, would seem, in its reasoning, to sustain the views here expressed. In that case, which was an action brought in a state court of the state of Kentucky to wind up the affairs of a corporation, pending a reference to a commissioner to take proofs and report upon the claims against the corporation, the receiver, by leave of court, filed what he called an answer and set-off, in which he admitted the correctness and validity of the claims which two persons had proved before the commissioner, but pleaded as a set-off a claim for damages against them arising out of their misconduct as officers of the corporation. Such claim was not one which the state statute authorized to be pleaded as a set-off or counterclaim. No order was entered making the receiver a party to the suit, and no process was issued upon his pleading. Without any appearance by the persons against whom such claim was made, judgment was rendered against them thereon for a large sum. Subsequently they appeared specially, and moved to set the judgment aside, and pending such motion one of them pleaded to the merits as to the claim made against him by the receiver's pleading, and at the same time filed a petition and bond for removal, being a citizen of another state. After removal the receiver moved to remand. On this state of facts it was held that the receiver was not a party to the suit, nor entitled to file any pleading therein; that the pleading filed by him was, in legal effect, a petition instituting a new action, in which the court could acquire jurisdiction of the defendants only by due service of process; and that, treating the action of one of them in pleading to such petition as an appearance which conferred such jurisdiction over him, his application for removal, made at the same time, was timely. Baumgardner v. Fertilizer Co. (C. C.) 58 Fed. 1; Donahue v. Fire-Clay Co. (C. C.) 94 Fed. 23. The case must be treated as if an action had been commenced in the state court by the plaintiff against the defendant, and no service of process. Under the laws of the state of South Dakota, issuance and deliverance of the summons to the sheriff of the proper county in an action, with intent that it shall be served, creates a pending action. The defendant could, by a voluntary appearance, at any time file its petition and bond for removal, and remove the cause; and this appearance need not be general, but may be special for any purpose which the defendant deems proper. In this action the proof shows that the defendant was not aware of the rendition of the judgment against it until the 10th of September, 1901. If there had been no service on the defendant, the defendant had the right to appear at any time, for any proper purpose; and defendant did appear in the action in the state court specially for the purpose of quashing and setting aside the service of process in said action, and also for the purpose of remov-

ing the cause, and it must be held that it is properly here, and the motion to remand must be denied.

From what has been heretofore said it also appears that the service of process upon the defendant was and is void, and the order must be that said service be quashed, and set aside, and the action dismissed. Hawkins v. Peirce (C. C.) 79 Fed. 452; Railway Co. v. Brow, supra.

RIVERDALE COTTON MILLS v. ALABAMA & G. MFG. CO. et al.

(Circuit Court, N. D. Georgia. October 8, 1901.)

No. 1,127.

FEDERAL COURTS STAYING ACTION IN STATE COURT—ANCILLARY JURISDICTION.

A circuit court of the United States which has rendered a decree from which an appeal is pending has power, upon an ancillary bill filed for the purpose, to grant an injunction restraining one of the parties from prosecuting against the other an action subsequently commenced in a state court of another state involving a question or affecting rights determined by such decree until the appeal therefrom has been determined.[1]

In Equity. On ancillary bill for an injunction.

Abbott & Abbott, Dorsey, Brewster & Howell, and Watts, Troy & Caffey, for complainant.

King & Spalding, Welles, Bennett & Welles, and J. M. Chilton, for defendants.

NEWMAN, District Judge. I am satisfied that, under any view of this case, an injunction should be granted at present, to remain of force until the appeal now pending in the supreme court of the United States is determined. It seems to me clear that pending the appeal from the decision of this court and the circuit court of appeals the defendant should not be permitted to prosecute, nor complainant required to defend, the suit instituted in Alabama. The purpose of this injunction will be to preserve the existing status pending the final determination of the case originating here. I think there can be no doubt of the power of the court to do this on an ancillary dependent bill, such as that presented in this case. See 16 Am. & Eng. Enc. Law (2d Ed.) p. 413. In the case of French v. Hay, 22 Wall. 250, 22 L. Ed. 857, in the opinion by Mr. Justice Swayne, this language is used:

"The order of the court below, annulling the decree upon which the suit at law in Pennsylvania was founded, was fatal to that action, and entitled Hay to a perpetual injunction, without reference to the final result of the prior case. This bill is not an original one. It is auxiliary and dependent in its character,—as much so as if it were a bill of review. The court, having jurisdiction in personam, had power to require the defendant to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory. Having the possession and jurisdiction of the case, that jurisdic-

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[1] Restraining proceedings in state courts, see notes to Garner v. Bank, 16 C. C. A. 90; Trust Co. v. Grantham, 27 C. C. A. 575.

tion embraced everything in the case, and every question arising which could be determined in it, until it reached its termination and the jurisdiction was exhausted. While the jurisdiction lasted it was exclusive, and could not be trenched upon by any other tribunal. The court below might, upon a cross bill, and perhaps upon motion, have given the relief which was given by the interlocutory and final decree in the case before us. If it could not be given in this case, the result would have shown the existence of a great defect in our federal jurisprudence, and have been a reproach upon the administration of justice. In that event the payment of the annulled decree may be enforced in Pennsylvania, and Hay, notwithstanding the final decree in that case and in this case, would find himself in exactly the same situation he would have been if those decrees had been against him, instead of being in his favor. They would be nullities, as regards any protection they could have given him. Instead of terminating the strife between him and his adversary, they would leave him under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice. The prohibition in the judiciary act against the granting of injunctions by the courts of the United States touching proceedings in state courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

In Deitzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497, in the opinion by Mr. Justice Woods it is said:

"A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court. Deitzsch, the original plaintiff in the action on the replevin bond, represented the real parties in interest, and he was a party to the action of replevin which had been pending and was finally determined in the United States circuit court. That court had jurisdiction of his person, and could enforce its judgment in the replevin suit against him, or those whom he represented, their agents and attorneys. The bill in this case was filed for that purpose, and that only. If the bill is not maintainable, the appellees would find themselves in precisely the same plight as if the judgment of the United States circuit court in the replevin suit had been against them, instead of for them. The judgment in their favor would settle nothing. Instead of terminating the strife between them and their adversaries, it would leave them under the necessity of engaging in a new conflict elsewhere. This would be contrary to the plainest principles of reason and justice. As the bill in this case is filed for the purpose of giving to litigants on the law side of the court the substantial fruits of a judgment rendered in their favor, it is merely auxiliary to the suit at law; and the court has the right to enforce the judgment against the party defendant and those whom he represents, no matter how or when they may attempt to evade it or escape its effect, unless by direct proceeding. These views are sustained by the case of French v. Hay, 22 Wall. 250, 22 L. Ed. 857, between which and this case there is no substantial difference."

See, also, Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123.

The provision of Rev. St. § 720, that no writ of injunction shall be granted by any court of the United States to stay proceedings in a state court, does not apply where jurisdiction of the federal court has first attached. Fisk v. Railroad Co., 10 Blatchf. 520, Fed. Cas. No. 4,830; Lanning v. Osborne (C. C.) 79 Fed. 657; Terre Haute & I. R. Co. v. Peoria & P. U. R. Co. (C. C.) 82 Fed. 943; Fidelity Insurance Trust & Safe Deposit Co. v. Norfolk & W. R. Co. (C. C.) 88 Fed. 815.

The fact that an appeal is pending does not, in my opinion, prevent the circuit court, in a proper case, from taking such action as

will protect the property and preserve the rights of the parties until the appeal can be determined. 2 Enc. Pl. & Prac. 330–331; Hinson v. Adrian, 91 N. C. 372. In Allen v. Allen, 80 Ala. 154, it is held that notwithstanding an appeal the chancellor rendering the decree may take steps to prevent the abuse of the process of the court. Summerville, J., delivering the opinion of the court, used this language:

"The chancellor very clearly erred in dismissing the motion made by the appellant to set aside the sale of the lands in controversy, upon the theory that the appeal pending in this court deprived him of all jurisdiction of the matter. We do not doubt that when a decree has been rendered by a court of equity, and an appeal has been prosecuted to this court from such decree, a chancellor would no longer have such jurisdiction of the cause as would enable him to render any further decree affecting the rights and equities of the parties in the same cause during the pendency of the appeal. The present motion, however, is a separate and distinct proceeding from the chancery suit which culminated in the decree from which the appeal in question was taken. It is based upon grounds which have nothing to do with the equities involved in and settled by the decree, and which have even originated subsequent to its rendition. The purpose of the motion is not to raise any question going behind the decree or concluded by it, but only to prevent any abuse of the process of the court by the agency of which it is sought to enforce the execution of the decree."

This is sustained also by decisions of the supreme court of the United States. Jennings v. Carson, 4 Cranch, 2, 2 L. Ed. 531 (and particularly the language of Chief Justice Marshall in the opinion, on pages 24, 25, 4 Cranch, and pages 538, 539, 2 L. Ed.); also Spring v. Insurance Co., 6 Wheat. 518, 5 L. Ed. 320.

I do not think the cases of Draper v. Davis, 102 U. S. 370, 26 L. Ed. 121; Ensminger v. Powers, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732; Keyser v. Farr, 105 U. S. 265, 26 L. Ed. 1025; Bank v. Farwell, 6 C. C. A. 30, 56 Fed. 539; and Morrin v. Lawler (C. C.) 91 Fed. 693,—cited by defendant's counsel, are applicable to the question presented here.

An injunction, as prayed, will issue, to remain of force until the further order of the court. When the appeal pending in the supreme court has been disposed of, further direction will be given the matter, either upon argument or without it, as counsel may prefer.

COCHRAN v. CHILDS.

(Circuit Court of Appeals, Seventh Circuit. October 26, 1901.)

No. 790.

1. APPEAL—REVERSAL—WANT OF JURISDICTIONAL AVERMENTS IN BILL.
   On an appeal from a decree of the circuit court sustaining a demurrer to the bill and dismissing the suit on the merits, where the bill contains no averment of the amount or value in controversy, essential to give a federal court jurisdiction, the decree will be reversed, with directions to enter a dismissal for want of jurisdiction and without prejudice.
2. SAME—COSTS.
   Where a bill filed in a circuit court of the United States contains no averment of the amount or value in controversy, the costs of an appeal taken by complainant will be taxed to him, and a dismissal for want of

jurisdiction will be directed, without leave to amend, although no objection to jurisdiction was made by the defendant below.

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

Lloyd C. Whitman, for appellant.
Charles Hudson, for appellee.

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

PER CURIAM. This bill is filed by the appellant (complainant below) for an accounting under an alleged agreement between him and Benajah Williams, deceased, for the prosecution of the business of manufacturing and selling wrappers under patents of the United States issued to Benajah Williams; one dated April 23, 1895, and numbered 537,870, and the other dated April 14, 1896, and numbered 558,244. It is charged that the patents covered inventions of the complainant, and, without his knowledge or consent, the patents were procured by Benajah Williams to be issued to himself; but the bill seems to seek no relief upon that ground. The defendant below (appellee here) demurred to the bill upon the grounds: First, that the cestuis que trustent are necessary parties; second, that the complainant has an adequate remedy at law; third, that the terms of the agreement are insufficiently stated; fourth, that the bill is without equity. The court below sustained the demurrer, and decreed that the bill be dismissed for want of jurisdiction.

The bill is wholly lacking in averment of the amount in controversy. It charges that a large amount of goods were manufactured and sold under the alleged agreement, but fails to state the amount in controversy, or that it exceeds the sum of $2,000, the amount necessary to confer upon the court below jurisdiction of the subject-matter. It has been so long and so often ruled that without such averment a federal tribunal is without jurisdiction, and that such court, whenever such lack of averment appears, should at any stage of the case and sua sponte dismiss the cause for want of jurisdiction, that it is passing strange that at this late day we should be confronted with pleadings devoid of proper jurisdictional averment. The court below was, because of such lack of averment, without jurisdiction to entertain the bill. The demurrer, however, did not present the question, but objected, inter alia, that an adequate remedy at law was declared. The court below in terms sustained the demurrer, and decreed that the bill be dismissed for want of jurisdiction. We think it manifest that the "want of jurisdiction" stated in the decree means that the bill exhibited no facts to bring the cause within the realm of equitable jurisdiction because an adequate remedy at law existed, and that the decree did not proceed upon the ground that the court was without jurisdiction because of the failure to declare the amount in controversy. It had reference to that equitable jurisdiction which is sometimes confounded with the jurisdiction of the court; so that it may be fairly stated that the bill was dismissed upon its merits. Under such circumstances, and with-

in the authority of Plant Investment Co. v. Jacksonville, T. & K. W. Ry. Co., 152 U. S. 71, 77, 14 Sup. Ct. 483, 38 L. Ed. 358, it is proper to reverse the decree sustaining the demurrer and dismissing the bill, and to remand the cause, with direction to dismiss the bill for want of jurisdiction, and without prejudice.

It is urged that we should not impose the cost of the appeal upon the appellant, as was done in the case cited, and that we should permit an amendment of the bill in the court below to declare the jurisdictional amount; and this upon the ground that neither party, in the court below or here, has suggested the question of jurisdiction stated. We are not so disposed. It would seem to be proper, after a century of decision, that the court should not be vexed with the question of jurisdiction arising from failure to state the amount in controversy. By directing the dismissal of the bill without prejudice, no right of the complainant is concluded. With that, we think, he should be satisfied, for it is he whose oversight has occasioned the unnecessary trouble and expense, and he should foot the bill.

The decree is reversed at the cost of the appellant, and the cause is remanded, with a direction to the court below to dismiss the bill for want of jurisdiction, and without prejudice.

WILCOX v. CHICAGO & N. W. RY. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. November 9, 1901.)

SETTLEMENT—CLAIM FOR PERSONAL INJURY—RESCISSION FOR MISTAKE.

Complainant, while a passenger on defendant's railroad, was thrown down in a car, and her hip was fractured. She was attended by her own physician, who was also defendant's local physician. A week after the injury she was visited by the physician and a claim agent of defendant, and a settlement was made of her claim for damages against defendant, and she signed a release. She was then 65 years old, by occupation a nurse, and dependent on her earnings for support. The principal question with her in making the settlement was the length of time the injury would incapacitate her from following her employment, and she was led to believe from the statements made by the agent and the opinion given by the physician that it would not exceed a year, and the settlement was made on that basis. In fact, she did not recover the use of her limb, and was permanently incapacitated from following her occupation. *Held*, that she was entitled to a rescission of the contract of settlement on the ground of mistake, and to a cancellation of the release, conceding that all parties acted in good faith.

In Equity. Suit for rescission of contract of settlement.

Caldwell & Walters, for complainant.
Hubbard, Dawley & Wheeler, for defendant.

SHIRAS, District Judge. This is a suit in equity brought for the purpose of securing the rescission and cancellation of a written agreement of settlement entered into, under date of March 1, 1898, between the complainant and the defendant railway company, whereby, in consideration of the payment of $600, the complainant released the railway company from all claims or demands "by reason of in-

juries received by me on or about the 22nd day of February, 1898, at Belle Plaine, Ia., at which time and place, while a passenger on one of said company's trains, I was thrown to the car floor, and my left hip was fractured, I received a severe nervous shock, and I was otherwise injured." It appears from the evidence that the complainant, while a passenger on the train upon defendant's line of railway at Belle Plaine, Iowa, was injured substantially as recited in the release above cited; that she was taken on the next day to her home, in Marengo, and on the succeeding day the fracture of the limb was set by Dr. Thompson, who was the complainant's physician, and also the local surgeon of the defendant company. A week from that date the complainant was visited by E. W. De Moe, a claim agent of the defendant, accompanied by Dr. Thompson; and after some discussion a settlement of complainant's claim for damages was reached upon the basis of the company settling the charges of the doctor in attendance, paying to Mrs. Blodgett, the nurse in charge of complainant, the sum of $100, and to the complainant the sum of $500; and, the payments having been made as agreed upon, the complainant signed the release already referred to, under date of March 1, 1898. In February, 1900, the complainant brought an action at law in the district court of Tama county against the company to recover damages for the injuries received while a passenger on the defendant's train; and thereupon the railway company removed the case into this court, and in its answer pleaded, among other matters, the settlement and release signed by complainant as a bar to the action. Thereupon the complainant filed the bill in this case for the purpose, as already stated, of securing the rescission of the contract of settlement, and, as grounds of such rescission, avers that when the release was signed she was sick in body and mind, and incapable of entering into a valid contract; that it was represented to her by the attending physician and surgeon that her injuries were but temporary, and that in less than a year she would be completely cured; that it was represented to her that the company was not in fact liable to her for her injuries; that these statements were made for the purpose of deceiving and misleading her; that they were relied upon and believed by her, and she was induced thereby to sign the release, but did not know its contents, and that she would not have signed the paper but for the belief, induced by such representations, that she would be permanently cured within a year; that in fact she has lost the use of her limb, and is unable to walk, and is permanently injured. The evidence shows that at the time of the accident the complainant was 65 years of age, and her occupation was that of a nurse, receiving compensation at the rate of $10 per week, and being so employed more than one-half of her time. It further appears that at the time the settlement was reached there were present with the complainant Dr. Thompson, the claim agent, De Moe, and Mrs. Blodgett, sister of the complainant. The evidence shows that much discussion was had over the question of settlement; that the first offer made on behalf of the company was to pay the sum of $300; that this was refused, and finally an agreement was reached on the terms already stated. The evidence fails

to show that complainant was not then in possession of her mental faculties. She admits that she signed the release, and that it was read to her by the claim agent, and there is nothing in the evidence which tends to support the charge of deceit or fraud upon part of the company's agent. It is claimed in the bill and in the testimony of complainant that she was induced to settle for the sum received by reason of the representation to her that she would recover and be able to carry on her occupation within a year. Upon this point the complainant testified that:

"They offered me $300 to settle with them, and I asked them about,—if I was to get well; when I was to get well; and I wanted to get well. I told them that was the main thing. He asked me what my occupation was. I didn't know the extent of my injuries, and they seemed to think I would get well without any trouble, and asked my occupation. I told them I was a nurse, and I had $10 a week when I was able to do anything. That is what I had. Q. Well, did they tell you when you would be well? A. They said there was no doubt but I would be well within a year. Q. Who said that to you? A. The agent. Q. Did the doctor say anything? A. They asked the doctor, and he said, 'No doubt of it.'"

Dr. Thompson testifies that:

"The question was asked me of how long I thought that she would be incapacitated, and I said she would not be able to do anything at least for a year; the injury was very slow to repair, if it did repair; and that she could not expect to be able to do anything inside of that time, and that there was no certainty of her ever entirely recovering; that those injuries resulted generally in a permanent disability."

What the witness meant by the statement that injuries of that character resulted generally in a permanent disability is shown by the statement subsequently made, "That the cases that I have treated have all resulted in recovery, with a partial halt in the gait." In other words, the statement of the doctor was to the effect that a complete or entire recovery was not probable, in that she would suffer from a partial halt in her gait, and that she could not expect to be able to do anything inside of a year.

The agent of the company, E. W. De Moe, who procured the execution of the release, testifies that:

"To the best of my recollection, it was conceded by all of us present there that the injury was a serious one, and the principal objection Mrs. Wilcox seemed to have against signing a release was the fact that she would probably be laid up for a long period of time. The matter was referred to Dr. Thompson in an indefinite sort of way, and just what was said by him at that time I don't remember. The drift of the conversation was that in all probability Mrs. Wilcox would be laid up at least a year,—be incapacitated for work,—and I made the suggestion that I didn't want to wait that long to adjust the case; and we figured, in a general way, about what she could earn, taking a year as a basis, and I think it amounted to something like $500."

From the evidence it fairly appears that the paramount thought in the mind of Mrs. Wilcox was how long would she be incapacitated for work. She was a widow, dependent on her own work as a nurse for her support. Naturally during the week that had intervened since her injury the thought ever present with her was, "How soon can I hope or expect to be about again?" so as to resume her occupation as a nurse. This was the query which she anxiously

pressed upon the agent and the doctor, as their own testimony shows. Their answer was, in effect, that the incapacity to labor would not extend beyond a year. It will be noticed that the plaintiff did not dwell upon or refer to the physical pain she was suffering. Her anxiety was to secure a sum that would make up the loss from her usual earnings during the period she would be incapacitated from labor, and the agent of the defendant testifies that a year was taken as the basis for figuring the amount to be paid. It is proven beyond fair question, therefore, that the plaintiff was led to accept the amount paid her in the belief that she would sufficiently recover from her injury in the space of a year to be then able to resume her occupation as a nurse. In this belief, and on that basis, she made the settlement. It now appears that she did not recover within a year. Her injury is undoubtedly permanent, and she will never be able to resume her occupation as nurse, as she cannot walk, but is wheeled about in an invalid's chair. While the evidence does not show that the defendant's agents are liable to the charge of fraud or wrongdoing, nevertheless it is apparent that in the matter of the settlement the plaintiff was at a disadvantage, in that she was practically without assistance or competent advice at the time it was made. As already said, it is entirely clear that the plaintiff was seeking to obtain compensation for the time she would be unable to earn her living. Upon this question of the probable time she would be incapacitated, she was compelled to rely upon the statements made her, and upon the opinion of the doctor. As the agent of defendant testifies, the question was referred in a general way to Dr. Thompson, and as a result a year was accepted as the basis of the settlement; that is, that a year would cover the time the plaintiff would be unable to follow her usual occupation. Undoubtedly the settlement was reached on this basis, and unquestionably the parties were mistaken in the substantial fact upon which the terms of settlement were reached. Granting that all parties were acting in the utmost good faith, it is nevertheless true that the plaintiff was induced to make a settlement upon a mistaken basis of fact, which misconception of the situation was largely, if not wholly, due to the statements and opinions expressed by the parties acting for and representing the defendant. Under these circumstances, the court is justified in holding that the settlement was made by the plaintiff under a clear mistake of the actual situation, and that this mistake was caused by the representations of the defendant's agents, made under such circumstances as that the defendant must be held responsible therefor, even though it be true that in one sense the representations referred to the future, and involved a contingency.

The plaintiff has tendered back to the defendant the money paid upon the settlement, and has therefore done all that is necessary to secure a rescission of the contract of settlement, and a decree of rescission as prayed for will be entered in the case.

BURLINGTON SAV. BANK v. CITY OF CLINTON, IOWA.

(Circuit Court, N. D. Iowa, E. D. November 4, 1901.)

1. MUNICIPAL CORPORATIONS—BONDS FOR STREET IMPROVEMENTS—IOWA STATUTE.

Acts 23d Gen. Assem. Iowa, c. 14, § 6, authorizing cities to make street improvements, provides that "for the purpose of providing for the payment of the cost and expenses of any such improvement the council * * * shall be authorized from time to time as the work progresses, to make requisitions upon the mayor of the city, for the issue of the bonds of the city in such sums as shall be deemed best." The amount and terms of such bonds are specified, and it is further provided that when any such improvement shall have been completed it shall be the duty of the council to ascertain the entire cost, and what portion may be by law assessable on adjacent property or against any street railway, and to make such assessments; the money collected thereon to be applied to payment of the bonds. There is no requirement that the bonds shall recite that they are payable from any particular fund. *Held*, that bonds issued under such act create an indebtedness of the city, and are affected by the constitutional provision limiting the amount of its indebtedness; recitals in such bonds that they are issued to provide for the cost of a certain improvement, which is assessable against abutting property, and is made a lien thereon, being merely to show the power of the city to issue the same under the statute, and to provide means for their payment.

2. SAME — LIMITATION OF INDEBTEDNESS — NOTICE TO PURCHASERS OF BONDS.

Where an issue of bonds under such statute, which were all sold to the same purchaser, in itself exceeded the constitutional limit of the city's indebtedness, the purchaser is chargeable with notice of such fact, and put upon inquiry as to the amount of its prior indebtedness and the amount of further indebtedness which it could lawfully contract, and is limited in his recovery against the city to such amount.

3. SAME—REMEDIES OF BONDHOLDERS.

Such bondholder has, however, the further equitable right arising from the statute and the recitals in the bonds, where the improvement has been made and paid for from the proceeds of the bonds, to require the city to exercise for his protection every lawful power it possesses to levy and collect from the property benefited by the improvement so much of its cost as is legally chargeable thereon, and for that purpose may bring all property owners affected into a court of equity, where their rights can be determined, and appropriate relief granted to complainant by mandatory injunction against the city, or other proper process.

In Equity. On final hearing.

A. L. Schuyler and Carr & Parker, for complainant.

S. C. Scott, W. J. McCoy, and Ellis & Ellis, for defendant.

SHIRAS, District Judge. This is a suit brought to enforce the payment of certain negotiable bonds issued by the city of Lyons, Iowa, under date of May 15, 1894. By proper proceedings taken under the statutes of Iowa in the year 1895 the city of Lyons was annexed to the city of Clinton, and therefore, under the provisions of section 614 of the Code of Iowa, this suit in equity was brought against the city of Clinton to establish the amount due from the city of Lyons, which has passed out of existence, and to secure payment thereof through the action of the council of the city of Clinton; it being enacted in section 614 of the Code—

"That the indebtedness of the city or town annexed shall be paid, by such city or town, and the council of the city, as it exists after annexation, is

authorized, and it is made its duty, to provide for the payment of such indebtedness by the levy of taxes upon the property subject to taxation within the limits of such city or town so annexed, and to continue such tax from year to year so long as the same shall be necessary."

To the bill originally filed a demurrer was interposed and overruled in an opinion reported in (C. C.) 106 Fed. 269, to which reference may be made for a more full statement of the facts of the case. From the evidence submitted it appears that in 1893 the city council of Lyons undertook the improvement of Sixth street, and to that end passed a resolution for the grading, curbing, and paving of said street for a width of 42 feet from the south line of improvement district No. 1 to the city limits of Lyons and Clinton, under the designation of "Improvement District No. 3"; the same to be completed by November 1, 1893. Bids for this work were invited by the publication of notices to contractors in the newspapers of the city, requiring the bids to be filed with the city clerk on or before July 5, 1893; it being further stated that:

"Such bids to be made upon the basis of receiving cash for such improvements, and upon the basis of receiving, when collected, the first installment of the amount assessed to abutting property, due on and after the date of such assessment, with six per cent. interest, and city improvement bonds for balance."

Two parties filed bids for the work, and on the 11th day of July, 1893, the city council rejected one bid, for informalities, and referred that of the Lyons Construction Company to the finance committee. On the 31st day of October, 1893, the city council adopted a resolution amending the resolution of May 30, 1893, by striking out the words "the 1st day of November, A. D. 1893," and by inserting in lieu thereof the words "the 1st day of August, A. D. 1894," thus changing and extending the time for the completion of the proposed improvement. The delay in acting upon the bids submitted by the Lyons Construction Company was due to the fact that arrangements could not be made for a sale of the bonds of the city, which sale was necessary to raise the funds to meet the contract price for the improvements, and hence action was postponed until about May 1, 1894, when a contract was entered into with the construction company for furnishing the labor and materials necessary to complete the proposed improvements; and under the terms of the contract the work was completed and accepted by the city authorities, and the construction company was paid the amount due for the work done, the total being the sum of $38,596.45. This money was procured by the sale on the part of the city of negotiable bonds in two series,—one of $7,000, and the other of $33,000,—in the form following:

Improvement Bond.

United States of America, State of Iowa, Clinton County.

Number ———. 500 Dollars.

Lyons City.

Improvement Bond.

District No. 3, Series No. 2.

Lyons City, in the state of Iowa, for value received, promises to pay the bearer on the 15th day of May A. D. 1901, or at any time before that date, at the pleasure of the said Lyons City, the sum of five hundred dollars, with interest thereon at the rate of six per centum per annum, payable semian-

nually on the 15th day of November and the 15th day of May, on the presentation and surrender of the interest coupon hereto attached as they respectively become due. Both principal and interest of this bond are payable at the National Park Bank, New York City, under and by virtue of chapter 14 of the Acts of the 23rd, and as amended by the 24th, General Assembly of the State of Iowa, and in accordance with an ordinance passed by the city council of said city on the 14th day of June, A. D. 1892, and in pursuance of resolutions of said city council passed May 30, May 31st, and October 31, 1893. This bond is one of a series of sixty-six bonds of like tenor, date, and amount, numbered 83 to 148, inclusive, and issued for the purpose of providing for the payment of the cost of certain improvements in, upon, and along Sixth street, in said Lyons City, which cost is assessable against and payable by abutting property and street railway benefited thereby, and is made by said law a lien on said abutting property and street railway, and payable in seven annual installments, with interest on said deferred payments at the rate of six per cent. per annum; and it is hereby certified and recited that all of the acts, conditions, and things required to be done happened and performed in regular and due form as required by law, and for the payment hereof, both principal and interest, the full faith and credit of Lyons City is hereby irrevocably pledged, in accordance with said chapter 14 of the Acts of the 23rd, as amended by the 24th, General Assembly of Iowa, and the ordinance and resolution heretofore referred to.

In witness whereof, Lyons City, by its city council, has caused this bond to be signed by its mayor, sealed by the corporate seal of the city, countersigned and registered by its city clerk, this 15th day of May, A. D. 1894.

C. L. Root, Mayor of Lyons City.

Countersigned:
C. L. Root,
Chas. F. Nagel,
Geo. T. Leedham,
Charles I. Parker,
Committee on Paving.

Countersigned and Registered:
I. N. Manville, City Clerk.

These bonds were purchased by the Burlington Savings Bank, a corporation created and organized under the laws of the state of Vermont; the negotiations being carried on through the firm of Farson, Leach & Co., of Chicago, Ill.; the purchase being completed about June 7, 1894. After the completion of the work on the street the city apportioned the cost thereof among the city, the street railway company, and the abutting owners, as required by the statutes of Iowa; and thereupon certain of the owners of property thus assessed brought a suit in equity in the district court of Clinton county to restrain the city of Lyons from collecting the tax thus assessed, on the ground that the city council had acted without warrant of law in contracting with the construction company for the street improvement, in that no bids had been asked or received after the change in the time fixed for the completion of the work caused by the action of the council in amending the resolution in the manner already stated. The district court granted the relief asked for, and on appeal the supreme court affirmed the ruling. Osburn v. City of Lyons, 104 Iowa, 160, 73 N. W. 650. After the rendition of the judgment in that case the city ceased to make payments of the interest on the bonds in question, and thereupon this suit was instituted for the purpose of determining the rights of the parties.

The position taken by the defendant is that, under the decision of the state supreme court in the Osburn Case, the property of the

abutting owners cannot be subjected to a special assessment to meet or cover the cost of the improvement, and that the bondholders must therefore be relegated to such claim as they can enforce against the city of Lyons, and that the bonds are not enforceable against the city, for the reason that the amount thereof would increase the indebtedness of the city to a sum in excess of 5 per cent. upon the taxable property of the city, which would be in contravention of the provisions of the state constitution which limits municipal indebtedness to 5 per cent. upon the amount of the taxable property within the municipality. The method of procedure provided for in chapter 14, Acts 23d Gen. Assem., is that the improvement must be petitioned for by the owners of a majority of the feet front abutting on the street to be improved, or the improvement must be voted for by three-fourths of the members of the council. The work proposed must be done by contract awarded to the lowest bidder after due notice published in at least two newspapers of the city. To meet the cost of such improvement, bonds may be issued by the city in an amount not exceeding the contract price, with the necessary incidentals, payable seven years after date, with interest not exceeding 6 per cent., payable semiannually. The bonds, when issued, may be sold at not less than par; the money received therefrom to be paid by the city treasurer, to be by him kept in a separate fund, and be paid out, on requisitions of the council, for the cost of the improvement. When the improvement is completed, it becomes the duty of the council to ascertain the entire cost thereof, and the portion thereof assessable on adjacent property, which shall then be assessed against the abutting property; provision being made for notice to the property owners of the proposed assessment, and for a hearing upon objections made thereto; the assessment being declared to be a lien upon the abutting property from the commencement of the work of the improvement. It is further provided in section 10 of the act that:

"Whenever any street railway may have been constructed and shall remain upon any street which the council may direct to be paved, at the time such direction shall be given, and when the owner of such street railway may be bound to pave any portion of said street by any action of the city under section 1 of chapter 16 of the Acts of the 22nd General Assembly, or by virtue of the provisions or conditions of any ordinance of the city under which said street railway may have been constructed, or may be maintained, and if the owner shall fail or refuse to comply with the order of the council to do such paving, then the portion of the cost of paving such street, assessable upon such street railway, shall be ascertained and shall be assessed against such street railway."

As already stated, it is shown in the evidence that the improvement contemplated in the resolution adopted by the city council under date of May 30, 1893, was one within the power of the city to undertake; that it was ultimately undertaken and properly completed, and the cost occasioned thereby was paid from moneys received from the sale of the negotiable bonds issued by the city, and that an assessment was levied upon the abutting property to provide funds to pay the bonds, but upon petition of some of the property owners this special assessment has been adjudged to be in-

valid and nonenforceable by the supreme court of the state, for the reason that after the bids for doing the work were advertised for and received the council changed the time for the completion of the work, but did not call for bids upon the improvement after this change in the time set for its completion.

The first question to be considered is whether the city of Lyons can be held liable for the payment of the bonds, in view of the limitation upon the extent of municipal indebtedness contained in the constitution of the state. As I construe the bonds in question, they always constituted or created an indebtedness on part of the city. The promise to pay on the part of the city is absolute. It is true that they recite that they are issued to provide for the payment of the cost of improving Sixth street, in Lyons City, which cost is assessable against the abutting property, and is made a lien thereon; but, in effect, this is but a recital of the power possessed by the city for levying and enforcing a special assessment, as a means towards providing funds for the payment of the debt created by the issuance and sale of the bonds, and there is no declaration in the bonds to the effect that they are payable only out of a particular fund. Furthermore, it is clear from the provisions of the act of the 23d general assembly that it was intended to authorize the issuance of bonds binding the city as the promisor. The act (section 6) declared that:

"For the purpose of providing for the payment of the cost and expenses of any such improvement the council * * * shall be authorized from time to time, as the work progresses, to make requisitions upon the mayor of the city for the issue of the bonds of the city in such sums as shall be deemed best."

It is made the duty of the mayor to execute the bonds, but it is not required that the bonds shall recite that they are payable out of a particular fund, but, on the contrary, the provision is that the mayor shall issue bonds of the city, the same to be issued from time to time as the work progresses, and then in section 10 of the act it is declared that:

"When any such improvement shall have been completed it shall be the duty of the council to ascertain the entire cost of the improvement, and also what portion of such cost may be by law assessable on adjacent property, and the portion of such cost so assessable shall then be assessed as provided by law, or by ordinance of such city, upon the property fronting or abutting on said improvement."

This section clearly shows that it is not expected that the abutting property will be liable for the whole cost, but only for a portion thereof, and the amount thereof cannot be ascertained until after the completion of the whole improvement, which may be months after the letting of the contract and the sale of the bonds. During this interval of time the city must certainly be bound to the purchaser of its bonds, or else the bondholders would hold no legal claim against any one; and, having once become bound for the payment of the bonds issued by it, there is nothing in the statute which enables the city to shift its liability upon the owners of the property abutting on the improvement. It must therefore be held that the bonds, when issued, created an indebtedness against the city,

within the meaning of that term as used in section 3, art. 11, of the state constitution, which limits the indebtedness of municipalities to 5 per cent. of the taxable property therein. There is not found on the face of the bonds any express recital to the effect that they do not cause the city indebtedness to exceed the limit. Furthermore, the evidence shows that the complainant bank purchased at the one time the whole issue of $40,000, and therefore knew that this issue in itself exceeded the constitutional limit, as it is shown that the total value of the taxable property within the limits of Lyons City at this time was the sum of $783,000, thus making the constitutional limit of indebtedness the sum of $39,150. The complainant, being bound to take notice of the value of the taxable property within the city, knew, therefore, that the total issue of bonds purchased by it exceeded the 5 per cent. limit. Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; Chaffee Co. v. Potter, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040; Sutliff v. Lake Co., 147 U. S. 280, 13 Sup. Ct. 318, 37 L. Ed. 145. This being the situation, the complainant is entitled to enforce against the city so much of the indebtedness evidenced by the bonds purchased as will not, when added to the pre-existing indebtedness, cause the total to exceed the constitutional limit.

As already stated, the limit of indebtedness lawfully creatable by the city of Lyons at the date of the issuance of the bonds was the sum of $39,150, and in the stipulation of facts submitted in the case it is admitted that the city was then indebted in the sum of $29,000; the difference between the two sums being $10,150. It is further shown that the city had collected on the special assessment levied on the abutting property the sum of $3,921.31, and had paid out of this amount, for interest on the bonds, and the incidental expenses connected with the improvement, the sum of $3,138.75, leaving in the hands of the city a balance of $882.56, which, being added to the sum of $10,150, makes a total of $11,032.56, which can be adjudged against the city without overstepping the constitutional limit, and upon which amount interest at 6 per cent., payable semiannually from and including May 16, 1895, is legally due and collectible. Equitably this amount would appear to be apportionable between the two series of bonds issued by the city of Lyons and sold to the complainant bank; one series being for $7,000, and the other for $33,000. The present suit is based alone on the series for $33,000, and it does not appear whether the bank is now the owner of both series or not. Upon the record as it now stands, the court must treat the $7,000 as an indebtedness due in full; and the amount recoverable upon the series of bonds declared on in this suit is therefore reduced to the sum of $4,032.56, with interest at 6 per cent., payable semiannually, dating from May 16, 1895.

So far the case has been viewed solely with reference to the question of the liability of the city of Lyons upon the bonds issued, viewed as contracts between the city and the bondholders. There is, however, involved in the issues the question of the equitable rights and remedies of the complainant as against the property owners, who have in fact received the benefit of the street improvement, the cost

of which was defrayed in the first instance by the money paid by complainant in the purchase of the bonds. The statute of Iowa under which the improvement of the street was undertaken made provision for assessing the larger part of the expense upon the abutting property and upon any street railway company whose track was laid and maintained along the improved street; and, beyond all question, when the city undertook to improve Sixth street the city and the abutting owners expected that the proper proportion of the cost would be assessed upon the adjacent property. The purchaser of the bonds, by reason of the recitals therein, and of the provisions of the statute under which the improvement was made and the bonds were issued, was justified in assuming that due provision would be made for collecting the funds to aid in paying the bonds by the assessment of a special tax upon the abutting property, including the street railway company. In equity the bondholder has the right to call upon the city of Lyons to enforce for his protection every power and right the city can exercise to levy and collect from the property benefited by the improvement the cost thereof, which is in fact and in truth represented by the bonds owned by complainant. It is shown in the evidence that the State Electric Company, which owned the street railway line on Sixth street, in consideration of an amendment of section 6 of the original resolution of May 30, 1893, reducing the space to be paved by or at the expense of the railway company, in writing waived its right to construct the pavement along or between its rails, and agreed—

"That Lyons City shall cause to be paved all the space between the rails of the track of said company and one foot outside thereof, in accordance with the law in such cases made and provided, and assess and levy the cost of the same against the property of said State Electric Co., in Lyons City, Iowa, when the same shall become due and collectible under said ordinance and resolutions."

It is not now perceived why this agreement on the part of the street railway company is not a waiver of all objections to the improvement of the street, and why the company is not bound thereby to respond to the assessment of its proper proportionate share of the total cost; but the railway company is not a party to the record, and the question of its liability ought not to be finally passed upon until it has the opportunity to be heard. In a supplemental opinion filed by the supreme court of Iowa in passing upon a petition for rehearing in the Osburn Case, supra, and found in 75 N. W. 672, it is said:

"We have not considered the liability of the plaintiffs or their property, except as it was dependent upon the contract and assessment which we have discussed. The decree to be entered in this court will not affect any right, not dependent upon such contract and assessment, which the defendants may have to recover for the improvement in question. Whether such a right exists, we do not determine."

Some discussion is had in the briefs of counsel upon the proposition whether the city, for the protection of the bondholders, can enforce in any method against the property abutting on the improved street the payment of the cost of the improvement. In the present state of the record this question cannot be determined, for

the reason that the owners of abutting property are not parties to the suit, and the court should not enter upon a consideration of a question which materially affects their interests without giving them the right to be heard. In order, therefore, to the final hearing and determination of the questions arising under the facts of this case, it is necessary that additional parties should be brought into the case. If it be the fact that the series of $7,000 of bonds issued by the city of Lyons are not now owned by the complainant bank, and the latter desires to present the question of an equitable apportionment of the amount found to be enforceable against the city of Lyons, the present holders of the bonds should, if possible, be made parties to the record. As already stated, in order to determine the question whether the street railway company and the owners of the abutting property can be called upon to pay the cost of the improvement of Sixth street, or any portion of such cost, it is necessary that these parties should be brought into the case and afforded the opportunity to be heard in defense of their rights.

In this view of the case, it is ordered that complainant has leave to file an amendment to the bill for the purpose of covering any one or all of the questions suggested, and to bring in the necessary parties, requiring them to appear and show cause why a mandatory injunction or other proper process should not issue, commanding the city of Clinton, through its council, to levy and collect a special assessment upon the abutting property; such amendment to be filed by December 15, 1901.

EAST COAST CEDAR CO. et al. v. PEOPLE'S BANK OF BUFFALO, N. Y., et al.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1901.)

No. 391.

1. APPEAL—FINAL DECREE—SUIT FOR PARTITION.

A decree in a suit for partition, in which the only question in controversy was whether the land should be partitioned in specie, or sold and the proceeds divided, which determines such issue, and orders a sale of the land, leaving the distribution of the proceeds as the only thing remaining to be done after such decree has been executed, is final, for the purposes of an appeal.[1]

2. PARTITION—DIRECTING SALE—IMPRACTICABILITY OF DIVISION.

A tract of land sought to be partitioned consisted of 128,000 acres, largely swamp, a large part of it practically worthless, and the remainder of very unequal value; the timber, which constituted its chief value, being in scattered tracts, and at greatly unequal distances from water courses by which it must be marketed. There were also over many portions of it adverse claims of various character, with uncertain boundaries. *Held*, that the trial court correctly decided that such tract could not be divided without injustice to some of the owners in common, of whom there were eight, owning unequal shares, and properly ordered it sold and the proceeds distributed, as the only just and practicable method of division.

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[1] Finality of judgments and decrees for purpose of review, see notes to Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. Ry. Co. v. Atchison, T. & S. F. R. Co., 28 C. C. A. 482.

8. SAME—PARTIES—LIEN CREDITORS OF TENANT IN COMMON.
Creditors having liens on the interests of some of the tenants in common of a tract of land are not necessary parties to a suit for its partition, but where the land is sold they may intervene and assert their liens against the share of their debtors in the proceeds.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

F. H. Busbee and E. F. Aydlett, for appellants.
Morris Morey and James E. Shepherd, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the Eastern district of North Carolina. The bill was filed by the East Coast Cedar Company against the People's Bank of Buffalo, N. Y., and several others, praying the partition of a large tract of land (about 167,000 acres) in Dare county, N. C., of which complainant claimed to be tenant in common with all the other defendants. The bill alleges that the complainant is the owner of an undivided one-fifteenth in the said lands, and that the defendants are owners of the remaining fourteen-fifteenths, and sets out in elaborate detail the percentages of ownership of each of the defendants and of the complainant, as follows:

East Coast Cedar Company	.067
American Exchange Bank	.28
People's Bank of Buffalo	.13
W. A. Ensign & Co	.168
Receivers of the Bank of Commerce	.234
Phœnix National Bank	.102
M. H. Brown	.019
	1.000

The answers of M. H. Brown and of the Phœnix National Bank admit this statement of the interests of the several owners. The other defendants (the People's Bank of Buffalo, N. Y.; the American Exchange Bank of Buffalo, N. Y.; W. A. Ensign and Charles A. Ensign, trading as W. A. Ensign & Co.; Bank of Commerce in Buffalo, N. Y., by its receivers) in their joint answer deny that the complainant had any interest whatever in the lands, but subsequently, by an amended answer, withdraw the denial, and admit the ownership of complainant in an undivided one-fifteenth in these lands. So the percentages above stated are admitted.

The substantial issue made in the pleadings is whether in making the partition the respective shares of the parties be allotted to them in severalty, or whether the lands be sold as a whole, and the shares of each be thus set apart in the proceeds. This large tract of land is thus described in the bill:

"The said land consists very largely of swamps, and its chief, if not its only, value is the timber growing thereon, a part of which in the more elevated portions is pine, gum, and kindred growths, and, upon the large, swampy part of it, juniper and cypress. That a large part of the land is a worthless savannah, without appreciable value for timber and impossible of cultivation. That the timber which is found upon the land, especially

that in the swampy portions, is found in detached bodies, as islands and oases surrounded by worthless land."

Many of the witnesses speak of these oases as bunches of land and timber, varying greatly in size and in quality, separate at unequal distances from water courses. Besides this, within the exterior boundaries of this large tract many persons own and claim to own interior tracts, some of them of undefined extent. The prayer of the bill, in which M. H. Brown and the Phœnix Bank concur, is for the appointment of commissioners to divide the land, if it be capable of partition in severalty, or for a sale as a whole, and allotment of the proceeds. The other defendants pray for a sale, deeming an allotment in severalty impossible.

A very large number of witnesses were examined for both sides of the controversy. During the progress of the cause it was declared that the complainant had become in control of the shares of M. H. Brown and of the Phœnix National Bank, thus increasing its interest to one-sixth. When the cause came on to be heard on its merits the following decree was entered:

"This cause coming on to be heard and being heard on the depositions and other proofs, after argument of counsel, both for petitioners and defendants, it is now considered, adjudged, and decreed: (1) That the land described in the petition cannot be actually divided without great expense and injury to the tenants in common interested. (2) That the said land be sold at public auction at the court-house door in Manteo, Dare county, N. C., after advertising the same for thirty days in some newspaper published at Raleigh, N. C., Norfolk, Va., Baltimore, Md., New York, and Elizabeth City, N. C. Said land may, if the commissioner herein named deems the same feasible, be divided into five lots, by taking the natural and established points on Alligator river to the natural tributaries on the opposite boundary, and estimating the area of said lots. That, after selling or offering said land for sale in lots as aforesaid, the commissioners shall offer said land as an entirety, and report both sales as in lots and as an entirety. Parties bidding for said land shall within ten days deposit in the registry of this court, the Citizens' National Bank, ten per cent. of the bid made for a lot or the whole of said land, or a certified check for such amount.

"A. B. Andrews, Jr., of Raleigh, is appointed commissioner."

The complainant, with Brown and the Phœnix National Bank, excepted to this judgment, and obtained leave to appeal upon assignments of error. The first four of these go to the refusal of the court to make actual partition in severalty, and, instead thereof, ordering a sale of the whole tract. The fifth goes to certain errors in the admission and rejection of testimony. The sixth, in ordering a sale notwithstanding that it appeared that the shares of some of the defendants were incumbered by liens.

At the call of the case in this court the appellees move to dismiss the appeal because the judgment appealed from was not final. This question meets us on the threshold. The sole issue presented in the testimony upon the pleadings was, shall these lands sought to be partitioned be partitioned in severalty, or be sold for the purposes of partition, and the proceeds divided? The shares of the respective co-owners were set forth in detail, and not controverted. The result of the decree of the court is that the lands be sold and the proceeds divided, thus settling that issue. When the judgment is executed by a sale, nothing remains but to ascertain the shares

of the several parties by an arithmetical calculation. This comes within the test laid down by the supreme court for determining what is a final decree: A decree, to be final for the purposes of an appeal, must leave the case in such a condition that if there be an affirmance the court below will have nothing to do but to execute the decree it has already entered. Lodge v. Twell, 135 U. S. 232, 10 Sup. Ct. 745, 34 L. Ed. 153; Dainese v. Kendall, 119 U. S. 53, 7 Sup. Ct. 65, 30 L. Ed. 305. It must terminate the litigation on the merits. Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15, 27 L. Ed. 73; Ex parte Norton, 108 U. S. 237, 2 Sup. Ct. 490, 27 L. Ed. 709. The practical illustrations of the doctrine are shown in the following cases: In Thomson v. Dean, 7 Wall. 342, 19 L. Ed. 94, a decree deciding the right of the property in contest, directing it to be delivered by defendant to complainant by transfer, and entitling complainant to have the decree carried immediately into execution, was held a final decree, although it left to be adjusted accounts between the parties in pursuance of the decree settling the questions of ownership. See, also, Forgay v. Conrad, 6 How. 201, 12 L. Ed. 404. So, in Stovall v. Banks, 10 Wall. 583, 19 L. Ed. 1036, a decree adjudging a certain sum of money to be due from defendant to the complainant, and awarding execution to collect it, was held to be a final decree, although it allowed a subsequent deduction from the amount there adjudged of any note held by defendant against complainant. And a decree directing a sale of trust property, and that the proceeds be brought into court, was held to be final. Railroad Co. v. Bradley, 7 Wall. 575, 19 L. Ed. 274. It is familiar practice in the supreme court to entertain jurisdiction over appeals from an order for sale in the foreclosure in railroad cases, although very much remains to be done in the determination of questions as to distribution of the fund. Bronson v. Railroad Co. went up on such an appeal in 2 Black, 524, 528, 17 L. Ed. 347. It went up again in 1 Wall. 405, 17 L. Ed. 616, and again in 2 Wall. 283, 17 L. Ed. 725. In our opinion, the decree in this case was final for the purposes of appeal.

As to the Merits.

The complainant and the two defendants whose interests it controls insist that a partition in severalty is perfectly feasible. This is a question of fact, considered and passed upon in the negative by the circuit court. The contention is renewed here, and the appellant asks that, if this allotment in severalty be not made as between all the parties, at least that its share, increased by the shares of the two defendants, its allies, be carved out and allotted to it, and that the remaining five-sixths be sold as the court has directed. We have carefully considered all the testimony in the record, and have reached the same conclusion as did the court below. This immense body of land is of very unequal value. Parts of it are almost, if not quite, valueless. The portions of it which have value vary in size, quality, and character and value of timber; are scattered over the tract; are at greatly unequal distances from water courses by which the timber, when cut, would reach the market.

It has over many portions of it adverse claims of various character, with uncertain boundaries. Even were the court to authorize the great expense of a survey of this whole tract, cause a plat to be made of it, and division made according to the plat,—even then no satisfactory division can be made, securing to each tenant an equal proportionate share. When a court of equity undertakes to make an allotment in partition, it asks the aid of commissioners, who should go on the land and examine it and apportion it, and if, in their judgment, or of that of a majority of them, it cannot be allotted in severalty without injury to all or to some of the co-owners, then to sell the land, and obtain the desired equality by getting its market value. This course has been pursued here, and is approved. Every objection applicable to a partition in severalty of this tract of land applies to the scheme of complainant to make a partial apportionment in severalty of one-sixth, and to sell the remainder. This would be so manifestly unjust to the other five-sixths as to need no discussion.

With regard to the fifth assignment of error, this is disposed of by the judge below in his rulings upon the record for appeal, and needs no consideration here.

With respect to the sixth assignment of error, we cannot perceive that any testimony was introduced respecting the alleged liens, and no rulings thereon or exceptions noted. Even if they were, it cannot affect this case. Such lien creditors, if any exist, were not parties to this suit, nor were they necessary parties. When the sale is made and the share ascertained, any creditor having a claim against one of the tenants in common can intervene and ask that the money allotted to his debtor be subjected to his claim. See French v. Gapen, 105 U. S. 509, 26 L. Ed. 951. This is the proper and usual practice.

The decree of the circuit court is affirmed, and the case remanded for such further proceedings as may be necessary.

CRENSHAW v. MILLER et al.

(Circuit Court, M. D. Alabama. November 1, 1901.)

AFFIDAVITS—POWER TO COMPEL MAKING—FEDERAL COURTS.

A federal court or judge has no authority to appoint a commissioner to require persons having knowledge of relevant facts to make affidavits to such facts for use on an application for the appointment of a receiver because such persons refuse to make affidavits voluntarily. The power to compel testimony by deposition does not extend to ex parte statements.

In Equity. On petition for appointment of commissioner to take affidavits.

John M. Chilton, for petitioner.

SHELBY, Circuit Judge. This case, which is a bill in equity to settle a partnership, has been set down for hearing on a motion to appoint a receiver. Pending that motion the complainant presents his petition, alleging that "there are persons residing in the

state of Georgia whose evidence is very material to your petitioner on the hearing of said application (the motion to appoint a receiver), but who refused to give voluntary affidavits containing the facts within their knowledge." It is further alleged that there is not time sufficient before the hearing of the motion to take the depositions of the persons referred to. It is prayed that a special master commissioner be appointed to take the affidavits of the persons who are unwilling to furnish voluntary statements. The purpose is not to have a master or commissioner appointed to take their depositions, but he is to proceed to require the witnesses to make ex parte statements.

It is the practice to sustain an application for the appointment of a receiver by affidavits. 2 Bates, Fed. Eq. Proc. § 588. Affidavits are received in evidence both to sustain and to resist the motion. Such affidavits are obtained usually without notice to the opposing party. The question presented by this petition is whether it is proper for a judge of this court to make an order authorizing a commissioner to require persons having knowledge of relevant facts to make affidavits to such facts. An affidavit is usually understood to be a voluntary statement. Ordinarily, when witnesses are compelled to testify, the proceeding is not ex parte; both parties to the suit are permitted to propound questions. No authority is submitted to me by counsel where the court or a judge has delegated authority to a commissioner or officer to require persons to make affidavits. There is no statute of the United States authorizing such procedure. A commissioner appointed for such purpose could only proceed by propounding questions or permitting counsel to propound them. This would be in effect taking a deposition, and, of course, to make it legal, the notice required by law should be given. The distinction between an affidavit and a deposition is that the former is ex parte and voluntary, and the latter is made after notice, and is compulsory. An affidavit is a voluntary, ex parte statement, formally reduced to writing and sworn to or affirmed before some officer authorized by law to take it. If the witness is subpœnaed, sworn, and required to answer, his evidence reduced to writing is his deposition, and it could only be legally taken on notice with the right of cross-examination. In Iowa, and perhaps in other states, there is a statute providing a mode for obtaining affidavits in pending cases by issuing a subpœna for the witness, and, if he fails to make a full affidavit of the facts known to him, his deposition is taken ex parte and used as an affidavit. Dudley v. McCord, 65 Iowa, 671, 22 N. W. 920. In Bacon v. Magee, 7 Cow. 515, a motion was made for a rule to compel one Wilson, who had knowledge of relevant facts, to make an affidavit. The court said that it was not aware of any precedent for such a rule, though there must have been frequent occasions for it. "The uniform course in relation to these summary applications," said the court, "has been to trust to voluntary affidavits; and the want of power to coerce them has often been urged in argument without contradiction as a defect in this kind of proceeding. We do not think we have power to make the rule applied for." Whether or

not there are other modes of procedure that would secure the evidence of the unwilling witnesses is a question not now to be considered.

The application is denied.

SHINGLEUR et al. v. JENKINS.

(Circuit Court, N. D. Georgia, W. D. October 2, 1901.)

No. 49.

EQUITY—INDISPENSABLE PARTIES.

To a suit to require defendant to account for the proceeds of drafts drawn by one alleged to have been acting as complainant's agent, which the bill charges defendant with having received through a conspiracy between himself and the agent to appropriate the profits of the agency, or as trustee in invitum, because of his having intermeddled with the business of the agency by receiving the proceeds of such drafts, the agent is a necessary and indispensable party, without whose presence a federal court of equity cannot entertain the suit and undertake to determine the rights of the parties, although such agent is not within the district, and cannot be brought in.

In Equity. On plea for want of necessary party.

Grigsby E. Thomas and John M. Chilton, for complainants.
McNeill & Levy, for defendant.

NEWMAN, District Judge. This suit was brought originally by complainant against William B. Swift and Felix J. Jenkins. Afterwards the complainant came by way of supplement and amendment to his original bill, and stated that at the time the bill was filed the complainant believed that Swift was a resident of the district as he had long been, but that about the time the bill was filed Swift removed from the district, and from the state of Georgia, and that it was impossible to secure service on him in the district, whereupon he asked leave to amend his original bill by striking Swift as a party, which amendment was allowed by the court. Thereupon Jenkins filed a plea, in which he sets up that Swift is a necessary and indispensable party to the case made in the complainant's bill. The facts shown by the bill are that J. A. Shingleur was in 1897 doing a cotton business in Jackson, Miss., under the name of J. A. Shingleur & Co., and that he employed W. B. Swift to purchase cotton for him at Columbus, Ga.; that Swift was to purchase cotton for complainant, and ship the same as directed by complainant, and draw drafts on the consignees therefor, and was to account to complainant for his acts as such agent, and be paid reasonable compensation for his services; that Swift purchased a large amount of cotton, and shipped the same, and drew drafts against the consignees therefor, all of which drafts except two were payable to Felix J. Jenkins; that these transactions resulted in large profits, and that Swift refused to account to complainant therefor; that in shipping the cotton Swift misstated the weights, increasing the weight 10 to 20 pounds on each bale, the raised or increased weights being included in the drafts drawn on the consignees; and that the consignees afterwards drew on complainant for the amounts of these raised weights, and com-

plainant paid the drafts. The bill further charges that Swift and Jenkins conspired and confederated together for the purpose of appropriating the fruits of the agency, and that, if such is not the case, by intermeddling in the execution of the agency, and receiving the proceeds of the cotton, Jenkins became liable to complainant as trustee in invitum.

The question presented by the plea in this case has been frequently before the supreme court of the United States, and particularly in the cases of Mallow v. Hinde, 12 Wheat. 193, 6 L. Ed. 599, Shields v. Barrow, 17 How. 130, 15 L. Ed. 158, and the more recent case of California v. Southern Pac. Co., 157 U. S. 229, 15 Sup. Ct. 591, 39 L. Ed. 683. The opinions in the two latter cases discuss the effect of the act of congress of February 28, 1839, as now embodied in section 737 of the Revised Statutes, and also the forty-seventh rule of equity practice. It is contended by counsel for complainant that under the statute and rule referred to he should be allowed to proceed against Jenkins, inasmuch as Swift is not an inhabitant of, and cannot be found in, the district, and therefore cannot be made a party. By the decisions of the supreme court above referred to, persons who have such an interest in the controversy as that their presence in the suit is really necessary to its proper disposition must still be parties. The rule which should govern in this matter is probably fully embodied in a paragraph of the opinion in the last-named case of California v. Southern Pac. Co., as follows:

"Sitting as a court of equity, we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties, or, at least, so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the state and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?"

In the case at bar can the court do complete and final justice without affecting Swift? I think not. Jenkins' connection with the transaction set out in the bill is such that it would be inequitable to attempt to pass upon his obligations and rights without the presence of Swift as a party. I am unable to see how any judgment could be rendered that would not affect Swift. This is true if we consider the case as made by the bill alone, and certainly true if we consider the bill in connection with Jenkins' answer. Using the language of the supreme court, "complete and final justice" would be impossible without the presence of Swift as a party.

The plea is sustained.

FAIRFIELD v. RURAL INDEPENDENT SCHOOL DIST. OF ALLISON et al.

(Circuit Court, N. D. Iowa, W. D. November 8, 1901.)

1. SCHOOL DISTRICTS—SUBDIVISION—ACTION ON BONDS OF OLD DISTRICT.

Where a school district has been subdivided into new districts under the statutes of Iowa, and subsequently an agreement is made by the new districts for the division and apportionment between them of the indebtedness of the old district, an action at law may be maintained

against them on bonds of the old district, and judgment rendered in conformity to such agreement.

2. MUNICIPAL BONDS—RECITALS—LIMITATION OF INDEBTEDNESS.
In view of the absolute limitation placed upon the indebtedness of municipalities by Const. Iowa, art. 11, § 3, which declares that no municipal corporation "shall be allowed" to contract debts beyond such limit "in any manner or for any purpose," which provision the legislature has no power to defeat or avoid by authorizing municipal boards or officers to make findings or recitals in bonds which shall be conclusive that they are within the limit, a purchaser of such bonds is not entitled to rely solely on a recital therein that the debt thereby created does not exceed the constitutional limit.[1]

3. SAME—IOWA SCHOOL DISTRICTS—NOTICE TO PURCHASERS.
A purchaser of bonds of an Iowa school district is chargeable with notice of the provision of the state constitution which prohibits the creation of debts by any municipal corporation in excess of 5 per cent. of the assessed value of the taxable property therein, and of the assessed value of the property of such district as shown by the public records, as well as of the authority possessed by the officers who execute the bonds; and where they recite that they are issued under the provision of an act of the legislature referred to, and of a resolution adopted by the board of directors in pursuance of such act, on a certain date, the purchaser is also charged with notice of the contents of the act and the resolution, and is not entitled to rely on general recitals that the resolution conforms to the act, and that the indebtedness created by the bonds is within the constitutional limit; where the resolution shows on its face that such recitals are untrue.

4. SAME.
Plaintiff was the owner of negotiable bonds issued by an Iowa school district, which recited that they were issued under the provision of Acts 18th Gen. Assem. c. 132, authorizing districts to issue bonds to refund their outstanding bonded indebtedness on the adoption of a resolution therefor by a three-fourths vote of the board of directors, and in pursuance of a resolution adopted on a certain date. The bonds also contained recitals that they were issued "in strict compliance with the laws of the state," and were within the constitutional limit of indebtedness. The resolution referred to, and under which they were issued, itself authorized the issuance of bonds to an amount several times greater than the amount of indebtedness the district could lawfully contract, and also showed on its face that the bonds to be thereby refunded were for a still larger amount. *Held*, that any purchaser of such bonds was charged with notice of such facts and of their invalidity, notwithstanding their recitals.

At Law. Action on school district bonds and coupons. Trial to the court.

Findings of Fact.

From the stipulation of the parties, the court finds the facts of this case to be as follows:

(1) The independent school district of Riverside, of Lyon county, Iowa, was organized in the year 1872, and continued its existence as such until the year 1885, when the territory comprising said district was divided into the independent school district of Allison and the independent school district of Jackson, which said districts are known as the "Rural Independent School District of Allison" and the "Rural Independent School District of Jackson," the same being school corporations under the laws of Iowa.

(2) The value of the taxable property, as is shown by the state and county tax lists of Lyon county, Iowa, within the said independent school district of Riverside, was for the years from 1872 to 1882, inclusive, as follows, to wit: For 1872, $43,995.32; for 1873, $68,317.01; for 1874, $68,890.83; for 1875,

[1] Constitutional and statutory limitations of municipal indebtedness, see note to City of Helena v. Mills, 36 C. C. A. 6.

$70,435.64; for 1876, $70,706.96; for 1877, $57,247.58; for 1878, $72,175.97; for 1879, $47,220; for 1880, $44,571; for 1881, $44,033; for 1882, $49,170.

(3) As shown by the tax lists of Lyon county, Iowa, for the year 1880, there was a taxable value of $22,494 of property exempt from taxation in said independent school district of Riverside by reason and on account of the timber culture acts of the state, which said $22,494 is not included in the valuation for the year 1880 as given above.

(4) That the plaintiff herein is and was a resident and a citizen of the state, as alleged in the petition herein, at and before the commencement of this suit, and was and is now a citizen and resident of said state.

(5) That the plaintiff was a bona fide purchaser of the bonds in suit, in good faith, for value, and before maturity thereof, and without knowledge or notice of any defense whatever thereto, except that imported by the constitution and laws of Iowa, and was such owner and holder thereof, and coupons attached, at and before the commencement of this suit, and is now such owner and holder thereof.

(6) That the defendants and the independent school district of Riverside are and were at all times mentioned in petition in this case corporations as therein alleged, and the officers who signed said bonds were the duly elected and qualified officers of said Riverside district at the time said bonds and coupons were issued and delivered, and that said bonds were signed by the officers by whom they purport to be signed.

(7) That the bonds and coupons sued on are offered in evidence, and made a part of this stipulation and finding of facts.

(8) That the bonds in suit of dates June 21, 1881, November 5, 1881, and March 11, 1882, were the only bonds of said district of Riverside ever purchased or owned by this plaintiff of the issue of those dates.

(9) That the bonds in suit of June 21, 1881, purchased by the plaintiff, were issued, and formed part of a series from 1 to 40, inclusive, aggregating $23,700, issued in pursuance of a resolution adopted by the board of the independent school district of Riverside June 21, 1881, and recorded in the secretary's record, reading as follows:

"Riverside, Lyon Co., Iowa, June 21, 1881.

"Board of directors of the independent school district of Riverside met at the school district at call of the president. Members all present. The following resolution was passed: 'Whereas, E. E. Carpenter comes before the board with bonds of said district bearing 10 per cent. interest, and offers to surrender to said district, upon the issue and delivery to him new bonds of said district bearing 7 per cent.,—the old bonds being taken at 70 cents on the dollar,—bonds issued in the year 1873, or bonds issued in 1877 or later, at par, in exchange for new bonds of said district: Therefore it is resolved by this board that they issue the bonds of said district of Riverside, and said bonds shall be issued by the president and secretary and delivered to the treasurer to exchange as above stated. Said bonds shall number as follows: Bonds Nos. 1, 2, 3, 4, 5, 6, 7, 8, for one thousand dollars each; and bonds Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39, for five hundred dollars each; and bond No. 40 for two hundred dollars,—and shall bear interest at 7 per cent., payable semiannually, on the first day of January and July of each year. The above-described bonds were issued and delivered to the treasurer for exchange. It is further resolved that the treasurer be authorized to exchange any bonds in his possession for old bonds of said district at 50 cents on the dollar, and be allowed 2 per cent. commission for refunding such bonds, as provided in the resolution of July 30, 1880.'

"Board adjourned at call of president. G. W. Stoops, President.

"G. R. Matthews, Secretary."

(10) At and prior to June 21, 1881, November 5, 1881, and March 11, 1882, the independent school district of Riverside had outstanding against the district evidences of indebtedness largely in excess of 5 per cent. of the value of the taxable property within the limits of the district.

(11) During all the time from January 1, 1873, to March 11, 1882, the independent school district of Riverside had outstanding evidences of indebted-

ness against it, in judgments and bonds, largely in excess of 5 per cent. of the value of the taxable property within the limits of said district, as shown by the several state and county tax lists for each of the years during the said period.

(12) That the bonds in suit were not issued to refund, and did not refund, any judgment or judgment bonds issued by the independent school district of Riverside.

(13) That prior to June 21, 1881, judgments were rendered in various courts against the said independent school district of Riverside on evidences of indebtedness issued by said district prior thereto, which said judgments amounted to $6,500, and remained unpaid and unsatisfied at the date of the issuing of the bonds in suit.

(14) On November 5, 1881, the said independent school district of Riverside issued, for the purpose of settling old bonds, bonds Nos. 18 to 30, inclusive, aggregating $13,000.

(15) The bonds of March 11, 1882, purchased by plaintiff, formed part of a series numbered from 1 to 39, inclusive, issued to one C. W. Rollins in pursuance of a resolution adopted by the board of directors of the defendant district on the 11th day of March, 1882, and recorded in the secretary's record as follows:

"Riverside, March 11, 1882.

"Board of directors of independent district of Riverside, Lyon county, Iowa, met at the school house in said district on the 11th day of March, 1882. The following resolution was passed: 'Whereas, C. W. Rollins came before the board with a resolution to settle with the district some bonds of said district which he held, to the amount of $72,000.00, at 50 cents on the dollar, and take in exchange new bonds drawing 7 per cent. interest, not counting accrued interest: Now, therefore, it is resolved by the board that they issue bonds to the amount of $36,000.00, and exchange the same with the aforesaid C. W. Rollins, and also to allow the treasurer 2 per cent. for exchanging as provided in resolutions of June 30, 1880. Therefore the secretary and president are authorized and directed to turn over to the treasurer, and take his receipt for the same, said bonds, to be numbered as follows: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, $1,000 each; 25, 26, 27, 28, $500; 29, 30, 31, 32, $1,000 each; 33, 34, $500 each; 35, 36, 37, 38, 39, $1,000 each.'

"There being no further business, adjourned subject to the call of the chairman."

(16) That the secretary's record of the independent school district of Riverside shows the resolutions upon which issued, and the date and amounts of the bonds issued, from the year 1877 up to March 11, 1882, as follows:

July	12, 1877.	Refunding bonds		$ 5,000
Dec.	15, 1877.	"	"	6,000
July	1, 1878.	"	"	8,300
July	16, 1878.	"	"	800
Dec.	19, 1878.	"	"	1,600
June	21, 1879.	"	"	500
July	15, 1879.	"	"	3,200
Sept.	11, 1879.	"	"	1,600
Oct.	15, 1879.	"	"	5,200
July	10, 1880.	"	"	3,300
July	3, 1880.	"	"	5,000
June	10, 1880.	"	"	10,000
July	30, 1880.	"	"	4,500
Dec.	4, 1880.	"	"	10,500
April	6, 1881.	"	"	1,700
June	21, 1881.	"	"	23,700
Nov.	5, 1881.	"	"	13,000
Feb.	15, 1882.	"	"	20,500
March	11, 1882.	"	"	36,000
Total				$160,400

(17) Subsequent to the organization of the independent school districts of Allison and Jackson, which by operation of law afterwards became the districts defendant, the said districts of Allison and Jackson made a division of the outstanding liabilities of the old district, by which it was agreed that two-thirds of the same should be paid by the said Allison district, and one-third by said Jackson district, and all of the judgments outstanding against the said old district, and all of the bonds upon which judgments have been heretofore rendered, and all other recognized liabilities of said district of Riverside, have been settled by the said districts in the above proportion.

(18) That, in the agreement between the said districts as to liabilities, no account was taken of the outstanding bonded indebtedness of the old independent district of Riverside, and neither of the said districts ever, by any contract or agreement, assumed or agreed to pay any part of the same, regarding and treating the said bonded indebtedness as void.

(19) That the assessed valuation of the said independent district of Riverside for the year 1883 was the sum of $98,168, and for the year 1884 $97,575, which was the last valuation of the old independent district of Riverside.

(20) That the assessed valuation of the rural independent district of Allison for the year 1885 was the sum of $72,973, and the valuation for the same year for the independent district of Jackson was the sum of $31,431.

(21) That the assessed valuation for the independent district of Allison for the year 1899 was the sum of $141,510, and for the independent district of Jackson for the same year the sum of $81,788.

(22) That the assessed valuation for the independent district of Allison for the year 1900 was the sum of $146,086, and for the independent district of Jackson for the same year was the sum of $83,603.

(23) That the assessed valuation of the independent district of Allison for the year 1901 is the sum of $149,699, and for the independent district of Jackson for the same year $82,479.

(24) That in addition to the judgments rendered against the said independent district of Riverside, as set out in the stipulation heretofore introduced in evidence, there were rendered in the district court of Lyon county, Iowa, prior to the division of the said independent district, judgments amounting to $3,887.94, and which said judgments were outstanding at the time of the division, and which said judgments have since been satisfied and paid off by said two new districts in the proportion of two-thirds by the said Allison district, and one-third by the said Jackson district.

(25) That there were issued by the old independent school district of Riverside $1,500 in judgment bonds, which said bonds were outstanding at the time of the said division, and upon which said bonds judgments have been rendered in the district court of Lyon county, Iowa, after defense made by the said districts, in the sum of $4,477.62 against the two independent districts defendant; the said judgments being divided and paid by the said districts in the proportion of two-thirds by the said Allison district and one-third by the said Jackson district; the said judgments being rendered by the court, two-thirds against the said Allison district, and one-third against the said Jackson district.

(26) That prior to the division of the old independent district of Riverside into the two defendant districts, in the year 1885, there had been erected in the old independent district of Riverside only two school houses, the valuation of which was not to exceed $1,500.

(27) That there are now pending in this court other suits against the defendant districts, based on bonds issued by the independent school district of Riverside, aggregating $30,000 in amount.

Parsons & Riniker, for plaintiff.

O. J. Taylor, for defendants.

SHIRAS, District Judge (after stating the facts). When this case was first submitted to the court it was held that it would be necessary to proceed in equity, in that it did not appear that there had been a division or apportionment of the indebtedness of the original

independent district of Riverside between the present defendants, which are rural independent school districts carved out of the territory embraced within the original district. Upon the filing of the opinion to that effect, leave was asked and granted to amend the petition, and to introduce evidence showing that in fact the defendant districts had made a division and apportionment of the indebtedness of the original district of Riverside; and it is now shown that subsequent to the organization of the defendant districts a division of liabilities was reached, whereby it was agreed that two-thirds thereof should be assumed by the rural independent district of Allison, and one-third by that of Jackson, and it now appears that the questions at issue can be disposed of in the present action at law. The defense interposed to a recovery on the bonds sued on is that when the same were issued the indebtedness of the independent district of Riverside exceeded the limitation imposed by section 3, art. 11, of the constitution of Iowa, upon the amount of indebtedness lawfully creatable by municipalities within the state; the limit being the amount represented by 5 per cent. of the taxable property within the municipality, as shown by the last preceding state and county tax lists. The evidence shows beyond question that, when the bonds sued on were issued by the district of Riverside, the indebtedness of the district largely exceeded the constitutional limit; and it is equally plain that the enforcement thereof against the present districts will impose a burden on the property now within the districts in excess of the 5 per cent. limit. If it is open to the defendant districts to prove and rely upon the facts as they are and were when the bonds sued on were issued, then it is clear that the defense based upon the constitutional limitation of indebtedness is made out; for it is an admitted fact that when the bonds sued on were issued the limit of indebtedness had been largely exceeded by the independent district of Riverside. The highest valuation of taxable property within the district of Riverside during its existence was that returned for the year 1878 in the sum of $72,175.97, 5 per cent. of which is $3,608.79; and yet it is shown that between July 11, 1877, and March 12, 1882, there were issued in the name of the district bonds to the amount of $160,400, or more than double the valuation of the property within the district; and the fraudulent character of the bonds in suit is shown by the fact that those issued under the date of June 21, 1881, form part of one issue of $23,700, and those issued under date of March 11, 1882, form part of one issue of $36,000 and the only property possessed by the district, when it ceased to exist, as a result of this exceeding industry in the issuance of bonds, was two school houses, of a value not exceeding $1,500.

On part of plaintiff it is contended that the defense relied on is not available to the defendant districts, by reason of the recital found in the bonds to the effect that "this bond is issued in strict compliance with the laws of the state of Iowa, and is within the constitutional limit of indebtedness fixed by sec. three (3), art. 11 (eleven), of the state constitution"; it being claimed that this recital brings the case within the rule announced by the supreme court in Chaffee Co. v. Potter, 142 U. S. 355, 12 Sup. Ct. 216, 35 L. Ed. 1040, and

Commissioners of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689, wherein it was held that the bond purchaser might rely upon the recital in the bond to the effect that the total issue did not exceed the limit fixed by the constitution of the state of Colorado. These decisions are based upon the construction given to the statute of Colorado which provides for the submission to the electors of the county the question of the issuance of bonds to take up outstanding warrants; it being enacted that, in case the electors vote in favor of the proposition, the board of commissioners may issue the same, in the form to be prescribed by the commissioners, and it being further declared:

"The whole amount of bonds issued under this act shall not exceed the sum of the county indebtedness at the date of the first publication of the aforementioned notice, and the amount shall be determined by the county commissioners, and a certificate made of the same, and made part of the records of the county; and any bond issued in excess of said sum shall be null and void; and all bonds issued under the provisions of this act shall be registered in the office of the state auditor, to whom a fee of ten cents shall be paid for recording each bond." Sess. Laws Colo. 1881, p. 87.

In construing this statute the supreme court, in Chaffee Co. v. Potter, supra, held that:

"The statute, in terms, gave to the commissioners the determination of a fact,—that is, whether the issue of bonds was in accordance with the constitution of the state and the statute under which they were issued,—and required them to spread a certificate of that determination upon the records of the county. The recital in the bond to the effect that such determination has been made, and that the constitutional limitation had not been exceeded in the issue of the bonds, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, under the law, estops the county from saying it is untrue."

The bonds sued on were issued under the authority conferred upon school districts to issue refunding bonds by chapter 132, Acts 18th Gen. Assem. Iowa, which enacts—

"That any independent school district or district township, now or hereafter having a bonded indebtedness outstanding, is hereby authorized to issue negotiable bonds at any rate of interest not exceeding seven per cent. per annum, payable semiannually, for the purpose of funding said indebtedness; said bonds to be issued upon a resolution of the board of directors of said district: provided, that said resolution shall not be valid unless adopted by a two thirds vote of said directors."

In the second section of the act it is provided that the treasurer of the district is authorized to sell the bonds at not less than par, and to apply the proceeds to the payment of outstanding bonds, or he may exchange such bonds for outstanding bonds, par for par. The facts stipulated by the parties show that the bonds of the date of June 21, 1881, were issued to E. E. Carpenter in exchange for bonds of the district then held by him in an amount greatly in excess of the constitutional limit. It cannot be gainsaid that there is great force in the contention of counsel for plaintiff that there is great similarity in the substance of the powers conferred upon the county commissioners under the Colorado statute and those conferred upon the school directors by the statutes of Iowa, and therefore that the same force and effect should be given to the recital in the bonds sued on as was given to the recital in the bonds sued on in the Colorado

case. There are, however, differences in the provisions of the statute in question. In that of Colorado the initiation of the proceedings authorizing the issuance of bonds is with the people of the county; it being provided that, upon petition of 50 of the electors, the county commissioners shall publish a notice requesting the holders of warrants to submit a proposition for the exchange of the warrants for bonds, and, if a proposition is submitted, then the question of issuance of bonds is to be submitted to the electors of the county, and, if the proposition carries, then the commissioners must determine the amount of bonds to be issued, making a certificate thereof, and the bonds issued must be registered in the office of the state auditor. By this act the commissioners are made a board with special authority to supervise the proceedings connected with the submission of the question to the people of the county, and with express authority to determine and certify the amount of bonds to be issued. In the case of school districts in Iowa no such extensive powers and duties are imposed upon the directors by the provisions of chapter 132, Acts 18th Gen. Assem. That act simply confers on school districts the power to issue refunding bonds provided the resolution to that end is approved by three-fourths of the directors. If it be held that the recital in the bonds sued on estops the district from showing that the bonds are void, because they exceed the constitutional limit, then it follows that the constitutional provision is practically rendered valueless, in that it is declared that the officers whose power and authority were intended to be limited by the provision can avoid its effect by the easy expedient of reciting in the bonds that they do not exceed the limit. It is contended that the protection of the people lies in their power to elect strictly honest officials, but it must be admitted that this is not within the absolute power of the people. When the constitution of the state was adopted, many provisions were inserted therein for the protection of the people against the unlimited abuse of official power; and among others is the limitation on the creation of municipal indebtedness, and this limitation is couched in the strongest terms; and, as is said by the supreme court in Doon Tp. v. Cummins, 142 U. S. 366, 12 Sup. Ct. 220, 35 L. Ed. 1044:

"The scope and meaning of this provision of the fundamental and paramount law of the state are clear and unmistakable. No municipal corporation 'shall be allowed' to contract debts beyond the constitutional limit. When that limit has been reached, no debt can be contracted 'in any manner or for any purpose.' * * * The prohibition is addressed to the legislature, as well as to all municipal boards and officers, and to the people, and forbids any and all of them to create or to give binding force to any debts of the corporation in excess of the limit prescribed. * * * The power of the legislature in this respect being restricted and controlled by the constitution, any statute which purports to authorize a municipal corporation to contract debts in any manner or for any purpose whatever in excess of that limit is to that extent unconstitutional and void."

Under this construction of the constitutional provision, it cannot be held that it is within the power of the legislature of Iowa to declare that the inhibition of the constitution cannot be availed of to defeat bonds issued by school districts which contain the recital that

they do not in fact exceed the limitation. In other words, it is not within the power of the legislature to declare that a mere recital in the bond shall defeat or avoid the constitutional provision. In view of the stringent restrictive force of the limitation on the creation of municipal indebtedness contained in the constitution of Iowa, it cannot be broadly held that a purchaser of a school district bond is authorized to rely solely upon a recital therein found that the debt created by the bond does not exceed the limit. He should be held to the inquiry of the source and extent of the authority possessed by the officials executing the bond, especially when the bond itself, as in this case, points out the means by which the would-be purchaser can ascertain whether he can rightfully rely upon the recitals of the bonds or not. It is settled by the decisions of the supreme court that, regardless of the recitals in the bonds, the purchaser is bound to take notice of the constitutional provision, and of the amount of the taxable property within the municipality. Lake Co. v. Graham, 130 U. S. 674, 9 Sup. Ct. 654, 32 L. Ed. 1065; Commissioners of Gunnison Co. v. E. H. Rollins & Sons, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689. Under this rule, when bonds issued by a municipality created under the laws of Iowa are offered for sale, the purchaser is bound to take notice of the limit of indebtedness, and he is bound to take notice of the authority possessed by the officials executing the bond. In this case the bond, on its face, recites that it is issued under the provisions of chapter 132, Acts 18th Gen. Assem. Iowa; the act being printed in full upon the back of the bond. In terms, it authorizes a school district to issue refunding bonds upon the adoption of a resolution by the board of directors, three-fourths of the directors voting therefor. The bond further recites on its face that it is issued in conformity with a resolution of the board of directors at a meeting thereof held June 21, 1881. This resolution thus referred to shows on its face that the issue of bonds therein provided for is in an amount largely in excess of the constitutional limit, as it directs the issuance of 8 bonds for $1,000 each, 31 bonds for $500 each, and 1 for $200, or in all $23,700, thus providing for an issuance at one time of an amount of bonds equal to the value of one-half of the taxable property in the district. Is it open to the plaintiff to say that she was not bound to take notice of the provisions of the resolution of the board of directors, which is referred to on the face of the bonds, and which in fact she must rely upon in connection with the provisions of chapter 132, Acts 18th Gen. Assem. Iowa, as the source of the authority of the district to issue bonds in any amount? If she was bound to take notice of the resolution, then she had notice of the fact that the series of bonds, which included those purchased by her, issued under that resolution, greatly exceeded the constitutional limit, and further that the bonds proposed to be refunded and held by E. E. Carpenter were largely in excess of the limit allowed by the constitution; and thus she was chargeable with full knowledge of the facts showing that the recital in the bonds that the issuance thereof would not exceed the limit was false. It certainly is the law that a purchaser of a municipal bond is bound to take notice of the matters recited in and appearing upon

the face of the bond, and, when a bond expressly declares that it is issued under the authority of a named resolution of the municipal officials, this reference makes the resolution a part of the bond, in such sense that the purchaser is bound to take notice of its provisions. Under the decisions of the supreme court, the purchaser may rely upon the recitals in the bond to the effect that the officials have followed or performed the acts by them required to be done by the state statute or resolution of the board; but a recital to the effect that the bond is issued in conformity with a resolution of the directors adopted at a given date is not a recital of the terms of the resolution, but is only a statement that the provisions of the resolution have been followed or carried out. For knowledge of the provisions of the resolution, reference must be made to the resolution itself. Thus the recital found in the bonds in suit, to wit, that the same were issued in conformity with a resolution of the board of directors passed June 21, 1881, authorized the plaintiff to assume that all the provisions and requirements of the resolution had been observed; but the provision of the resolution was that bonds should be issued in the sum of $23,700, and therefore in this view there is no escape from the conclusion that the plaintiff was charged by the terms of the bonds with notice that the issue of which they formed part were in excess of the legal limit. To avoid this result it must be held that, although the bond on its face cited the act of the legislature and the resolution of the board which were relied on for the authority to issue the bonds, nevertheless the purchaser is not required to know or to take notice of the terms and conditions therein contained. If this is the rule, then if the legislature of the state should pass an act authorizing the counties of the state to issue bonds to an amount equal to 50 per cent. of the taxable property within the county, and such bonds should be issued, containing a recital that the bonds were issued in pursuance of and in conformity with the act of the legislature, persons would be protected in purchasing the same, on the theory that they were not chargeable with knowledge of the terms and provisions of the act which authorized their issuance. Due force and effect can be given to recitals such as are found in the bonds in suit without going to the extreme length of holding that by reason thereof a purchaser of the bonds is not to be held chargeable with notice of the terms and conditions contained in the resolution of the board of directors; the adoption of a resolution by the board being a necessary step, under the law, in the creation of the right to issue bonds.

The conclusion reached is that the plaintiff, when she bought the bonds in suit, was bound to take notice of the provisions of chapter 132, Acts 18th Gen. Assem., and of the resolution of the board of directors adopted June 21, 1881, both of which are cited and referred to on the face of the bonds as the sources of authority for the issuance thereof; that the resolution thus brought to the notice of the plaintiff charged her with knowledge of the fact that the series of bonds of which those purchased formed part, and which were directed to be issued by the resolution of June 21, 1881, amounting to $23,700, were so issued for the purpose of being exchanged for

bonds of an equal or greater amount held by E. E. Carpenter; that the plaintiff was thus charged with knowledge of the fact that Carpenter was holding bonds in an amount greatly in excess of the constitutional limit, and that the exchange proposed by the resolution of June 21st would not impart validity to the bonds then issued, if the bonds for which they were exchanged were themselves void by reason of the constitutional limit; and that the recitals in the bonds sued on are not of such a character as to enable the plaintiff to escape from the consequences of the knowledge chargeable to her by the matters recited in the bonds themselves. Being chargeable with knowledge of the terms of the resolution of June 21, 1881, the plaintiff knew that the issuance of the bonds directed by that resolution in fact violated the constitutional limit, and the plaintiff cannot, therefore, estop the defendant districts from proving the actual truth of the situation, to wit, that the series of bonds directed to be issued, and in fact issued, under the authority of the resolution of June 21st, were greatly in excess of the limit, and are therefore void if viewed as an original issue, and are equally void viewed as refunding bonds, because exchanged for bonds which in themselves exceeded the limit, and which are not shown to have been enforceable against the district when they were exchanged.

Judgment will therefore be entered for the defendants.

WOOD et al. v. JOLIET GASLIGHT CO.

(Circuit Court of Appeals, Seventh Circuit. November 5, 1901.)

No. 797.

DAMAGES—BREACH OF CONTRACT.

Plaintiffs contracted to build a gas holder for defendant, it being an express requirement of the contract that the holder should be completed by December 1st. It was not in fact completed until January 15th following. The evidence showed that defendant did not require such holder for use except during the months of December and January each year, when the consumption of gas by its customers was unusually large. *Held*, that the time of completion was of the essence of the contract, and, in the absence of evidence of special damages, defendant was entitled to recoup, as damages against the unpaid balance of the contract price, a sum at least equal to the legal interest for one year on the amount already paid on the contract, and the cost of the land on which the holder was situated.

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

The action in the Circuit Court was by the plaintiffs-in-error, citizens of the State of Pennsylvania, against defendant-in-error, a corporation under the laws of Illinois; and grew out of a contract wherein the plaintiffs-in-error agreed to construct for the defendant-in-error a gas holder for the contract price of Twenty-five Thousand Dollars, of which $9,616.89 is still unpaid. For this balance the suit was brought.

At, and before, the making of the contract in question, the defendant-in-error was engaged in the manufacture and distribution of gas in the City of Joliet, Ill. Its plant had a manufacturing capacity of 287,000 cubic feet, but a storage capacity of about 90,000 feet only. This storage capacity seems to have been sufficient for the needs of the entire year except during

the months of December and January, when, because of the Holidays, and the increased lengths of the nights, the demand for gas was greatly increased. To meet this particular need, the contract in question was contemplated.

July 3rd, 1899, defendant-in-error wrote to the plaintiffs-in-error, asking for a proposition on a holder in steel tank of a capacity of 300,000 feet, and added: "Will you kindly state whether or not you can have this holder completed by December first of this year. There is no necessity for us to build a holder this year unless it can be completed by that date"; to which, the plaintiffs-in-error, July 13th, replied, stating the price of $25,000, but making no reference to the time for completion. July 18th defendant-in-error acknowledged the letter of July 13th, stating it would give plaintiffs-in-error the contract at once to build the holder at the price stated, providing the plaintiffs-in-error would guarantee to have the same completed on or before December first of the current year, and added: "Unless it is completed before December first of this year, we should not care to have it ready before the middle of September or October, 1900. If you cannot guarantee to have the holder completed by December first, we shall certainly advertise for bids based on completion at any time before October first of next year, and know we can save ourselves some money by so doing. As I said, however, we are willing to pay you your price on an absolute guarantee that it will be finished by December first, providing the details and specifications are satisfactory"; to which, plaintiffs-in-error replied by telegram, July 22nd, as follows: "Can complete holder by December first if material is ordered immediately." July 31st following defendant-in-error replied: "We accept your proposition for Joliet; must be done December first."

Thereupon, plaintiffs-in-error began the construction of the holder, but it was not finished until the 17th of January following. January 15th the holder was accepted by the defendant-in-error, "subject to our final settlement with your company", and was filled with gas, whether for trial or storage does not clearly appear.

A jury having been waived, the case was submitted to the Court for trial, by whom it was found that by reason of the delay in the completion of the holder, the defendant-in-error was damaged to the extent of Twelve Hundred Dollars, ($1,200); and a judgment was rendered for the balance of the contract price, less this sum. From this finding and judgment, this writ is prosecuted.

Henry C. Wood and Thomas C. Clark, for Plaintiffs-in-Error.
Ralph R. Bradley, for Defendant-in-Error.

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

GROSSCUP, Circuit Judge. The completion of the holder by the first of December, 1899, was, in our opinion, of the essence of the contract; and if the plaintiffs-in-error failed in this respect, and such failure resulted in damage to the defendant-in-error, such damages could properly be recouped against the unpaid balance of the contract price. About this there seems to be no question. The principal questions in the case concern the proof, and the measure of damages.

No evidence was introduced respecting damages, other than that the holder constructed was useless to the defendant-in-error except during the months of December and January; and proof tending to show that but for the defendant-in-error's anxiety to have the holder ready by the first of December, the contract could have been let at a figure considerably less, the saving amounting probably to three thousand dollars. We do not deem it necessary to inquire whether the fact last stated could be made the basis of re-

covery or recoupment. We think the first fact, viz.—that the holder was useless except during the months of December and January—discloses in law a definite measure of damage.

The amount allowed by the Circuit Court is within a few dollars of a year's interest at five per cent., (the legal rate in Illinois), upon the contract money already paid and the amount invested in the land upon which the holder was erected. Whether the computation should not have been made upon the contract price, with the land investment added, is a question we need not pass upon, for the defendant-in-error is not complaining; nor need we ascertain that this was the measure upon which the Circuit Court actually made the calculation. It is sufficient to support this judgment that the law justifies such a rule of damages, and that the record furnishes the facts to which it can be applied.

It seems plain to us that the defendant-in-error was entitled to the loss it suffered by reason of the plaintiffs-in-error's default. In the absence of special damages, such a loss seems correctly measured by the investment tied up on account of the breach. It is of no consequence, that immediately after the completion of the holder it may have been used for storage purposes. The point is, that it was not needed for that purpose, and that, therefore, owing to the plaintiffs-in-error's default in the matter of time of completion, the investment represented by the holder was premature to the extent of an entire year. Unless this rule is applicable, the defendant-in-error would have been put, without his fault, and by the failure of the other party to the contract, to a loss without a remedy. The rule we have adopted is in our opinion sufficiently supported in the case of Mining Syndicate v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665, 32 L. Ed. 1031.

The judgment will be affirmed.

MILLER v. NORTHWESTERN MUT. LIFE INS. CO. OF MILWAUKEE, WIS.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1901.)

No. 397.

LIFE INSURANCE—CREATION OF CONTRACT—AUTHORITY OF LOCAL AGENT.

An application for life insurance was made and delivered to a local agent, containing a clause that no statement or representation made by or to the agent should be binding on the company unless reduced to writing and approved by its officers at its home office, in another state. The applicant gave his check for the amount of the first premium to the agent on the statement of the latter that if he did so the insurance would be in effect from that date, but that the company would have to approve the application. The application and check were forwarded to the state agent, who retained the check and sent the application to the company, which wrote for further information in certain particulars. In reply the applicant wrote directly to the company, giving such information, and stating that if not satisfactory it should consider the application withdrawn and return his check. The company rejected the application, and so advised the state agent, who wrote the local agent, notifying him of the fact, and returning the payment received. On the day such letter

was written the applicant died, but neither the company nor the state agent had any notice of his sickness until after his death. The executor refused to accept repayment of the money, and sued to recover the amount of the insurance. *Held*, that no contract of insurance was made; that the local agent had no authority, either actual or apparent, to make the same, even if he had attempted to do so, and the applicant evidently understood such fact, as shown by his letter asking the company to consider his application "withdrawn" if his statement was not satisfactory, and was not misled so as to create any estoppel against the company.

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

In June, 1898, the defendant, a life insurance company created by and organized under the laws of the state of Wisconsin, with its home office at Milwaukee, was doing business in the state of Virginia; T. A. Cary at Richmond, Va., being its state agent, and Wm. H. John its local agent at Coeburn, in said state. On the 7th day of June, 1898, Hobart Miller, the plaintiff's testator, who lived at Coeburn, made application through John, the local agent, for a $5,000 policy under the 20-year endowment plan of said company. The application consisted of three parts, numbered 1, 2, and 3. Part 1 of the application was signed by Miller, and was dated at Coeburn on the 7th day of June, 1898. This part contained a clause to the effect that no statements, representations, or information made or given by or to the agent taking the application for the policy, or to any other person, should be binding on the company, or in any manner affect its right, unless such statements, representations, or information were reduced to writing and presented to and approved by the officials of the company at the home office. It was further stipulated in the said part that all the statements and answers written in the application, including those thereafter to be made to the medical examiner, were warranted to be true, and to be full and fair answers to the questions offered to the company as a consideration for the contract for insurance, and, further, that the contract should not take effect until the first premium was paid during the life of the person proposed for insurance, and while he was in good health. On the 13th of June, 1898, Miller executed parts 2 and 3 of the application, by submitting to a medical examination, which was required by the rules of the company under the terms of the application. On the 14th of June, 1898, Miller paid to John, the local agent, by his check of that date, $241.20, and took the following receipt:

"Received of Hobart Miller $241.20, as first annual premium on policy for $5,000 with Northwestern Mutual.

"[Signed] Wm. H. John."

The following was John's testimony, and the only evidence on the trial, relative to what occurred between him and the applicant in connection with the payment of the premium: "I could not be positive, but I know the conversation occurred between Mr. Miller and myself either on a prior occasion or at that time [meaning when the receipt was given], and it was something like this: When I asked him if he wanted to accompany the application with a payment, he asked what would be the difference, and I told him if the check accompanied the application the insurance would be in effect from that date; and before I could say anything he said, 'Of course, the company must accept the application.' I said the company would have to approve it, and he said, 'Yes.'" On the date the check was given, John forwarded the application, consisting of the three parts, with applicant's check for the premium, to Cary, the state agent at Richmond. It reached Cary on June 16, 1898. Cary, finding that the application was in some respects inaccurately made out, returned it on the same day that he received it to John for correction; and it came back to Cary corrected, and was received by him on the 20th of June, 1898, and he mailed it the same day to the home office

of the company, at Milwaukee, where it was received June 22, 1898, in due course of mail. The check, however, Cary retained, and placed to his own credit in a Richmond bank.

Miller, in his medical examination, when asked as to the use of intoxicating beverages, made a statement showing that he drank both whisky and beer, and sometimes in more than moderate quantities, but stated further that he had used neither whisky nor beer to the extent of intoxication during the past 10 years. On the 24th of June, 1898, the medical director of the company at Milwaukee wrote Cary, the agent at Richmond, calling his attention to the answers of the applicant relative to the use of intoxicants, and asking for additional information on that subject. This letter was received by the Richmond agent on the 27th of June, 1898, and on the same day he communicated its contents to John, the local agent at Coeburn, in a letter of that date. John informed Miller, and the latter wrote a letter on July 1st from Coeburn, addressed directly to the company, which is as follows:

"Northwestern Mutual Life Insurance Company, Milwaukee, Wis.—Gentlemen: Your Mr. W. H. John, of this place, has shown me your letter to him of the 27th of June, and has asked me to write you, covering the ground outlined by it. Dr. Wolfe and I both thought the questions propounded upon the application blank had been fully answered, but I will try again. It is impossible to make a statement showing just what I drink a day, for sometimes I take nothing for several days, and then, again, if I am with friends I drink more freely than ordinarily. I very rarely drink beer in winter, and in summer I very rarely drink both beer and whisky upon the same day. Occasionally I do so, but very occasionally. My drinking depends greatly upon circumstances, and varies greatly. I drink half a pint of whisky a day occasionally only,—say once in two weeks. I hope this statement will be satisfactory. If it is not, please return me the check forwarded to you, and consider my application as withdrawn. I have already, without any fault of my own, been out of my money since June 14th, and I do not care to let the matter drag any longer. Truly yours,

"[Signed] Hobart Miller."

This letter was transmitted by John to Cary, the state agent at Richmond, and was received by the latter on the 5th day of July, 1898, and was immediately on the same date transmitted to the home office of the company at Milwaukee, where it was received on the evening of July 7, 1898. On July 9th the application of Miller, together with his letter of July 1st, was finally considered by the medical department of the company, and the application unconditionally rejected on account of the habits of the applicant. The agent at Richmond was advised of this action by letter from the home office of the company dated July 9, 1898, which was received by him on July 11th; and on the same day the agent at Richmond sent notice of the rejection of the application to John, the local agent at Coeburn, Va., inclosing with the notification a check to the order of Hobart Miller, the applicant, for the $241.20 which had been previously paid as premium. On the 11th of July, 1898, the applicant died from sickness, and when the letter of notification that the application for insurance had been rejected and the check reached John, at Coeburn, the applicant was dead, and there was no one to whom the check could be paid. The defendant had no notice of applicant's sickness at the time the application was rejected; nor was the agent at Richmond informed of his sickness and death when the notice was received by him and forwarded to John, the agent at Coeburn. The applicant, Hobart Miller, left a last will and testament, which was duly admitted to probate in the county of Wise, in the state of Virginia, and the present plaintiff, E. Spencer Miller, was duly qualified as executor thereof. As soon as the plaintiff qualified as executor, John tendered him the $241.20 premium which had been paid by his testator, but the plaintiff declined to accept it, and the same was deposited by the agent to the plaintiff's credit in a national bank in Philadelphia, where it still remains. This suit was then brought by the executor in the circuit court of Wise county, in the state of Virginia, and removed by the petition of defendant to the circuit court of the United States for the Western district of Virginia, on the ground of diverse citizenship. The plaintiff's action is

trespass on the case in assumpsit, and he claims damages in the sum of $5,000, and interest from the 11th day of July, 1898. The circuit court, in the trial, after hearing the evidence, directed a verdict for the defendant, and it was so returned by the jury, to which the plaintiff excepted, and sued out his writ of error, by which the case is brought here for review.

Daniel Trigg, for plaintiff in error.
William H. White, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BOYD, District Judges.

BOYD, District Judge (after stating the facts). The application consisting of the three parts put in course of preparation on the 7th of June, with John's receipt for the first premium, given June 14th, and forwarded together on the last-named date to the state agent at Richmond, constituted the initial step of the parties in this transaction. This was the proposal of Miller, the applicant, for a policy of insurance upon his life in the defendant's company, and, according to the terms of the application, the right was reserved to the company to accept or reject the proposition; for it is set forth in express terms that the statements and representations made either to or by the agent taking the application should not be binding on the company, or in any way affect its right, unless reduced to writing and approved by the company at its home office, which was in Milwaukee, Wis. Certainly, so far there was no obligation resting on the company, for the application had not yet reached the place for approval. There was no unreasonable delay on the part of the company's agents, under the circumstances, in forwarding the application to the home office; for when Cary received it at Richmond, on the 16th of June, two days after it was sent from Coeburn, he discovered inaccuracies and returned it for correction. The corrections were made, the application sent to him, he mailed it at once, and it was received at the home office in Milwaukee on June 22d. After an examination the company, through its chief medical officer, by letter dated June 24th, called for further information in regard to applicant's use of intoxicating liquors. The state agent at Richmond received the letter asking this information on June 27th, and at once communicated its contents to John, the agent at Coeburn. John called upon the applicant, and the latter answered the inquiry by his letter of July 1st. In this letter the applicant reiterates, in substance, the answers he had given to questions upon the same subject in the application, and goes further and admits in his letter that his application is only pending the action of the company, and asks, if his explanation is not satisfactory, that the company will return his check and consider the application withdrawn. We think the court may take judicial notice of the way in which contracts for insurance are usually regulated. Abb. Tr. Ev. (2d Ed.) p. 590, par. 5. There is nothing here to support the theory that John was invested by this company with any power or authority beyond that usually confided to local life insurance agents; that is, to explain the character of their principal's business and operations, and to solicit and forward applications or proposals for policies, accom-

panied by the statements of applicants and the necessary medical examinations. It is true that John stated to the applicant at the time of the payment of the premium, or about that time, that if the premium was paid the insurance would take effect from that time; but he then and there qualified this statement by saying that the company would have to approve it, to which the applicant assented. It is thus shown that applicant understood fully at the time the premium was paid to John and the application forwarded that there was no contract, and that the application must be passed upon and approved by the company at its home office before it became binding upon the latter. If there was any uncertainty as to how the applicant regarded the situation when he paid the premium, he himself has set the matter at rest by his letter of July 1st, in which he gives additional explanation as to his use of intoxicants, and, after expressing the hope that his statement would be satisfactory, says, if it is not, to return his check and consider his application withdrawn. Here the applicant in unmistakable terms admits that there was no contract; that the matter was still in fieri, and dependent upon the action of the company for its completion. The acceptance by the company of the applicant's proposal was essential to the creation of a contract of insurance. Insurance Co. v. Young, 23 Wall. 85, 23 L. Ed. 152; Insurance Co. v. Ewing, 92 U. S. 377, 23 L. Ed. 610; Giddings v. Insurance Co., 102 U. S. 108, 26 L. Ed. 92.

Under the circumstances, we do not deem it necessary to discuss at length the power of the agent to bind his principal. It is well settled that he can only do so when acting within the scope of his agency. An oral contract of insurance, in order to be valid, must be definite as to time, rate of premium, etc., and the evidence adduced to establish such contract must justify the inference that the same was completed. Was there any completed contract in this case? The plaintiff in error relies on the statement of John, the local agent, that the insurance would take effect from the payment of the premium. This action of John, taken alone, is not sufficient to bind his principal; for neither the fact nor the scope of agency can be proved by the agent's acts, representations, declarations, or admissions. The agency must first be established, and either a specific authority, or one of so general a nature as to give him authority to do the act in question, or a subsequent ratification with full knowledge, or a holding out to the world, must be proved. It is a settled principle that:

"Third parties dealing with an agent are put upon their guard by the very fact, and do so at their own risk. They cannot rely upon the agent's assumption of authority, but are to be regarded as dealing with the power before them, and must, at their peril, observe that the act done by the agent is legally identical with the act authorized by the power. Especially is this the case with one dealing with an agent whose authority he knows to be special. And it is the duty of all having transactions with an agent in his representative capacity to inquire into the extent of his authority." 1 Am. & Eng. Enc. Law, p. 987, and cases cited in note.

The whole course of the transaction under consideration, in our opinion, supports the conclusion that the applicant fully understood John's position,—that he was merely the instrument of negotiation,

and that no contract of insurance was effected until the application was approved by the company at its home office, and the policy issued. The conversation between John and the applicant with reference to the payment of the premium bears out this conclusion; for, although John told applicant that the insurance would take effect from the time of the payment of the premium, he qualified this statement by saying that the company would have to approve the application, to which the applicant assented. The receipt given by John does not sustain the contention that the payment of premium at that time bound the company. The receipt does not in itself contain any terms which can be construed into a contract to insure. On the other hand, it expressly recites that the money paid by the applicant to John was paid as the first annual premium on policy for $5,000 with the Northwestern Mutual. No policy was in existence when the receipt was given, because none had been issued. The application which accompanied the premium was applicant's proposal for insurance, subject to the approval of the company; the approval to be in the form of a policy, which, when issued, became the evidence of the company's obligation. It was the first premium upon this policy, when issued, that the applicant was paying, and we are unable to find any other conclusion consistent with reason and intelligent business dealing.

The judgment of the circuit court is affirmed.

PARKER et al. v. MOORE.

(Circuit Court, D. South Carolina. October 22, 1901.)

1. CONTRACTS—PURCHASE OF COTTON FOR FUTURE DELIVERY—VALIDITY UNDER SOUTH CAROLINA STATUTE.

Rev. St. S. C. 1893, § 1859 et seq., declares void every contract for the sale of certain articles, including cotton, for future delivery, unless the party contracting to sell shall at the time be the owner of such article, or the owner's authorized agent, or unless it is the bona fide intention of both parties to the contract at the time of making the same that the said article shall be delivered and received in kind at the time for delivery specified. The statute also places the burden upon the plaintiff in any action based on such a contract to bring the case within its provisions, to be entitled to recover thereon. *Held*, that under such statute a broker who advanced margins for his principal to protect a purchase of cotton for future delivery on the New York Cotton Exchange could not recover the same from the principal, where the latter testified that it was not his intention at any time to receive or pay for the cotton, but to make a cash settlement in accordance with the difference between the market and contract price, notwithstanding the fact that under the rules and by-laws of the exchange, subject to which the defendant knew the contract to have been made, and to which he assented, actual delivery in kind, or acceptance and payment, could be enforced by either party. The statute goes behind the contract itself, and makes the actual intention of both parties that there should be a delivery and acceptance essential to its validity, and the right to enforce delivery is not inconsistent with an intention not to insist on such right.

2. FEDERAL COURTS—RULES OF EVIDENCE—STATE STATUTE.

Under the provisions of the conformity act (Rev. St. U. S. § 721), the rules of evidence of the courts of a state, established by statute or deci-

sion, become those of a United States court sitting therein, in actions at law.[1]

At Law. On entering order of nonsuit.

Duncan & Sanders and Cothran & Cothran, for plaintiffs.
Stanyarne Wilson and Heyward, Dean & Earle, for defendant.

SIMONTON, Circuit Judge. Counsel have requested that the court put in writing the reasons governing it in ordering a nonsuit in this case.

The plaintiffs are cotton brokers in the city of New York, both of them being members of the New York Cotton Exchange. The defendant, a small farmer in Spartanburg, S. C., employed them in the purchase of cotton futures for him. This relation began about a year before the first of the transactions which are the subject-matter of this suit, and during that period the defendant made money out of them. The transactions sued upon here resulted in a loss. It seems from the evidence that, when a person instructs his broker to buy or sell futures for him under the rules of the Cotton Exchange of New York, such purchases or sales must be made in the name of the broker making them, his principal not being disclosed. The purchases or sales are always made on putting up a certain sum of money as a margin, and that margin must be kept up to meet the fluctuation of the cotton market. Under the rule of the New York Cotton Exchange, the broker who made the transaction must protect the margin. He does so to protect his principal. Whenever the defendant gave his orders to plaintiffs, in executing them they notified him that they had done so, and that the whole transaction was governed by the rules and by-laws of the New York Cotton Exchange. He received every such notice in writing, and did not reply one way or another. He first put some money in their hands himself. This was exhausted, and plaintiffs repeatedly made margins good, notifying the defendant each time of this fact, and requesting repayment. When he failed to do this at their reiterated requests, they closed out the transactions, and now bring their action for recovery of these advances. There is no doubt that the money was advanced by plaintiffs for the use of defendant, and at his special instance and request; and under ordinary circumstances, ex æquo et bono, he should repay them. He sets up his defense that the money so advanced for him was used in a gaming transaction, and that under the law of South Carolina such a transaction is immoral, illegal, and void.

The statute law of South Carolina (Rev. St. 1893, § 1859 and those following) declares void every contract, bargain, or agreement, whether verbal or written, for the sale or transfer at any future time of certain articles enumerated, including cotton, unless the party contracting to sell or transfer the same at the time of making the contract be the owner thereof, or the authorized agent of such owner, or unless it is the bona fide intention of both parties to the contract at the time of making the same that the said article (in this

[1] Conformity of practice in common-law actions to practice of state courts, see note to O'Connell v. Reed, 5 C. C. A. 594.

case cotton) so agreed to be sold be actually delivered in kind to the party contracting to deliver, and be actually received in kind by the party contracting to receive, the same, at the period in the future specified in said contract. The next section (1860) provides that in any and all actions brought in any court to enforce such contract, or to collect any note or other evidence of indebtedness or any claim or demand whatever founded on such contract, the burden of proof shall be on the plaintiff to establish that at the time of making said contract the party making it was the owner of the goods agreed to be sold, or the duly-authorized agent of such owner, or that at the time of making the contract it was the bona fide intention of both parties thereto that the goods so agreed to be sold should be delivered by the one in kind, and be received in kind by the other. The plaintiffs, in a carefully prepared case, proved every step necessary to sustain their demand. As part of their proof they introduced the rules and by-laws of the New York Cotton Exchange, and sustained it with the testimony of expert witnesses, who explained the transactions under these rules. These rules expressly provide that a purchaser of cotton for future delivery can demand the delivery of the cotton in kind at the time fixed in the contract, and that the seller could tender and enforce the acceptance by the buyer of the cotton in kind, and, further, that all the contracts for future delivery of cotton made upon the floor of the New York Cotton Exchange are based upon the fact of an actual delivery, either to the original purchaser by the original seller, or to some mediate or intermediate purchaser of his contract. The plaintiffs having closed their case, the defendant took the stand in person. Under oath he declared that it never was his intention at any time, either at the date of his several contracts, or before or after such dates, to require or accept the delivery of the cotton in kind; that it was hopelessly impossible for him to do so, for want of means or opportunity; that it was his full intention not to receive the cotton, but to insist on the difference in cash if cotton went up beyond the price stipulated; and that he had done this in every instance in all previous transactions. He certainly did not intend to deliver the cotton if the price went against him. At this point counsel for defendant brought the South Carolina statute to the attention of the court. This declaration upon the part of the defendant seemed to decide the case. The court suo motu entered an order of nonsuit.

This statute of the state of South Carolina above referred to has been construed by the supreme court of that state in Harvey v. Doty, 54 S. C. 382, 32 S. E. 501. In that case, dealing with a contract for future delivery, the court held that when an agent contracts in good faith in his own name with other parties for the sale of property for future delivery, and there is a bona fide intention on the part of the agent and the other contracting parties at the time of making the contract to actually deliver on the one hand, and actually receive on the other, at the period mentioned in the contract, such agent cannot recover from his principal losses or advances made on such contracts, unless he can show that it was the bona fide intention of his principal at the time of the making of the contract to ac-

tually deliver or to receive the property so sold at the maturity of the contract. This statute determines the public policy of the state with regard to these future contracts. We cannot consult our own views of the wisdom or propriety of this policy. Our province is to learn and enforce it. Beyond that it is unnecessary and unwise to pursue our inquiry. Vidal v. Girard's Ex'rs, 2 How. 127, 11 L. Ed. 205; U. S. v. Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 Fed. 69, 24 L. R. A. 73. We must apply the law of South Carolina. By that law a rule of public policy has been adopted under which contracts like this under discussion are condemned, except under certain conditions. These conditions must be enforced in this court.

There was a point strongly presented to the court, which greatly impressed itself. At the time the plaintiffs made each contract for the defendant and reported that fact to him, they gave formal notice in writing that it had been made under and subject to the rules and by-laws of the New York Cotton Exchange. The receipt of each notice was not denied. Upon such receipt, defendant did not reply, but his silence evidenced his assent. This, it was contended, estopped him from resorting to the defense now set up. But even under the rules of the New York Cotton Exchange, although the parties to the contract have the right the one to demand and the other to insist upon the acceptance of the subject-matter of the contract in kind, yet they may, without violation of this rule, forego this right, and intend not to exercise it, and to settle their difference in money. Besides this, the act goes behind the contract. Notwithstanding the contract, it makes the validity of the transaction depend on the bona fide intention of both parties. In the present case the defendant has sworn as to his intention,—that he at no time intended to deliver in kind; had no intention to deal in spot cotton, but speculated entirely on the profits of his contract. The counsel for the plaintiffs also insisted that all that this South Carolina statute effected was the adoption of a rule of evidence for the state of South Carolina, and for cases in her courts. But the courts of the United States, in actions at law, administer the rules of evidence as they find them in the courts of the state in which they are situate. Thompson v. Railroad Co., 6 Wall. 138, 18 L. Ed. 765. Section 721, Rev. St. U. S. (being the reproduction of section 34 of the judiciary act of 1789), has been uniformly construed as requiring the courts of the Union, in the trial of civil cases at common law, to observe as rules for decision the rules of evidence prescribed by the laws of the state in which such courts are held (Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 254, 255, 5 Sup. Ct. 119, 28 L. Ed. 708); the only exception being cases provided for by the statutes of the United States (Potter v. Bank, 102 U. S. 165, 26 L. Ed. 111). See Vance v. Campbell, 1 Black, 430, 17 L. Ed. 168.

For these reasons, the nonsuit was ordered.

UNITED STATES, to Use of THOMAS LAUGHLIN CO., v. MORGAN et al.

(Circuit Court, D. Maine. September 15, 1900.)

No. 30.

1. CONTRACTS FOR GOVERNMENT WORK—BONDS OF CONTRACTOR—CLAIMS SECURED.

The surety in a bond given by a contractor for government work, conditioned as required by Act Aug. 13, 1894 (28 Stat. 278), to secure the payment of all persons supplying the contractor "labor and materials in the prosecution of the work," is liable, in favor of one supplying materials, for the price of materials so furnished which actually entered into the work, together with the expense of transporting the same to the place where the work was being done, paid by the claimant, which may properly be considered as a part of the price; also for materials used in the construction of false works necessary in the performance of the contract; but he is not liable for repairs or equipment furnished for a steam launch owned and used by the contractor to transport supplies, nor for materials for the construction of dump cars, tracks, derricks, storage sheds for materials, or other similar structures or appliances used by the contractor, or tools for use by the workmen.

2. PAYMENTS—APPLICATION AS BETWEEN CREDITOR AND SURETY.

Where plaintiff supplied materials to a contractor for government work, for a part of which he was protected by the contractor's bond, and for part of which he was not, as between him and the surety on such bond payments made on account generally by the contractor should be applied to the payment for materials furnished and charged prior to the dates of such payments.

At Law.

Benjamin Thompson, for plaintiff.

Anthoine & Talbot, for defendant American Surety Co.

WEBB, District Judge. This is an action of debt on a bond executed by the defendant Morgan as principal and the American Surety Company of New York as surety for the performance of a contract by Morgan to supply materials and do work on fortifications to be constructed by the United States on Diamond Island, near Portland, Me. Trial by jury is waived, and the cause is submitted to the court; the right of exception to rulings of the court on questions of law during the trial, and in its conclusions upon the facts, being reserved.

Upon the hearing the court finds the following facts:

(1) The contract between Morgan and the United States is as follows:

Proposals for Building Gun Emplacements and Wharf on Great Diamond Island, Portland Harbor, Maine.

U. S. Engineer Office, 537 Congress Street.

Portland, Maine, January 21, 1897.

Sealed proposals for building gun emplacements and wharf on Great Diamond Island, Portland Harbor, Maine, will be received until 3 p. m. February 18, 1897, and then publicly opened. For information, apply to

A. N. Damrell, Lieut. Col. of Engineers.

Specifications.

General Instructions for Bidders.

1. The attention of bidders is specially invited to the acts of congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page

332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or territories or the District of Columbia.

2. "That all material purchased under the foregoing provisions of this act shall be of American manufacture, except in cases when, in the judgment of the secretary of war, it is to the manifest interest of the United States to make purchases in limited quantities abroad, which material shall be admitted free of duty." (Extract from fortification appropriation act, approved June 6, 1896.)

3. Maps of the localities may be seen at this office. Bidders, or their authorized agents, are expected to visit the place, and to make their own estimates of the facilities and difficulties attending the execution of the work, including the uncertainty of weather and all other contingencies.

4. No proposal will be considered unless accompanied by a guaranty in manner and form as directed in these instructions.

5. All bids and guaranties must be made in triplicate, upon printed forms to be obtained at this office.

6. The guaranty attached to each copy of the bid must be signed by two responsible guarantors, to be certified as good and sufficient guarantors by a judge or clerk of United States court, United States district attorney, United States commissioner, or judge or clerk of a state court of record, with the seal of said court attached.

7. A firm, as such, will not be accepted as surety, nor a partner for a copartner or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties must be citizens of the United States.

8. Each signature to guaranties and bonds shall have affixed to it an adhesive seal. All signatures to proposals, guaranties, contracts, and bonds should be written out in full, and each signature to guaranties, contracts, and bonds should be attested by at least one witness, and when practicable by a separate witness to each signature.

9. Each guarantor must justify in the sum of fifteen thousand dollars on bids for the emplacements, and three thousand dollars on bids for the wharf. The liability of the guarantors and bidder is determined by the act of March 3, 1883 (22 Statutes, 487, chap. 120), and is expressed in the guaranty attached to the bid.

10. A proposal by a person who affixes to his signature the word "President," "Secretary," "Agent," or other designation, without disclosing his principal, is the proposal of the individual. That by a corporation must be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who must file evidence of his authority to do so. That by a firm must be signed with the firm name, by a member thereof, or by its agent, giving the names of all members of the firm. Note, also, par. 16, infra.

11. The place of residence of every bidder, and post-office address, with county and state, must be given after his signature.

12. All prices must be written, as well as expressed in figures.

13. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person, must be securely attached to each copy of the proposal, and be considered as comprising a part of it. A written memoranda offered for inspection in connection with the drawings will also be considered a part and parcel of the proposal, and of any contract subsequently made in pursuance of it.

14. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

15. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

16. Any one signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

17. All blank spaces in the proposal and bond must be filled in, and no

change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions, limitations, or provisos attached to proposals will be liable to render them informal and cause their rejection.

18. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

19. If the bidder wishes to withdraw his proposal, he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and when reached it shall be handed to him or his authorized agent, unread.

20. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

21. No bids received after the time set for opening of proposals will be considered.

22. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for Gun Emplacements (or Wharf) on Great Diamond Island," and inclosed in another sealed envelope addressed to Lieut. Col. A. N. Damrell, Corps of Engineers, Portland, Maine. The outer envelope must be so indorsed as to indicate before being opened the particular work for which the bid is made.

23. The United States reserves the right to reject any and all bids, and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor, known as such to the engineer department.

24. The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved security, in an amount equal to about 33 per cent. of the amount covered by the contract, within ten (10) days after being notified of the acceptance of his proposal.

25. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in use by the engineer department of the army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

26. The sureties are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must jointly justify in double the amount of the penalty.

27. Bidders are invited to be present at the opening of the bids.

General Conditions.

28. A copy of this advertisement, specifications, and instructions will be attached to the contract, and form a part of it.

29. The contractor shall, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

30. Transfers of contracts, or of interests in contracts, are prohibited by law.

31. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should error or omission be discovered.

32. The decision of the engineer officer in charge as to quality and quantity shall be final.

33. It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to examine the drawings, and are invited to make the estimate of quantities for themselves.

34. Payments. The work is to be done under the following provisions of the act of June 6, 1896: "That contracts may be entered into under the direction of the secretary of war, for materials and work for construction of fortifications, to be paid for as appropriations may from time to time be made by law." It is expected that congress will, in accordance with the provisions in the act quoted in this paragraph, make appropriations at such

times as to permit of the uninterrupted payments for the work covered by these specifications, but the contractor must take his own risk in this, and it is distinctly understood and agreed that the United States is in no case to be made liable for damages in connection with this contract on account of delay in payments on same due to a lack of available funds. There are no funds available for the work at the date of these specifications, but, when appropriations are made available by law, payments for work done will be made monthly, to such extent as said appropriations will permit, after providing for contingent expenses; ten per centum being reserved from each payment until the completion of the contract.

35. Should the time for the completion of the contract be extended, all expenses for inspection and superintendence during the period of the extension, the same to be determined by the engineer officer in charge, shall be deducted from payments due or to become due to the contractor: provided, however, that if the party of the first part shall, in the exercise of his discretion, because of freshets, ice, or other force or violence of the elements, allow the contractor additional time, in writing, as provided for in the form of contract, there shall be no deduction for the expenses of inspection and superintendence for such additional time so allowed: provided, further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the engineer department of the army.

36. It is understood and agreed that all drawings for this battery are to be kept in possession by the engineer officer in charge, and that the contractor or his agents are not to have possession of copies of them. The lines of the work are to be laid out by the engineer, and the contractor or his agents will be allowed to consult the drawings in the presence of the engineer or his agents. It is further understood and agreed that, should the contractor or his agents give undue publicity to the plans to any other party or parties, such action may cause the annulment of the contract, so far as the United States is concerned, with the forfeiture of all money due or to become due under it. All rights of action, however, to recover for such breach of contract by the contractor, are reserved to the United States. Persons desiring to see the plans for this battery must be known to the engineer in charge, or be vouched for to him. The order of the work will be fixed by the engineer in charge.

Special Description.

37. Location and Character of Work. The location of the emplacements is at the northeasterly end of Great Diamond Island, Portland Harbor, Me., and about two miles northeasterly from the city of Portland. The site and adjacent territory is partly wooded. Solid ledge crops out in many places, and the depth of the overlying soil is supposed to average about 3 feet. The elevation of the site averages from 48 to 63 feet above mean low water. The mean tidal range is 9.1 feet. The average distance from the site to the high-water line is about 300 feet. The emplacements will consist of concrete, stone, earth, and metal work. All work connected therewith will conform to the lines and dimensions to be given by the engineer, and generally to the drawings exhibited, and to such others as may be furnished from time to time during construction. The drawings exhibited are intended merely to show the contractor the general character of the work, and it is understood and agreed that the engineer shall have the right to change or modify the plans as he may deem necessary, and that the contractor shall neither have nor make any claim against the United States on account of such changes.

38. Contract to Include. The contract will include all material and work, temporary and permanent, necessary to the entire completion of this project according to the true intent and meaning of these specifications. Within thirty days after the completion of the work, and before the final payment is made, all temporary buildings, unused material, rubbish, etc., must be removed or otherwise disposed of to the satisfaction of the engineer.

39. The Contractor to Furnish All Material and Work. The contractor, under his contract price, is to furnish and pay for all material and plant of every description, and everything entering into or connected with the tempo-

rary or permanent construction. He must also supply and pay for all work, skilled or otherwise, required to prepare and place the materials and complete the work according to drawings and specifications.

40. Excavation. The site of the battery and so much of the adjacent ground as will be needed for construction purposes will first be cleared of all woods. The soil will then be stripped from the site to be occupied by the emplacements and removed to some convenient place approved by the engineer, outside the limit of the work, to be used as hereinafter provided; the cost of any rehandling to be included in the price of the excavation. It must be deposited in piles so as to facilitate measurement. It will be estimated and paid for by the cubic yard, measured in the piles. The price paid shall include the removal of the woods. Excavation will then be made for magazines, passages, gun pits, and at such other places as the engineer may direct. The material is believed to be mostly solid rock, but the contractor should satisfy himself as to this, as no guaranty will be given as to the character of the material. All excavations shall conform to such lines, slopes, and grades as may be given by the engineer, and anything taken out beyond such given limits will not be paid for. All natural surfaces of the ledge, which are to form foundations for concrete, shall be well cleaned of all soil and vegetable matter, and shall be thoroughly cleaned before the concrete is deposited thereon. Should the excavated material prove suitable for broken stone for concrete and for quarry grout to be placed in concrete No. 1, for the body of the work, which question will be decided upon by the engineer officer in charge, the contractor may select from the excavated material suitable rock for that purpose. All the fine quarry refuse and other suitable material shall be deposited in front and on the sides of the concrete, as may be required, so as to form an embankment as shown on the plans, and shall be kept inside of the lines, slopes, and grades given; otherwise the excavated material shall be deposited at such places as the engineer may direct; but no material now upon the reservation shall be removed therefrom by the contractor. Rock excavation, including the removal and deposit of the excavated material, will be measured by cross sections of the place from which it was removed, and will be paid for by the cubic yard so measured. The top and side slopes of the embankment or parapet will be filled so as to give a subgrade about one foot below the finished grades, to receive one foot of top soil. The filling will be well rammed or compacted, and must be kept at a sufficient height above the subgrade to allow for shrinkage and settlement. The filling for a depth of 2 to 3 feet below the subgrade must be of selected material, free from stones larger than one inch. Should the fine quarry refuse and other material deposited in the embankment during the work of excavation prove insufficient in amount to bring the embankment up to the subgrade, the deficiency will be supplied by the contractor from areas designated by the engineer in charge. All material thus supplied will be measured in conveyances, and will be paid for by the cubic yard.

41. Soil Covering. The superior and other slopes of the earth parapet are to be covered with top soil to the depth of one foot, measured at right angles to the slope line. The soil first stripped from the site will be used for this purpose, and, if it does not yield a sufficient amount, an area of ground, to be designated by the engineer, will be stripped of the soil to supply the deficiency; and the material thus obtained will be measured in conveyances of known capacities, and will be paid for by the cubic yard as fill. The surface of the soil covering will be brought to exact line, slope, and grade, and neatly finished, and all weeds, roots, etc., raked from the surface.

42. Seeding Slopes. After the slopes have been covered with soil and finished as specified, they will be seeded (if practicable, just before rain) with grass seed of approved quality. The seed is to be carefully "brushed in" after sowing. The cost of seeding will be included in the price for fill.

43. Material. The contractor must keep on hand material in sufficient quantity that the work shall not be delayed for lack of proper material, and in order that opportunity may be had for the thorough test of any material in advance of its being needed for the work.

44. Cement—Portland Cement. The Portland cement must be of the best quality of hydraulic Portland cement, uniform in quality, finely ground, free

from lumps, and must be packed in strong, tight barrels, in such manner as to be secure from air and moisture. Each barrel must weigh not less than 375 pounds net. The cement must be slow-setting. At least 95 per cent. must pass through a sieve of 2,500 meshes to the square inch. Briquettes of neat cement kept one day in air must have a tensile strength of not less than 175 pounds to the section of 1 square inch; and kept one day in air and six days in water, not less than 400 pounds. The cement will be subjected to such other tests as the engineer may deem necessary.

American Natural Cement. The Natural cement is to be hydraulic, uniform in quality, fresh, dry, finely ground, free from lumps, and put up in good, sound barrels; each barrel of cement to weigh not less than 300 pounds net. A sample is to be submitted for test, and the entire quantity must be fully equal to the sample. The cement must not set within 20 minutes. Briquettes made of neat cement must have a tensile strength per square inch of not less than 60 pounds after exposure to the air for 24 hours; and kept 1 day in air and 6 in water, not less than 100 pounds; and kept 1 day in air and 27 in water, not less than 180 pounds. At least 90 per cent. must pass through a sieve of 2,500 meshes to the square inch. The cement will be subjected to such other tests as the engineer may deem necessary. All cement when opened must be perfectly dry and free from lumps or other imperfections. Each barrel must be labeled with the brand and name of the manufacturer, and each and every barrel may be tested by the engineer if deemed necessary. It must be stored in a dry place, and any deterioration from moisture or other cause will cause its rejection.

45. Sand. Sand must be clean, sharp, and silicious; free from dirt, organic matter, or other impurities. Bidders will submit samples of the sand they propose to furnish, labeled with name and location of deposit from which taken, and sand furnished must be equal in quality to the sample submitted.

46. Broken Stone. Broken stone for concrete will be of two sizes, the ordinary and granolithic. Both must be clean, hard, and durable, thoroughly screened, and otherwise subject to approval of the engineer. Ordinary stone must be of such sizes as to pass in any direction through a ring 2½ inches in diameter. The granolithic must pass through a ring ½ inch in diameter, and must be free from dust. Broken stone will also be used on roadways for blind drains, and at such other parts of the work as the engineer may require, and the quantities so used will be paid for in place by the cubic yard.

47. Quarry Grout. The stone must be of a kind satisfactory to the engineer as regards strength and durability. Granite rubble is preferred. If any other kind of stone is offered, a sample must accompany the bid, and the location of the quarry must be stated. Should the stone excavated from the site of the battery prove acceptable to the engineer officer in charge, as regards strength and durability, the contractor will be permitted to use the same for certain or all parts of the work, as the engineer may direct. Quarry grout will be paid for by the cubic yard, in place in the work.

48. Concrete. The concrete will be of three different kinds, viz.: No. 1 will be used for the body of the work, and will be made of one part (by volume) of natural cement, two parts sand, four parts of broken stone. Quarry grout, varying in size from 250 pounds to 2 tons, will be used in the body of the concrete, where directed. The proportion of this stone to concrete in which it is imbedded will probably be about one-third. No stone will be placed nearer than 1 foot to faces of walls nor to each other. No. 2 will be used for gun platforms, steps, inside walls, floors and roofs, etc., and will be composed of one part (by volume) of Portland cement, two parts sand, and four parts ordinary broken stone. No. 3 will be used on all outside surfaces to a depth of about six inches, and will be composed of one part (by volume) of Portland cement, 1½ parts sand, and two parts granolithic stone. Nos. 1 and 3 will be put in place at the same time, so as to secure a perfect bond. All concrete will be thoroughly mixed to the satisfaction of the engineer; the quantity of water used to be such that upon ramming the concrete in place the water will flush slightly to the surface. Concrete will not be dumped from a height greater than 5 feet. It will be laid immediately after being mixed, in layers not more than 6 inches in thickness, and thoroughly rammed with concrete rammers until the water flushes

to the surface. The top surface of each layer, before another is added, must be moistened, and have spread over it a thin layer of grout, made with cement and water. All the quarry grout placed into No. 1 concrete shall be evenly distributed, be free from dirt, shall be well moistened, and firmly bedded upon the concrete while still in a plastic state. The surfaces of the quarry grout must be clean and well moistened before the concrete is laid around them, and the concrete must be thoroughly rammed so as to insure a good bond. Concrete will be paid for by the cubic yard in place. The price paid for concrete will include the cost of all forms, shoring, etc., needed to hold the material in place. The concrete, when the forms are removed, must show smooth and true surfaces out of wind; and for this reason the surfaces of the frames in contact with the concrete must be planed, the joints closely fitted, and the frames set up to true lines in a substantial manner. Concrete placed by order of the engineer in charge, and damaged by the elements, will be removed, without costs to the United States, by the contractor, if so ordered by the engineer in charge, and, if so removed, will be paid for as concrete.

49. Brick Masonry. Brick masonry may be used for manholes, door jambs, and at such other places as the engineer in charge may direct. The best quality of hard-burned brick will be required, and will be laid moist on a full bed of Portland cement mortar, consisting of one part (by volume) of cement and two parts of sand. Brick masonry will be paid for by the thousand bricks laid.

50. Water. An artesian well, to supply fresh water, shall be sunk at a point to be designated by the engineer in charge, in close proximity to the work. The well will be sunk to such a depth as may be necessary to obtain satisfactory water in ample quantity, to be determined by the engineer. The well will be of 6 inches diameter, and will be fitted with a suitable steam pump, with boiler, of a capacity of not less than 2,000 gallons per hour. The pump and boiler must be of a design to be approved by the engineer, and must be established and housed. The contractor will have the use of this well and pump for supplying the necessary water for concrete, boilers, and other purposes, but must maintain it in serviceable condition. The price paid for the well will be per foot depth; and for the pump and boiler set up in place, a lump sum. The well will be provided with such lining as the engineer may deem necessary, the price to be included in the price of the well.

51. Frost. No concrete or other masonry work will be placed during freezing weather, except by special permission or direction of the engineer. The contractor must, at his own cost, protect the work from injury by frost or other causes.

52. Base Rings, Anchor Bolts, Anchor Plates, and Nuts. The base rings of the carriages will be furnished by the United States. If they arrive in time the contractor will be required to place them at his own cost, and under the direction and to the satisfaction of the engineer. There will be required for anchoring the base rings in the concrete 28 steel bolts 2½ inches in diameter and 103¾ inches long, and 24 steel bolts 2½ inches in diameter and 72¾ inches long, each provided with a cast-iron anchor plate and three wrought-iron nuts. Anchor bolts are to be of soft, open-hearth structural steel. Each finished bolt must be stamped with the melt number, and one extra bolt for test purposes must be supplied for each length, with the lot made from any particular melt; said bolt to be selected at random by the agent of the United States. The tensile strengths, limits of elasticity and ductility shall be determined by test pieces cut from the selected bolt. The bending test shall be made upon a test piece cut from the selected bolt and machined to one inch square in cross section. The material shall fulfill the following tests: Ultimate tensile strength from 56,000 to 62,000 pounds per square inch; elastic limit not less than one-half the ultimate strength; minimum elongation 25 per cent. in 8 inches; minimum reduction of area at fracture 50 per cent.; shall bend 180 degrees flat on itself without fracture on outside of bent portion. The finished bolts must be free from injurious seams, flaws, or cracks, and have a workmanlike finish. Anchor plates are to be of tough, gray cast iron, free from injurious cold-shorts or blowholes, cored and bev-

eled as shown on the drawings; the holes in the anchor plates to be roughly finished to fit the bolts, the surfaces under the head of the bolt affording a true bearing. Bottom nuts of anchor bolts to be square, and one-half thicker than U. S. standard, of best quality of wrought iron, hot pressed, smooth forged and not finished; top nuts to be hexagonal, hot pressed, and of same quality and finish as bottom nuts, conforming to the U. S. standard in size, except thickness of jam nuts. Detailed dimensions of bolts, plates, and nuts are to be obtained from the drawings. The approximate weight of bolts, plates, and nuts is 9,840 pounds.

53. Drainage. Vitrified sewer pipe of approved make will be laid as shown on the drawings. Brick catch-basins connecting with the main drain will be built as shown, and all openings provided with cast-iron rings and perforated covers, of approved design. All the work is to be done according to standard sewer practice. Whenever considered necessary by the engineer in charge, blind drains, consisting of either porous tiles or broken stone, will be laid to his satisfaction. The excavation, including back fill, of all trenches for drains, will be paid for by the cubic yard, as excavation. All ironwork will be paid for in place by the pound. Porous tiles and vitrified pipe, inclusive of elbows, etc., will be paid for in place by the foot. All concrete used in connection with the drainage system will be No. 2 concrete, and will be estimated and paid for.

54. Cast Iron. All cast iron for gearing, sheaves, machinery, basin heads, gratings, washers, etc., is to be the best quality of tough, gray cast iron, without the admixture of cinder iron or other inferior metal. Castings must conform to plans furnished, and must be free from scoria, blowholes, air bubbles, cold-shorts, cracks, or any other defects or imperfections, and of a quality satisfactory to the engineer. Each casting shall be well cleaned. Castings for drain covers, rims, gratings, etc., will be coated with coal pitch and oil, as is usually done with water pipe; the coating to be applied at a proper heat and in a proper manner before any rust sets in.

55. Material Deposited in Disregard of Instructions. Material of any kind deposited in disregard or absence of instructions shall, if required by the engineer, be removed by the contractor at his own cost.

56. Steel Beams. Steel I beams and channels will be used in the roofs of the rooms, passages, and magazines of the battery. They will be of standard make, subject to the approval of the engineer, and will be paid for in place by the pound. The price paid will include the setting, fitting, and the drilling of all bolt holes, and all fittings, as bolts, nuts, washers, rods, and connecting angles, used in securing them.

57. Trolleys. Steel trolley rails or tracks of approved design will be suitably fastened to the roofs of the magazines and passages, as shown on the plan. Each track will be provided with two trolleys of approved design, with differential blocks, all adapted to handling a load of 1,500 pounds. The trolleys and tracks will be paid for by the pound in place. The price paid will include the drilling of all bolt holes, and all fittings necessary to secure them in place ready for service.

58. Cranes. There will be required four simple crane masts of medium forged steel, and of shape and dimensions as shown on detailed plans. Each crane mast is to be fitted with a block of a hoisting capacity of 1,500 pounds, equal or superior to a Yale Weston triplex block, adjusted to a velocity ratio not less than 11 to 1. The price paid will be per crane, with block complete, and shall include all labor and materials necessary to secure the crane in place, ready for service.

59. Ammunition Lifts. Two lifts, each consisting of a pair of platforms counterbalancing each other, are to be arranged in the lift wells of each emplacement as shown. All details need not conform to those indicated, but commercial articles which are acceptable mechanical equivalents may be substituted. The ruling dimensions must be rigorously adhered to. The lifts shall be arranged to be worked either by hand or electric power. Each crab of the double lift will be so built that it can be worked by electric motor, but the motor is not to be furnished by the contractor. The lifts must be furnished and set up by a manufacturer skilled and experienced in this class

of work. A lump sum will be bid for each lift, complete, including guides, casings, and all accessories shown.

60. Doors. Doors will be fitted to the magazines, passages, and rooms. They will be made of steel, according to detailed plans. They will be hung with bronze hinges and gudgeons of approved quality, as shown on plan, and will be secured with bronze staples and locks of approved design. The doors will be paid for by the pound in place, including all fittings and fastenings. There will be required 6 double-leaf doors for 4-foot openings, 4 double-leaf doors for 6-foot openings, all hung with bronze hinges, and 4 shutter doors for 4-foot openings, secured by steel crossbars. Also 8 steel doors for openings in lift wells.

61. Signaling and Lightning. Brass speaking tubes 1¼ inches diameter will be laid on the lines indicated. All turns will be made on radii not less than two feet, and all ends must be cut square and true, and made up to a close contact within the couplings. The exposed ends will be threaded and capped. Tubes will be estimated and paid for by the running foot. At all places where the electric light circuit passes through walls, openings shall be provided as shown on plans. These openings shall be lined with cement pipe, 4 inches diameter, which will be paid for by the running foot in place.

62. Ladders. Iron ladders will be placed where shown in the drawings. They will be paid for by the ladder in place.

63. Railings. Iron railings three feet high will be placed where shown on the drawings. The railings are to be constructed in such a manner as to be removable. They will be paid for by the set in place.

64. Painting. All doors and other ironwork must be painted with three coats of red lead, or such other paint as the engineer in charge may direct; and, at the discretion of the engineer, all the interior walls will be whitewashed, or painted 2 coats. The cost will be included in the cost of the work to which applied.

65. Bricks. To be selected hard burnt, of uniform texture and color, and with true angles and faces.

66. Roadway. The roadway in the rear of the battery shall be finished with a 4-inch layer of ordinary broken stone, which must be well compacted and covered with 1 inch of sand. The roadbed shall conform to the grades as shown on the plan. The broken stone will be paid for by the cubic yard in place and the sand will be paid for as fill.

67. Purchases Made or Work Done not Specified. If at any time it should become necessary, in the opinion of the engineer officer in charge, to do any work or supply any materials not herein specified, for the proper completion of this contract, the contractor will be required to furnish the same at the current rates existing at the time of said purchase or work; the current rates to be determined by the engineer officer in charge.

68. Competent Men to be Employed. The contractor will be required to employ only skillful and competent men to do the work herein specified. If any person employed by the contractor on the work appears to the engineer to be incompetent or disorderly, or shall refuse or neglect to obey the directions of the engineer, his assistants or inspectors, in anything relating to the work, or shall perform his work in a manner contrary to the specifications, or attempt to secure the acceptance of any imperfect work or materials, such person shall be discharged immediately, on the request of the engineer, and shall not be again employed or allowed upon the work.

69. Inspection, Rejected Material, etc. The work will be conducted under the direction of the engineer in charge, who shall have the power to prescribe the order and manner of executing the same in all its parts; of inspecting and rejecting materials, work, and workmanship which in his judgment do not conform to the drawings that may be furnished from time to time, or to these specifications. And any material, work, or workmanship so rejected by him shall be kept out of or removed from the finished work, and no estimate or payment shall be made until such material, work, or workmanship be so removed.

70. When so required, rejected material shall be piled up in sight near the works, and kept there until the engineer gives permission to have it removed.

71. The United States will keep inspectors on the work, who will receive

instructions from the engineer. They will have power to object to any materials, work, or workmanship. Any material, work, or workmanship objected to by the inspectors shall be kept out of or removed from the finished work, unless in each particular case the objection of the inspectors shall be overruled by the engineer; and, unless the objection be so overruled, no estimate or payment shall be made until such material, work, or workmanship be so removed.

72. The engineer shall have the power to overrule or rescind any or all objections or decisions of the inspectors.

73. The decision of the United States engineer officer in charge of the work will be final and conclusive upon all matters relating to the work, and any doubt as to the meaning of these specifications, and any obscurity in the wording of them, will be explained by the engineer, who shall have the right to correct any errors or omissions in them, when such correction is necessary for the proper fulfillment of their intention.

74. The contractor shall commence operations within thirty days after notification of award of contract, and shall complete all work by December 1, 1897. The monthly rate of work shall not be less than $10,000 worth for any month, and the average rate must be such as to insure the completion of the work by the date specified.

75. Failure to Prosecute or Protect Works. If at any time the contractor shall refuse or fail to prosecute the work or provide for carrying on the same as directed by the engineer, or fail to properly protect any part of the work, permanent or temporary, the engineer shall have the power to employ men, to purchase or otherwise provide materials, tools, machinery, etc., and put the work in proper advancement or condition, and the entire cost of so doing shall be deducted from payments to be made under this contract.

76. Work at Night. It is expected that the work will be prosecuted with a good force during the day. The engineer may, however, permit the contractor to work at night. If work is carried on at night, the works must be well lighted for operations by the contractor at his own cost, by approved apparatus.

77. Stakes, Templates, etc. The lines and levels for the work having been given on the ground by the engineer or his agent, the contractor must conform and keep thereto; and all stakes and benches, after being placed, must be kept in position by the contractor without cost to the United States. The contractor shall furnish, at his own expense, the stakes required to lay off the work, as well as the labor required to set and place them. He will also be required to furnish, without cost to the United States, all templates, patterns, or platforms that may be required in any part of the work.

78. Drawings. In case the contractor, under any option granted in these specifications, or by competent authority during construction, proposes to substitute a mechanical equivalent for any detail shown in the drawings, he shall first submit to the engineer officer in charge a detail drawing of the same, with specifications for its construction, or a copy of a trade catalogue in which it is fully illustrated and described.

79. The contractor shall provide, without cost to the United States, a separate building, on a location selected by the United States engineer in charge, for use as an office for the United States inspector. It shall be weather-proof, tight, and well lighted, and provided with locks and keys.

80. Contractor and His Employés. The contractor must personally superintend the work during its progress, or have it personally superintended by a skilled and responsible representative; and the contractor must comply in every respect with the instructions of the engineer officer in charge, or his representative, as to the order and extent of the work to be done, and the rate of its progress.

81. Working Plant. The bidder must satisfy the United States of his ability to furnish the materials and perform the work for which he bids. He will state whether he has ever been engaged on any contract or other work under the United States; giving, if so, the location of the work, the year in which it was done, and the manner of its completion. The working plant of the contractor will be kept in good order, and be of such capacity as the engineer officer in charge shall deem necessary for the vigorous prosecution of the work.

82. Extra Work. No claims for extra work beyond that shown on the plans or ordered by the engineer at contract prices, or for delay of any kind, will be considered or paid unless an agreement therefor shall be made in writing, and approved by the chief of engineers, U. S. army. The contract prices are to be full compensation for furnishing all the materials, labor, and appliances necessary, and for doing all the work herein specified.

83. Risk of Work. The work, as it progresses, will be and remain at the risk of the contractor until it has been approved and accepted.

84. Wharf. The contractor will be required to build a wharf, consisting of a road and landing, on the northerly end of the island. The wharf will be built in accordance with the drawings exhibited in this office, and will be carried out to a depth of 8 feet at mean low water, or such other depth as the engineer may require. The exact site of the wharf will be determined by the engineer. The walls of the pier or landing up to the high-water level will be built of split granite dry rubble masonry in courses. No course shall have a rise less than 18 inches. Each course shall be built with alternate headers and stretchers as near as the shape of the stone will admit. No stone shall weigh less than 1 ton, and the bulk of the stones shall weigh from 2 to 5 tons each. All stones shall be firmly bedded, and must be laid so as to break joints with the course below. No pinners will be allowed. After completion of every 2 courses the interior space shall be filled with random stone to a height nearly level with the top of the finished course. The filling must be carefully placed so as to reduce the voids between the stones to a minimum. A course 3 feet high shall be built above high-water level, of rubble masonry laid in Portland cement mortar, of 1 part Portland hydraulic cement (by volume), 2 parts sand, and 2 parts gravel. A top or coping course of selected split granite of about 18 inches rise, consisting of stones not less than 3 feet wide and 4 feet long, with outside joints not larger than two inches, shall be laid in a bed of cement mortar, and the vertical joints well filled with mortar. The top of this course must be level. The filling between the walls, above high water, shall be of stone decreasing in size; and the top of the landing shall have a layer of 6 inches of broken stone, well compacted and leveled. Sound and straight oak fender piles of an average mean diameter of 10 inches shall be strongly and suitably fastened along the front face of the wharf, about 8 feet apart, and at each corner there shall be 3 fender piles. Near each corner of the wharf shall be placed a suitably finished belaying post of white oak, 12 inches in diameter, and 12 feet long. They shall project 4 feet above the top of the wharf, and be imbedded in the stone filling for a distance of 8 feet. The price for the fender piles and belaying posts will be per piece in place. A roadway 16 feet wide, connecting this pier with the shore, shall be built of random quarry grout, carefully dumped in place, having side slopes of 1 on 1. Stone which forms the slopes shall weigh from 1 ton upward, and shall be substantially placed to conform as nearly as practicable to the slope lines. The top shall be finished with stone decreasing in size so as to form a hard and smooth roadway. All the work shall be done to the satisfaction of the engineer in charge. The stone of the pier wall up to the level of high water will be paid for in place, by the ton of 2,000 pounds, measured by displacement on board of vessel. The 3-feet course above high-water level (laid in cement mortar) will be paid for by the cubic yard in place. The coping course will be paid for by the ton of 2,000 pounds. The filling of the pier, including the "finishing of the top" and the stone for the roadway, will be measured and paid for by the cubic yard in place. The prices bid shall include all the material, appliances, and labor required for the completion of the work as specified. The contractor will be allowed to use material from the reservation, when the same is suitable, to be taken from such places as shall be approved by the engineer officer in charge. The contractor for the emplacements will have the use of the wharf during the time of construction of the battery: provided, however, that he will repair all damages done during its use, to the satisfaction of the engineer.

85. Road from High-Water Level to the Battery. The contractor is required to build a roadway 16 feet wide, with an open ditch of dimensions shown on plan, from the site of the battery to high-water line, connecting

with the roadway to the wharf. Excavation for the road and ditch shall be made on lines and grades as given by the engineer in charge. The excavated material shall be deposited at such places as the engineer may direct. If placed in the wharf or roadway, it will not be again paid for as filling. The roadway shall be prepared with a covering of such material as will be suitable and available to insure a good, hard, smooth road. The contractors will be required to maintain all roads built under this contract in good and serviceable condition, and have them so at the completion of the work. The price bid for construction of this road and ditch shall be for excavation per cubic yard in place, and shall include the removal of the excavated material to the places designated by the engineer, and shall also include all the work necessary for the proper completion of the road and ditch. All work must be done to the satisfaction of the engineer in charge.

Form 19.

This agreement, entered into this second (2d) day of March, eighteen hundred and ninety-seven, between Lieut. Col. A. N. Damrell, corps of engineers, United States army, of the first part, and William Morgan, of Trenton, in the county of Mercer, state of New Jersey, of the second part, witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Lieut. Col. A. N. Damrell, for and in behalf of the United States of America, and the said William Morgan, do covenant and agree to and with each other as follows:

The party of the second part agrees to construct gun emplacements at Great Diamond Island, Portland Harbor, Maine, in the manner and according to the terms prescribed in the specifications hereunto attached, and to receive as full compensation for the same the following named prices, viz.:

(1) For earth excavation (including the removal of woods) thirty-four cents (34c.) per cubic yard.
(2) " rock excavation in place, one dollar and fifty cents ($1.50) per cubic yard.
(3) " earth fill, twenty-nine cents (29c.) per cubic yard.
(4) " bricks in place, eighteen dollars ($18.00) per thousand.
(5) " concrete No. 1 in place, three dollars and eighteen cents ($3.18) per cubic yard.
(6) " concrete No. 2 in place, five dollars and sixty-four cents ($5.64) per cubic yard.
(7) " concrete No. 3 in place, eight dollars ($8.00) per cubic yard.
(8) " quarry grout, seventy-five cents (75c.) per cubic yard.
(9) " broken stone (not in concrete) in place, seventy-five cents (75c.) per cubic yard.
(10) " steel beams, channels, etc., in place, three cents (3c.) per pound.
(11) " steel trolley rails and trolleys in place, ten cents (10c.) per pound.
(12) " brass tubing, fifty cents (50c.) per linear foot.
(13) " castings for drain covers, rings, etc., three cents (3c.) per pound.
(14) " 12-inch vitrified sewer pipe in place, fifty cents (50c.) per linear foot.
(15) " 8-inch vitrified sewer pipe in place, forty cents (40c.) per linear foot.
(16) " 4-inch vitrified sewer pipe in place, thirty cents (30c.) per linear foot.
(17) " 4-inch cement pipe in place, fifty cents (50c.) per linear foot.
(18) " steel bolts, with plates and nuts, in place, eight cents (8c.) per pound.
(19) " iron ladder in place, twenty-five dollars ($25.00) each.
(20) " iron railings in place, fifty dollars ($50.00) per set.
(21) " ammunition cranes, complete, in place, one hundred and twenty-five dollars ($125.00) per crane.
(22) " ammunition lifts, complete, in place, seven hundred and fifty dollars ($750.00) per lift.
(23) " doors in place, eight cents (8c.) per pound.
(24) " artesian well, including lining, seven dollars and fifty cents ($7.50) per foot depth.
(25) " steam pump and boiler, three hundred and fifty dollars ($350.00.)

And the party of the first part agrees to pay to the said party of the second part the above-named prices for constructing the said gun emplacements as

specified. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the government, and such as do not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final. The said William Morgan shall commence the work under this contract on or before the first (1st) day of April, eighteen hundred and ninety-seven (1897), and shall complete the same on or before the first (1st) day of December, eighteen hundred and ninety-seven (1897). If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall, in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the party of the first part, or his successor legally appointed, shall have power, with the sanction of the chief of engineers, to annul this contract, by giving notice in writing to that effect to the party (or parties, or either of them) of the second part; and, upon the giving of such notice, all money or reserved percentage due or to become due to the party or parties of the second part by reason of this contract shall be and become forfeited to the United States; and the party of the first part shall be thereupon authorized, if an immediate performance of the work or delivery of the materials be, in his opinion, required by the public exigency, to proceed to provide for the same by open purchase or contract, as prescribed in section 3709 of the Revised Statutes of the United States: provided, however, that if the party (or parties) of the second part shall, by freshets, ice, or other force or violence of the elements, and by no fault of his or their own, be prevented either from commencing or completing the work or delivering the materials at the time agreed upon in this contract, such additional time may, in writing, be allowed him or them for such commencement or completion as in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon. If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the secretary of war: provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished, under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the party of the first part or his successor, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the chief of engineers. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material. It is further understood and agreed that, in case of failure on the part of the party of the second part to complete this contract as specified and agreed upon, that all sums due and percentage retained shall thereby be forfeited to the United States, and that the said United States shall also have the right to recover any or all damages due to such failure in excess of the sums so forfeited, and also to recover from the party of the second part, as part of said damages, whatever sums may be expended by the party of the first part in completing the said contract, in

excess of the price herein stipulated to be paid to the party of the second part for completing the same. Payments shall be made to the said William Morgan as specified when the work contracted for shall have been delivered and accepted, reserving ten (10) per cent. from each payment until the whole work shall have been so delivered and accepted. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferror or the transferee, but all rights of action for any breach of this contract by said William Morgan are reserved to the United States. No member of or delegate to congress, nor any person belonging to or employed in the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom. This contract shall be subject to approval of the chief of engineers, U. S. A.

In witness whereof, the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

C. F. Porter, as to A. N. Damrell, Lieut. Colonel, Corps of Engineers.

Chas. R. Hall, as to William Morgan.

(Executed in Quintuplicate.)

Approved: March 16, 1897. A. MacKenzie, Acting Chief of Engineers.

I do solemnly swear that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ———; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ———, or any other person; and that the papers accompanying include all those relating to the said contract, as required by the statute in such case made and provided.

———————,

————, Corps of Engineers.

Subscribed and sworn to before me this ——— day of ———, 189—.

———————,

———————.

(2) Morgan, as principal, and the American Surety Company of New York, as surety, executed and delivered to the United States a bond of which a copy is as follows:

(No. 100. Form H.)

Contractor's Bond (Public Works).

(When Principal is an Individual or a Partnership, and Surety is a Corporation.)

Know all men by these presents, that we, William Morgan, as principal, and American Surety Company of New York, a corporation existing under the laws of the state of New York, as surety, are held and bound unto the United States of America in the penal sum of eighteen thousand (18,000) dollars, to the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents. The condition of this obligation is such that whereas the above-bounden William Morgan has on the second day of March, 1897, entered into a contract with the United States, represented by Lieut. Colonel A. N. Damrell, corps of engineers, U. S. army, for constructing gun emplacements at Great Diamond Island, Portland Harbor, Maine: Now, therefore, if the above-bounden William Morgan, his heirs, executors, or administrators, shall and will in all respects duly and fully observe and perform all and singular the covenants, conditions, and agreements in and by the said contract agreed and covenanted by said William Morgan to be observed and performed, according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term

of the same, and shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

In witness whereof, the parties hereto have executed this instrument this 2d day of March, 1897; the name and corporate seal of said surety being hereto affixed and these presents duly signed by its 2nd vice president & asst. secretary, pursuant to a resolution of its board of trustees, passed on the 12th day of April, 1893, a copy of the record of which is on file in the war department.

In presence of
Chas. R. Hall, as to William Morgan.
Howard Allison, as to American Surety Company of New York,
David B. Sickles, 2d Vice President.
Attest: George L. Holmes, Asst. Secretary.

(3) Morgan entered upon the performance of his contract aforesaid, and after a time abandoned its further prosecution.

(4) While prosecuting the work the plaintiff, the Thomas Laughlin Company, supplied to Morgan material to be used by him in his work, amounting to the sum of $4,389.86.

(5) It is admitted that of this sum the just price of iron beams, bolts, and washers which were required for the work contracted for, and which actually entered into the construction of the same, was $2,107.22 at Portland, and that interest on so much of the same as may be allowed by the court is to be computed from July 29, 1898, and added to the $2,107.22.

(6) The plaintiff also paid thirty dollars ($30), the expense in transporting from Portland to Diamond Island, where they were used under the contract, the beams, bolts, and washers referred to in finding numbered 5.

(7) The plaintiff also supplied to Morgan nails used in the construction of a pump house required by the contract, and the construction of the false works or wooden forms about which the concrete was placed in building the emplacements, so as to give the concrete form, amounting to $27.82 at fair price.

(8) Morgan had a steam launch expressly constructed for and used by him in transporting merchandise to be used in the work contracted for by him. For tackle, apparel, and furniture in fitting out and equipping this steam launch, the plaintiff performed work and furnished material to the fair amount of $15.29.

(9) For the construction of dump cars, skips; grout tubs, and conveyors constructed for the prosecution of said contract, and actually used at Diamond Island in making the excavations called for by the contract of Morgan, and conveying the materials excavated, the plaintiff demands $769.07. The rate of charges is fair and right, and the items of the charges are correct, and were actually furnished to the contractor.

(10) The plaintiff also furnished rails, spikes, and fish plates for the construction of a track upon which the cars were run to transport the earth and rock excavated preparatory to the building of the gun emplacements, and afterwards for conveying concrete for building the battery, to the amount of $312.65.

(11) He also furnished wire, steel, and rope of the value of $581.55

for setting up and sustaining derricks for hoisting out excavated material, and for putting concrete and materials into place in the excavations.

(12) Nails, screws, bolts, and similar articles used in the construction of sheds on the premises, for the storage of cement, and in making repairs to the plant used in the prosecution of the work specified in contract, were furnished to the value of $209.43.

(13) Plaintiff also supplied shovels, pickaxes, bars, hammers, and other similar tools used in the prosecution of the work called for in Morgan's contract, valued at $197.82.

(14) Also supplied $39.41 worth of shafting and pulleys necessary for the construction and operating a mixer with which to mix cement and other materials required in the prosecution of the work.

(15) Plaintiff also furnished to Morgan a smokestack to a boiler used in making steam with which to run the mixer, hose, or the conveying of steam and lubricators, $66.67; tin and tarred paper used in the construction of buildings on the premises for storage, $7.64; hogsheads for storing water to be used in prosecuting the work, and bags for the handling of coal, $13.55; and screws to drills used in excavating, $6.48.

(16) Also locks on buildings on the premises used by the contractor for storage of tools and cement were furnished by this plaintiff, for which the proper price is $1.30.

(17) Morgan paid to this plaintiff on account:

August 23, 1897	$300 00
September 24, 1897	300 00
November 15, 1897	200 00
A total of	$800 00

Neither Morgan nor the plaintiff made special appropriation of any portion of these payments to any specific items or class of items of the plaintiff's account. The items supplied by and charged in the account of the plaintiff prior to June 30, 1897, slightly exceeded the total of the above payments on account. None of those items are included in findings 1, 2, and 3, above stated; but they are all included in the above findings of fact, numbered 8 to 16, inclusive. Writ dated July 29, 1898.

The court's conclusions of law on the foregoing facts are as follows, viz.:

The rights and obligations of the parties, respectively, are based on the act of congress approved August 13, 1894 (28 Stat. 278, c. 280), pursuant to which act the bond was given.

(a) Under that statute and the bond aforesaid, the plaintiff is entitled to recover in this action the sum of $2,107.22, admitted to have actually entered into the construction of the work as stated in finding of fact aforesaid numbered 5, together with interest on said sum from July 29, 1898, to the date of judgment.

(b) The sum of $30 named in the above finding of fact numbered 6 is also legally recoverable in this action, with interest as in ruling "a"; this expense of freight being properly added to the price of the material at Portland.

(c) He should also recover the $27.82, under finding of fact numbered 7, and interest from June 29, 1898.

(d) The charges of $15.29 under finding No. 8 do not come within the provisions of the act of congress or of the bond, and are not recoverable in this action.

(e) The items under finding numbered 9 are not recoverable. They did not enter into the construction of the public work, but were in the nature of tools and appliances to be used by the contractor for his own convenience and advantage in his execution of his contract.

(f) The ruling of the court is that the plaintiff ca ot recover in this action the sum of $312.65 named in finding No. 10, this ruling being for the same reasons stated in "e."

(g) For the same reason the several items specified in finding 11 are not allowed; nor are those enumerated in finding 12 allowed; nor the charge of $197.82 for tools specially referred to in finding 13; nor $39.41 charged for shafting and pulleys under finding 14; and for the same reason the several items for articles named in finding 15 are disallowed.

(h) The contract called for a building to be used as an office by the engineers of the government, and for a lock on the same. For these the party furnishing material would have the right to proceed against the surety to recover any unpaid portion. But the evidence in this case does not show anything relating to this matter.

(j) The court rules that the payments found under the seventeenth finding of fact are to be applied to payment of the materials furnished and charged prior to the dates of the payments.

Summing up the conclusions of the court, the plaintiff should have judgment for $2,107.22 under finding of fact No. 5; for $30 under finding of fact No. 6; for $27.82 under finding of fact No. 7,—a total of $2,165.04,—with interest from June 29, 1898, to the date of judgment, with costs.

The court cannot properly enter judgment until certain proceedings in equity are disposed of, which proceedings relate to the same controversy in this case, and are pending in this court on the equity side.

UNITED STATES v. ECCLES et al.

(Circuit Court, D. Utah. November 4, 1901.)

No. 364.

1. PUBLIC LANDS—RIGHT OF RAILROAD COMPANY TO CUT TIMBER — CONSTRUCTION OF STATUTE.

Act March 3, 1875 (18 Stat. 482), granting right of way for railroads over the public lands, which confers on a company so constructing its road, "which shall have filed with the secretary of the interior a copy of it : articles of incorporation and due proofs of its organization under the same," the right to take timber and other materials for the construction of its road from public lands adjacent to its line, confers no right to cut timber for such purpose prior to the filing of the required papers, nor does the subsequent use in the construction of the road of timber so cut render the cutting lawful, or devest the title of the United States

thereto, since the act does not give the right to appropriate timber already cut.

2. SAME—ACTION FOR UNLAWFUL CUTTING OF TIMBER—DEFENSES.
Where defendants, in an action by the United States to recover the value of timber cut from public lands, defend on the ground that the timber was taken for use in the construction of a railroad, as authorized by Act March 3, 1875, the burden rests on them to bring themselves within the provisions of such act; and when it appears that at least a part of the timber was cut before the railroad company had filed its articles and proof of organization with the secretary of the interior, so as to be entitled to take timber for its use, it is incumbent on the defendants to show what part, if any, was cut after that time.

3. SAME—MEASURE OF DAMAGES.
Defendants, who unlawfully cut and removed timber from public lands, but believing, in good faith, that they had the lawful right to cut the same, although negligent, are liable only for its value as it stood in the trees.

At Law.

C. O. Whittemore, U. S. Dist. Atty.

L. R. Rogers, for defendants.

MARSHALL, District Judge. This action was brought by the United States to recover damages for the taking of certain timber from public land by defendants. The taking of the timber was admitted, and the defendants claimed that it was taken from the land adjacent to the line of the St. Anthony Railroad, and assert the right to so take it for the original construction of said railroad. A jury was waived, and a trial had before the court upon a stipulation of facts and oral testimony. It was stipulated that the defendants took from the public land of the United States, between July 20, 1899, and November 4, 1899, timber amounting to 935,000 feet of lumber, board measure, which was worth $2.50 per thousand feet standing in the trees; that the St. Anthony Railroad Company filed its articles of incorporation and proofs of its organization thereunder with the secretary of the interior on September 30, 1899; and that the lumber obtained from this timber was actually used in the original construction of the railroad of said company. I do not find it necessary to decide whether or not the land from which this timber was taken was in fact adjacent to the line of the railroad.

Two questions only need to be considered: (1) Does the act of March 3, 1875, give any right to the timber taken prior to the filing of the articles of incorporation and proofs of organization of the railroad company? (2) Should the damages be measured by the value of the timber before such value was enhanced by the acts of the defendants, or by the value after such increase and at the time when the lumber was delivered to the railroad company?

The defendants attempt to justify the taking of the timber under the act of March 3, 1875, which grants to certain railroad companies "the right to take from the public lands adjacent to the line of said road material, earth, stone and timber necessary for the construction of said railroad." 18 Stat. 482. This grant is limited to any railroad company "which shall have filed with the secretary of the interior a copy of its articles of incorporation and due proofs of its organization

under the same." The statute is an offer on the part of the government to induce the building of railroads through the public lands of the United States. It points out the method of acceptance. The grant is only to the railroad companies that communicate to the United States their acceptance of the offer by filing the prescribed papers with the secretary of the interior. Until this is done the railroad has no right to cut timber upon the public lands, and therefore can confer no such right upon others.

In this case the taking of at least a part of the timber preceded the filing of the required papers. Nor did the use of the lumber by the railroad company after it had filed its articles and proofs of its organization with the secretary of the interior purge the act of the defendants of its wrongful character. When the defendants took the timber their act was unlawful. The timber remained the property of the United States. This was also true as to the lumber manufactured from it. The title of the United States thereto could only be devested with their consent. The statute does not give to a railroad company the right to appropriate any timber already cut, or any manufactured lumber, the property of the United States, but only to go on the public land adjacent to the line of its road, and take timber in its natural state. This does not result from any strict construction of the grant, but is its evident meaning. The decision of the circuit court of appeals of this circuit in U. S. v. Price Trading Co., 109 Fed. 239–243, is controlling on this point.

It therefore follows that as to all of the timber cut prior to the 30th day of September, 1899, the date of the filing with the secretary of the interior of the articles of incorporation of the railroad company and the requisite proofs of its organization, the defendants could gain no right under the grant to the railroad. But there is no way, under the stipulation of facts and the evidence in this case, to discriminate between the timber cut before September 30, 1899, and that, if any, cut thereafter. The stipulation is that it was all cut and carried away between July 20 and November 4, 1899, and it may well be that all was in fact taken before September 30, 1899.

The defendants are seeking to justify the taking of this timber. The burden is on them to show that an act prima facie a wrongful invasion of the plaintiffs' right of property was in fact authorized by the statute in question. The means of proof were in their power. It is only to the extent that it is proven that the timber was taken after September 30, 1899, that their defense can be maintained. The evidence fails to show that any of it was so taken. It follows that the plaintiffs are entitled to a judgment for the entire amount of timber taken.

The question as to the measure of damage remains. The defendant Spencer, as between the two defendants, appears to have taken special charge of this business. He testifies that he consulted the attorney for the railroad company, and was told that the company had or would file the necessary papers with the secretary of the interior, and that the defendants would be entitled to cut the timber in question. He made no further inquiry, but believed that he had the right to take the timber. The circumstances surrounding the trans-

action all tend to show the good faith of the defendants. It may be that they were negligent in not ascertaining before commencing to take the timber that the papers had actually been filed. But negligence is not the same thing as bad faith, although some evidence of it.

In most cases of inadvertent trespass there is found negligence, but this does not prevent the operation of the rule that the value added to the property of another by the inadvertent act of the trespasser, in the belief that he was lawfully exercising a right, shall be excluded in the estimate of damages for the conversion. Durant Min. Co. v. Percy Consol. Min. Co., 35 C. C. A. 252, 93 Fed. 166–168.

I am of the opinion that the plaintiffs are only entitled to recover the value of the timber standing in the trees at the time of the taking, and before the acts of the defendants had increased its value, together with legal interest from November 4, 1899, as damages for the time during which plaintiffs have been deprived of their property. Mining Co. v. Old, 38 C. C. A. 89, 97 Fed. 150.

Judgment will be entered for the plaintiffs for $2,362.50 principal, and $378 interest, making a total of $2,740.50.

WILBUR v. WATSON et al.

(District Court, D. Rhode Island. November 7, 1901.)

No. 1,095.

BANKRUPTCY—ALLOWANCE OF COMPENSATION TO ASSIGNEE.

Assignees under a general assignment, which was itself an act of bankruptcy and constructively fraudulent and in violation of the bankruptcy act, are not entitled to compensation from the estate for their services rendered prior to the filing of petition in bankruptcy against the assignor, and they cannot retain any sum as such compensation from the proceeds of the property in their hands.

In Bankruptcy.

Cooke & Angell, for trustee.

BROWN, District Judge. The sole question in this case is whether the assignees under a general assignment, which was itself an act of bankruptcy, are entitled, before paying over to the trustee the proceeds of the sale of the assigned property, to deduct any sum as compensation for their services rendered prior to the filing of the petition in bankruptcy. Such an assignment was constructively fraudulent and in violation of the bankruptcy act, in that it provided for a different mode of administration of the effects of the insolvent debtor than that contemplated by the act. This was the view of the circuit court of appeals of the Eighth circuit in Davis v. Bohle, 1 Am. Bankr. R. 412, 92 Fed. 325. See, also, Bryan v. Bernheimer, 181 U. S. 188, 192, 193, 21 Sup. Ct. 557, 45 L. Ed. 814; West Co. v. Lea, 174 U. S. 590, 596, 19 Sup. Ct. 836, 43 L. Ed. 1098; In re Gutwillig (D. C.) 90 Fed. 475, 478, 480, affirmed in 34 C. C. A. 377, 92 Fed. 337.

In Stearns v. Flick, 4 Am. Bankr. R. 723, 727, 103 Fed. 919, 921, it was said:

"No equity can arise, therefore, in favor of the assignee, which would entitle him to compensation for services rendered * * * in an attempt to defeat the operation of the bankrupt law."

Nor should the generally recognized rule that an assignee is not entitled to compensation for services as assignee be weakened or evaded by allowing compensation for services under the guise of a compensation for custody prior to the filing of the petition in bankruptcy. In Re Peter Paul Book Co., 5 Am. Bankr. R. 105, 104 Fed. 786, it was said:

"There is no authority at law for granting this allowance. Section 64b, subsec. 1, expressly prohibits it. In re Giblom, 2 Nat. Bankr. N. 60. The conclusion is reached that an allowance to an assignee under a general assignment for services rendered as custodian of the property prior to the filing of the petition in bankruptcy, even though it have the appearance of being rendered for the benefit of the general creditors, is not permitted by the bankruptcy act, and ought not to be allowed."

The assignees were not assignees for value, but simply agents of the assignor for the distribution of the proceeds of the property among the creditors. Bryan v. Bernheimer, 181 U. S. 188, 192, 193, 21 Sup. Ct. 557, 45 L. Ed. 814. Their custody was not for the purpose of preserving the estate for administration under the bankruptcy law. On the contrary, their custody was to enable them to act contrary to the policy of that law. Having voluntarily become parties to an arrangement which was contrary to the policy of the bankruptcy law, and assuming to carry out the directions of the assignor, I fail to see any reason for holding that they have acquired any standing in equity, or that there is any merit in their claim for compensation for what has possibly resulted in some benefit to the creditors. It would be, in my opinion, a substantial violation of the spirit and letter of the bankruptcy act to allow the present claims for compensation. The act provides that a trustee, for the performance of all that these assignees have done, as well as other services, shall receive the sum of $5, and 3 per centum on the sums to be paid as dividends and commissions. The amounts claimed by the assignees exceed this many times. It is contrary to the policy of the bankruptcy act that an insolvent should select the persons who shall administer the estate for the benefit of the creditors, or that he should fix their compensation. If we are to allow for the services of assignees, this will tend to encourage the making of assignments, instead of direct applications to the bankruptcy courts. Furthermore, the present trustee, under the law, is entitled to a fixed compensation provided by the act. This compensation covers all his services in reducing to money the property of the estate. To pay an assignee for doing the same thing would be to make the creditors pay double for the performance of a portion of the services. While there are a number of decisions of referees and of courts which give, perhaps, some countenance to the contention that what an assignee has done for the benefit of the creditors should be paid for by the estate, it seems to me that the broader view is that one who has voluntarily become a party to an arrangement which is contrary to the policy of

congress in enacting a uniform bankruptcy law should rather lose his time and effort, than that the door should be opened to evasions of the bankruptcy act. In the present case there is no question but that the assignees have acted honestly and intelligently, and it is probable that the estate has profited by their experience and efforts; but this case must be decided, not upon the special circumstances, but as a matter of general law.

The claim of the assignees for compensation for services prior to the filing of the petition is disallowed, and judgment may be entered for the trustee for the full amount in the hands of the assignees.

In re IVES et al.

(District Court, E. D. Michigan. August 1, 1901.)

BANKRUPTCY—JURISDICTION OF COURT—SETTING ASIDE ADJUDICATION.

The settled rule that federal courts have no power to set aside their judgments, decrees, or orders unless steps to that end are taken during the term at which such judgment, decree, or order was entered is applicable to bankruptcy proceedings, except in case of an application for the revocation of a discharge, which is expressly provided for by Bankr. Act 1898, § 15; and a court of bankruptcy is without jurisdiction to entertain a petition to set aside an adjudication which was not filed until several terms had intervened since the adjudication was made.

In Bankruptcy. On petition of Adolph Feldheim and Leo M. Butzel to dismiss and vacate the adjudication made herein.

Elliott G. Stevenson and Leo M. Butzel, for petitioners.

Henry A. Harmon and T. A. E. Weadock, for respondents.

SWAN, District Judge. The adjudication of bankruptcy in this cause was made September 11, 1900, upon voluntary petition duly verified and signed by Butler Ives and Albert Ives, Jr., and by Albert by his attorney in fact, Mary Ives Cowlan. Albert Ives died March 20, 1901. The petition in this cause was filed June 7, 1901, and alleges that at the time of the adjudication Albert Ives, one of the bankrupts, was incompetent to transact business, and had been for some time before the filing of the petition; that his name was signed thereto by a person who represented herself to be the attorney in fact of said Albert Ives; that said Albert Ives never executed any power of attorney, or conferred any authority upon any person to sign said petition; and that a fraud was committed upon the court in applying for and obtaining an adjudication of the firm of Albert Ives & Sons, which said firm was composed of said bankrupts. The petitioners, Feldheim and Butzel, represent that they are creditors of said bankrupts, and were such prior to and at the time of the adjudication had in this cause, and that they have a right to intervene for their interest, and are entitled to have said adjudication vacated and set aside. To this petition the respondents, Henry A. Harmon, trustee of the bankrupts, and Albert Ives, Jr., administrator of the estate of Albert Ives, have demurred, and have filed a plea to the allegation of the petition denying the existence of the power of attor-

ney. The verified plea sets forth the original power of attorney given by said Albert Ives, which in express terms authorizes the signature by the attorney in fact of any petition which might be filed in behalf of said firm of Albert Ives & Sons in proceedings in bankruptcy.

The first ground of the demurrer challenges the jurisdiction of the court to grant the relief prayed, because several terms of the district court had elapsed before the filing of said petition. This ground of the demurrer is well taken. In Phillips v. Negley, 117 U. S. 673, 6 Sup. Ct. 904, 29 L. Ed. 1014, Mr. Justice Miller, who delivered the opinion of the court, says:

"It is a general rule of the law that all the judgments, decrees, or other orders of the court, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court; but it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them. * * * So strongly has this principle been upheld by this court, that, while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered; and this is placed upon ground that the case has passed beyond the control of the court."

In Bank v. Moss, 6 How. 31, 12 L. Ed. 331, it was held that the circuit court could not set aside a judgment of a former term on motion, even for want of jurisdiction. See, also, U. S. v. The Glamorgan, 2 Curt. 236, Fed. Cas. No. 15,214.

The present bankruptcy act expressly authorizes the revocation of a discharge in bankruptcy for fraud, but it contains no provision which modifies in any degree the rule of law stated in the cases cited, which rule is applicable to all federal courts in all branches of jurisprudence which they administer. The express authority to revoke a discharge for fraud, and the absence of any provision authorizing the court to vacate an adjudication after the lapse of the term, is a strong implication that it was not the intention of the bankruptcy act to vest the courts of bankruptcy with any power to disturb its decrees after the lapse of the term in any other than the excepted case mentioned.

Without passing seriatim upon the other grounds of demurrer, it is sufficient to say that, on the face of the petition, the petitioners are chargeable with laches in seeking the relief now asked. It appears from the petition that petitioners knew of the adjudication entered herein as early as October 11, 1900 (that is, at the same term at which the adjudication was made), and that Henry A. Harmon had been appointed trustee of said bankrupts. They might then have sought the relief now asked, and it would have been competent for the court, for cause shown, to have entertained their petition, if filed in that term, or at the next term on leave granted during the June term. No excuse is shown for the delay, but the petitioners appear to have postponed action without necessity, and with full knowledge of the rights asserted under the adjudication. By Rev. St. U. S. § 572, it is enacted that the terms of the district court of the

United States for this district shall be held on the first Tuesdays of March, June, and November. Two terms have elapsed since the adjudication. The matters alleged in the petition as the basis of the relief prayed may all be conceded, yet the adjudication is not a nullity, but remains in full force and effect, and is conclusive on all parties until reversed. McCormick v. Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. Ed. 202; Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463. The voluntary petition on which the adjudication was had contained the necessary jurisdictional averments to sustain the adjudication. No application was made at the June term to vacate that judgment. It is therefore beyond the power of the court to grant the relief asked. Bank v. Sheffey, 140 U. S. 451, 11 Sup. Ct. 755, 35 L. Ed. 493.

The petition avers, and it was also conceded on the hearing, that Albert Ives, the senior member of the bankrupt firm, died March 20, 1901. His administrator joins in the demurrer to the petition, and objects to the relief it seeks. It may be suggested, without discussion at length, that the right to vacate the adjudication for any infirmity was personal to Albert Ives, the deceased, during his lifetime, and at his death his administrator succeeded to that right. As he has not asserted it, but objects to its exercise, and insists that the adjudication should not be disturbed, it does not seem competent for a creditor of the bankrupt to attack the proceedings at this time. Under section 5, subd. "c," of the bankruptcy act, "The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners, and of the administration of the partnership and individual property." The petition is not aided by subdivision "h" of section 5, as all the partners have been adjudged bankrupt, and that judgment, for the reasons stated, is not assailable. It fixed the status of the firm. In re Meyer, 39 C. C. A. 368, 98 Fed. 976.

It was candidly admitted on the hearing that the purpose and object of the petition in asking that the adjudication be vacated and set aside is to validate the preference given to Feldheim by the bankrupts within four months before the filing of the petition in bankruptcy under the form of a loan to the bankrupts, but which respondents claim was a mere device to convert the bankrupts' indebtedness for moneys standing to the credit of Feldheim as a depositor on the books of the bankrupts at the time of the filing of the petition into a preferred debt. If the adjudication of September 11, 1900, should be vacated and a new adjudication entered, the lapse of time would validate the claim of Feldheim and Butzel as preferred creditors. There is no equity in the petition, and no power in the court to grant it if there were.

The demurrer is sustained, and the petition dismissed, with costs.

In re McHARRY.

McHARRY v. KINGMAN & CO.

(Circuit Court of Appeals, Seventh Circuit. November 5, 1901.)

No. 795.

BANKRUPTCY—ESTATE PASSING TO TRUSTEE—VESTED REMAINDER.

Where lands were devised to a life tenant, with remainder in fee to his children or their descendants, if any should survive him, a son of such life tenant took a vested remainder, both under the general law and under the law of Illinois, which he could transfer, and which passed to his trustee on his bankruptcy during the lifetime of his father.

Petition for Review and Revision of Order of the District Court of the United States for the Southern District of Illinois, in Bankruptcy.

On petition of Homer C. McHarry to review and revise an order declaring a remainder in realty an asset of his estate.

John F. Armstrong, for petitioner.

Arthur Keithley, for respondent.

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

GROSSCUP, Circuit Judge. Upon the petition of Kingman & Company, a corporation under the laws of Illinois and a creditor of Homer C. McHarry, Bankrupt, the District Court, affirming a like finding of the referee in bankruptcy, ordered the bankrupt to schedule, as part of the assets of the bankrupt estate, his one-fifth interest in certain real estate devised under the Will of the bankrupt's grandfather, Hugh McHarry, to Hugh A. McHarry, father of the bankrupt, during the term of his natural life, with remainder in fee, on the death of said Hugh A. McHarry, to his children, share and share alike.

The principal clause of the Will, omitting the description, is as follows:

"I give, devise and bequeath unto my son, Hugh A. McHarry, for and during the term of his natural life, the * * * (description), with the remainder in fee in all of the lots and lands in this clause mentioned, on the death of the said Hugh A. McHarry, to his children, share and share alike; the descendant of a deceased child to take the share his, her or their parent would be entitled to if living; but should the said Hugh A. McHarry die without leaving any child or children, or the descendant of any child or children surviving him, then in that event, it is my wish and will, and I hereby give, devise and bequeath to my children, Homer C. McHarry, William A. McHarry, Margaret E. Donaldson, Hugh A. McHarry and Josie R. Dexter, the said lands and lots in this clause mentioned in fee simple share and share alike. The heirs of each of my children to take the share which such child would be entitled to if living."

At the time of Homer McHarry's adjudication as a bankrupt Hugh McHarry, the testator, was dead, but Hugh A. McHarry, father of the bankrupt, and owner of the life estate, was still living and in possession of the life estate.

Section 70 of the Bankrupt Act vests the Trustee in bankruptcy, by operation of law, with the title of the bankrupt, as of the date of

adjudication, of all property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process. The question, therefore, presented by this case is: Did the will of Hugh McHarry, above quoted from, vest Homer McHarry, the bankrupt, on the death of the testator, with an estate that could by any means have been transferred by him?

We are of the opinion that it did. The estate taken by Homer McHarry on the death of the testator was a vested remainder. It embraced a fixed interest in particular pieces of real estate, and it was in favor of a person certain and definite, to be enjoyed in future by him and his descendants. The only contingency presented was whether the devisee would be alive when the intervening life estate expired. Such a contingency does not go to the right of enjoyment, but only to the actuality of enjoyment. It is not an uncertainty as to the estate conveyed, but only as to whether the remainder-man will live to take possession of it. Such uncertainty does not make the estate a contingent remainder.

The rule is laid down by Kent as follows:

"It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. The present capacity of taking effect in possession—if the possession were to become vacant—distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues." 4 Kent, Comm. 282.

The Supreme Court of Massachusetts thus states the rule:

"Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests in interest as soon as the remainder-man is in esse and ascertained." Blanchard v. Blanchard, 1 Allen, 227.

The adjudications in Illinois are to the same effect. In Scofield v. Olcott, 120 Ill. 371, 11 N. E. 351, the rule is stated as follows:

"Every remainder-man may die without issue before the death of the tenant for life. It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty, that the possession will become vacant before the estate, limited in remainder, determines, that distinguishes a vested from a contingent remainder. When the event, on which the preceding estate is limited, must happen, and when it also may happen before the expiration of the estate limited in remainder, that remainder is vested."

See also, Kellett v. Shepard, 139 Ill. 433, 28 N. E. 751, 34 N. E. 254; Ducker v. Burnham, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; Harvard College v. Balch, 171 Ill. 275, 49 N. E. 543; and McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015.

Were the question one of general law, we would have come to the conclusion announced; but being one of local law, in which we are required to follow the rule laid down by the court of last resort of the state where the property is situated, we have found no difficulty in disposing of the question according to the adjudications of the Supreme Court of Illinois.

The order below is affirmed.

In re DUNDAS.

(District Court, D. Vermont. November 6, 1901.)

BANKRUPTCY—PREFERENCE—RIGHT TO RETAIN.

An insolvent, within four months prior to his bankruptcy, borrowed $100 from one to whom he previously owed $75, and gave him an order on a third person for the entire amount, which order was accepted, and after the debtor's bankruptcy was paid. *Held* that, upon a finding that the creditor had at the time no reason to believe the debtor insolvent, he was entitled to the money so paid; the $100 being the proceeds of a security taken for a present consideration, and the $75 a preference, which, because innocently received, the creditor could not be compelled to surrender.

In Bankruptcy. Upon review of decision of referee.

Frank J. Martin, for claimant.

H. William Scott and William Wishart, for trustee.

WHEELER, District Judge. The bankrupt owed Dunquid, the claimant, $75, and well within the four months prior to the petition borrowed $100 more, and gave him an order on a man in Ohio for $175, which was accepted before the adjudication, and has been paid since, and the proceeds are awaiting a decision upon the respective rights of the trustee and claimant to them.

As to the $75, the order was a preference, within section 60a of the bankrupt act; and as to the $100, it was accepted in good faith, and for a present consideration, within section 67d. Preferences are made recoverable back, by section 67c, only when the person receiving them has reasonable cause to believe a preference is intended. Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171. The referee to whom the matter was referred has reported that the claimant did not know, nor have reasonable cause to believe, that the bankrupt was insolvent at the time of taking the order. The taking of the order was the receiving of the security. The acceptance became a new obligation from the acceptor, which the proceedings in bankruptcy would not affect.

This is not a question of proving a debt without surrendering the preference, which depends upon a different clause of section 60. Speaking of the effect of the reasonable cause to believe of clause b of section 60, Mr. Justice McKenna, in Pirie v. Trust Co., 182 U. S. 438, 447, 21 Sup. Ct. 906, 909, 45 L. Ed. 1171, 1177, said:

"What a preference is, is plain. What the effect of it is, if taken under the conditions mentioned, is equally plain. So taken, it may be recovered back. If not so taken, it may be kept or surrendered. His election is between keeping the preference and surrendering it. That is the favor of the law to his innocence."

Upon these principles and the findings of the referee, the claimant is entitled to keep this preference.

Report accepted. Proceeds of order decreed to claimant.

In re BARKER et al.

(District Court, N. D. Iowa, C. D. November 9, 1901.)

BANKRUPTCY—COMPENSATION OF REFEREES AND TRUSTEES.

A referee in bankruptcy, under Bankr. Act 1898, cannot charge a per diem for his services in presiding at the creditors' meeting, or in hearing the bankrupt's examination or evidence upon claims, nor for the labor of making out the dividend sheet; all such services being within those required by sections 38 and 39, and which are to be compensated by the fee of $10, provided for by section 40. Nor is either a referee or trustee, under sections 40 and 48, entitled to commissions, except on sums available for payment of "dividends and commissions."

In Bankruptcy. On record certified by referee.

SHIRAS, District Judge. This case is before the court upon the matter of the referee's account, it appearing therein that he has charged at the rate of $5 per day for his services when engaged in hearing evidence upon claims filed against the estate, and in hearing the examination of the bankrupt, and also $10 for presiding at the first meeting of the creditors. These services, as well as the labor in preparing the dividend sheet, for which a charge of $2.50 is made, are all included within the services of the referee, within the meaning of that term as used in section 40 of the bankruptcy act, which declares that referees shall receive as full compensation for their services, payable after they are rendered, a fee of $10. Sections 38 and 39 of the act point out that duties pertaining to the referees and the services rendered in this case, in passing upon claims filed and in preparing the dividend sheet, are clearly within the scope of the services intended to be included within the named compensation of $10. There is no question that this allowance is but a miserly compensation for the time and labor involved upon part of the referee, but such is the law, and it must be obeyed. The fee of $10 charged for services on July 15th, and $5 charged for services on July 22d, 23d, 26th, and 27th, and in preparing the dividend sheet,—making $32.50 in all,—must be disallowed.

It further appears that the referee and the trustee have charged and been paid commissions on the gross sum of money coming into their hands of the trustee, instead of limiting the commission to the sums available for payment as dividends and commissions, according to the express provisions of sections 40 and 48 of the act. The amount of the overcharge by the referee is $1.37 and by the trustee is $4.03. These amounts, making in all $37.90, must be divided among the creditors in the proportions shown on the dividend sheet already prepared. Upon this being done, the accounts will be approved, and the estate will be closed.

In re HINSDALE.

(District Court, D. Vermont. October 31, 1901.)

BANKRUPTCY—TITLE OF TRUSTEE—PROPERTY SOLD TO BANKRUPT CONDITIONALLY.

V. S. § 2290, which provides that no lien reserved on personal property sold conditionally, and which passes into the hands of the conditional purchaser, shall be valid "against attaching creditors or subsequent purchasers without notice" unless a memorandum is signed by the purchaser and filed, does not enlarge the rights of a trustee in bankruptcy in respect to goods which had been furnished to the bankrupt, to be paid for as sold by him, or to become his property when paid for, and which had not been paid for; and since the title to such goods did not pass at common law under such circumstances, the sellers have the right to retake the same.

In Bankruptcy.

Frank S. Williams, for petitioners.

Matthew M. Gordon and George A. Swasey, for trustee.

WHEELER, District Judge. The Berry Hall Company and the Walker Grocery Company put groceries into the store of the bankrupt for sale by him; those of the former to be paid for as sold, those of the latter to become his when paid for. They have filed petitions for the goods unsold, which have been heard. The title to goods does not pass under either of these circumstances at common law. Am. & Eng. Enc. Law (2d Ed.) 436, 798, and note; Manufacturing Co. v. Nash, 70 Vt. 434, 41 Atl. 429. It is provided (V. S. § 2290) that "no lien reserved on personal property sold conditionally, and passing into the hands of the conditional purchaser, shall be valid against attaching creditors or subsequent purchasers without notice unless the vendor takes a written memorandum, signed by the purchaser witnessing such lien, and the sum due thereon," and causes the same to be recorded within 30 days. The facts found by the referee show no such record, and the want of it is much relied upon on behalf of the trustee. But this statute applies only to such as come within its description. Manufacturing Co. v. Nash, 70 Vt. 434, 41 Atl. 429. The trustee is neither an attaching creditor nor subsequent purchaser, but is a successor, like an executor or administrator, taking the title of the bankrupt. Bankr. Act. § 70. He may have rights to property conveyed by the bankrupt in fraud of creditors that the bankrupt could not enforce, but the question here is not as to whether the bankrupt validly conveyed the property, but whether he fully acquired it. The property had been attached before the bankruptcy proceedings, but, if that attachment became a lien paramount, it could probably be preserved only by the trustee being allowed to be subrogated to the rights of the creditor, under the provisions of section 67, "Liens," cl. 3, no question in respect to which is presented here.

Property decreed to petitioners.

In re COLLER.

(District Court, D. Massachusetts. November 6, 1901.)

No. 4,939.

BANKRUPTCY—EXEMPTIONS—WATCH AS IMPLEMENT OF TRADE.

Under Pub. St. Mass. c. 171, § 34, cl. 5, which exempts to a debtor "the tools, implements, and fixtures necessary for carrying on his trade or business," a bankrupt who is a cabinet maker, and required in the ordinary course of his employment, when working outside the factory of his employer, to keep the time of himself and other workmen, is entitled to a watch as exempt; but such exemption will not be allowed beyond the amount required to purchase a watch which would be sufficient for the purposes of his trade, and any excess of value of the watch owned by him he will be required to surrender to his creditors.

In Bankruptcy. On review of decision of referee.

Alfred W. Putnam, pro se.
John J. Higgins, for bankrupt.

LOWELL, District Judge. The bankrupt in this case is a cabinet builder or maker, in the employ of the Derby Desk Company. In the usual and ordinary course of his employment, it is necessary for him, when working outside the factory, to keep a true account of the time spent by himself and other workmen in such outside work. He claims as exempt a watch worth $25, alleging that it is one of "the tools, implements, and fixtures necessary for carrying on his trade or business." Pub. St. Mass. c. 171, § 34, cl. 5. No evidence was introduced that the bankrupt is unable to keep or to ascertain time without the watch in question, but only that the watch is a convenient instrument for that purpose. The question thus presented was expressly left open in Re Turnbull (D. C.) 106 Fed. 667. Upon the whole, considering the general use of watches by most handicraftsmen in connection with their trade, I am inclined to think, though with considerable doubt, that the bankrupt is entitled to a watch. It is clear, however, that he is not entitled to it except as a tool or implement of his trade. Whatever value it may have for other purposes belongs to the creditors. Ten dollars will buy a watch suitable in all respects as a tool of the bankrupt's trade. If the trustee elects to take the watch, he must pay the bankrupt $10 to get a new one. Upon that payment, the judgment of the referee will be affirmed; otherwise reversed.

In re SWIFT et al.

Ex parte WILCOX et al.

(District Court, D. Massachusetts. October 4, 1901.)

No. 2,745.

BANKRUPTCY—RELINQUISHMENT OF LIEN THROUGH MISTAKE OF LAW—RIGHT TO REINSTATEMENT.

A creditor of a bankrupt sued him and garnished persons owing him within four months before the bankruptcy, and thereafter obtained judgment and collected the same from the garnishees, believing that the garnishment was valid. At that time both he and the garnishees knew

of the bankruptcy, and that the trustee claimed the money owing from the garnishees, and they required a bond of indemnity from the creditor. Thereafter a fund was received by the estate on which such creditor was entitled to a lien for the amount of his debt, but, in the belief that his debt had been discharged, he waived any claim to such fund. The trustee afterwards brought suit against the garnishees, who made demand on the creditor under his bond of indemnity, and he settled the suit by paying over to the trustee the amount he had received under the garnishment. *Held*, that such payment should be treated in equity as a restitution of money belonging to the bankrupt's estate, and the creditor reinstated in his lien on the fund in the hands of the trustee, as having been relinquished through a mistake of law; his good faith in the transaction being conceded.

In Bankruptcy. On petition of Wilcox and others, creditors, to be allowed to prove his claim in the matter of the bankruptcy of Frederick Swift and others, and for reinstatement of a lien.

Ropes, Gray & Gorham, for creditor.
Freedom Hutchinson, trustee, pro se.

LOWELL, District Judge. Wilcox, a creditor of the bankrupt, sued him and garnished Post & Flagg less than four months before the filing of the petition. Thereafter he proceeded to judgment, took out execution, and collected from Post & Flagg the amount due him from the bankrupt, in the belief that it had been duly recovered under a valid garnishment, and that there had thus been effected a full settlement of the judgment rendered against the bankrupt. The judgment was entered satisfied. At that time Wilcox knew that bankruptcy proceedings were pending, and that Swift's trustee claimed the debt owed by Post & Flagg. As Post & Flagg had been informed of the bankruptcy, they took a bond from Wilcox to indemnify them in case of loss. Still later Wilcox was notified that the bankrupt's seat in the New York Stock Exchange had been sold. The rules of the exchange gave Wilcox a lien upon the proceeds of the seat for the amount of the bankrupt's debt to him, and he was invited to prove his claim against the bankrupt in the manner prescribed by the rules. To this notice he replied that he had already made a settlement with the bankrupt, and that he relinquished whatever claim he had against the bankrupt's membership. The trustee brought suit against Post & Flagg to recover their debt to the bankrupt's estate. As the garnishment made by Wilcox was void under section 67 of the bankrupt act, the payment by Post & Flagg to Wilcox did not avail them to resist the trustee's suit. Wilcox was called upon under his bond of indemnity, and agreed with the trustee that the trustee's suit against Post & Flagg should be settled by the payment by Wilcox of the money due the trustee from Post & Flagg. The payment was made, and the trustee received and applied the same in full settlement of his suit. Wilcox now seeks to prove against the bankrupt's estate, and to reinstate his lien upon the proceeds of the bankrupt's seat in the stock exchange, which have been paid over to the trustee.

While none of the cases cited in argument are exactly like the case at bar, yet the latter does not differ substantially from cases in which it has been held that a creditor who has relinquished a security

by mistake, either of law or fact, should be reinstated in his security by the court of bankruptcy, if the estate will be left by the reinstatement no worse off than if the security had been originally retained. In re Condon, 9 Ch. App. 609; Oil Co. v. Hawkins, 20 C. C. A. 468, 74 Fed. 395, 33 L. R. A. 739; Bank v. McKey, 42 C. C. A. 583, 102 Fed. 662. In Re Condon, it is true, the money was paid directly to the trustee by the party held to be equitably entitled, and was recovered directly from the trustee as paid under a mistake of law. Here the transaction was not quite so simple. Wilcox released to the trustee his lien on the seat in the stock exchange, believing that his claim against the bankrupt had been settled under the attachment. This belief was the mistake of law. He released his security, believing that he was no longer the bankrupt's creditor. Proof of a debt as unsecured ordinarily releases any security for the debt held by the creditor making proof. If a secured creditor believes he is unsecured, and proves accordingly, thus releasing his security, even though his mistake be caused by pretty stupid ignorance of the law, yet it is held that his proof can be recalled, and his release thereby avoided, "when all parties can be placed in the same situation they would have been in if the error had not occurred." In re Parkes, 10 N. B. R. 82, 83, Fed. Cas. No. 10,754. If the release of a security can be avoided because the release was caused by a mistaken belief that the debt was unsecured (Oil Co. v. Hawkins, 20 C. C. A. 468, 74 Fed. 395, 33 L. R. A. 739), there should be possibility of avoidance where the release was caused by a mistaken belief that the debt secured had ceased to exist.

The trustee argued that, as he did not and could not recover from Wilcox the money paid Wilcox by Post & Flagg, the bankrupt's debt to Wilcox remains satisfied by the satisfaction obtained of the judgment recovered against the bankrupt. He contended that the bond given by Wilcox to Post & Flagg is not to be taken as part of the transaction, but as something with which the trustee has no concern. But it is not clear that the trustee was without remedy directly against Wilcox, and, moreover, considering the bond of indemnity in connection with the negotiations between Wilcox and the trustee, and with the settlement they both entered into, it appears to me that equity will treat the payment to the trustee by Wilcox as a restitution made by Wilcox of money belonging to the bankrupt's estate which had come into Wilcox's hands, thus reviving Wilcox's claim. In the Condon Case, above cited, the creditor took the proceeds of goods of the bankrupt sold on execution. These proceeds he subsequently paid over to the trustee, believing himself bound in law to do so. If his belief had been correct, can it be supposed that his claim against the bankrupt would have been satisfied by the levy of execution? It was suggested that in this case Wilcox sought to secure an unfair advantage by realizing under his garnishment. If he did so,—if he sought to evade the bankrupt act,—he cannot now appeal to the equitable consideration of this court; but the agreed facts state expressly that he received payment from Post & Flagg in the belief that the money had been duly recovered from them under a valid attachment. He knew of the bank-

ruptcy, but he may not have known when it took place. For many purposes the adjudication may give notice to all the world, but it does not give such notice as to make a person who fails to govern his conduct by it guilty of so willful an attack upon the law that he should be deprived of a security to which he is otherwise equitably entitled. That ignorance of the law excuses no one is not a maxim of universal application. Against some mistakes of law a court of bankruptcy will relieve. Actual knowledge that bankruptcy proceedings were pending, and constructive knowledge of their date, of all the language of the act, and of the correct interpretation thereof, will not turn an otherwise innocent mistake of law into a guilty one. Again, Wilcox knew that the trustee claimed to recover from Post & Flagg, but, as he also believed that his own attachment was valid, he was under a mistake of law or of fact. That the mistake was unreasonable, that he ought to have known better, even if true, does not appear to me material, so long as he acted in good faith, as the agreed facts declare.

It was urged further that Wilcox cannot now get the benefit of his lien, because that lien can be established only according to the rules of the stock exchange, out of whose hands the money had passed. But the rules of the stock exchange do not establish any method of formal proof as a condition precedent to the existence of the lien. They establish the lien generally, and then provide for the ascertainment of the amount of the debt. As that amount is found in the agreed statement of facts, Wilcox should be permitted to prove therefor, and to receive satisfaction out of the proceeds of the seat, as far as those proceeds will go.

The judgment of the referee is modified accordingly, but the creditor will recover no costs of this proceeding. He must pay the costs of the suit against Post & Flagg, taxed as between solicitor and client.

In re CLAFF.

(District Court, D. Massachusetts. November 1, 1901.)

No. 3,543.

BANKRUPTCY—DISCHARGE—NEW PROCEEDINGS AFTER REFUSAL OF DISCHARGE.

A bankrupt who has been refused a discharge is not debarred from filing a second petition, and obtaining a discharge thereunder, and such discharge, when granted, will be made general, leaving its effect as to debts proved under the first petition, but not under the second, to be determined whenever the occasion may arise.

In Bankruptcy.

Philip Tworoger, for bankrupt.

LOWELL, District Judge. Claff was adjudicated bankrupt in 1899 upon a voluntary petition. His discharge was refused for fraudulent concealment of assets. In 1900 he filed a second petition, and seeks a discharge thereunder. That his discharge under the second petition, if obtained, will be no bar to a suit upon a debt sched-

uled under the first commission, and not proved under the second, seems clear. Gilbert v. Hebard, 8 Metc. (Mass.) 129; In re Drisko, 2 Low. 430, Fed. Cas. No. 4,090. See Dean v. Justices, 173 Mass. 453, 53 N. E. 893. But this fact does not prevent the bankrupt from filing a second petition, or from getting a discharge thereunder, for whatever the discharge may be worth. In re Drisko, above cited. The discharge is granted, and no exception will be made therein of debts scheduled under the earlier commission. It is more convenient to make the discharge a general one, and to leave its effect to be determined by subsequent proceedings. In re Marshall Paper Co., 43 C. C. A. 38, 102 Fed. 872, and cases cited; In re Black (D. C.) 97 Fed. 493.

In re GROSSMAN.

(District Court, E. D. Michigan, N. D. July 11, 1901.)

1. BANKRUPTCY—DISCHARGE—CONCEALMENT OF ASSETS AND FALSE OATH.
A bankrupt had been engaged in business as a retail merchant. On November 23d he gave a chattel mortgage on his stock to a trustee for creditors, who took possession of and sold the same. The stock was inventoried by the trustee at $2,560. The evidence showed that on July 1st, preceding, the stock amounted to about $4,000, and between that date and the giving of the mortgage he had purchased additional stock to the value of $7,457 on credit, on which he had not paid to exceed $200. His bank book also showed deposits during that time of about $3,400, of which about $3,100 had been checked out. Neither the checks nor stubs were produced; nor did the bankrupt explain what use was made of the money, or what had become of the goods. There was also other evidence in the record which tended to discredit his testimony and his business integrity. *Held*, that such evidence, together with his failure to sustain the burden placed upon him by Bankr. Act 1898, § 7, subd. 9, of making a full and frank disclosure as to his business transactions, justified a finding that he had property at the time of his bankruptcy which he concealed, and that he knowingly and fraudulently made a false oath to his schedules, in which he stated that he had no property above his exemptions, and warranted the refusal of his discharge.

2. SAME—FEES OF REFEREE—HEARING ON APPLICATION FOR DISCHARGE.
Where objections to a bankrupt's discharge are referred to a referee for hearing, he is entitled to a reasonable allowance for his services, in addition to the fees allowed him by the bankruptcy law.

In Bankruptcy. On review of decision of referee holding bankrupt entitled to a discharge.

Isaac A. Gilbert, for petitioner.
Pierce & Kinnane, for opposing creditors.

SWAN, District Judge. Specifications in opposition to the discharge of the bankrupt were filed by several of his creditors, and on March 12, 1900, were referred to the referee. On April 2, 1901, on cause shown, the creditors were permitted to file amended specifications. These were as follows:

"(1) That said bankrupt, in his petition and schedule filed in this cause, and in his application for a discharge thereof, did knowingly and willfully make false oath and false oaths, in this: that the said bankrupt in said schedules and petitions filed herein did make oath that at the time of filing

said petition in bankruptcy he had no assets, whereas in truth and in fact he, the said bankrupt, had and still has in his possession and ownership money and property to the value of $5,000. (2) That said bankrupt, in his schedules and petition filed herein, and in his sworn testimony taken before the referee, did knowingly and willfully make false oath, in declaring under oath that he had no assets or property, whereas in truth and in fact he had and still has, in money and property taken, received, and abstracted from his store and stock of goods and business owned and operated by him previous to filing said petition in bankruptcy, assets to the amount of $5,000, which the above-named objectors are not able to more particularly describe."

The contest over the bankrupt's discharge was had over these two specifications, the prior objections being practically abandoned.

Prior to January 1, 1898, the bankrupt had been in business in Bay City for upward of five years as a retail dealer in clothing, boots and shoes, and men's furnishing goods. He testifies that he can neither read nor write, except to write his name, and there is no showing to the contrary. His principal business man, the bookkeeper, was one Simon Grabowski, who apparently continued with him until about January 1, 1899. On or about January 31, 1898, the bankrupt made a statement of his financial condition to R. G. Dun & Co. This statement was made out by Grabowski, but signed and delivered by the bankrupt to Dun & Co. It reads as follows:

"M. Grossman, Dealer in Clothing, Hats and Caps, Gent's Furnishing Goods, Boots and Shoes, 906 Water Street, Bay City, Mich., Jan. 4, 1898.

Stock on hand	$5,467 34
Cash on hand and in bank	1,011 72
Accounts	175 00
Fixtures	80 00
Resources	$6,734 06
Liabilities	2,075 29
Balance	$4,658 77

"[Signed] M. Grossman."

Upon his examination his bank book was put in evidence, from which it appears that on January 1, 1898, his balance in the bank was $481.92. On the 1st day of November, 1898, according to the bank book, his balance was $273.23, and his monthly payments from said bank account in 1898 to November 1st were as follows:

January	$1,402 60
February	542 40
March	984 27
April	1,573 32
May	757 58
June	1,485 66
July	787 18
August	1,135 48
September	718 48
October	456 10
Total	$9,843 21

Between July 1 and November 23, 1898, the proofs show that he received new goods to the amount of $7,457 at invoice prices, and that his payments on account of such goods were less than $200. November 23, 1898, he filed a chattel mortgage running to one Orr as trustee,

purporting to cover all of his property and to secure all of his debts. In this chattel mortgage his indebtedness is scheduled at $11,505.83, including $1,250 to his wife and $2,230 to his mother-in-law, Mrs. Kate Roth. The trustee, Mr. Orr, took immediate possession of his property, inventoried and appraised it at once, and the value of the stock and fixtures was appraised at $2,560. The trustee sold under the mortgage, and realized from the stock and fixtures the sum of $1,985. The chattel mortgage sale was held December 23, 1898, and the property was purchased by the bankrupt's mother-in-law. The business has been carried on in the same store from that time until the present, with the bankrupt in full charge and management. The testimony shows that the stock of the bankrupt in January, 1898, and in July, 1898, amounted to about $4,000 in value. The bankrupt filed his voluntary petition in October, 1899, in which he declared that he had no property except such as was exempt by law. In his schedules he sets forth his liabilities as $10,386.14. These were almost entirely for goods purchased after July 1, 1898, excepting the sums of $1,095.05 and $1,986.48, which he alleged were loans from his wife and mother-in-law, respectively, made in 1895 and in 1897. The only book of account sent up with the testimony by the referee is the bankrupt's bank book, from which the following facts appear: July 1, 1898, he had a balance of $124.74, and his total deposits during the month were $895.98. At the end of the month the balance to his credit in the bank was $98.80. In August, 1898, he deposited $1,370.46. Of this sum he paid out in August all but $234.84. He deposited during September $772.31, of which in that month he paid out all but $53.73. In October, 1898, he deposited $729.23, of which he paid out in that month $273.23. November 8th he deposited $50; November 14th, $39.65. At this date his bank book transactions seem to have been closed. From the foregoing it will be seen that he received and deposited from July 1 to November 14, 1898, $3,409.86; that he paid out during the same time $3,097.42. Not a dollar of the latter amount seems to have been paid for goods purchased during the period mentioned, nor does it appear that the funds in the bank were used to pay creditors, or for what purpose the sums drawn were paid. Grabowski, his bookkeeper, testifies, from the merchandise accounts which were produced before the referee, to the substantial correctness of the indebtedness for merchandise purchased and delivered to the bankrupt after July 1, 1898. The bankrupt does not deny the correctness of any of these claims, or pretend to have paid any of his creditors except the Peerless Manufacturing Company, which seems to have received about $143 for goods sold and delivered to the bankrupt after July 1, 1898. No attempt is made by the bankrupt to account for the disposition of the moneys, the payment of which is evidenced by his bank books, or to explain the disappearance from his assets of the difference between his stock on hand July 1, 1898, with his subsequent purchases of $7,457, and that covered by the chattel mortgage, which was inventoried at $2,560, as stated. If, as the referee finds, he had his stock of $4,000 worth of goods July 1, 1898, and added thereto by purchases of goods of the value of $7,457, it is obvious that he must

have had a stock of value between eleven and twelve thousand dollars during the period between July 1 and November 23, 1898. Whether this stock was sold in great part, and the proceeds deposited and used by the bankrupt, or what became of it, does not appear. The checks drawn by the bankrupt upon his bank account were not produced. The check stub book he had destroyed. The books of account kept by Grabowski, who described himself as a "general utility man," and disclaimed competency as a bookkeeper, fail to afford any explanation for the disappearance of these goods from the bankrupt's assets, or their avails if sold. The bankrupt's testimony, making due allowance for the fact that he did not keep the books and was unable to read and write, is very unsatisfactory. He disclaims remembrance of the most important business transactions, which must have been known to him, or should have been evidenced by entries on the books. Grabowski testifies that such entries were made thereof as were directed by Grossman. It further appears that prior to July 1, 1898, the bankrupt had made a statement to R. G. Dun & Co., which made no mention whatever of the alleged indebtedness of the bankrupt to his mother-in-law or his wife, and claimed that his net assets were about $4,600. He seeks to evade responsibility for this statement by the fact that it was made out by Grabowski, but it is scarcely credible that Grossman signed it, as he admits he did, without knowing its substance. It is difficult to reconcile the omission in his statements of his alleged indebtedness to his mother-in-law and to his wife with the acknowledgments in the schedules attached to his voluntary petition that he was in their debt to the amount of over $3,000, which indebtedness was created in 1895 and in 1897. While this in itself is not ground for refusing his discharge, it discredits his testimony, and casts a strong suspicion upon the rectitude of his subsequent business career, and his disposition of the large purchases of goods made after July 1, 1898. The burden of showing a lawful disposition of his property and its proceeds, and of explaining the concealment until he filed his petition in bankruptcy of his alleged debts to his wife and mother-in-law, and generally of making a full and frank disclosure of his pecuniary transactions, was upon the bankrupt. This is the express requirement of section 7, subd. 9, of the bankruptcy act. He has failed to perform this duty, to produce his books for examination by his creditors, or to offer any explanation whatever of the disposition of his property and its avails. It is impossible to learn from his testimony what he did with the $7,457 worth of goods bought after July 1, 1898, or the $4,000 of goods in stock before that time. Accepting the facts as found by the referee, from whose careful report I have quoted largely, I am compelled to differ from him as to the effect of the testimony. I cannot believe that nearly $12,000 worth of goods could have honestly dwindled to a stock of $2,560, as evidenced by the inventory of Mr. Brakie, the trustee under the chattel mortgage, between July 1, 1898, and November 23, 1898, without the knowledge and active aid of the bankrupt. If he sold goods in that time to the amount of the difference between these sums, his books should show the sales and what he did with the proceeds. He

vouchsafes no explanation of this shrinkage in his stock, and admits no additions to his bank account which would throw light upon the matter. He must have had the goods or their proceeds when he filed his petition. The only conclusion of law which can be drawn from these facts is that the bankrupt knowingly and fraudulently swore falsely that he had no assets, and therefore is not entitled to a discharge. In re Dewell, 2 Nat. Bankr. N. 598, 100 Fed. 633; In re Finkelstein, 2 Nat. Bankr. N. 839, 101 Fed. 418; Knitting Works v. Schreiber, 2 Nat. Bankr. N. 899, 101 Fed. 810; Id., 4 Am. Bankr. R. 299, 101 Fed. 810.

In reference to the compensation to which the referee is entitled, it is clear that the duty he has performed in this matter is outside of his official position, and is that of a special master. Fellows v. Freudenthal, 3 Nat. Bankr. N. 97, 102 Fed. 731. It appears that the examination upon the reference had upon the bankrupt's application for a discharge occupied three days. For this the referee should be allowed the sum of $25, and his necessary disbursements for stenographer's fees at the usual rates for taking and reporting the testimony.

An order will be entered in accordance with the foregoing opinion.

In re SOLDOSKY et al.

(District Court, D. Minnesota, Second Division. October 31, 1901.)

BANKRUPTCY—SURRENDER OF PREFERENCES—NEW CREDITS.

Bankr. Act 1898, § 60c, which provides that "if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind, for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him," entitles any preferred creditor, as defined in section 60a, to a deduction of the amount of such new credits from the preferences which he is required to surrender before proving his claim, and is not limited in its application to cases where the trustee sues to recover the preferences.

In Bankruptcy. On review of decision of referee.

Pfau & Pfau, for creditor.

A. E. Clark, for trustee.

LOCHREN, District Judge. It appears from the record certified up by the referee that the bankrupts were insolvent at all times from November 1, 1900, to the filing of their petition and adjudication, March 2, 1901. On November 19, 1900, they were indebted to the L. Patterson Mercantile Company, for merchandise, in the sum of $217.79, and thereafter paid to that creditor in the usual course of business $136.07, which was received by the creditor without cause for believing that the debtors were insolvent. After receiving such payment the same creditor, in good faith and without security, gave further credit to the debtors, by selling them on credit other merchandise which became part of their estates, to the amount of

$149.24. Upon proof of claim by this creditor the referee held that this payment of $136.07 was a preference received by the creditor, which must be surrendered before the claim of the creditor could be allowed, but that in making such surrender the creditor was entitled to set off the new credits so given to the bankrupts in good faith and without security, after the receipt by the creditor of the preferential payment; and that, as such new credits exceeded the preference, there was, after the set-off, no sum, parcel of the preference, left to be paid to the trustee to accomplish the surrender. The referee, therefore, allowed the claim of this creditor at the sum owing before the preferential payment..... $217 79
New credit, $149.24, less set-off against the preferential payment of $136.07..... 13 17

Allowed claim..... $230 96

The trustee excepted to this ruling and allowance by the referee, contending that because this creditor received the preference innocently, without suspicion of the insolvency of the debtors, it had no right, in the surrender of the preference, to set off such subsequent credits given to the debtors, in good faith without security, and for merchandise which became part of the debtor's estate. He contended that section 60c of the bankruptcy act was enacted solely for the benefit of creditors who had received preferences in bad faith, having reasonable cause to believe that a preference was intended.

I examined this question in a case not reported, prior to any reported decision on the subject, and held that section 60c applied to creditors who had innocently received preferences no less than to creditors who had received preferences in bad faith, and such has since been the ruling in this district. There has since been considerable conflict of decision upon this question; the judge of the Northern district of Illinois (In re Ryan [D. C.] 105 Fed. 760), and the circuit court of appeals of the Seventh circuit (McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923), construing the act as I did, while the judge of the Northern district of Iowa (In re Christensen [D. C.] 101 Fed. 802; In re Keller [D. C.] 109 Fed. 118, 125) holds that section 60c applies only to creditors who have received preferences in bad faith. As these four decisions present the arguments on both sides of the question, I need not refer to others which have been reported. A careful examination of them all, and of the act, brings me to the conclusion that my first holding was correct.

All the provisions of the act relating to the rights of creditors who have received preferences, with the possible exception of the use of the word "recoverable," in section 60c, are set forth in language so plain that there is little room for misapprehension. A distinction is made between the case of a creditor who has innocently received a preference, with no cause for suspecting insolvency of the debtors, and the case of a creditor who has received a preference having reasonable cause to believe that it was intended as a preference. It will be matter of surprise if it is found that the act is so drawn as to give the creditor who has received a preference in bad faith a plain advantage over the creditor who has innocently received a pref-

erence. Section 57g provides: "The claims of creditors who have received preferences shall not be allowed, unless such creditors shall surrender their preferences." This clause applies to all creditors who have received preferences, whether in good or bad faith. If they surrender their preferences, their claims will be allowed; and, if there were no other provisions applicable, all creditors having received preferences would have the option to keep their preferences, and forego further claims on the bankrupt estate, or to surrender their preferences and prove their claims. In case of surrender the preferences would be "recovered" by the trustee through the coercive provisions of the act, compelling the creditor to give back the preference under the penalty of losing the rest of his claims against the estate. Section 60a merely defines what is a preference, and it is seen that a preference may exist irrespective of good or bad faith. Section 60b provides that when the creditor receiving or to be benefited by the preference, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. Under the provisions of this clause, a creditor who in bad faith has received a preference cannot withhold it from the trustee. This clause takes away the option which such a creditor would otherwise have, under section 57g, to retain his preference and forego proof of his claims. But he has still the right, under section 57g, to surrender his preference, so received in bad faith, to the trustee, and thereupon have his claims allowed, and the trustee would thus, through the coercive force of the act, "recover" the preference.

Section 60c provides:

"If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind, for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

The language of clause "c" is general, and covers, by its terms, every case where "a creditor has been preferred." And it is to clause "a" of the same section that we must look to determine whether any particular creditor is a creditor who has been preferred. No syllable in clause "c" purports to confine its operation to the particular class of preferred creditors who appear to be fully dealt with by the terms of clause "b."

All the reasoning attempting to maintain that clause "c" applies only to creditors who have received preferences in bad faith (aside from that based in the word "recoverable") consists of criticisms of clause "c" and of its practical effect, which criticisms are equally valid whichever construction is given to it, and therefore irrelevant. For instance, it is shown in the Keller Case, clearly enough, that to allow a preferred creditor, when he comes to surrender his preference and to prove his claims, to set off against the amount of such preference the new credits, which after receiving the preference he in good faith gave to the debtor, is in itself a preference, to the extent which such set-off exceeds the percentage which the creditor

would have received on the same credits had they been given before the preference was received, or had there not been any preference. This is plain enough, and, had it been called to the attention of congress while the matter was under consideration, might have been a persuasive argument in favor of striking clause "c" out of the bill. But the courts cannot abrogate clause "c" even though it is subject to this just criticism; and there appears to be no equity and little reason in attempting to twist its plain language to reach a construction giving all its obvious advantages to creditors who in bad faith receive preferences, and denying them to creditors who receive preferences innocently.

Under such a construction, the practical operation of clause "c" will be made to appear by a supposititious case: A., an insolvent, is indebted to B., one of his many creditors, in the sum of $10,000, and pays B., who then has reasonable cause to believe him insolvent, $4,000. A month later an apparent change in A.'s circumstances convinces B. that A. is solvent, and he, in good faith, without security, gives A. a further credit of $3,000, for property which becomes part of the debtor's estate. One month later A. is adjudicated a bankrupt, and it is estimated that his estate will pay all creditors 75 per cent. B. is willing to surrender his preference and prove his claim, which he may unquestionably do, pursuant to section 57g; and he is the more willing to do this as he knows that his preferential payment of $4,000 is voidable, and "recoverable" from him by the trustee, under section 60b. If he is well advised, he knows, further, that if such preference is recovered from him by action, he will not be deemed to have surrendered it, and, while losing his preference, he will not be allowed to prove his claim. In re Richter's Estate, 1 Dill. 544, Fed. Cas. No. 11,803, cited in the Keller Case (D. C.) 109 Fed. 118, 126. He is therefore very willing to surrender his preference without action. But, in making such surrender, he is entitled to set off against the amount of the $4,000 preferential payment which he received in bad faith the amount of the new credit, $3,000, which he gave to the debtor in good faith, subsequent to the preference; and his payment to the trustee of $1,000, the balance after such set-off, will be a complete surrender of his preference, under section 57g, as modified in such case by section 60c. This must be so, as the supposed case contains all the conditions of section 60c to let in the right of set-off, and the $4,000 received in bad faith by the creditor, B., was "recoverable" by the trustee, beyond question. But if the actual case differed from the one just supposed only in the circumstance that the creditor received the preferential payment innocently, without cause for suspecting that the debtor was insolvent, must the court, solely because of his honesty and good faith, laboredly wrest a meaning from section 60c beyond the import of its terms, to put the creditor who has acted in good faith in a worse position than the creditor who has acted in bad faith, thus placing dishonesty at a premium? The tenor of the entire act makes such construction of the clause under consideration inadmissible. Clause "c," as it states in express terms, applies to every case where "a creditor has been preferred." This act is not expressed in a lan-

guage so technical that we are forced to stumble over the word "recoverable" into a position compelling us to favor dishonesty. The word is used in its ordinary sense, as the equivalent of "obtainable." That is recoverable which may be regained, reached, or come at. A preference surrendered to a trustee is recovered. As well might "set-off" be claimed to have some occult bearing on the interpretation of the clause. Though of comparatively recent use as a technical phrase, it was always appropriate to describe the process whereby, in the settlement of mutual accounts or demands, items on the one side are used to satisfy and cancel items on the other side, and thus ascertain the balance. In this clause both of these terms are employed in the ordinary sense understood by laymen.

The ruling of the referee is affirmed.

In re MILLER ELECTRICAL MAINTENANCE CO.

(District Court, W. D. Pennsylvania. September 30, 1901.)

BANKRUPTCY—POWERS OF COURT—ORDERING ASSESSMENT ON STOCKHOLDERS OF BANKRUPT CORPORATION.

Under Bankr. Act 1898, § 2, which invests courts of bankruptcy "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to * * * (7) cause the estates of bankrupts to be collected," etc., a court of bankruptcy has power, in a proper case, to order an assessment on the stockholders of a bankrupt corporation for unpaid subscriptions, which constitute a trust fund for the benefit of its general creditors, and the stockholders are not necessary parties to an application for such an order.

In Bankruptcy. On demurrers to petition of trustee.

Way, Walker & Morris, for trustee.

Smith Shannon, H. & G. C. Burgwin, J. S. Ferguson, J. Boyd Duff, and Charles W. Jones, for defendants.

BUFFINGTON, District Judge. This is an application by the trustee of the Miller Electrical Maintenance Company, an adjudged bankrupt company, to order an assessment on stockholders for alleged unpaid stock subscriptions, and to direct the trustee to collect the same. The demurrers of the respondents challenge the court's jurisdiction. By section 2 of the bankruptcy act, the district court is vested "with such jurisdiction at law and in equity as will enable [it] to exercise original jurisdiction * * * to * * * cause the estates of bankrupts to be collected," etc., and "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." The company was duly adjudged bankrupt by this court.

Unpaid subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of its general creditors. Sawyer v. Hoag, 17 Wall. 620, 21 L. Ed. 731; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220; Handley v. Stutz, 139 U. S. 417, 11 Sup. Ct. 530, 35

L. Ed. 227. In ordering an assessment a court is executing a corporate function for a corporate purpose. Hawkins v. Glenn, 131 U. S. 328, 9 Sup. Ct. 739, 33 L. Ed. 184. Where jurisdiction over the corporation exists, the stockholders are not necessary parties in an application to levy an assessment. Sanger v. Upton, supra; Hawkins v. Glenn, supra. The fact that the stockholders were notified of the present application in no way affects the prior existing jurisdiction of the court over the corporation. Under the former bankruptcy law the right to order an assessment upon stockholders of a bankrupt corporation was exercised by the district court; and in Hawkins v. Glenn, supra, it was held that the decision in Sanger v. Upton, supra, sustaining such jurisdiction, was "made not in pursuance of any express provision of the bankruptcy law, but in analogy to the powers and proceedings of a court of equity, and to meet the requirements and justice of the case." We are therefore of opinion this court, having acquired jurisdiction over this bankrupt corporation, has power, in a proper case, to order an assessment on the stockholders for unpaid subscriptions. In re Crystal Spring Bottling Co., 3 Nat. Bankr. N. 180, 96 Fed. 945. Whether such assessment shall be made, or how it shall be collected, are questions not now before us.

The demurrers filed by the several respondents will be overruled, with leave to answer within 20 days.

In re PIERCE.

(District Court, D. Colorado. June 4, 1901.)

1. BANKRUPTCY—COMPENSATION OF REFEREE—ALLOWANCE FOR EXPENSES.
Under Bankr. Act 1898, § 40a, and General Order No. 35 (18 Sup. Ct. ix.), a referee is not authorized to charge a per diem in any case, nor for any order he may enter. The provision of such general order, permitting an allowance to a referee for expenses incurred in publishing or mailing notices, etc., refers to actual expenses; but a referee may make a general charge for blanks used in mailing notices to creditors and for orders entered, and also for clerk hire, where the extent of his business is such that a clerk is needed, which charge should be a gross sum, and uniform in each case, regardless of the amount of work done.

2. SAME—POWERS AND DUTIES OF REFEREES.
A referee in bankruptcy has no authority to collect or receive money belonging to an estate, nor to issue subpœnas.

In Bankruptcy. On settlement of referee's account for expenses.

Bicksler, McLean & Bennett, for creditors.

HALLETT, District Judge (orally). The referee allowed to himself the sum of $323.75 for incidental expenses incurred by him in the progress of the cause. From an itemized bill presented with the order allowing the claim, it appears that $145 of this amount was per diems for hearing testimony and making various other orders in the case; a considerable part of it was for clerk hire, and attendance of the referee's clerk upon the hearings; some of it for making various orders; and some for subpœnas issued for witnesses.

The first clause of section 40 of the bankruptcy act provides that the referee shall receive, as full compensation for his services, payable after they are rendered, a fee of $10, deposited with the clerk at the time the petition is filed in each case. And in No. 35 of the bankruptcy orders of the supreme court (18 Sup. Ct. ix.) it is provided that the compensation of the referees, as prescribed by the act, should be in full compensation for all services performed by them under the act, or under these general orders, but shall not include expenses necessary to be incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessary to be incurred in the performance of their duties under the act, and allowed by special order of the judge. The bankruptcy act and the order of the supreme court afford no authority to a referee for charging a per diem in any case whatsoever, nor does it authorize a charge for any order whatsoever that may be entered. As to the subpœnas which were issued for witnesses, they are not, under the act, to be issued by the referee under any circumstances. They should be issued by the clerk, and neither the referee nor the clerk, nor anybody else, can receive any fee or reward for issuing such subpœnas. The provision of the general order of the supreme court in regard to expenses of mailing notices, traveling, and perpetuating testimony refers to actual expenses; but a referee may make a general charge, which should be a uniform charge in all cases, for blanks that may be used in each case, for notices to creditors, and orders which may be entered by him. He may make a similar charge for clerk hire where the business is such that clerks are needed. The referees in Denver, I believe, each keep clerks, and probably it is necessary with the number of cases that they have that they should do so; but in those parts of the state where no clerks are kept, and none are needed, the referee is confined to the gross sum of $10, which is allowed for general services in a case, and to the commissions which are mentioned in the act upon dividends declared. The clerk hire which is allowed is not a sum which is to be estimated by the number of notices issued, nor by any other act done in any single case. The charge to be allowed for it, and which is to be, under the rule adopted in regard to all fees under this act, is a gross sum in each case, whether the labor in each case be large or little. The act gives to the clerk and to the referee and to the trustee a gross sum for all services to be performed by him, or by each of them, whether work in any case be large or little.

It is, perhaps, unnecessary to go further into the items of this account. Under the view which I have of the law of the case, it will be necessary to reconstruct the claim entirely. In his report of the case the referee says that there has come into his hands on account of the estate the total sum of $348.60. Upon that it appears to be necessary to state that the referee has no authority whatever in respect to the collection of the estate. This is a matter which stands with the trustee altogether. If there be a receiver in the first instance, or if the marshal be appointed to take charge of the estate before a trustee is chosen, he may, or the receiver may, or the marshal may, perhaps, collect the funds of the estate. It will be the

duty of the referee to at once pay over this sum of $348.60 to the trustee, to be accounted for as the law directs, and I suppose, under the views here expressed, nothing further of this kind will occur in any other case.

The referee's account for incidental expenses will be vacated and set aside.

In re SOUTHERN OVERALLS MFG. CO.

(District Court, N. D. Georgia. October 19, 1901.)

No. 612.

BANKRUPTCY—PREFERENCES—DEDUCTION OF NEW CREDITS.

Bankr. Act 1898, § 60c, entitles a creditor who has received preferential payments on account, but who has extended further credit as therein specified, to a deduction of the amount of such new credits from the preferences he would otherwise be required to surrender before proving the remainder of his debt, and is not limited in its application to cases where the trustee sues to recover the preferences.

In Bankruptcy. On exceptions of Cone Export & Commission Company, a creditor, to decision of referee.

King & Spalding and J. T. Pendleton, for exceptors.
Rosser & Carter and King & Anderson, for trustee.
Slaton & Phillips, for bankrupt.

NEWMAN, District Judge. The question presented by the exceptions to the decision of the referee is whether, as against a payment made within four months and required to be refunded before proof of claim can be allowed, under section 57g of the bankruptcy act, a creditor can set off the amount of new credit given, as provided in section 60c. The question, stated in another way, is whether the provisions of section 60c refer only to cases covered by paragraph "b" of the same section, where the trustee is authorized to recover because the preference was knowingly received, or whether it refers also to payments made before proof can be allowed, under 57g. In the case of the present exceptor, in some instances after a payment within four months was made by the bankrupt company, goods were sold to it to an amount in excess of the payment previously made, but the creditor only asks to set off the value of the goods so sold, and going into the bankrupt's estate, in an amount equal to the immediately preceding payment. On an accounting even in this way, however, a balance is left to be returned by the creditor, which he offers to pay.

There have been conflicting opinions on this question. The cases holding that paragraph "c" of section 60 is confined to cases arising under the provisions of paragraph "b" of the same section are In re Christensen (D. C.) 101 Fed. 802, decided by District Judge Shiras, of the Northern district of Iowa; In re Arndt (D. C.) 104 Fed. 234, by District Judge Seaman, of the Eastern district of Wisconsin; In re Keller (D. C.) 109 Fed. 118, by Judge Shiras, and In re Oliver, Id. 784, by District Judge Phillips, of the Western district of

Missouri. Those which hold that the provisions of 60c extend to cases under 57g, where repayment of amount received within four months is necessary to proof of debt, are McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923, by the circuit court of appeals of the Seventh circuit; In re Ryan (D. C.) 105 Fed. 760, by District Judge Kohlsaat, of the Northern district of Illinois; and In re Seckler (D. C.) 106 Fed. 484, by District Judge Hook, of the Northern district of Kansas.

If the contention of counsel for the trustee in this case is correct, then this remarkable situation is presented: The creditor who had received a payment within four months would be approached by the trustee with a demand for the surrender of the preference, and with the statement that the creditor knew at the time he received it that the debtor was insolvent. The creditor might say: "Yes; I received the preference knowingly, and concede that you can recover it, and am ready to pay it back; but since I have received the payment I have in good faith sold a bill of goods to the bankrupt, which has gone into his estate, and I wish to credit the amount of that bill on the amount of the payment received." The trustee could do nothing but accept it. The payment would clearly be one recoverable under section 60b, and in that case there would be no doubt of the right of the creditor to set off the amount of goods subsequently sold against the payment from the insolvent debtor knowingly received within four months.

On the other hand, a creditor who had received a payment without any knowledge whatever of the debtor's insolvency, and without any reason to believe that he was insolvent, and who had afterwards sold goods in good faith, which had become a part of the bankrupt's estate, could not be permitted to set off the amount of goods so sold against the payment. The creditor, therefore, who may be called the guilty creditor, would receive a benefit which an entirely innocent creditor would not be allowed. It would require the most explicit language in the act to justify a court in concluding that congress intended any such result.

But it is said, in reply to this view, that a creditor who knowingly receives a preference cannot prove his debt against the bankrupt's estate, and that the innocent creditor, having repaid his preference, can do so. This contention is not justified by any provision in the bankruptcy act of 1898. The most that can be said of the authorities on this subject under this act, or probably under the act of 1867, is that a creditor who knowingly receives a preference can only be prevented from proving his debt when he compels the trustee to sue the demand against him for the preference to judgment, and after judgment has been obtained against him. A large number of decisions under the old act are collated and referred to in Coll. Bankr. (3d Ed.) pp. 319, 320, and the result of these decisions seems to be that, under the act of 1867, a surrender of a preference, although knowingly received, could be made at any time before judgment.

Even the case of In re Richter's Estate, 1 Dill. 544, Fed. Cas. No. 11,803, cited by counsel for the trustee, does not contain anything contrary to this view. The decision by Circuit Judge Dillon is made

under the act of 1867, and there is a discussion of the effect of sections 23 (Rev. St. § 5083), 35 (Rev. St. § 5128), and 39 (Rev. St. § 5021) of that act. After deciding that a creditor, who had knowingly, and in fraud of the act, received a payment, and had refused to surrender it, and had been sued to judgment, and had then paid the judgment, could not afterwards prove his claim, the part of the opinion material here is as follows:

"As a further argument in support of the opinion above expressed, it may be urged that, when section 23 is read in connection with sections 35 and 39, all being in pari materia, it will be seen that the surrender provided for in section 23 is an act to be done by the creditor before the recovery of a judgment against him, as provided by section 35. That is, the assignee may demand of the creditor the property received by him. If he surrenders it, he stands upon the same plane as the creditors, and may prove his debt and receive his dividends. If he refuses to surrender it, the assignee may sue as provided in section 35; and if he recovers, and payment be made on an execution, this is not a surrender (which implies voluntary action on the part of the creditor), but a refusal to surrender. So that the bankrupt act says decisively to every person who, under the circumstances specified, has received a preference: 'Surrender what you have received, and you shall lose nothing. If you refuse, and the assignee recovers the property or its value, you shall get nothing. Make your election.' When this election may be made we are not now required to decide, further than to hold that it is too late to make it after the recovery of judgment by the assignee."

In the case of Burr v. Hopkins, 12 N. B. R. 211, Fed. Cas. No. 2,192, it was held in the circuit court for the Eastern district of Wisconsin that even after an opinion had been given by the court, and after findings of fact had been made, but before the actual entry of the judgment, a creditor might surrender his preference, and be authorized to prove his claim.

If it is true that under the act of 1867 a preference could be surrendered at any time before judgment, so as to authorize proof of the debt, it is certainly true under the present act. Therefore, in a large class of cases covered by clause "b" of section 60, the creditor would have the right to prove his debt. This is assuming that the restriction is as great against the proof of claims in this respect under the act of 1898 as it was under the act of 1867, which is not at all clear. So we see that, notwithstanding the payment is one which would be "recoverable," the creditor may still prove his debt if he surrenders his preference, and the only qualification to this is that he probably cannot do so, even under this act, after he has allowed suit to be brought, and has resisted it up to judgment. The argument, consequently, that that class of creditors receiving payments, and who are subject to the provisions of 60b of the act, cannot be allowed to prove their claims, and that there is that distinction between them and the class referred to in 57g, falls to the ground.

In McKey v. Lee, supra, Circuit Judge Grosscup, after citing the different clauses of the act on which the question depends, uses this language:

"Appellant insists that the payments made to Lee, Tweed & Co. (one thousand three hundred and thirty-four dollars and fifty-six cents), the 17th of September, 1899 (that being the beginning of the four-months period previous to the bankruptcy), were a preference, within the meaning of section 60, and that under paragraph 'g,' § 57, there must be a return of these pay-

ments before the claim can be allowed. The district court held that the sale of goods to the bankrupt, after the payments, amounted, within the meaning of paragraph 'c,' § 60, to a further credit, in good faith, without security, of property going into the bankrupt's estate, and set off the value of such property against the payments; requiring, as a condition to the allowance of the claim, a return only of the surplus payment. Counsel for appellant contend that paragraph 'c,' § 60, is not applicable to the facts stated; that it is intended to affect cases only where the trustee seeks to recover, by suit, preferential payments made to a person having had reasonable cause to believe that a preference was intended, as provided for in paragraph 'b,' § 60; that the employment of the word 'recoverable' shows that such a limitation of the right of set-off was intended. We cannot concur in this interpretation. Confessedly, it would limit the right of set-off to those only who, having received the preference knowingly, chose to stand out against its return to the trustee. The creditor, willing to make return, without the delay and expense of a suit by the trustee, even though the preferential payments had been innocently received, could exercise this impulse towards obedience with the law, only under penalty of losing what otherwise his recalcitrancy would have secured him. We ought not to lean towards an interpretation that would thus put the consenting creditor at a disadvantage, and afford a premium to the designing creditor. There is nothing in the employment of the word 'recoverable' that forces such an interpretation. The primary definition of the word is to 'regain'; to 'get back again.' Cent. Dict. A thing is 'recoverable' when it is susceptible of being 'regained'; 'gotten back.' The law provides alternatively for the regaining of the preferential payments by the trustee—First by visiting the creditor with the danger of a penalty,—the disallowance of any portion of his claim; and, secondly, in case of the knowing creditor, the right upon the part of the trustee to bring suit. In either case the payments are gotten back,—there is a recovery,—and in both, whether under stress of the penalty or by virtue of a suit, it is the law that makes them recoverable. Such interpretation compasses the reasonable purpose of the provision. It leaves the estate unimpaired; for the property of the creditor coming into the debtor's estate is presumably the equivalent of the money value at which it was purchased. It, in substance, simply cancels the effect of the preference, to the extent only that such preference no longer harms the interests of the other creditors."

This is a decision by the circuit court of appeals of another circuit, which must be regarded as high authority. There has been no decision on the subject by the circuit court of appeals of this circuit.

In Re Ryan, supra, the opinion by Judge Kohlsaat is brief, and is as follows:

"I am of the opinion that the mutual debits and credits contemplated by section 68a, Bankr. Act, do not include cash payments on account within four months of the filing of the petition against the bankrupt, and that the referee's finding herein that creditors should be permitted to have an accounting of all transactions between them and the bankrupt, both prior to and during such four months, and to have their claims allowed for the balance shown by such accounting, is not sustainable. With reference to section 60c, I do not think that the word 'recoverable,' in the last line thereof, should be held to dominate the meaning of the entire section. The whole paragraph, until this word is reached, covers as well the creditor who receives a preference without, as one who receives a preference with, reasonable cause to believe it to be intended as such. Reasoning from general business experience, it is extremely difficult to imagine a case in which a creditor would give a debtor further credit 'in good faith' after a knowledge of the latter's insolvency. Giving the word 'recoverable' its strict legal signification, the decision of Judge Shiras in Re Christensen (D. C.) 101 Fed. 802, is undoubtedly correct; but the wording of the entire section is so general and untechnical that I am impressed with the belief that the word 'recoverable' therein was intended to convey its lay meaning, and was not used

in its strict legal sense. The injustice which would follow a construction differentiating between creditors who voluntarily surrender their preferences, in favor of the one who would be compelled to do so at the end of a lawsuit if he did not make the surrender voluntarily, should certainly have weight in the mind of the court in aiding it to arrive at the meaning of congress as embraced in the entire section. The ruling of the referee is reversed, with directions to proceed in the matters in question herein in accordance with the above construction of section 60c."

In Re Seckler, supra, in the opinion by Judge Hook, this language is used:

"Some of the creditors who had thus innocently secured preferences by receiving payments on their accounts thereafter in good faith gave the debtor further credit, without security, for property which became a part of the debtor's estate, and such new credits remained unpaid at the time of the adjudication in bankruptcy. The question in this connection is whether such a creditor is entitled to have his new credit set off against the preference which he is called upon to surrender as a condition to the allowance of his claims. Clause 'b' of section 60 of the bankrupt act of 1898 provides that, if a preference is received with reasonable cause on the part of the creditor or his agent acting in the matter to believe that it was intended as a preference, it shall be voidable by the trustee, who may, under such circumstances, maintain an action to recover the property or its value. Clause 'c' of the same section provides that if a creditor has been preferred, and afterwards in good faith gives the debtor further credit, without security, for property which becomes a part of the debtor's estate, the amount of the new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him. The rule in respect of a preference innocently received, without reasonable cause for belief that a preference was intended, is that an affirmative action for its recovery cannot be maintained by the trustee, but the creditor will be denied the right to have his claims against the bankrupt's estate allowed, unless he surrenders the preference. The solution of the question under consideration turns upon the interpretation to be given to the term 'recoverable,' as used in clause 'c' of section 60. The new credit can only be set off against a preference that is recoverable from the creditor. It has been held in some jurisdictions that, in order that a new credit may be used as a set-off against a preference previously received, the preference must be one that is recoverable in an action brought by the trustee for that purpose,—that is to say, a preference received with reasonable cause for belief that it was so intended; that the new credit cannot be the basis of a set-off against a preference innocently received, for the reason that such a preference is not one that is 'recoverable.' In re Christensen (D. C.) 101 Fed. 802; In re Arndt (D. C.) 104 Fed. 234. I am of the opinion that this interpretation is too restricted, and is not in harmony with the equitable spirit of the bankrupt act. The term 'recoverable,' in its larger and more popular sense, implies a capability of being obtained by course of law. 'Recovery,' as a legal expression, signifies a restoration of a right by means of a judicial proceeding; and it is not material whether it is the result of a proceeding especially instituted for that purpose, or is by law made a condition to the accomplishment of some other purpose for which suit is brought. If a preference is not received in good faith, the trustee may institute suit for it. If it is innocently received, the trustee may not maintain suit therefor, but the creditor is compelled to surrender it as a condition to the maintenance of a proceeding for the allowance of his demands. In either event, the preference is recoverable. In either case, there is a restoration of a right by course or process of law. Whenever the creditor presents for allowance the balance due upon his old claims or the new credits extended to his debtor, the amount or value of the preference received by him must be surrendered as a condition to the award which he seeks. There are many rights, especially of an equitable nature, which may properly be said to be recoverable, but which await for their enforcement the initiative of the person against whom they rest. This conclusion is concededly a most equitable

one, and it is well within the spirit and a liberal interpretation of the letter of the bankrupt act. There is another consideration which tends to the same result. The new credit, to be available as a set-off against a preference received, must under clause 'c' have been afterwards given in good faith. If the preference were innocently received, it might well be that a subsequent credit could be so given; but, if the preference were not innocently received, it is more difficult to perceive how the creditor could thereafter, within the limited period, and in good faith, extend a new credit to his debtor. The ruling of the referee upon this question will be set aside."

Nothing need be added to what is so well said in the foregoing quotations as to the meaning of the word "recoverable" and the sense in which it is used in the act.

It is urged here that the use of the expression "set-off" in section 60c adds force to the argument that "recoverable" is used in a restricted sense, and refers only to payments which may be recovered back by suit. I do not agree with this argument. "Set-off," as used in this section, in common parlance, or even as a legal expression, may as well express an allowance against what is required to be surrendered under 57g as against that which may be recovered by suit under 60b. This view is sustained by the use of this term as it appears in section 68, cls. "a," "b."

In Pirie v. Trust Co., 21 Sup. Ct. 906, 45 L. Ed. 1171, in the opinion by Mr. Justice McKenna, this language is used: "Nor, again, do we find anything which militates against our conclusion in subdivison 'c' of section 60. That subdivision is applicable to the cases arising under 'b,' and allows a set-off which otherwise might not be allowed." It is not clear that it was intended by this language to express an opinion upon the question now before this court. The question which was being discussed, and which was determined, was whether payments received when the creditor did not know or have reasonable cause to believe that the payments were intended to give a preference, and the debtor did not intend to give a preference, must be surrendered before proof of claim can be allowed under section 57g. The decision of the question here was in no way necessary to a decision of the question there. This expression by the supreme court certainly cannot be regarded as a decision of the important question involved in the case at bar.

The action of the referee is disapproved, and the case will be referred back to him, with instructions to allow as a set-off credits for the amount of goods sold in good faith and without security, which became a part of the debtor's estate.

In re SLACK.

(District Court, D. Vermont. October 29, 1901.)

1. BANKRUPTCY—DEATH OF BANKRUPT—ALLOWANCE TO WIDOW.
Bankr. Act 1898, § 8, provides that, in case of the death of a bankrupt pending the proceedings, "the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence." The statutes of Vermont give a widow such part of the personal estate of her deceased husband as may be assigned to her by the probate court, but not less than one-third after payment

of debts and expenses. *Held*, that where a bankrupt died after his personal estate had been disposed of by his trustee, and the proceeds were insufficient to pay the debts, there was no allowance therefrom, "fixed by the laws of the state," to which the widow was entitled.

2. SAME—DOWER—VERMONT STATUTES.

Under the statutes of Vermont, the widow of a deceased person is entitled to one-third in value of the real estate of which her husband died seised in his own right in fee as an enlarged right of dower. *Held*, that a bankrupt who died after the title to his real estate had become vested in his trustee for the benefit of creditors by operation of the bankruptcy law, but before it had been disposed of, remained seised of the same until his death for the purposes of inheritance, and within the meaning of such statute; and that under Bankr. Act 1898, § 8, which preserves to the widow in case of the bankrupt's death the right of dower fixed by the state laws, the widow of such bankrupt was entitled to have one-third in value of the real estate set apart to her as dower.

In Bankruptcy. On petition of the widow of the bankrupt, who died pending the proceedings.

Geo. E. Lawrence, for claimant.
Edward Dana, for trustee.

WHEELER, District Judge. The laws of the state provide (Acts 1896, p. 31) that "the widow of a deceased person shall be entitled to one-third in value of the real estate of which her husband died seised in his own right, unless she is barred as is provided in this chapter; but where a right of homestead also exists said one-third shall be diminished by the amount of such homestead"; and that she shall receive "the wearing apparel of the deceased and such other part of the personal estate of the intestate as the probate court assigns to her according to her circumstances and the estate and degree of her husband," but not less than one-third, after payment of debts and expenses. V. S. § 2418. The bankrupt act (section 8) provides that "the death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence."

The bankrupt appears to have been seised at the time of adjudication, in his own right, of real estate to the value of about $6,000, including a homestead, and of considerable personal estate, and to have died leaving a widow and children after the personal estate had been converted into money, and before the real estate had been disposed of or severed. The widow claims a third of the real estate and allowances from the personal property, and is not barred by any of the provisions of that chapter. As no net excess of personal property over debts and expenses is possible, of which the widow can be entitled absolutely to a third, but only such as out of which the probate court might, but for the bankruptcy proceedings, make allowances, there does not appear to be any fixed allowance from personal property, within the meaning of this section of the bankrupt act, to which she can be entitled. Holmes v. Bridgman, 37 Vt. 28. Common-law dower was a life estate in the third,

and this provision of the state law is for an estate in fee simple of the third. Nevertheless, it is dower enlarged, or, if not, it is, at most, an allowance fixed by the laws of the state.

The principal objection to this allowance here is that the right is fixed by the state law in real estate of which the husband may die seised in his own right, and that this husband had been disseised of this real estate by the proceedings in bankruptcy, which are said to have conferred the seisin upon the trustee. It was competent for congress, in pursuance of the power conferred by the constitution (article I, § 8), to establish "uniform laws on the subject of bankruptcies," to provide for exemptions, and how the estates should go; and this provision was undoubtedly a proper exercise of that authority, within its scope. Proceedings in bankruptcy in respect to a bankrupt are, from beginning to end, one case; and whatever is done in them, at whatever stage, is done in, and of what is involved in, that case. This real estate has been in this case all the while in which there has been a case, and is in it now. The estate of the bankrupt that the creditors are entitled to the benefit of has gone to the trustee for sale and distribution of the proceeds, but not for inheritance, or for distribution of the real estate itself. The bankrupt is not wholly disseised till the land is gone out of the estate. No other widow could have dower or thirds in it yet. The evident intention of the act was to leave or give to the widow and children the same share of the estate while it is in the custody of the law that would be fixed for them by the state law if it had remained in the bankrupt while he lived. The bankrupt seems still to have been seised in his own right, within the meaning of the state law, of what would be subject to this right of the widow and children under the bankrupt law. This fulfills the provisions of both statutes.

Let one-third of real estate, including the homestead, be set out to the widow.

UNITED STATES v. NASH et al.

(District Court, W. D. Kentucky. November 7, 1901.)

1. PENALTIES—DISTINCTION BETWEEN FINE AND PENALTY.
   While the word "penalty" has a broader meaning than the word "fine," still a fine, in a judicial sense, is always a penalty, although a penalty may sometimes not be a fine, or even a criminal punishment.
2. CRIMINAL LAW—CONSTRUCTION OF STATUTE—IMPOSITION OF "PENALTY."
   Where a statute forbids or commands certain acts, its violation constitutes a public offense, punishable as such by a criminal prosecution in the courts, notwithstanding the punishment imposed by such statute is denominated a "penalty."
3. SHIPPING — OFFENSES AGAINST NAVIGATION LAWS — OPERATING GASOLINE LAUNCH WITHOUT LICENSED ENGINEER.
   Under the provisions of Rev. St. § 4426, that no ferryboat, canalboat, yacht, or other small craft of like character, propelled by steam, shall be navigated without a licensed engineer and a licensed pilot, as amended by Act Jan. 18, 1897 (29 Stat. 489), by extending its provisions to all vessels of above 15 tons burden, carrying freight or passengers for hire, propelled by gas, fluid, naphtha, or electric motors, and Id. § 4500, which

provides that "the penalty for the violation of any provision of this title, not otherwise specially provided for, shall be a fine of $500, recovered one-half for the use of the informer," one who navigates a gasoline launch of over 15 tons burden, in the carrying of freight for hire, without a licensed engineer, is guilty of a crime, and may be indicted and prosecuted therefor, notwithstanding the provisions of sections 4496 and 4499, which authorize a proceeding in rem against the vessel by the collector or inspectors of customs for the recovery of a penalty of $500 for a violation of any of the provisions of such title.

4. SAME—OPERATING GASOLINE LAUNCH WITHOUT CERTIFICATE OF INSPECTION. Rev. St. § 4426, requiring the inspection of steam vessels, etc., as amended by Act Jan. 18, 1897 (29 Stat. 489), by making it applicable to vessels propelled by gas, fluid, or electricity, when used for carrying freight or passengers for hire, contains no provisions prohibiting an owner from running his vessel before such inspection has been made; and an indictment for navigating a gasoline launch for hire without inspection charges no offense, at least where it does not aver that any regulation prohibiting such act in respect to that class of vessels has been adopted pursuant to the authority given by statute.

Criminal Prosecution. On motion to quash indictment.

R. D. Hill, U. S. Atty.

J. B. McCormick and W. H. Watson, for defendants.

EVANS, District Judge. The first count in the indictment in this case charges, in brief, that the defendants, being the owners of a certain vessel of more than 15 tons burden, bearing the name of "R. Nash," and propelled by means of fluid and gasoline power, engaged the said vessel in freight and passenger carriage for hire to and from Louisville, Ky., and to and from other points on the Ohio river, and that while so engaged the hull, tank, and appliances for storing, generating, and applying such fluid and gasoline as its motive power were not under license or certificate of inspection as required by law, nor were said hull, tank, and appliances then, nor had they theretofore been, inspected as required by law. The second count charges the defendants with having unlawfully and knowingly navigated said vessel without having thereon, and in charge and control of its engines and machinery, an engineer duly licensed as such, as required by law. The defendants have moved the court to quash the indictment upon two grounds, namely—First, that the court has no jurisdiction of the offenses charged; and, second, that jurisdiction to punish such offenses is, by the laws of the United States, given exclusively to the surveyor of customs.

By the provisions of many enactments now grouped in title 52 of the Revised Statutes, congress has undertaken to make a comprehensive code for regulating navigation, and providing for the safety of vessels propelled by steam and other motive powers, and for the safety of the passengers and freight carried thereon, and from time to time has since improved this code by various separate amendments. The chief object of all this legislation was, of course, to secure the protection of life and property as against the many dangers naturally incident to the navigation of vessels of every character. At the time, however, of the enactment of the original legislation, steam was mainly the motive power in vogue. Later, others were introduced, and, becoming prevalent, vessels propelled by them were

embraced in certain amendments to the various sections of the Revised Statutes in the title referred to.

In some cases congress, it is contended, has authorized the imposition and collection of penalties by the surveyors of customs, and sections 4496 and 4499 are relied upon to support that view, and probably many persons subjected to such exactions have paid them without questioning the power of congress to authorize this mode of procedure. In the case now before the court it is quite unimportant to attempt definitely to determine whether congress has such power or not. The question does not necessarily arise, particularly as the two last-named sections do not seem to reach the point at issue here, but, as I am pressed to do so, I will say this much upon it. The sixth amendment to the constitution of the United States expressly provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

This being so, I should be greatly predisposed to hold that those provisions of the legislation referred to, if fairly susceptible of the construction contended for, would be unauthorized—First, because they did not, in conformity to that constitutional principle, in any way provide for a trial by a jury of the issue of the guilt or innocence of the person accused; and, second, because it is an attempt to bestow judicial powers upon merely executive officers, and to make them at once judges, jurors, and executioners. While, therefore, I should be much disposed to so hold if the question were involved in the pending motion, I make no decision upon it, for the reason indicated.

The real question to be determined is, has this court jurisdiction of the offenses charged in the indictment? It may be said that, even if the surveyor of customs had the power to enforce the penalties prescribed for violating any law or regulation respecting such matters, it would by no means necessarily follow that the courts would not also have jurisdiction if a public offense had been committed, and especially in order to give effect to the sixth amendment to the constitution. The matter now to be decided is, does the indictment charge any public offense made punishable under the criminal laws of the United States? It is essential, therefore, to inquire whether the facts stated in the indictment, if true, constitute offenses, under the laws of the United States, which are punishable through its courts. It is argued by the learned counsel for the defendant that sections 4496, 4499, Rev. St., put the matter entirely in the hands of the surveyor of customs. Those sections read as follows:

"Sec. 4496. All collectors or other chief officers of the customs, and all inspectors within the several districts, shall enforce the provisions of this title against all steamers arriving and departing."

"Sec. 4499. If any vessel propelled in whole or in part by steam be navigated without complying with the terms of this title, the owner shall be liable to the United States in a penalty of five hundred dollars for each

offense, one-half for the use of the informer, for which sum the vessel so navigated shall be liable, and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

He contends that the facts alleged in the indictment do not constitute public offenses punishable by the courts, not only because the matter is committed entirely to the surveyors, but also because only a "penalty" is prescribed, and in his argument he cites authorities tending to show the difference between a "fine" as such and a "penalty" as such. He says that:

"A 'fine' is defined as follows: 'In ordinary legal language, the term "fine" means a sum of money, the payment of which is imposed by a court according to law, as a punishment for a crime or misdemeanor.' 13 Am. & Eng. Enc. Law (New Ed.) p. 53, § 2. 'A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor.' 1 Bouv. Law Dict. p. 786. A 'penalty' is defined as follows: 'Specifically, a penalty means a sum of money, the payment of which the law exacts by way of punishment for doing some act which is prohibited, or omitting to do some act which is required.' 13 Am. & Eng. Enc. Law (New Ed.) pp. 53, 54, § 3; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123."

From the two statutory provisions last quoted and these authorities he deduces the conclusion that, while the court can impose a "fine," it cannot inflict a "penalty," through an indictment. The court, however, is of opinion that, while the word "penalty" has a broader meaning than the word "fine," still that a fine, in the judicial sense, is always a penalty, although a penalty may sometimes not be a fine, or even a criminal punishment. For example, penalties are often inserted in bonds, official or otherwise, as a measure of damages, and the enforcement of them in no way invokes the criminal processes of the courts. Sometimes, when taxes are not paid when due, a penalty is added; but in such instances no crime has been committed, and the word "penalty" is used in a restricted sense, and does not include any idea of criminal punishment. It is rarely, if ever, made a criminal offense, by express provisions of the statutes, to omit to pay taxes at the exact time when they become due, and the enlargement of the amount of taxation which results from such failure is measured by way of interest or otherwise. While this, in a certain sense, is the infliction of a penalty, there is no provision for punishment therefor under the criminal laws. A crime is well known to be "an act committed or omitted in violation of a public law forbidding or commanding it." Bouv. Law Dict. If such law be supplemented by a provision imposing some punishment or penalty for its violation, the idea of a public offense is complete, though, of course, there are different degrees of crime, some being felonies and some misdemeanors. Bearing this definition in mind, it seems to the court that the decision of the pending question must depend upon whether the act done or omitted is made a public offense, punishable by law as such. This being, as we think, the proper test, we find that section 4426 of the Revised Statutes, as originally enacted, is as follows:

"The hull and boilers of every ferry-boat, canal-boat, yacht, or other small craft of like character, propelled by steam, shall be inspected under the provisions of this title. Such other provisions of law for the better security of

life, as may be applicable to such vessels, shall, by the regulations of the board of supervising inspectors, also be required to be complied with, before a certificate of inspection shall be granted; and no such vessel shall be navigated without a licensed engineer and a licensed pilot."

While the phraseology is somewhat peculiar, the opinion of the court is that the language of the first clause of the act of January 18, 1897 (29 Stat. 489; 2 Supp. 539), is manifestly an amendment to section 4426, Rev. St., and must, as to all cases arising after that date, be read as if it had been originally embraced in section 4426, as a part hereot. The language of that clause is as follows:

"Be it enacted," etc., "that all vessels of above fifteen tons burden carrying freight or passengers for hire, propelled by gas, fluid, naphtha or electric motors, shall be, and are hereby, made subject to all the provisions of section forty-four hundred and twenty-six of the Revised Statutes of the United States, relating to the inspection of hulls and boilers, and requiring engineers and pilots."

The explicit requirement of the statute thus amended is that "no such vessel shall be navigated without a licensed engineer and a licensed pilot," and it is a plain violation of the statute to navigate such a vessel without both a licensed engineer and a pilot. The omission to have the licensed engineer in charge and control of the boat's engines and machinery was the omission to do what a public law commanded, and comes strictly within the definition of the word "crime." If what has been indicated be the proper construction of section 4426 as amended, it seems to the court that it must necessarily be read in connection with section 4500, Rev. St., and from this it would seem to follow that, unless some other provision controls, section 4500 would be applicable, and would supply the necessary provision for the punishment of the offense charged in the second count. Section 4500 is in this language:

"The penalty for the violation of any provision of this title, not otherwise specially provided for, shall be a fine of five hundred dollars, recoverable one-half for the use of the informer."

It seems to the court that sections 4496 and 4499 in no way prevent this result, and were never intended in any way to do so.

What has been said would seem to dispose adversely of the motion to quash, so far as it applies to the second count in the indictment, and the court is clearly of opinion that this result is not and cannot be avoided by the legislative policy announced in the statute of giving one-half of the fine to the informer.

It may be added that the authorities are clear and explicit that section 4426 must, since the amendment of January 18, 1897, be read precisely as if the matter contained in that amendment had been embraced in section 4426, when originally enacted. Black, Interp. Laws, § 131; End. Interp. St. §§ 40, 294. If this be true, then section 4500, Rev. St., must inevitably supply the punishment for the willful doing of what the last clause of section 4426 has forbidden. Certainly, the judicial tribunals may enforce this as well as the other criminal laws of the United States. Indictment is the well-established proceeding for doing this as against the persons offending, whatever other course may be pursued as against the vessel itself.

We come now to the first count. Bearing in mind all that has

been said, we have been unable to find, and the learned counsel for the United States have not pointed out to the court, any express provision of the statute which forbids the owners of a vessel of the character described in that count, and operated by the motive power therein mentioned, from navigating it without a license or certificate of inspection, nor for navigating it before it had been inspected. As to this, the language of section 4426, as amended, is different, and, while it does require certain acts at the hands of the officials, it does not contain an express prohibition against the running of the boat by the owner before inspection, although there is an express prohibition against navigating it without putting a licensed engineer in charge of its engines and machinery. Doubtless it was the duty of the government officials to inspect it, but I have not found any express provision forbidding the owner to navigate it previous to such performance of duty by the proper officials. Steam vessels might possibly invoke a different result, but the first count, as drawn, does not show, so far as the statutes have been brought to my attention, any violation by the owner of any law in respect to a vessel operated by fluid and gasoline as a motive power. No amendment to the statute is pointed out which, in respect to this charge, would expand the statute so as to embrace anything but vessels operated by steam, unless regulations were properly made, and none are alluded to in the count. The facts stated in the first count are not sufficient, in my judgment, to constitute a public offense, particularly in the absence of an averment that specific regulations were made and disobeyed.

It results that the motion to quash the first count should be sustained, unless the district attorney chooses to enter a nolle prosequi as to that count, but the motion to quash the second count is overruled.

MAHLER et al. v. ANIMARIUM CO.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1901.)

No. 1,527.

PATENTS—VALIDITY—THE OXYDONOR.

The Sanche patent, No. 587,237, for a device known as the "Oxydonor," an appliance for use in treatment for disease, is void on its face for lack of patentable invention. The device itself, which consists of two metal plates or pads connected by a fine wire, has no features of novelty which render it patentable, considered apart from the force, if any, which is thereby utilized; and the theory advanced by the patentee in the specification to sustain the claim of utility in some respects, at least, contradicts accepted truths of medical science, and appears to rest upon no substantial foundation, but to have been put forward for the sole purpose of obtaining a patent on a device to be sold to the public for the treatment of disease. It also seems probable that, if the device has any utility, it is due to the generation of a slight current of electricity between the two plates, and that the denial of such effect in the specification was made for the same purpose, since as an electrical appliance it clearly lacks novelty.

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

L. A. Gilmore, for appellants.

C. A. Dudley and Justus Chancellor (Charles S. Thornton, on the brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge. The Animarium Company, the appellee, exhibited its bill against James H. Mahler, Myrtle G. Mahler, and Chattie E. Field, who were doing business as the Oxygenor Company, the appellants, to restrain the latter from infringing United States letters patent No. 587,237, issued July 27, 1897, and United States letters patent No. 587,612, issued August 3, 1897, and United States letters patent No. 588,483, issued August 17, 1897. The patents in question were issued to Hercules Sanche, as assignor to the Animarium Company of New York. The defendants below, who are the appellants here, demurred to the bill, but the demurrer was overruled. Thereupon they elected to stand on the demurrer, and a decree was entered in favor of the Animarium Company, sustaining the validity of patents Nos. 587,237 and 587,612, from which decree the defendants have appealed. Although the bill charges an infringement of the three patents specified above, yet it was conceded in argument by the complainant's solicitors that the right of the Animarium Company to a decree depends upon the validity of patent No. 587,237, issued on July 27, 1897, which contains but a single claim. It was admitted that the decree below ought not to have been granted if that claim is invalid. In view of these concessions made in open court on the oral argument, it becomes unnecessary to examine or express any opinion concerning the later patents. As the case below passed off on demurrer, no testimony having been heard, in determining whether patent No. 587,237 is valid we are at liberty to consider only the allegations of the bill and the specification and claim of that patent. We are at liberty, however, to examine the patent and determine whether it is valid in the light of that common knowledge of facts and principles which is possessed by all persons of average intelligence. Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200; Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991; Id., 159 U. S. 477, 16 Sup. Ct. 53, 40 L. Ed. 225; Engraving Co. v. Hoke (C. C.) 30 Fed. 444, 446. The specification of letters patent No. 587,237 declares at the outset that the patentee has invented "a new and improved method of, and apparatus for, treating diseases, of which the following is a specification." He then says:

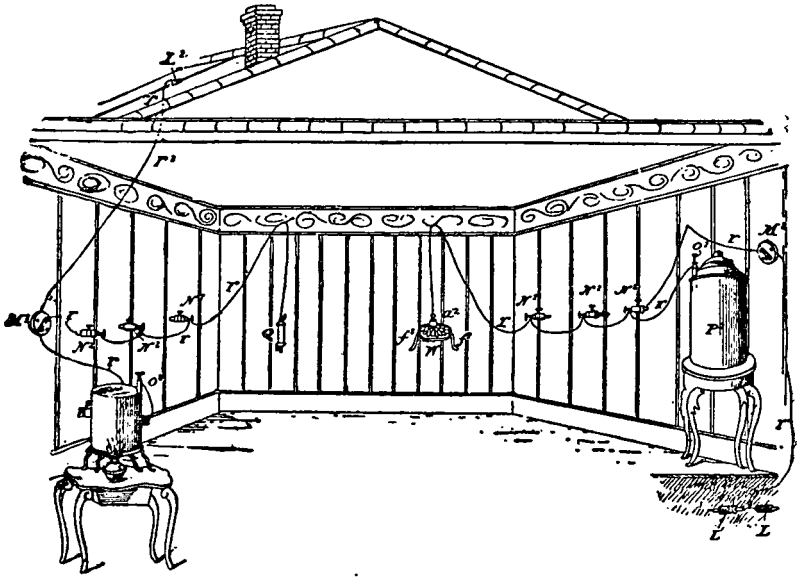
"In an application for a patent filed by me September 17, 1885, I have advanced certain new ideas and theories concerning the disturbance of the normal functions of life commonly known as 'disease.' My observation and experience justify the belief that most diseases, and especially those of a nervous character, are due to a disturbance of the electrical equilibrium of the body. It is well known that the earth and the surrounding envelop of air are strongly charged with an opposite polarity, and that any disturbance of the normal relations of these forces, such as occurs before a thunderstorm, results in discomfort to the whole animal tribe. The habits of civilized life—i. e. the wearing of shoes and clothing of nonconducting material, and the insulation from the earth by dry floors and feather beds—

prevent the body from partaking freely of the electrical equilibrium of the earth, and a preponderance of an electric tension of either a positive or negative character in the body produces, by a stimulation or suppression of chemico-vital function, the abnormal condition of things, the symptoms of which we call 'disease.' Hogs in the field, turtles, alligators, and the lower animals that lie in the mud and readily partake of or assimilate themselves to the electrical conditions of the earth, are notoriously free from disease and nervousness. Man, the feathered tribe, and higher animals, who are covered with a nonconducting coat, and are more or less insulated from the earth, are subject to these difficulties in marked contrast. Pursuing this theory, I have undertaken to correct these difficulties, not by an attack upon the symptoms, after the manner of medication, but by the logical process of bringing to bear upon the system a set of influences reverse to those which involved the difficulties. In my first application I only contemplated the restoration of electrical equilibrium by a metallic or conductive contact between the body and the earth. My present application comprehends even a wider scope and a more general application, in that it does not simply comprehend a preservation of electrical equilibrium, for this would only seem to preserve health, but it contemplates the removal of abnormal conditions by producing an electrical tension in the body contrary to that which superinduced the disease; and for this purpose I have found that the contact of the body through a small conductor with a source of extraordinary heat or extraordinary cold permits me to produce either a positive or negative condition in the body without connection with the earth; it being remembered at the outstart that the electrical condition referred to by me has nothing whatever to do with galvanism or dynamic currents, but is only a condition of electric potential or static polarity. This agency permits me to reach all the functions of the body, and bring them into healthy and effective action, stimulating the chemico-vital processes without having to rely upon the single channel of an enfeebled and diseased stomach, which is almost the only avenue of treatment by medication."

Then follows a description of the device, which is very simple; being nothing more than two metallic plates connected by a fine wire, one of which plates is to be placed in contact with the limb or arm of a patient, and the other placed in an ice cooler or on a stove or in the sun. The cut on the opposite page illustrates the device. The inventor suggests in his description of the device that the wire connecting the two metal plates may be connected at M^2 in the drawing, by an "electrical switch," with a "metal anchor" imbedded in the ground so as to put the patient "in the same electric tension with the earth."

The following additional observations or statements are contained in the specification:

"It is not pretended that there is any flow of current or any of the phenomena of dynamic electricity manifest in this apparatus, but only a charging of the body with a certain magnetic polarity, the effects of which upon the system are remarkable in stimulating the system to throw off disease. The cold or earth connection I find almost universally applicable to allay nervousness and stimulate the system by counteracting one polarity of the body. The hot connection is for the opposite polarity,—such, for instance, as exists in inflammatory fevers; its effect being usually to first raise the temperature, and then bring the body to a normal temperature by dissipating congestion and starting the perspiration. The manner in which I believe the charging of the body with a positive or negative polarity acts upon the system to effect physiological changes is by the exertion of an attractive influence, and the stimulating of an endosmose of gases of the air through the capillaries and electrolytic action in the cells, which agencies by intelligent application are made to arrest various disorders. * * * I am aware that it is well known to apply to patients the cooling effect of direct contact or radiation of hot bricks, bottles of water, etc., and also to apply directly cool-



ing applications of ice. The application of these is entirely different from my invention, in that I do not employ the direct conduction of cold or heat, nor do I apply it in the same way. I utilize the influence of a cold or hot object at a distance through a conductor of electricity, the source of its influence being removed to a point out of range of direct radiation or conduction of heat. Another important and distinguishing feature of my invention is that the wire connection which I employ does not necessarily have the qualities of a conductor for dynamic electricity where flow or passage of the current increases with the increase of cross sectional areas of the conductor, but I find ordinarily that the best effects are produced with a very small copper wire, varying in size from 24 to 30, and when great variations in temperature —i. e. an intense degree of cold or intense degree of heat—are employed the tendency to best effects is produced by the finer wire, and vice versa. This strengthens my belief that the principle which is made available is not of a dynamic character, but only such small wire is required as to permit the polarity in molecules of the wire to induce a corresponding polarity of the body, and to make of the body a feeble magnet of positive or negative polarity, according to the character of the connection (hot or cold) and the nature of the disease. In substantiating by analogy the effect of hot or cold connection upon magnetism in inanimate things, I find by test that a magnet of normal temperature connected at its equator to a body of ice water by a fine wire will after a lapse of several days show a strengthening of its north pole and a weakening of its south pole; the center of magnetism in the south pole moving gradually towards the equator. A magnet similarly connected to a hot body (the heat of a stove) shows precisely the reverse,—i. e. a strengthening of the south pole and a weakening of the north pole,—and I am led to believe that a similar result takes place in the human body when my invention is applied. It is not absolutely essential that I should employ different temperatures to get the concomitant effects of magnetic polarity. A body of hydrogen gas can be substituted for the cold application and oxygen for the hot application, and the body of the patient may also be given a polarity by connection with the pole of a permanent or electro magnet."

The claim of the patent is as follows:

"The clinical instrument comprising a contact plate or member adapted to be attached to the body to be treated, a second plate or member adapted to

be placed in or under the influence of a temperature higher or lower than the body to which the other plate is attached, or under the influence of matter which is electro-positive or electro-negative to the body having said other plate or member attached to it, and a flexible conducting or transmitting medium connecting said two plates or members, said medium being of a relatively small size to said plates or members, and of a length sufficient to permit said two plates or members to be placed at such distances apart that the body having one plate or member attached thereto will be removed beyond the range of influence transmitted by direct radiation, conduction, or contact from said other plate or member, substantially as described."

The appellants contend in this court, as they did in the lower court, that patent No. 587,237 is void on its face, for the reason that the specification pretends to describe in scientific terms the theory upon which the patented device operates, whereas, as they aver, the terms employed are unscientific, ambiguous, and false as statements of scientific truths, and were intended only to mistify the officials of the patent office and to mislead the public. If this charge is true, it doubtless renders the patent void, and its truth or falsity must be determined in the main by a critical analysis of the specification, since the record contains no other evidence to which we can refer. Turning to the specification and translating it as we understand it, it contains in substance the following representations or statements: The inventor of the device believes (such belief being based on his observation) "that most diseases, and especially those of a nervous character, are due to a disturbance of the electrical equilibrium of the body"; that the habits of civilized life, particularly modes of dress, prevent the body from partaking freely, as it ought to partake, of the electrical equilibrium of the earth, in consequence whereof the body becomes charged at times either with too much positive or too much negative electricity, the result being an overstimulation or a suppression of the vital functions, producing an abnormal condition, termed "disease." This is the new fact or principle which the inventor thinks he has discovered and seeks to utilize in the treatment of diseases. Having adopted this theory of the origin of all or most diseases, he represents that he has had in contemplation the removal of the abnormal condition aforesaid, which end he proposes to accomplish by producing an electrical condition of the body contrary to that which occasioned the disease; and the means that he employs to that end, which is the only patentable subject, is a small wire with metallic pads at the end, designed to connect the human body with some other object which is either very hot or very cold, and so far removed as to avoid the effects of radiation. The inventor recommends a hot connection to allay inflammation, and a cold connection to allay nervousness; but he makes no recommendation as to the sort of connection which should be made to cure hundreds of diseases that are well known to the medical profession, leaving those who may be afflicted with such diseases to find out the proper connection for themselves. Concerning the manner in which the alleged alteration of the polarity of a human body by means of the wire connection operates to cure disease, the inventor says that he believes that it operates by "the stimulating of an endosmose of gases of the air through the capillaries and electrolytic action in the

cells, which agencies by intelligent application are made to arrest various disorders." This explanation is not very lucid, but as the word "endosmose" means "a thrusting inward," and as it is a word frequently employed in physiology to describe the absorption of the fluids of the stomach into the blood vessels by capillary attraction, and as "electrolytic action" means the decomposition of substances occasioned by electricity, the paragraph above quoted must be understood to mean that the inventor believes that his device operates to cure disease by causing an increased flow of the gases of the air through the capillaries or ducts of the human body, and by causing a more rapid decomposition in the cells of the body, due to the action of an increased current of electricity. Now, as no one knows in what way electricity when applied to the human body operates to cure disease, or whether it does effect cures, it is obvious that any physician who employs electricity as a healing agent by means of an ordinary battery might give the very same explanation of its operation as that given by the patentee, and with full as much assurance that his explanation was right. A further criticism of the clause of the specification last quoted is that, while the inventor suggests that an "intelligent application" of his device must be made to arrest various disorders, yet he nowhere points out how it should be applied to cure any specific disease which flesh is heir to. If one has a headache, or a cold, or consumption, or a cancer, or Bright's disease, or any severe pain, all of which diseases, according to the inventor's theory, are due to a disturbance of the electrical equilibrium of the body or to a loss of one species of polarity, he could not determine from anything contained in the specification how the device should be applied, or with what exterior object he should become specially connected, to regain a proper electrical equilibrium or the requisite electrical polarity. Again, in two places in the specification the inventor says, in substance, that his invention has naught to do with "galvanism or dynamic currents," and that he does not pretend that there is a flow of any electric current along the wire, from which we understand that he means to assert, without any proof whatever, that the connection of two bodies of a different temperature and of a different polarity by a copper wire does not generate an electric current. There are other statements, however, contained in the specification, such as the statements, in substance, that the wire "makes of the body a feeble magnet of positive or negative polarity," according to the connection; that he utilizes "a conductor of electricity" to communicate the influence of a hot or cold object to the human body; and that the body may be given the desired polarity by connecting it by means of the wire with an electro-magnet,—all of which seem to be inconsistent with the aforesaid assertions of the inventor, and to have been intended to create the impression in the minds of ordinary persons that a current of electricity such as they are familiar with is generated by his device, and that he makes use of it for healing purposes.

We are of the opinion that the patented device, considered by itself, and apart from the force, if any, that is thereby utilized, contains no features of novelty entitling it to a patent; it being nothing

more than a wire connecting two metal pads. We are furthermore of opinion that if what is ordinarily termed an "electric current" is generated or occasioned by the attachment of the wire to two objects of a different temperature or different polarity, and if the curative effect of the device when applied to a patient is due to a slight electric force or energy thereby generated, then the device is wanting in patentable novelty. It seems most probable that, if it exerts any curative power, it is due to the cause last suggested. It is within the common knowledge of everybody that electric energy has long been used in the treatment of various diseases, and that when so employed it is conveyed from the source of generation to the patient by means of a wire, and is applied in various ways,—generally by bringing the end of the wire in contact with the affected part. There is nothing new in the idea of using electric energy to heal disease, although it may not be well enough proven to be accepted as an established scientific truth that electricity does effect cures. The inventor himself seems to have realized the truth of the foregoing observations, and we feel constrained to believe that he made the several assertions heretofore mentioned (that he did not employ dynamic currents, and that there was no flow of current) upon the assumption that if a current of electricity was developed by his device, or by his mode of applying it, its healing effect, if any, was most likely due to the slight electric current thus developed, and that in that event he would not be entitled to a patent. We have been forced to conclude, after a careful study of the specification, that the theory enunciated by the inventor, that most diseases are "due to a disturbance of the electrical equilibrium of the body," is a mere pretense; that is to say, a theory not entertained by the inventor in good faith, but put forward as an imaginary hypothesis merely for the purpose of obtaining a patent on a very simple contrivance, which was not patentable unless the claim was re-enforced by some such pretended discovery. The theory or discovery in question is certainly at war with at least one of the accepted truths of medical science of which we are entitled to take notice, namely, that many diseases are occasioned by germs or microbes that are taken into the system, either in the food which we eat, or the water which we drink, or in other ways, and whose operations in some instances have been observed and studied by the microscopist. We also conclude that the statement in the specification to which allusion has already been made, to the effect that the inventor does not by means of his device make use of "dynamic currents," but relies on some other mysterious and unexplained property of electricity to effect cures, is a statement which rests upon no substantial foundation, and was most likely inserted in the specification for the purpose of forestalling objections to the granting of a patent which would probably have been made if it had been conceded by the inventor that an electric current was generated and flowed along the connecting wire, to which the healing effect of the device might be attributable.

It may be conceded that one who discovers a new force, or a new capability of a known force, and who provides some practical means

for applying the new force or the new capability to a useful purpose, may obtain a patent, although the means which he provides are substantially old, or of such a kind that, when considered alone and without reference to the utilized force or capability, they would not be patentable. Rob. Pat. §§ 91, 92, 95, 959. We think, however, that a patent cannot be lawfully granted when, as in the present case, it appears that the claim preferred by the patentee that he has made a discovery of a new fact or principle in medical science, and of a new mode of operation of a known force whereby the discovery is utilized, rests upon no substantial foundation, and is at best an imaginary hypothesis, and was most likely put forward merely to obtain a patent on a device which he proposes to make and sell to the public for the treatment of disease. The granting of a patent under the circumstances last stated would give to the theories enunciated in the specification an appearance of authenticity, and tend to mislead and deceive the public if the theories are false.

For these reasons, we are of opinion that the patent in suit does not describe or cover a patentable device, and that it ought not to have been granted. It is accordingly ordered that the decree below be reversed, and that the cause be remanded, with directions to dismiss the bill of complaint.

BRADLEY PULVERIZER CO. v. BOWKER FERTILIZER CO. et al.

(Circuit Court, D. Massachusetts. November 4, 1901.)

No. 902.

1. PATENTS—INFRINGEMENT—MILLS FOR PULVERIZING ORES.

In the Griffin patent, No. 410,757, for improvements in mills for pulverizing ores, claims 13, 14, and 15, which relate to devices for discharging the ground material from the mill, if valid, are limited to substantially the combination of devices described in the specification, and are therefore not infringed by a mill in which stirrers on the bottoms of the rolls are used instead of the elevating inclines or shoes described in the patent, to project the pulverized material towards the openings.

2. SAME.

The Griffin patent, No. 515,673, for improvements in mills for pulverizing ores, claim 5, the important element in which is the use of stirrers on the bottoms of the rolls to effect the agitation and elevation of the ground material, must be limited, in view of the prior patents granted to the same inventors for mills having similar stirrers, to their use in connection with the particular form of driving mechanism described in the specification. As so limited, *held* not infringed.

In Equity. Suit for infringement of patents. On final hearing.

Fish, Richardson & Storrow, for complainant.

Hoke Smith and Edward P. Payson, for defendants.

COLT, Circuit Judge. The two Griffin patents on which this suit is brought are for improvements in mills for pulverizing ores. The mills belong to what is known as the "centrifugal type," in which the ores are ground by suspended rollers held in contact with an annular die by centrifugal force. Patent No. 410,757 was issued September 10, 1889, to E. C. Griffin, and patent No. 515,673 was issued February 27, 1894, to J. K. and E. C. Griffin. Only claims 13, 14,

and 15 of patent No. 410,757 are in issue. These claims relate to devices for discharging the ground material from the mill, and the important elements are the two-part casing having an annular passage or opening, and the elevating devices adapted to project the material towards the screened openings. Only claim 5 of patent No. 515,673 is in controversy. The important element in this claim is the use of stirrers upon the bottoms of the rolls to effect the agitation and elevation of the material in the pan. In defendants' mill are found a two-part casing having an annular passage, and stirrers upon the bottoms of the rolls, and therefore it is contended that the above claims of both the patents are infringed.

The first patent, No. 410,757, is for improvements on a prior Griffin mill patented October 19, 1886. These improvements are classified under six heads. The claims in issue come under the fourth head, which relates to the parts for grinding, screening, and discharging the material. As the claims are nearly identical, it is only necessary to refer specifically to the thirteenth:

"In a pulverizing mill, the combination of a stationary two-part casing or pan having an annular passage or openings for discharging material from its lower portion, an annular die, pulverizing rollers, and a cover having screened openings above said die and feed-elevating devices below said die, which are adapted to project the pulverized material towards said openings, substantially as described."

We have here a combination of the following elements: (1) Two-part casing, with annular passage; (2) annular die; (3) pulverizing rolls; (4) cover; (5) screens above the die; (6) feed-elevating devices below the die.

The novelty of each of these claims resides in the combination rather than in any single element, and the question of infringement turns upon whether there is found in the defendants' mill the same combination. If the claims are limited to substantially the elevating devices disclosed in the patent, it is apparent there is no infringement. The defendants' mill has lugs or stirrers located on the bottoms of the rolls, while the elevating devices described in the patent are "inclines or shoes" attached to the frame of the mill, which are thus referred to in the specification:

"The elevating inclines or shoes, h', pass through inclined slots formed in said flange, and are attached to the latter by wedges fitted into lugs having wedged-shaped recesses, or said inclines or shoes may be bolted or otherwise removably secured to said flange."

The complainant seeks to sustain infringement by insisting that the claims should receive a broad construction; that they should be construed to cover any elevating device below the die which operates in any degree to project the material towards the screened openings; that this liberal construction is warranted by reference to the specification, which says, when speaking of the operation of the mill, "it [the material] then falls downward towards or upon the elevating inclines or shoes, h', and by them or by other lifting means is driven upwardly and outwardly against the screens in the screened frames, c." I find myself unable to give such a broad construction to these claims for the following reasons: (1) The mill described in the patent was unsuccessful; (2) the combinations covered by

these claims never went into practical use; (3) the Griffin commercial mill does not employ these inclines or shoes for elevating the material, but stirrers on the bottom of the roll; (4) all the elements enumerated in these claims were old in the art, and all are disclosed in the prior Griffin patent No. 351,321, except the two-part casing; (5) a two-part casing, which it is maintained is the novel feature in this combination, is found as early as the Cochran patent, issued in 1854.

The complainant advances the argument that the discharge devices embraced in these claims solved an important problem in the centrifugal mill art. It maintains that, while wet pulverizing mills were practically successful, dry pulverizing mills were unsuccessful by reason of the difficulty of getting the ground material out of the mill, and that these combinations first taught the world how this could be accomplished, and consequently made dry pulverizing mills successful. To state the argument in another way: The problem of the construction and operation of the driving mechanism in a centrifugal mill having been first solved by Huntington by suspending the rolls, and improved by Griffin in his patent of 1889 by adding thereto the positively driven gyrating roll, there was still another problem to solve in the case of a dry pulverizing mill, namely, to devise means for getting the material out of the mill, and that these means were first disclosed in these claims.

I do not think this argument is sound or supported by the record. In the first place, there appears to be little or no distinction in this art between wet and dry pulverizing mills. The same mill is commonly adapted, with slight change, to both forms of pulverizing. The patents in some cases state that the mill is adapted to both wet and dry grinding. Again, this record abundantly shows that some form of stirrers, or agitators, or scrapers, or elevating devices was common to almost every patented crushing mill for the past 40 or 50 years, and also that such mills were provided with passages or channels of various forms through which the material was discharged, and this applies to centrifugal grinding mills as distinguished from other kinds of grinding mills.

I do not find that the failure of any of the unsuccessful Griffin mills, or of any of the patented mills in evidence, arose from the difficulty of devising adequate means for discharging the material, but was due to other causes. There are many minor inventions enumerated in the patents for these mills which are the subject-matter of numerous claims. These inventions relate to details of construction, such as the form of the casing or pan, the die, the feed, the cover, the screened openings, the fan, the stirrers or elevating devices, and other subordinate matters. While the construction of these parts varies in different mills, they were all known and a part of the art before 1888, when the patent under consideration was applied for. It does not follow from this that there may not be patentable novelty in the combinations covered by the claims in issue, but it does follow that such combinations are not entitled to the broad construction they might receive if they were radically new, and solved for the first time an important problem.

Including the two patents in suit, J. K. Griffin and his son, E. C. Griffin, took out eight patents for pulverizing mills between 1886 and 1894. Two of these patents were issued to J. K. Griffin, five to E. C. Griffin, and one to both jointly. One of these patents is for the Griffin commercial mill, which has gone into extensive use. The suit at bar is not brought upon the patent for this mill. The other Griffin mills proved unsuccessful.

The really difficult problem presented in a pulverizing mill is the construction and operation of the driving mechanism. It is here that difficulties like friction and gravity have to be met and overcome. It is upon this, the main feature of the mill, that the thoughts and efforts of inventors have been chiefly centered. It is this which has called for the exercise of the inventive faculty, and which constitutes the principal invention embodied in the various Griffin patents and other patents in evidence. The other inventions concern the minor features of the mill, and are of a subordinate character.

In the old construction of centrifugal mills, the rolls came in contact with, and operated against, the bottom of the die. This arrangement proved unsatisfactory. The centrifugal force was neutralized by the friction of the rolls against the bottom of the pan, and the rolls soon wore out. These defects were overcome by Huntington, who conceived the idea of suspending the rolls above the pan. In the Huntington mill, which was patented May 8, 1883, suspended rolls operated against an annular die by centrifugal force. Afterwards, J. K. Griffin conceived the idea of a positively driven roll, and this he effected by the application of power direct to the roll shaft, whereby a single roll is caused to rotate positively against the die. In this manner Griffin utilized, in a crushing mill, both centrifugal force and rotary momentum.

In view of the prior art, I must hold that claims 13, 14, and 15 of the Griffin patent, No. 410,757, if valid, are limited to substantially the devices described in the specification, and therefore to the "inclines or shoes" attached to the frame of the mill, and that the defendants' mill does not infringe these claims when in place of such "inclines or shoes" it uses stirrers on the bottoms of the rolls.

Claim 5 of patent No. 515,673, the other patent in suit, is as follows:

"In a pulverizing mill, the combination with a pan or chamber and an annular die of pulverizing rolls suspended and driven above the bottom of said pan or chamber, and provided with stirrers upon their bottoms, substantially as shown and described."

The elements in this claim which call for consideration are (1) rolls suspended and driven above the bottom of the pan, and (2) stirrers upon the bottoms of the rolls. The defendants' mill is a centrifugal grinding mill of the Huntington type, and the driving mechanism is different from that described in the Griffin patent. It has, however, stirrers upon the bottoms of the rolls, though differing somewhat in form from those of the patent. Assuming this claim covers all forms of driving mechanism in the centrifugal type of mill in combination with stirrers on the bottoms of the rolls, it is clear the defendants' mill is an infringement. Assuming the claim is limited to the kind of driving mechanism described in the patent, it is clear there is no infringement. The question of infringement,

therefore, turns upon the construction which should be given to the claim.

If stirrers upon the bottoms of the rolls of a centrifugal grinding mill had been disclosed for the first time in this patent, I should be inclined to construe the claim broadly, and to hold that the defendants' mill infringes, although it contains a different form of driving mechanism. But such is not the fact. The application for this patent was filed March 31, 1891. On August 20, 1889, patent No. 409,579 was granted to J. K. Griffin, which embodies substantially the Griffin commercial mill, and which describes stirrers on the bottom of the roll. The specification says: "To the bottom of the roll are attached the stirrers, 17', which may be made of steel, chilled iron, or other hard material;" and in claims 8, 9, and 10 of the patent these stirrers are made an element of the combinations. Another patent, No. 449,118, for an improvement on the patent last mentioned, granted to E. C. Griffin, March 31, 1891, upon an application dated October 29, 1890, also describes stirrers on the bottom of the roll. Patent No. 452,782, granted to J. K. Griffin, May 26, 1891, upon an application filed October 20, 1890, also contains stirrers on the bottom of the roll.

If this were all the evidence, it is manifest that claim 5 of the patent in suit, if valid, must be limited to stirrers on the bottoms of the rolls in combination with the special driving mechanism described in the patent. The complainant seeks to meet this difficulty by the testimony of both the Griffins, who swear that they made the invention covered by claim 5 in the summer of 1888, thus carrying back the invention to a date prior to the three patents above referred to. This testimony is supplemented by the introduction in evidence of an application for a patent filed February 18, 1889, by J. K. Griffin, and afterwards withdrawn. In this application the third claim is identically the same as the fifth claim of the patent in issue. The Griffins explain the withdrawal of this application by testifying that it was subsequently found, upon going carefully over the matter, that they were joint inventors of the mill covered by this application; that in consequence the application was withdrawn, and the subsequent application for the patent in issue was filed March 31, 1891, in which they appear as joint inventors. The withdrawn application and the specification of the patent subsequently granted are substantially the same, except that the patent contains certain additional matter.

It is important to note that the Griffins do not say that, in the summer of 1888, they invented stirrers upon the bottoms of the rolls in a centrifugal grinding mill. What they say is that they made the invention referred to in the fifth claim of the patent in suit at that time. On this point J. K. Griffin's testimony is as follows:

"Q. Please state when you and your son made the invention referred to in the fifth claim of this patent in suit, 515,673. A. In the summer of 1888, I think, about that time."

E. C. Griffin testifies:

"Q. When did you and your father make the invention pointed out by this fifth claim of patent in suit 515,673? A. Some time in the year 1888; I think about the middle or latter part of the summer."

The Griffins at that time were at work upon the mill embraced in patent No. 515,673, which is first described in the 1889 application. Assuming the truth of the testimony of both the Griffins, it would seem that what they invented in the summer of 1888 was the application of stirrers to the bottoms of the rolls in the mill which they invented at that time. The theory that the Griffins at that time invented the application of stirrers to centrifugal mills, whatever the form of the driving mechanism, is inconsistent with their own evidence, and is inconsistent with the subsequent Griffin patents, which contain such stirrers.

The natural and consistent conclusion from the evidence and the various Griffin patents is as follows: In the summer of 1888 the Griffins invented a mill with stirrers attached to the bottoms of the rolls. This mill was subsequently patented, February 27, 1894, and is one of the patents now in suit, No. 515,673. Subsequently, J. K. Griffin invented another mill, with stirrers on the bottom of the roll, for which he was granted patent No. 409,579. On March 31, 1891, E. C. Griffin was granted patent No. 449,118, for another mill, which was an improvement on the mill last mentioned, with stirrers on the bottom of the roll. On May 26, 1891, J. K. Griffin was granted patent No. 452,782 for still another mill which he had invented, and which contained stirrers on the bottom of the roll. In the light of this history of the Griffin inventions and patents, the combination covered by claim 5 of the patent in suit must be limited to the form of driving mechanism described in the specification, and the defendants' mill does not infringe this claim by the use of stirrers on the bottoms of the rolls, combined with the driving mechanism of the old Huntington mill. The conclusion reached by the court renders it unnecessary to pass upon the defendants' petition, filed after the case was heard, to reopen the case on the ground of newly-discovered evidence.

Bill to be dismissed, with costs.

THE DEL NORTE.

CRESCENT CITY TRANSP. CO. v. TOWNSLEY.

(District Court, D. Washington, N. D. October 31, 1901.)

1. SHIPPING—CHARTER DEMISING SHIP FOR TERM—LIABILITY FOR WRONGFUL ACT OF OFFICERS.

By a time charter the owner agreed to let and hire to the charterer the whole of a steamship, with her tackle, apparel, furniture, etc., for the term of four months, at a stated rental, to be employed by the charterer between the port of Seattle and Alaskan ports. She was to be delivered to the charterer at Seattle in good order and repair, and redelivered to the owner there at the end of the term in the same good condition, with certain exceptions of usual wear and tear and damages arising from sea perils and inevitable casualties. The charterer was to have "full charge of the vessel during the continuance of the charter party"; to pay all bills and expenses incurred in her operation, including the wages of the master, officers, and crew; to protect her from all liabilities, and to have all her earnings of whatever description. The master, chief engineer, and steward were to be appointed by the owner, but "to be in all respects under the orders and direction of the charterer," and subject to removal on his complaint, if found to be justified.

It was further provided that, in case the charterer should fail to pay the rental at the times specified, or the operating expenses, including wages, the owner should have the right to retake possession, and that on his request the master should hold possession of the ship as his representative. *Held*, that such charter constituted a demise of the vessel, which placed the charterer in possession, as owner, for the voyages made during the term, and that he could not hold the vessel liable by a proceeding in rem for loss or damages occasioned by the malfeasance or wrongful acts of the master or steward while so in his service.

2. SAME—CONSTRUCTION OF CHARTER.

A provision of such charter, giving the master authority to control the operations of the vessel in towing barges, and expressly exempting the owner from liability for the abandonment of any tow where, in the judgment of the master, the safety of the vessel required such abandonment, did not confer on the master any powers he would not otherwise have had, nor change the relation of the charterer to the ship as owner pro hac vice, and it gave him no claim on the vessel on account of the wrongful act of the master in abandoning a barge without necessity.

In Admiralty.

This is a suit in rem against the steam schooner Del Norte, and in personam against her owner, by T. F. Townsley, libelant, to recover damages for alleged losses resulting from misconduct of the captain and steward of the vessel while she was in his service under a charter party, and for breach of the contract contained in the charter party by withdrawing the vessel from the charterer's service before the termination of the period for which she was hired. The owner of the Del Norte filed a cross libel in personam against the libelant to recover a balance alleged to be due for hire of the ship under the charter party. Decree for the respondent and cross libelant.

Pratt & Riddle and James Kiefer, for libelant.

Preston, Carr & Gilman, for claimant and cross libelant.

HANFORD, District Judge. After rendering a decision upon the merits in these cases, the court granted a rehearing and admitted further proof, and now, upon due consideration of the additional evidence and arguments, the court finds it necessary to revise its decision.

The amended libel alleges losses to the charterer, of which I have made the following condensed statement:

Beef and potatoes negligently wasted	$ 2,048 99
Barge Mildred abandoned at Juneau	4,000 00
Two days' unnecessary detention at Juneau of steamer	500 00
False expense voucher	257 50
Four days' unnecessary detention at St. Lawrence Bay	1,000 00
Failure to collect freight on goods carried from St. Lawrence Bay to Unalaklik	3,000 00
Two days' unnecessary detention at Dutch Harbor	500 00
Cash collected for extra meals and retained by captain	112 50
Removal of cabins and reduction of passenger accommodations, and knocking down of fares by captain	15,636 00
Carrying passengers and freight gratis	685 00
Two anchors and one winch removed from barge Mildred	125 00
Stores confiscated when steamer was taken from charterer's possession	300 00
Wrongfully taking steamer from charterer 27 days before expiration of charter	10,000 00

That part of the libelant's claim which is for losses alleged to have been caused by or resulting from the incompetence and mis-

conduct of the captain and steward is based upon an assumption that the master and steward must be considered as agents of the general owner, and that the ship and owners are liable to the charterer for all losses and damages arising either from their incompetence, or malfeasance in their respective stations. The claimant and cross libelant repudiates the agency of the captain and steward during the time the vessel was in the service of the charterer, and insists that those officers were the charterer's servants, and that the vessel cannot be held liable to the charterer for any loss occasioned by their incompetence or misconduct, and that there can be no personal liability of the owner for such loss. Therefore the question as to which of the contending parties must suffer for the alleged mismanagement of the vessel while she was in the charterer's service must be decided before it becomes necessary to investigate the charges made against the officers, and the relation of the parties towards each other and towards the officers intrusted with the management of the vessel must be ascertained and fixed by a true interpretation of the charter party. In the opinion of the supreme court, by Mr. Justice Clifford, in the case of Reed v. U. S., 11 Wall. 591–600, 20 L. Ed. 220, it is stated that:

"Affreightment contracts are of two kinds, and they differ from each other very widely in their nature, as well as in their terms and legal effect. Charterers or freighters may become the owners for the voyage, without any sale or purchase of the ship, as in the cases where they hire the ship, and have, by the terms of the contract, and assume in fact, the exclusive possession, command, and navigation of the vessel for the stipulated voyage. But where the general owner retains the possession, command, and navigation of the ship, and contracts for a specified voyage,—as, for example, to carry a cargo from one port to another,—the arrangement in contemplation of law is a mere affreightment sounding in contract, and not a demise of the vessel, and the charterer or freighter is not clothed with the character or legal responsibility of ownership. Unless the ship herself is let to hire, and the owner parts with the possession, command, and navigation of the same, the charterer or freighter is not to be regarded as the owner for the voyage, as the master, while the owner retains the possession, command, and navigation of the ship, is the agent of the general owners, and the mariners are regarded as in his employment, and he is responsible for their conduct. Courts of justice are not inclined to regard the contract as a demise of the ship, if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer; but where the vessel herself is demised or let to hire, and the general owner parts with the possession, command, and navigation of the ship, the hirer becomes the owner during the term of the contract, and, if need be, he may appoint the master, and ship the mariners, and he becomes responsible for their acts."

The same distinction and the same rule for determining whether a charterer is to be treated as the owner of the ship during the life of the charter party are recognized and applied in nearly all of the decisions cited upon the argument of this case. See Marcardier v. Insurance Co., 8 Cranch, 39, 3 L. Ed. 481; The Gracie v. Palmer, 8 Wheat. 605, 5 L. Ed. 696; Leary v. U. S., 14 Wall. 607, 20 L. Ed. 756; Shaw v. U. S., 93 U. S. 235, 23 L. Ed. 880; U. S. v. Shea, 152 U. S. 178, 14 Sup. Ct. 519, 38 L. Ed. 403; Donahoe v. Kettell, Fed. Cas. No. 3,980; The Aberfoyle, Fed. Cas. No. 16; Certain Logs of Mahogany, Fed. Cas. No. 2,559; Drinkwater v. The Spartan, Fed. Cas. No. 4,085; Eames v. Cavaroc, Fed. Cas. No.

4,238; Hill v. The Golden Gate, Fed. Cas. No. 6,492; Mott v. Ruckman, Fed. Cas. No. 9,881; Richardson v. Winsor, Fed. Cas. No. 11,795; Webb v. Peirce, Fed. Cas. No. 17,320; Winter v. Simonton, Fed. Cas. No. 17,894; The Volunteer, Fed. Cas. No. 16,991; Posey v. Scoville (C. C.) 10 Fed. 140; The T. A. Goddard (D. C.) 12 Fed. 174; Anderson v. The Ashebrooke (C. C.) 44 Fed. 124; The Euripides (D. C.) 52 Fed. 161; Steamship Co. v. Washington, 6 C. C. A. 313, 57 Fed. 224; The Alvira (D. C.) 63 Fed. 144; The Nicaragua (D. C.) 71 Fed. 723; Id., 18 C. C. A. 511, 72 Fed. 207; The Terrier (D. C.) 73 Fed. 265; Bramble v. Culmer, 24 C. C. A. 182, 78 Fed. 497; The Elton, 31 C. C. A. 496, 83 Fed. 519; McGough v. Ropner (D. C.) 87 Fed. 534; American Steel-Barge Co. v. Cargo of Coal (D. C.) 107 Fed. 964; Dest. Shipp. & Adm. § 205; 7 Am. & Eng. Enc. Law (2d Ed.) 164–194. In some of these cases it was decided, in accordance with the rule stated, that the charterer was owner pro hac vice, and in others the charterer was found to be not such owner I have not separated one class from the other, because it would be useless to do so, since both give equal support to the general rule. The only apparent departure from the rule which casts upon the charterer who receives possession of the ship and has full control of her operations the responsibility of ownership and liability for the conduct of the captain and crew, which has been brought to my notice, is the case of The Craigallion (D. C.) 20 Fed. 747. I am not disposed to criticise that decision, as the facts upon which it was based appear to have been peculiar. It is enough to say that one decision by a district court sustaining a suit in rem against a chartered vessel by the charterer for damages to the cargo, caused by the negligence of the officers and mariners in the performance of their ordinary duties, as such, while the vessel was in the possession and control of the charterer, is not sufficient to outweigh the great weight of authority, which, in my judgment, establishes a fixed rule of law inconsistent with any right in an owner pro hac vice to hold the ship or her general owner liable to him for losses attributable to torts or crimes of the master or crew. The Daniel Burns (D. C.) 52 Fed. 159. And the charterer is owner pro hac vice where the master is subject to his orders and directions, though appointed to his position as master by the general owner. The India (D. C.) 14 Fed. 476; The Bombay (D. C.) 38 Fed. 512. In such a case the charterer is himself responsible for the torts of the master, because, having a legal right to control, he is legally presumed to actually control the master's conduct. On the other hand, the general owner is not responsible, because he does not have the right to control the master in the performance of his duties. Wood, Mast. & S. § 281.

Having in view the law applicable to this case as settled by the above authorities, it is not a difficult matter to ascertain which of the parties to the cause now before the court should be held responsible for the conduct of the captain and steward of the Del Norte as to the several matters alleged in the libel. The charter party is set forth in the pleadings of both parties, and there is no controversy as to its exact terms. The contract is in writing, and the

parties to it are the Crescent City Transportation Company, which will hereafter be referred to as the "owner," and T. F. Townsley, heretofore and hereafter referred to as the "charterer." The first article provides: That the owner, for and in consideration of the covenants and agreements of the charterer to be kept and performed, does hereby charter, let, and hire to the charterer the whole of the steamship Del Norte, her tackle, apparel, furniture, machinery, appurtenances, and appliances, for the term commencing on the 6th day of June, 1898, and extending to and including the 6th day of October, 1898; said vessel to be employed during the term of this charter party in plying between the port of Seattle, Wash., and ports, islands, and places in Alaska. The second article provides that the vessel shall be delivered to the charterer at Seattle in good order and repair. The third article provides that the owner shall protect the vessel from all liens and claims of liens on account of debts contracted prior to the date specified for her delivery to the charterer. The fourth article specifies the rent to be paid by the charterer, and the dates, places, and manner of payments, and provides that in case of nonpayment the owner may retake possession of the vessel, and provides for the forfeiture of a specified sum to the owner as damages. The seventh article provides that the charterer shall deliver to the owner at the termination of the charter party the vessel, her tackle, apparel, furniture, machinery, and appurtenances, subject to exceptions, specified in the sixth article, of reasonable wear and tear and damages arising from collisions, stranding, fire, perils of the sea, and inevitable casualties. The eighth article provides that the charterer shall have full charge of the vessel during the continuance of the charter party, and shall pay all bills and expenses incurred in the operation of the vessel, including wages of the master, officers, and crew, except as provided in the sixth article, and that all earnings of the vessel, of whatever description, during the term specified, shall belong to the charterer, and inure to his sole benefit; and that, before the vessel shall be permitted to leave the port of Seattle during the continuance of the charter party, all debts contracted by the charterer for stores, supplies, or any other matter or thing whatever purchased for the use or operation of the ship, shall be fully paid, and payment certified by the master and steward; and provides that the charterer shall deposit a specified sum of money to secure payment of wages of the master and crew. The ninth article provides that the owner shall have the naming and appointing of the master, chief engineer, and steward of the vessel, said officers to be in all respects under the orders and direction of the charterer, and to receive from him wages at a rate specified; and provides further that, in case the charterer shall be dissatisfied with the conduct of either of said officers, the owner, on receiving written notice of his dissatisfaction, and the particulars and reasons therefor, shall remove the offending officer (if, upon investigation, such complaint shall be found to be justified), and shall appoint another in place of the officer so removed. The tenth article provides that the charterer shall not expose the vessel to

liability, to forfeiture, or fine under the laws of the United States by carrying contraband merchandise, or by any violation of the revenue or shipping laws of the United States. The eleventh article provides that the charterer shall pay the sums agreed upon, not assign the charter party nor sublet the vessel without the written consent of the owner, and shall deliver the vessel at the port of Seattle at the expiration of the term specified in the charter party, and that in case of his failure, neglect, or refusal to pay for the use of the vessel at the times and in the manner agreed upon, or any part thereof, or to pay the bills and expenses of operation of the vessel, including wages, the owner shall have the right to consider the charter party forfeited, and retake possession of the vessel, wherever she may be; and that in such case it shall be the duty of the master, at the request of the owner, its agent or attorney, to hold possession of the vessel for and as the representative of the owner, but forfeiture of the charter party for the causes specified shall not release the charterer or any security given by him from the payment of any portion of the rent agreed to be paid, or from the payment of the bills or expenses contracted in the operation of the vessel; and further provides that the charterer shall protect the vessel from being libeled for any matter or thing occurring subsequently to his receiving possession thereof by virtue of this charter party. The twelfth article provides that the Del Norte may tow barges or other vessels from Puget Sound to islands and places in Alaska, but the master shall have the right to determine the number of barges or vessels to be towed and the amount of cargo to be carried by each, and shall have the right to abandon any tow, when, in his judgment, the safety of the Del Norte requires. No liability shall attach to the owner by reason of any such abandonment, but it is agreed that the master is expected to use due diligence for the protection of any tow placed in his charge. A supplemental agreement annexed to the charter party also provides that the Del Norte may be employed to carry freight or live stock and passengers between Alaska and Siberia, but not to land freight or passengers at any place where the ship would be in danger, the master to judge of the safety of all landing places; and as part of the consideration for this privilege it was agreed that the master should collect the earnings in this trade, and that, if necessary, he might apply the same to pay operating expenses, and the rent to accrue under the charter party.

There is certainly very little, if any, ground for claiming that this instrument is ambiguous, or that its meaning is doubtful with respect to its being a demise of the ship. The different provisions are harmonious with the manifest purpose to place the ship, during the term for which she was hired, in the possession of the charterer, and to give him complete control of the entire ship, and her employment, and also complete control of her officers and crew. His right to have such complete possession and control could only be forfeited by failure on his part to make the required payments, or by a breach of his covenants to not expose the vessel to forfeiture by any infraction of the laws, or by failure to keep the ves-

sel free from liens. The charterer not only had a right of possession under the contract, but it is a fact admitted by the pleadings that the vessel was actually delivered, and that he did have possession during the time covered by the alleged peculations and wrongful conduct of the captain and steward. The charterer's covenants contained in the charter party obligating him to protect the vessel from seizure, and to secure her release promptly in case of an actual seizure being made, are sufficient to cast upon him the financial liabilities incident to ownership of a vessel engaged in commerce, and are entirely inconsistent with any right of the charterer to subject the ship to liability by a proceeding in rem on account of any malfeasance or wrongful act of her officers while in his service. A lien is essential to the foundation of a suit in rem in admiralty, and, as a man cannot acquire a lien upon his own property, the libelant's ownership of the vessel is a complete bar to a suit against her in rem, and the legal effect is the same whether the ownership be temporary only, or permanent.

On the rehearing it has been argued very earnestly that the twelfth article of the charter party vests in the master authority superior to the right of the charterer to control the operations of the vessel in towing barges, and that, as the owner is expressly exempted from liability for abandonment of any tow when, in the judgment of the master, the safety of the vessel requires such abandonment, this article should be construed differently from other parts of the contract, and that for the loss of a barge, alleged to have resulted from abandonment thereof in a safe harbor, when there was no imminent peril to the ship, there is an implied agreement that the owner should be liable. I might assent to this argument if in fact the twelfth article did confer upon the master any unusual or extraordinary power; but it does not. Under the law the master of a ship is responsible for the proper stowage of cargo. It is part of his duty to see that his vessel does not proceed upon a voyage overburdened, and he has authority superior to that of the charterer or owner to abandon a tow or jettison cargo to save his ship when in peril, and it is also his duty to be diligent to protect property intrusted to his care, whether it be a barge in tow or merchandise in the hold. Stipulations in the contract agreeing that the master shall have such powers, and that he shall be obligated to perform such duties, have no more effect to enlarge the rights of the charterer than would an agreement that the master shall maintain discipline on the ship, and supervise the work of his subordinates and the crew, and see that the steward does not waste the stores provided for a voyage. The contract in its entirety must be construed as an agreement that the master to be chosen by the owner should have all the powers pertaining to the office of master, and that in the operations of the ship he should be subject to the control of the charterer only to the same extent that an owner usually exercises his power to control. In my opinion, the twelfth article adds nothing to the contract except the right of the charterer to have such increased profits as might be earned by performing towing services. The only addi-

tion to the master's authority conferred by the supplemental agreement was the sole right to collect the earnings of the ship in the Siberian trade, and use the same, if necessary, to meet the charterers' obligation to pay expenses and the rent stipulated for. This agreement is not incompatible with the master's position as agent of the charterer, and it does not override the provisions of the charter party, which constituted him such agent, nor change the relation of the charterer towards the ship as owner pro hac vice. All the earnings of the ship during the life of the contract which the master collected belonged to the charterer, and the master was not authorized to appropriate any of it otherwise than to pay it out in discharging the charterers' liabilities. For any surplus he is accountable, and the owner is not accountable to the charterer unless it received the money.

For the reasons I have stated, all of the damages claimed by the libelant on account of the alleged misconduct of the captain and steward must be eliminated, and further inquiry with respect to the damages demanded by the libelant must be confined to the claim which he makes on account of being dispossessed before expiration of the time for which the vessel was hired. A forfeiture of the charter party was claimed, and the owner, by his agents and representatives, took the vessel out of the libelant's possession on the 10th day of September, 1898, which was 27 days before the expiration of the term specified in the charter party. The only ground for this proceeding is an alleged default on the part of the charterer by nonpayment of the full amount of rent which became due and payable on the 1st day of September. If, in fact, all the payments made by the charterer and the earnings of the vessel received by the captain and turned over to the owner were insufficient to pay all the wages earned and other expenses of operating the vessel and the full amount of rent to the end of the term, the owner had a right to take possession of the vessel at any time after September 1st, and the charterer is precluded from claiming damages on account of being dispossessed. It appears by a voucher introduced in evidence as "Exhibit E" that cash payments were made to John W. Graham, the agent of the owner, who conducted the negotiations for the charter and signed the charter party as agent for the owner, and money was deposited, as required by the charter party, to the amount of $10,650, and said agent also received in lieu of cash an order for $600. The statement of account rendered to the charterer by an agent of the owner, after the vessel returned from her northern voyage, which was produced in evidence, and marked "Libelant's Exhibit A," shows that the earnings for the voyage and money paid by the charterer to the captain amounted to the total sum of $5,408.88. Presumably this money, less the amount which the captain claimed to have disbursed in Alaska, was turned over by the captain to the owner, otherwise the owner would not have accounted for it to the charterer,—making an aggregate amount of cash credits in favor of the charterer on account of the charter party of $16,658.88. Against this total the charterer is to be debited with the rent for

the whole term,—that is, up to October 6th,—which amounts to $12,300, and expenditures made by the captain during the voyage, and the wages up to September 10th. From the evidence I find the following to be the true amounts: Wages to September 3d, $4,316.80; expenditures during the voyage, $2,705.65; wages from September 3d to September 10th, $173.16. The libelant is also chargeable with $1,250 for extra insurance premiums under the supplemental agreement. I disallow the claim for board of the officers and crew after the return of the vessel to Seattle, for the reason that the surplus stores which the libelant provided have not been accounted for. The total amount of all debits against the libelant is $20,745.61. The evidence sustains the libelant's claim for $300 on account of stores, fuel, and supplies for the engine room, which he paid for, and which remained on board the vessel when he was dispossessed. I allow him credit for that sum in addition to the benefit of the disallowance of the claim made against him for board. Upon a complete adjustment of the whole account, there is a balance due to the cross libelant of $3,786.73, and interest thereon at the rate of 7 per cent. per annum from September 10, 1898.

The owner's agent in Seattle demanded a sum very much in excess of the true balance due, and the libelant now claims that he was greatly prejudiced by this exorbitant demand, and was thereby prevented from securing money sufficient to meet the payment necessary to have entitled him to retain the vessel to the end of the term, and on that ground he urges that he should be relieved from his obligation to pay rent and wages for the time after September 3d, but, having failed to make a legal tender of the sum which was due, there is no legal ground upon which the court can grant relief.

A decree will be entered in favor of the cross libelant for the amount of said balance and interest and costs.

THE BERTHA.

(District Court, D. Washington, N. D. October 30, 1901.)

SEAMEN—GROUNDS FOR DISCHARGE—EXCESSIVE USE OF LIQUOR.

It is within the legal authority of the master of a ship to prohibit absolutely the use of intoxicating liquors by his subordinate officers and the members of the crew, and a mate who, after the master had remonstrated with him for his excessive use of liquor, and had forbidden the steward to furnish him any, obtained it through the connivance of a passenger, and, owing to intoxication, failed to obey an order with the required promptness, gave legal cause for his discharge before the expiration of his term of service.

In Admiralty. Libel by seaman to recover wages, and damages for wrongful discharge.

Root, Palmer & Brown, for libelant.

Gorham & Gorham, for claimant.

HANFORD, District Judge. The libelant shipped as first mate on the steamship Bertha for a voyage from Seattle to Kodiak and return, and having served in that position until he was discharged by the captain at Kodiak, where he was paid wages for the time of his actual service, is now prosecuting this suit for the recovery of the balance of his wages for one month, and expenses for his return voyage from Kodiak to Seattle, alleging as his grounds that he was wrongfully discharged. The owner of the steamship appears as claimant, and defends on the ground that the captain was justified in discharging the libelant for insubordination, in this: that he persisted in the excessive use of intoxicating beverages, rendering him unfit for the duties of his position, after the captain had remonstrated with him, and prohibited the steward from supplying him with liquor. It appears by the uncontradicted testimony and the admissions of the libelant that at the beginning of the voyage he had in his stateroom one-half gallon of whisky and one gallon of port wine, and during the voyage he took a drink whenever he wanted to, which must have been frequently, as it is shown by a fair preponderance of the testimony that he frequently appeared to be under the influence of liquor, and his supply with which he started must have been consumed within a period of 10 days. The captain, after remonstrating with the libelant for his use of liquor, gave strict orders to the steward, forbidding him to furnish the first mate with any liquor; and this prohibitory rule was evaded by the instrumentality of a passenger who purchased a bottle of whisky from the steward, and conveyed it into the mate's room, where it was afterwards found by the captain. At Tyoonick, where the vessel made a landing before arrival at Kodiak, the captain observed a small boat coming to the ship, and thereupon he ordered the mate to send a man to lower a gang plank to enable those on the boat to come on board the ship. As there was a strong current, it was necessary that the order should have been obeyed promptly, which was not done; and this neglect on the part of the mate resulted in an altercation between him and the captain, and on the following day, when the ship arrived at Kodiak, the mate was discharged, and paid his wages up to that time. The dilatoriness of the mate in obeying the captain's order was not because of any intention on his part to be disobedient, but was due to his semistupid condition caused by indulgence in his appetite for whisky, and, in connection with the previous conduct of the mate, furnished sufficient legal cause for his discharge. It is within the legal authority of the master of a ship to prohibit absolutely the use of intoxicating beverages by his subordinate officers and members of the crew, and, after the libelant had received notice that the captain had given orders prohibiting the steward from furnishing him liquor, it was a breach of discipline on his part to obtain liquor through the connivance of passengers; and his failure to obey an order with required promptness was such an aggravation of his offense as to furnish not only sufficient legal ground for his dismissal, but, in my opinion, the captain would have been derelict if he had not exercised his authority as he did.

Decree of dismissal.

GARDNER et al. v. NINETY-NINE GOLD COINS et al.

(District Court, D. Massachusetts. March 21, 1899.)

No. 970.

1. SALVAGE—MONEY RECOVERED FROM BODY FOUND AT SEA—SALVAGE AWARD.
A fishing schooner on her voyage from Gloucester to the fishing grounds on August 17, 1898, found floating in the water the body of a man who had been a passenger on the Bourgogne, sunk in collision on July 4th. Upon the body was found a wallet containing coins and bank notes to the value of $1,050. The body was immediately buried by sinking in the usual manner, and the money was brought back and paid into a court of admiralty. The man's name was not discovered. The salvage involved no danger to vessel or crew. *Held*, that in view of the probability that the money would not otherwise have been recovered, and of the meritorious action of the officers and crew in bringing it into court, when they might readily have kept and divided it among themselves, one-half the amount would be awarded for the salvage services, to be divided between the owners, master, and crew.[1]

2. PUBLIC ADMINISTRATOR—RIGHT TO PROPERTY OF UNKNOWN DECEDENT—FUND IN COURT OF ADMIRALTY.
A number of gold coins and bank notes were taken by the crew of a fishing schooner from the body of a man found floating in the sea, and who had been a passenger on a steamship sunk in collision some weeks before. The money was paid into the registry of an admiralty court, and an award for salvage services was made, and paid therefrom to the owners and crew of the schooner. The body was buried at sea, and after the lapse of more than two years remained unidentified, except for a name in a receipt found thereon, and no relatives or heirs were known. *Held*, that the public administrator of the county in which the admiralty court was located, who had been granted letters of administration on the estate of the decedent by the probate court, pursuant to the statutes of the state, was entitled to possession of the remainder of the fund in preference to the salvors, claiming as the finders of lost goods, whose owner was unknown, or to the United States, claiming as successor to the prerogative rights of the king of England.

In Admiralty. Suit to recover for salvage services and to determine rights in the fund remaining in court.

John J. Flaherty, for libelants.
Theodore H. Tyndale, public administrator, pro se.
William H. Garland and John H. Casey, Asst. U. S. Attys.

LOWELL, District Judge. The libelants are the owners, master, and crew of the fishing schooner William H. Cross, which upon her voyage from Gloucester to the fishing grounds on August 17, 1898, found floating in the water the body of a man who had been a passenger on the Bourgogne, sunk in a collision on July 4th. Upon the body of this man was found a wallet containing coins and bank notes to the value of $1,050. The body was immediately buried by sinking in the usual manner, and the man's name has not yet been discovered. The only question arising in this case concerns the amount of salvage. It is admitted with entire frankness by the libelants that the salvage involved no danger whatsoever to the schooner or to its crew, and that the delay caused by it was insignificant. On the other hand, it is very unlikely that the property would have been

[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

recovered at all had it not been recovered as it was by the libelants; and it would have been easy for the crew, after its recovery, to divide it among themselves without bringing it into court. This is a case of the salvage of a derelict in the greatest danger of complete loss,—a salvage involving no danger or expense, but offering a great and unusual temptation to appropriate the entire property to the use of the salvors. I think I am justified in giving considerable weight to this last-mentioned element of the case. Upon the whole, I award to the salvors half the value of the property salved; one-third of the salvage to be paid to the owners of the vessel, one-third to the master, and one-third to the crew. See The Georgiana, 1 Lowell, 91, Fed. Cas. No. 5,355. The master's share is made somewhat larger than the allowance in other cases, because it appears that some members of the crew did propose to divide up the whole property on the spot, and that the master was put to some difficulty and annoyance in resisting their proposals. In spite of this, especially as the particular members of the crew in fault have not been pointed out, I do not think it proper to deprive them of all share in the salvage.

Decree accordingly.

(October 18, 1901.)

LOWELL, District Judge. The fund remaining in the registry of the court after the payment of the salvage decreed more than two years ago has three claimants: (1) The salvors, claiming the fund as the finders of lost or abandoned goods whose owner is unknown, and as having "such a property as will enable to keep it against all but the original owner." Armory v. Delamirie, 1 Strange, 505; Russell v. Proceeds of Forty Bales of Cotton, Fed. Cas. No. 12,154. (2) The United States, claiming as successor to the prerogative rights of the king of England. Peabody v. Proceeds of Twenty-Eight Bags of Cotton, Fed. Cas. No. 10,869. (3) The public administrator of Suffolk county, who has taken out letters of administration, pursuant to Pub. St. Mass. c. 131, § 2, upon the estate of the man on whom the coins were found. In the petition and in the letters the description of this man is that given by the salvors, and a name of doubtful spelling, written in a receipt found upon his person, is assigned to him. The evidence that this man was the owner of the property is convincing.

The salvors and the United States both admit that their rights, whatever they may be, are subordinate to the claim of the original owner of the property, if a claim by that owner be made in this proceeding. Does the public administrator so represent the original owner that his intervening claim is effectually the claim of that owner? That an administrator ordinarily represents his intestate's rights of property is plain. The administrator of the original owner of the jewel in Armory v. Delamirie could have recovered the same from the chimney sweep as effectually as could the owner himself if living. In what respect does the public administrator in this case differ from an ordinary administrator? He is appointed by the same court, and has substantially the same duties. That he holds a commission from the governor, which entitles him to apply for administration in a case like this, does not make him the less an administra-

tor after his appointment by the probate court. The rights and duties of an administrator do not depend upon his relationship to the intestate or upon the existence of next of kin, but upon his appointment by a court of competent jurisdiction. It is urged against the administrator's claim: First, that his appointment was not authorized by the statute, because the fund is not in Suffolk county; second, that this court, having got possession of the fund, should provide for its final distribution; and, third, that the claim of the public administrator here is really no more than a claim by the commonwealth of Massachusetts to property in which it has no right. But, if the fund is not in Suffolk county, it is hard to perceive where else it is. If the next of kin of the deceased owner should appear, it is admitted on all hands that, by some proceeding or other, they should obtain the fund. Yet this court would not undertake to determine their distributive shares. It would require them to take out administration, original or ancillary, in the probate court of this county, and would then pay over the fund to the administrator for distribution among them according to the order of the probate court. In that case the letters of administration would be undoubtedly valid, and yet the fund would be in Suffolk county no more than it is in the case at bar. Compare Pub. St. c. 131, § 2, with chapter 156, § 2. Pinney v. McGregory, 102 Mass. 186. It is true that by virtue of Pub. St. Mass. c. 131, §§ 7, 12, 14, the fund, if paid to the public administrator, may ultimately become the property of the commonwealth; but this might happen if it was paid to any other administrator. Pub. St. c. 135, § 3. The condition under which the commonwealth is entitled to estate in the hands of a public administrator and in the hands of any other administrator is substantially the same, viz. that no next of kin can be found. If the deceased owner had been domiciled in Massachusetts, and was without next of kin, his estate would certainly pass to the commonwealth, yet his administrator would be entitled to a fund like this. In the case at bar it is quite possible that the deceased owner's next of kin, who probably exist, will be discovered by the public administrator. If a certainty that the estate will eventually pass to the commonwealth, as in the case just put, does not defeat the claim of the administrator, his claim cannot be defeated by a mere possibility that the commonwealth will take. In a sense, it may doubtless be said that the deceased owner has not been identified. His name is in doubt, and his body was buried at sea. But, in the last analysis, identification always differs in degree, and not in kind. That a man's name is in doubt, that he is known by different names, will not prevent administration upon his estate; and this court is informed that the practice here is not uncommon to administer upon the estates of persons whose names are wholly unknown. Should a guest staying in a hotel foreign to his domicile die suddenly in his room, and should his name and relatives be undiscoverable, the money found on his person would hardly become the property of the chimney sweep or of the chambermaid who should first lay hands upon it. Doubtless extreme cases may be put. If treasure were dug up in a field, so placed that it had been manifestly the property of the unknown man with whose body it had been buried two centuries before, the public administrator might not be entitled to the prop-

erty, even upon taking out letters upon the estate of the skeleton. To an illustration like this it should be answered: First, that it is not the case at bar; and, second, that in the case supposed the probate court would hardly issue the requisite letters. In Russell v. Proceeds of Forty Bales of Cotton, and in Peabody v. Proceeds of Twenty-Eight Bags of Cotton, nothing was known of the owners, and probably they were alive.

It was further urged that not the public administrator, but the commissioner of wrecks, was here entitled to the goods, by virtue of Pub. St. Mass. c. 97. But the commissioner has made no claim, and nothing in the chapter cited forbids the owner to take his wrecked property if he can find it. See sections 2 and 8. The salvage hitherto allowed by this court has amply satisfied the claims which might be made before the commissioner under section 7.

The court has been referred to two cases in the circuit court for this district, unreported and without written opinion, in which that court refused to deliver to the public administrator of a deceased seaman his effects and wages. But congress has undertaken to regulate the disposition of such wages and effects. The circuit court is not bound to deliver them to the administrator or to the person ordinarily entitled, and need not make any provision for creditors, unless the value exceeds $300, which it did not in the cases referred to. Rev. St. § 4544.

As the administrator in this case represents the estate and the rights of the undoubted owner, the fund in court must be paid over to him. The decree may contain an express saving of any right which either the salvors or the United States have against the fund while in the hands of the administrator or in the treasury of the commonwealth.

THE GEORGE PRESLEY et al.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1901.)

No. 887.

COLLISION—STEAMER AND TOW—CONCURRING FAULT.

A steamer with three vessels in tow on a single line, altogether about 2,500 feet long, was coming down the Detroit river, but had stopped temporarily on the Canadian side, headed upstream, with the steamer in front. As she was turning with the tow to proceed down, and when she and the first tow had turned and headed southward, and were about 400 feet from the American side of the channel, the Yakima, a heavily laden steamer, was half a mile downstream, coming up. At this time the schooner Helvetia, the second of the tow, was headed directly across the river, and about midstream, while the last tow was still headed upstream. The navigable channel was straight, 1,800 feet wide, and the current about 2½ miles an hour. The Yakima signaled her intention to pass between the fleet and the American side, which was assented to. Both steamers starboarded slightly, and the Yakima checked speed to about 4 miles. When 600 feet apart, the master of the Yakima observed that the tow was not under control and was not turning properly, but kept on, and, after passing the other steamer, turned in as close as possible to shore. The Helvetia, through improper steering, failed to follow the vessels ahead, but swung over towards the American side, and struck the bluff of the Yakima's bow at right angles. *Held*, that the Helvetia was clearly in fault, but that the Yakima was

also guilty of contributory fault, conceding that she was justified in attempting to pass on the side she did; that, being alone and ascending the stream, the duty rested upon her to keep out of the way of the descending tow, and to stop if the situation required it; and that she should have stopped when it first became apparent that the tow was not turning properly, the other steamer being then from 200 to 300 feet to her starboard side, where there was little danger of collision between the two.

Appeal from the District Court of the United States for the Eastern District of Michigan.

In Admiralty.

About midday, in a substantially straight channel of the St. Clair river, the steamer Yakima came into collision with the schooner Helvetia, both receiving considerable injuries. The navigable channel of the river is substantially 1,800 feet wide. From shore to shore its width is about 2,100 feet. The witnesses in general refer to the banks of the deep-water channel, and not to the visible shore line, and we shall do likewise, unless specifically mentioned. The Helvetia was one of a tow of three in tow of the steamer George Presley, bound down the river, all loaded. The length of the entire tow was not much short of 2,400 feet, the tow lines ranging from 400 to 500 feet each in length, and the vessels from 200 to 300 feet each in length. The Helvetia was probably on the longest tow line, and was the longest vessel in the tow. For a temporary purpose, the Presley and her tow came to anchor along the Canadian side of the river, heading up, the tow tailing downstream. The Yakima, loaded with coal, was bound up the river. When she came in sight, the Presley and her tow were in the process of coming around to again head down the stream. When within a half mile of the Presley, the Yakima observed that the Presley and the first of her tow, the disabled steamer, Johnson, had made the turn and were headed down the river, and were about 400 feet out from the American channel bank. The Johnson was a bit nearer the bank, but was following substantially behind the Presley. The Helvetia, on a line variously estimated as from 400 to 600 feet, was at that time about midriver, headed almost directly across stream. The Reddington, the last in the tow, was possibly two to three hundred feet out from the Canadian channel bank, headed upstream. The lines between each of the tow seemed to be taut. Two courses were now open to the Yakima: First, she might follow the tow around and pass port to port; or, second, she might pass up on the American side, having the tow on her starboard hand. She chose the second, and blew two whistles, signifying her desire to go up on the American side of the channel. To this the Presley at once assented, by replying with a passing signal of two blasts. Under this agreement both steamers starboarded a trifle, the Yakima being brought to head between the Presley and the American channel bank. When from 1,000 to 1,500 feet below the Presley the Yakima checked down to a claimed speed of about 4 miles, and passed the Presley at a distance of from 200 to 300 feet on her starboard hand. After passing the Presley, and when nearly abreast of the Johnson, seeing the Helvetia coming out from behind the stern of the Johnson, and still headed for the American shore, she starboarded again, and increased her speed for the purpose of holding close into the channel bank, and of passing, if possible, before the Helvetia should strike the bank. The Yakima was crowded against the channel bank as far as possible, but the effort to escape collision failed. The stem of the Helvetia struck the bluff of her bow nearly at a right angle. The court below held the Helvetia wholly at fault, and dismissed her cross libel. The Yakima was given her full damages against the Helvetia, but her libel was dismissed so far as it sought to hold the Presley and Reddington at fault. The Helvetia alone has appealed.

Harvey D. Goulder and Frank S. Masten, for appellants.

John C. Shaw, for appellee.

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

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

We have no hesitation in agreeing with the court below as to the fault of the Helvetia. The testimony of her master that she was kept under a port helm until within 300 feet of the American shore before starboarding to come around is an admission of a plain and palpable fault. His anxiety not to make a shorter turn than the Johnson induced him to hold her up under a port helm until it was impossible to turn in time to avoid a collision with the Yakima, which was plainly seen coming up between the tow and the American shore. The story of the Helvetia's wheelsman, that he, without orders from his captain, on deck at his side, put his wheel to starboard when little over midway the river, is contradicted, not only by the positive testimony of her captain, but by the fact that she struck the bluff of the bow of the Yakima at nearly right angles, when the Yakima was crowded into shallow water against the channel bank. The thing speaks for itself. His wheel was not put over to starboard when it should have been, otherwise the Helvetia would not have gone upon so erratic a course. The man at the Helvetia's wheel was an ordinary seaman, doing his trick at the wheel. To assume that the Halvetia's master trusted the management of his vessel to this common seaman when making a movement which required skill and soundness of judgment to avoid risk of collision with the Yakima, plainly seen to be coming up between the tow and the American bank, is to convict him of utter indifference to an ominous situation, or total ignorance of the duties pertaining to his station. The management of the maneuver by the Helvetia, whether the fault of her wheelsman or master, was negligent and unskillful.

The case against the Yakima presents a more difficult question. The court below thought that the situation, as it appeared when the Yakima proposed to pass starboard to starboard, was one which reasonably admitted of such a maneuver. At that time the Presley and the Johnson were both headed down the river, the Johnson substantially following behind the Presley. There was then probably 500 feet of clear channel between the Presley and the American channel bank, and 400 feet between the Johnson and that bank. If the Helvetia and Reddington should both make the same turn as that which had been made by the Presley and Johnson, they would leave not less than a 400-foot channel for the Yakima to pass up on their starboard hand. Doubtless it would have been more prudent to have followed the tow around and passed port to port after they had straightened out. The danger of getting up into the bight of the tow was small, in view of the fact that the Yakima was ascending a current of 2½ miles, and was heavily loaded. In such circumstances she could have been quite easily held at nearly a standstill until the tow should be straightened out, if any complication arose which delayed its coming around. The danger to be apprehended from passing on the starboard side of the Presley before her tow got straightened out behind her was that the Helvetia or the Reddington might make a larger circle than had been made by the

Presley and Johnson, and thus diminish the width of the clear channel up which the Yakima proposed to pass, and thus involve risk of collision. While the maneuver was one which did not present any very imminent risk of collision as the matter presented itself when the passing agreement was made, yet the situation was one which might rapidly change, and the utmost watchfulness was therefore requisite to guard against any complication which might arise in straightening out the lagging members of the tow. Upon the interchange of passing whistles both vessels were promptly starboarded a trifle, so that the Presley was headed towards the middle of the stream, and the Yakima for the middle of the clear channel, between the Presley and the American bank. The Yakima's mate was at this time on top of her pilot house, and in charge of her navigation. He was not insensible to the possible danger of running up between the tow and the American shore before the tow should all get straightened out, for immediately after making the agreement to pass on the starboard hand he ordered his engines checked down. When asked why he did this he replied:

"My idea of that was to give the tow a chance to get straightened down the river. That was my opinion, to give them a show to get turned around before I would get up where they were."

The probabilities are, upon all of the evidence, that this checking down occurred when the Yakima was somewhere in the neighborhood of 1,200 or 1,500 feet below the Presley. When the passing whistles were blown, Capt. Williams, of the Yakima, had just stepped out from the dining cabin, on the starboard side. From that side he saw that the Presley and the Johnson were headed down the river; that the Helvetia was about midstream, and headed across the river; and that the Reddington was not far out from the Canadian bank, and headed upstream, with apparently little headway. He then went onto his forecastle deck. His own account of the matter is as follows:

"I walked back and forth on the forecastle deck once or twice until we were within six hundred feet of the George Presley, the steamer that appeared to be towing, and I noticed by the moving on the Presley that something was wrong. I could see they were acting kind of nervous. She was not handling right,—the tow was not under control, as the action of the men on the wheel house indicated to me. She was uneasy; and I then went on top of the Yakima's wheel house, and took charge from the mate."

This confession of apprehension, when still nearly 600 feet below the Presley, that the tow was not under control or was not coming around right, seems to have been based upon the checking whistle blown by the Presley immediately after assenting to the Yakima's passing signal, and upon evidence of uneasiness exhibited by those on the Presley's wheel house and in charge of her navigation. We are not able, from the evidence of either Capt. Williams or Mate Pringle, to locate the Helvetia or the Reddington at this precise moment. Indeed, it is to be inferred that at this moment the position of the Presley off the starboard bow of the Yakima was such as that she was interposed between the Yakima and the Helvetia. When last seen by Capt. Williams, the Helvetia was about midriver, headed for the American bank, while the Reddington, with little

apparent headway, was still on a taut towline, heading up the river. A checking whistle from the Presley meant that the headway of the Reddington would be still further diminished, and that she would be a still greater hindrance to the proper turning of the Helvetia. Unless the situation continued to indicate that the Presley's tow was coming around in an orderly manner and well under control, the continuance of the Yakima's purpose to push on and pass the Presley's tow before it got straightened out cannot be justified. The case, in our opinion, turns here. The indications, whatever they were, as her captain saw them, were not propitious. He was full of apprehensions of danger, and fully recognized what his mate had at an earlier moment recognized by checking, namely, that there was risk of collision in undertaking to pass this long and unwieldy tow while in the process of turning to head down the stream in so narrow a channel. That he did not then stop was not due to any opinion that the situation was a safe one. His examination on this point makes it perfectly clear that he was fully conscious that he was in danger. We quote from his evidence touching this point in the crisis:

"Q. At that time did you know there were three other barges in that tow? A. Yes, I certainly did. Q. And you say you cannot give it with any accuracy, because you didn't note their position at that time? A. No, sir. Q. You say you didn't note it? A. I didn't note it, to be accurate, just exactly as to their position. Q. You were navigating with reference to that tow, were you not? A. I was, most decidedly. Q. Did you take charge of the vessel as soon as you went on the pilot house? * * * Q. Was there anything in that situation that you saw then that indicated danger to you? A. There was. Q. What was it? A. The action of the Presley; the maneuvers of the Presley. Q. Why didn't you stop your boat? A. Why didn't I stop her? Q. Yes. A. I didn't consider that I had room to stop the boat. Q. You were six hundred feet below the Presley? A. I have estimated it about that distance, when I left the forecastle deck. Q. The Presley was headed some out from the American side? A. Yes, sir. Q. And was under headway? A. Yes, sir. Q. Your vessel was heading in towards the American side? A. Yes, sir. Q. And the river is how wide at that point? A. Oh, about eighteen hundred feet from channel bank to channel bank. Q. And you did not consider it necessary to stop? A. I didn't consider it safe to stop there. Q. Why couldn't you have stopped there? A. To have stopped my boat there, I should have to back her, and by backing her I would have swung her broadsides across the bow of the Presley. Q. You backed her later? A. Yes; when I had her in a different position. Q. You could back her with more safety when she was up against the bank than you could when she was away out in the river? A. I could when I had her stern swung away out in the current. Q. What did you do on your boat the first thing when you went on the pilot house, and the boats were in the position that you have there indicated? A. I told the mate I would assume charge of the boat. Q. Then what did you do? A. I asked the wheelsman how his wheel was. Q. Then what did you do? A. I hard-starboarded. Q. And then what did you do? A. I saw then it was necessary to get in on the bank, as then I could see the Helvetia coming across, apparently across the stern of the Johnson. Q. While you were doing all those things you had come up to what place in that tow? Your boat was abreast of what part of the tow? A. In about abreast of the Presley. Somewhere in that neighborhood. Q. Was there as much as one-third of the channel between you and the American channel bank at that time? A. Between us and the American channel bank, one-third of the channel? Q. Yes; when you were abreast of the Presley? A. No, sir. Q. How much was there? A. I would not think we were over a boat length from the visible line of water to the

side of the Yakima. Probably a hundred feet from the channel bank. Q. I think you have told us between your boat and the Presley there was three hundred fifty or four hundred feet? A. Yes, sir; something like that. Q. And was it in that position you put your helm hard a-starboard? A. It was; yes, sir. Q. Does your boat answer her helm quickly? A. She is considered a good steering boat. Q. She was already on a swing, was she not, under a starboard helm? A. Swinging slowly when I took charge of the boat. Q. And you didn't stop at that time, because you didn't think it safe to stop? A. No, sir; my boat would not have been under control if I had stopped in the current at that point. Q. Did the situation, in your judgment, call for any such measure as that? A. As what? Q. As stopping and reversing? A. Well, the situation, in my judgment— I done the only thing I could do, in my judgment. The Court: Suppose the question is put this way: Did the situation call for you to stop at that time, if it had been safe for you to do so? A. If it had been safe to stop without taking chances of dropping broadsides across the Presley, I should have stopped. My object was to stop the boat. Q. Did you check the boat at that time? A. No, sir; the boat was under check at that time. Q. Now, you rung her up very shortly, did you not? A. I rung her up when circumstances required it. Q. What circumstances required it, then? A. She was hanging logy on her wheel close to the bottom. Q. Over against the American bank? A. Dragging over against the American bank in shoal water. I would like to have you take into consideration that one boat is coming down and the other coming up all the time, and they are getting pretty close together."

The only reason which is given for not stopping at this juncture is that he did not think he could do so without danger of dropping "broadsides across the bow of the Presley." The Yakima was then under check. She was loaded, and was ascending a current of 2½ miles. The duty rested upon her, as an ascending lone steamer, to keep out of the way of the descending tow, and to stop if the situation became such as to require either to stop. The Galatea, 92 U. S. 439, 23 L. Ed. 727; The Mayumbra (D. C.) 21 Fed. 476; The Osceola (D. C.) 50 Fed. 326. We are not at all convinced that under the circumstances the Yakima might not have been at least brought to a practical standstill before passing the Johnson. With the current she had to breast, and wholly unincumbered, it is not so probable that she would have come into collision with the Presley, from 200 to 300 feet on her starboard side, as to justify her in crowding between the turning tow and the American bank, so close at hand. Capt. Williams, on his own evidence, was then nearly or quite 600 feet below the Presley, and we are not at all satisfied that he might not have avoided all risk of collision by then stopping and reversing. As the sequel shows, the Helvetia was still heading across the river, and the Reddington still headed upstream, on a tight towline. He did not stop. He pushed on until nearly abreast of the Johnson, when, seeing the Helvetia coming out from behind the stern of the Johnson, and headed across the river, he rung up his engine and starboarded. It was probably then too late to have stopped and reversed.

For failing to stop and reverse at the time when Capt. Williams took charge of the Yakima's navigation, and when the Presley was still several hundred feet above the Yakima, the Yakima must be condemned as having contributed to the collision. Both vessels being at fault, the damages should be divided. The decree will be modified accordingly. Costs of appeal will be divided.

UNION & PLANTERS' BANK OF MEMPHIS v. CITY OF MEMPHIS.

(Circuit Court of Appeals, Sixth Circuit. October 21, 1901.)

No. 924.

1. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit to enjoin the collection of taxes levied on the capital stock of a bank, and exceeding $2,000 in amount, on the ground that the revenue statute under which such taxes were levied impairs the obligation of the contract embodied in the bank's charter granted by the state, is one of which a federal court has jurisdiction, because of the constitutional question involved, without regard to the citizenship of the parties.[1]

2. EQUITY JURISDICTION — PREVENTING MULTIPLICITY OF SUITS — SUITS TO ENJOIN TAXATION.

A court of equity has jurisdiction of a suit by a bank to enjoin a city from levying taxes upon its capital stock in violation of the terms of its charter, on the ground of the prevention of a multiplicity of suits, where it is alleged that the city has repeatedly levied similar taxes in previous years, resulting in litigation in which the validity of the bank's charter exemption from such taxation has been sustained by the supreme court of the state.

3. RES JUDICATA—PLEADING.

To raise the question of res judicata, the judgment relied on must be pleaded and proved.

4. SAME—MATTERS CONCLUDED—EFFECT TO BE GIVEN TO JUDGMENT OF STATE COURT WHEN PLEADED IN ANOTHER JURISDICTION.

Under Rev. St. § 905, enacted pursuant to the authority vested in congress by Const. art. 4, § 1, to prescribe the effect to be given to judicial proceedings in other states, and which provides that the judicial proceedings of a state, when properly authenticated, "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken," the effect of a judgment of a state court, when pleaded in a federal court or a court of another state in support of a plea of res judicata, is to be determined by the "law or usage" of the state in which it was rendered.[2]

5. SAME.

A bank, in a bill filed in a federal court against a city to restrain the assessment and collection of taxes on its capital stock on the ground that it was exempted from such taxation by its charter, alleged that the matter was res judicata by virtue of a judgment of the supreme court of the state in an action between the same parties involving taxes assessed by the city for previous years, in which complainant's charter had been construed, and its claim to exemption sustained. By the settled rule of decision in the state, such judgment was conclusive only as to the identical taxes involved in the action, and had no conclusive effect upon the right to levy similar taxes in subsequent years. *Held* that, regardless of the rule of the federal courts as to the matters concluded by such judgments, the judgment pleaded could be given only the effect it had by the "law or usage" of the state court, and did not, therefore, sustain the claim of res judicata.

6. TAXATION—BANK CAPITAL—EXEMPTION IN CHARTER.

Under the decisions of the supreme court of the United States and of the supreme court of Tennessee, a provision in the charter of a bank granted by the state of Tennessee requiring the bank to pay to the state

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

[2] Conclusiveness of judgments as between federal and state courts, see note to Railroad Co. v. Morgan, 21 C. C. A. 478.

"an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes," does not exempt the bank from the assessment of ad valorem taxes on its capital, but applies only to the stock in the hands of its shareholders.

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

The case is this: In 1859 the state of Tennessee, by its general assembly, granted a charter under which the Union & Planters' Bank was organized. That charter contained a provision upon the subject of taxation in these words: "That said company shall pay to the state of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes." The complainant's bill avers that, in impairment of the obligation of this contractual exemption from every tax except that provided by the charter, the state of Tennessee has passed a law providing, among other things, for the assessment of state, county, and city taxes upon the capital stock of this and all other corporations having like contractual exemptions, and that the city of Memphis, under and in pursuance of the legislation referred to, has assessed an ad valorem tax for the year 1899 upon the capital stock of the complainant bank for municipal purposes exceeding $2,000, and is about to distrain, etc. It is averred that the law under which this assessment has been made impairs the obligation of the contract by which complainant is exempt from all taxation upon its capital stock other than that provided for in its charter. It is then averred that in a former litigation between this complainant and the city of Memphis, where it was sought to enforce a municipal assessment of taxes upon complainant's capital stock for the years 1888, 1889, and 1890, it was solemnly adjudged and decided that under the charter provision aforesaid the capital stock of said corporation was exempt from all general taxation. The record in the said suit, and the judgment therein rendered,—being a judgment of the supreme court of Tennessee,—is set out in full, and pleaded and relied upon as an adjudication estopping the said city of Memphis from bringing the validity or the true and proper construction and meaning of said provision again into controversy. The bill is most specific in averring that the judgment so pleaded and set out as establishing the exemption of its said capital stock from taxation was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question, and that "the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions" as those appearing herein. Upon this former judgment between the same parties, and upon the same facts and issues, the complainant bank avers and contends that the question of the right of the city of Memphis to assess its capital stock "has been finally judicially determined not to exist, because of the judicial construction put upon its exemption in the suit to determine that question between it and the said city of Memphis." The defendant filed a demurrer assigning no less than 12 reasons why the complainant's bill should not be sustained. This demurrer was sustained, and the bill dismissed.

Wm. H. Carroll and T. E. Cooper, for appellant.
John H. Watkins, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, proceeded then to deliver the opinion of the court.

1. The demurrers which go to the jurisdiction of the court are not well founded. The jurisdiction does not depend upon diversity of citizenship, for that does not exist, but upon the federal question arising out of the alleged violation of the obligation of the contract contained in the charter of the complainant corporation. The bill

attacks the constitutionality of the revenue laws of 1897 and 1899, so far as they authorize the imposition of a tax upon the capital stock of the Union & Planters' Bank, as laws impairing the obligation of the charter exemption. Bank v. Stone (C. C.) 88 Fed. 383, 390; Stone v. Bank, 174 U. S. 409, 412, 19 Sup. Ct. 880, 43 L. Ed. 1027.

2. Neither is the demurrer to the equitable jurisdiction of the court well founded. The remedy by suit at law to recover a tax paid under protest given by the Tennessee act of 1873 (chapter 44; being section 1059 of Shannon's Revision of the Tennessee Code) applies only to revenue due the state. City of Nashville v. Smith, 86 Tenn. 213, 6 S. W. 273. It has no application where the tax complained of is one assessed by a county or city. In such case the only legal remedy to recover an illegal tax is that furnished by the common law. Railroad v. Williams, 101 Tenn. 146, 46 S. W. 448. There must exist some equitable ground for relief besides the mere illegality of the tax. If it appears that the tax constitutes a cloud upon the title of the complainant, or that he will be subjected to irremediable damages or to a multiplicity of suits if compelled to rely upon his legal remedy alone, equity will interpose upon the ground of the inadequacy of the remedy at law. Dows v. City of Chicago, 11 Wall. 108, 20 L. Ed. 65; Railway Co. v. Cheyenne, 113 U. S. 516, 525, 5 Sup. Ct. 601, 28 L. Ed. 1098; City of Ogden City v. Armstrong, 168 U. S. 224, 238, 18 Sup. Ct. 98, 42 L. Ed. 444; Bank v. Stone (C. C.) 88 Fed. 383. The case made by the bill is not the case of an objection to a single or particular assessment. The complainant sets up a claim of complete exemption not only against the particular assessment, but against all future efforts to assess its capital stock. As observed by Chief Justice Marshall in Osborn v. Bank, 9 Wheat. 738, 842, 6 L. Ed. 204, 229:

"The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition and protects the privilege."

The bill, in substance, avers that there have been many previous litigations between the complainant and the state of Tennessee, the county of Shelby, and the city of Memphis, in which the right to levy taxes upon its capital stock was asserted, and the exemption claimed under the charter was denied. Complainant sets out in full one such former litigation with the city of Memphis, resulting in a judgment of the supreme court of the state judicially determining the exemption of its capital stock from any and all taxes other than the charter tax. Notwithstanding these former litigations, the defendant is charged with persisting in a denial of the exemption claimed. Under such circumstances, it would appear that the complainant is entitled to the remedy in chancery for the purpose of preventing repetitions of such assessments in the future, and thereby preventing a multiplicity of suits. Bank v. Stone (C. C.) 88 Fed. 383, 392; Morris Canal & Banking Co. v. Mayor, etc., of Jersey City, 12 N. J. Eq. 227; High, Inj. § 530.

3. Is the capital stock of the complainant company contractually

exempt from taxation, other than the charter tax of one-half of 1 per cent. on each share of stock subscribed? Does this exemption apply to the corporate capital in the hands of the corporation, or to the shares of capital stock in the hands of shareholders, or are both species of property equally exempt from any tax other than that payable by the express provision of the charter? Curiously enough, we are not lacking in very high authority upholding each of three possible constructions of the taxing clause of the complainant's charter. Thus, in City of Memphis v. Farrington, 8 Baxt. 539, the supreme court of Tennessee held that language similar and identical in meaning found in the charters of a number of Tennessee banks and insurance companies operated only to exempt the capital stock of such corporation in the hands of the corporation upon the payment of the charter tax stipulated for, but that shares of stock, being a distinct property, were not exempt, but were subject to taxation in the hands of shareholders. This decision was made in 1876 in a case between a stockholder in the complainant bank, as well as in other corporations, in which Farrington stood for and represented the entire class of stockholders; the city of Memphis and the state of Tennessee being the adversary parties. The complainant corporation was not a party to the suit, and the real question involved was that of the taxability of shares of stock in the hands of shareholders. That case was taken on writ of error to the supreme court of the United States, and there reversed; that court holding, in an opinion by Justice Swayne, that the exemption granted extended to the shares in the hands of shareholders. Three members of the court dissented, holding that the exemption did not extend to shareholders, and that the judgment of the Tennessee court should be affirmed. The judgment of the Tennessee court was accordingly reversed, and the shareholders held to be exempt from any tax other than that stipulated to be paid by the corporation. Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558. In Bank v. McGowan, 6 Lea, 703, the liability of the Bank of Commerce to be assessed upon its bank building and upon several parcels of realty bought in payment of debt was involved. The court held that the bank building was exempt under a provision of the charter providing that the bank "shall pay to the state an annual tax of one-half of one per cent. on each share of its capital stock, which shall be in lieu of all other taxes," but that this exemption would not extend to the real estate bought in satisfaction of debt due the bank. This result was reached upon the assumption of the exemption of the capital stock of the bank, and upon the authority of the case of De Soto Bank v. City of Memphis, 6 Baxt. 415, 32 Am. Rep. 530, where it was held that the bank's power to hold real estate was limited by the charter to the real estate necessary for the conduct of its business, and the corporate capital used for the purposes of the corporation, and that the contract ceased to operate when taxable property was held for other purposes. In respect of the opinion of the supreme court of the United States in Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558, Judge Cooper, speaking for the court, said:

"There is nothing in conflict with this view, as the learned counsel of the complainant seem to think, in the decision of the supreme court of the United States in Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558. It was there held that the provision in a bank charter like the one before us is a contract, and will protect the shares of the stockholders from additional taxation. We recognize the controlling authority of that court in such cases, and yield to its decisions. The provision in question will therefore protect the capital stock and the shares of the stockholders from any taxation beyond that prescribed in the charter."

That case was affirmed upon a writ of error sued out by the bank, the case being reported as Bank of Commerce v. Tennessee, 104 U. S. 493, 26 L. Ed. 810. Both of these decisions were made in 1881.

The next opinion in point of time proper to be referred to is that of the city of Memphis against the Union & Planters' Bank, the appellant herein, in which the city sought by a bill in equity to compel the payment of city taxes for the years 1887 to 1891, inclusive, assessed upon the corporate capital of the bank. The bill also sought to compel the payment of a privilege tax for the years 1889, 1890, and 1891 imposed by the city for the right of exercising its franchises of doing a banking business in the city. The bill averred that the bank claimed an exemption from all taxation upon its capital stock, as distinguished from the shares in the hands of stockholders, by virtue of the charter contract heretofore set out, and claimed that it was not subject to the ad valorem or privilege tax which had been imposed, and therefore refused to pay. The contention of the city, as set out on the face of its bill, was that the true and proper interpretation of the charter exemption referred to was to exempt the shares in the hands of shareholders from any tax other than that which the bank was required to pay under its charter, and that the corporation, as such, was liable to pay taxes upon its capital stock and upon its franchises notwithstanding the terms of the charter. The court sustained the demurrer of the defendant bank and dismissed the bill, holding that the bank was exempt from both species of tax by reason of its charter exemption. Touching the former decisions of the court construing and applying the charter exemption involved, Judge Caldwell, speaking for the court, said:

"Since the decision in the Farrington Case by the supreme court of the United States, this court has uniformly adhered to its previous holding that no ad valorem tax can lawfully be laid on the capital stock, and, in recognition of that decision, has gone further, and said that shares of stock are likewise exempt from other taxation than that prescribed in the charter." Bank v. McGowan, 6 Lea, 705; State v. Butler, 13 Lea, 406; Id., 86 Tenn. 633, 8 S. W. 586.

Continuing, the learned judge said:

"Considering the decisions of the supreme court of the United States in Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558, and in Bank of Commerce v. Tennessee, 104 U. S. 493, 26 L. Ed. 810, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank on its capital stock or against owners on shares of stock. Under the construction there given, the charter exemption includes both. As an original question, we would hold as held by this court in City of Memphis v. Farrington, 8 Baxt. 539, and charge the stockholders with an ad valorem tax; but, upon authority, we hold as stated above. This

court has never decided, and in the absence of the ruling of the supreme court of the United States in Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558, would not now decide, that the charter gives the owners of shares of stock any immunity or exemption from taxation on the shares. That question is now adjudged alone upon the authority of that case. It did not arise and was not adjudged in Bank v. McGowan, 6 Lea, 705, in State v. Butler, 13 Lea, 406, or in Id., 86 Tenn. 633, 8 S. W. 586. Complainant seeks, in addition to what has already been stated, to recover from the bank $1,800 as privilege taxes for the years 1889, 1890, and 1891. These taxes are claimed from the corporation for the right of exercising its franchises,—for the privilege of doing a banking business. Manifestly, the charter tax was intended to cover this right or privilege. The language of the charter implies that in consideration of the public good, and the payment of the tax therein specified, the state will allow the corporation to exercise the franchises granted without further taxation. City of Memphis v. Hernando Ins. Co., 6 Baxt. 527; Union Bank of Tennessee v. State, 9 Yerg. 490. The case of New Orleans C. & L. R. Co. v. City of New Orleans, 143 U. S. 192, 12 Sup. Ct. 406, 36 L. Ed. 121, is not, as we understand it, an authority against this ruling. There the contract afforded 'no evidence of an intention' to exempt the corporation from license or privilege tax. 143 U. S. 195, 12 Sup. Ct. 406, 36 L. Ed. 122. Here the intention to do so is clear and unmistakable. The charter tax was imposed primarily as a consideration for the corporate franchises and the right to exercise them. No other reasonable construction can be placed upon the words of the charter. The state is bound by its contract; and so, likewise, is the city of Memphis, which is but an arm or agency of the state government. This is true not only as to privilege taxes, but also with respect to the other taxes claimed in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the state, county, or municipality. As to those subjects, the specified tax is in lieu of all the other taxes,—state, county, and municipal. Such is the undoubted meaning of the contract. City of Memphis v. Hernando Ins. Co., 6 Baxt. 527; Union Bank of Tennessee v. State, 9 Yerg. 490; City of Nashville v. Thomas, 5 Cold. 600."

The effect of the judgment in the case last cited as an estoppel and bar to the assessment of taxes upon the capital stock of the appellant bank by the city of Memphis is the principal question in the case now before us. For the present, however, we will continue the history of the litigations which involve the extent of the exemption.

The next decision in point is that of Shelby Co. v. Union & Planters' Bank, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650. In that case the charter exemption here involved was construed as not including capital stock or surplus and accumulated profit, and as exempting only the shares of stock in hands of the shareholders. The Farrington Case, 95 U. S. 679, 24 L. Ed. 558, is there construed as not inconsistent with the conclusion stated. After the decision last cited the city of Memphis again sought to tax the capital stock of the complainant bank, and assessed same for the years 1896 and 1897. The bank filed its bill in a chancery court of the state to enjoin the city from enforcing the collection of said tax, and set out in its said bill two distinct grounds upon which it resisted the enforcement of said assessment: (1) That its capital stock was exempt under the charter provision already mentioned, and that such exemption had been duly adjudged in previous litigations which had the force of res adjudicata; (2) that the revenue law of the state provided that "no tax shall hereafter be assessed upon the capital stock of any bank, banking association or loan or trust, insurance

or investment companies, but the shareholders in such bank or other association shall be assessed and taxed upon the market value of their shares of stock herein." Laws 1895, c. 120, § 10. The city answered, asserting its power to make said assessments, and denied the exemption of the complainant's capital stock under its charter, and denied the force of the former decision as res adjudicata. After answering, the city filed a cross bill for the purpose not only of enforcing the payment of the ad valorem tax so assessed against the capital stock of said bank, but also for the purpose of compelling payment of certain privilege taxes due the city for the same year. Upon the pleadings and proofs the chancellor held the bank not liable for either tax, and perpetually enjoined the city from enforcing payment, and dismissed the cross bill. From this decree the city appealed to the supreme court of the state of Tennessee, which reversed the decree of the court below, holding that the capital stock was not exempt, but that the particular assessments complained of were invalid, because the revenue law of the state did not provide for the assessment of the capital stock of any bank. It further held that the privilege tax was authorized under the existing law, and the bank liable therefor. In respect to the force and effect of the former decision of the same court adjudging the capital stock not liable to any general taxation as res adjudicata, the court held: (1) That the effect of the decision in favor of the exemption of such capital stock from general taxation was nullified by the later decision of the supreme court of the United States in the case of Shelby Co. v. Union & Planters' Bank, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650, holding that the charter exemption had no application to corporate capital stock; (2) that its former judgment involved a different cause of action, to wit, the taxes assessed for years prior to the assessment then complained of, and that "the plea of res adjudicata is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years."

It is plain from this history of the litigation involving the scope of the charter exemption claimed, and of like exemptions in other charters, that, as a mere question of authority, the exemption claimed in favor of appellant's capital stock does not exist, and that this court, in the interpretation of the charter exemption, should accept as authoritative the opinion of the supreme court of the United States in Shelby Co. v. Union & Planters' Bank, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650. But the duty of interpreting the scope and meaning of the exemption clause may be regarded as eliminated if it be true, as claimed, that the exemption exists as claimed because it has been so determined by the judgment relied upon as res adjudicata. On this point, in City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 387, 17 Sup. Ct. 905, 911, 42 L. Ed. 202, 207, Mr. Justice White, speaking for the court, in a case where a charter exemption was claimed from general taxation by force of certain former judgments, said:

"Of course, if the judgments are the things adjudged and conclusively determined as between parties that the exemption of the bank under its char-

ter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question."

Passing, then, the interpretation of the scope of the charter exemption as an original question, and as affected by the decisions heretofore made, considered as mere authorities, we come to the examination of the effect of the judgment of the supreme court of Tennessee pronounced in a suit wherein the present complainant and appellant, the Union & Planters' Bank, and the city of Memphis, the present defendant and appellee, were adversary parties, and in which it was adjudged and determined that the charter tax of one-half of 1 per cent. was in lieu of all other taxes against the capital stock of said bank, as well as against the stockholders upon their shares of stock, and that the capital stock of said bank was not liable to the assessment which had been made, nor for the license or privilege tax asserted against it. That the suit in which said judgment was rendered was in the name of the state for the use of the city of Memphis is of no moment. The city was the real party, and is as much concluded as if the suit had been prosecuted directly by it. City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 388, 17 Sup. Ct. 905, 42 L. Ed. 202; Scotland Co. v. Hill, 112 U. S. 183, 5 Sup. Ct. 93, 28 L. Ed. 692.

We come then to the question of the efficacy of the judgment in the prior case as adjudging conclusively that an exemption exists which extends to the capital stock of the complainant bank. The city taxes involved in the prior case were those assessed upon complainant's capital stock by the city of Memphis for the years 1888 to 1891, inclusive. The taxes involved in the present case are taxes assessed by the same municipality and upon the same capital stock for the year 1899. The cause of action in the two cases is therefore not the same, inasmuch as the demand in the adjudged case was taxes of certain years, other than the years involved in this suit. But the question of exemption of the capital stock from taxation other than that stipulated in the charter was necessarily presented and determined adversely to the claim of the city of Memphis upon identically the same facts upon which the right of exemption is now claimed. Under the decisions of the supreme court of the United States, the mere fact that the present demand is for a tax for one year, and the demand in the adjudged case was for taxes for other and antecedent years, "does not prevent the operation of the thing adjudged." City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 396, 398, 17 Sup. Ct. 905, 42 L. Ed. 202; Southern Pac. R. Co. v. U. S., 168 U. S. 1, 52, 18 Sup. Ct. 18, 42 L. Ed. 355.

In City of New Orleans v. Citizens' Bank of Louisiana, the court said:

"The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

"This," said the court, "is the elemental rule, stated in the text-books, and enforced by many decisions of this court." Among the cases cited as supporting this principle are the cases of Bank v. Beverly, 1 How. 134, 139, 11 L. Ed. 75; Cromwell v. Sac Co., 94 U. S. 351, 353, 24 L. Ed. 195; and Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; and the case of Heroman v. Louisiana Institute, 34 La. Ann. 805, 814. This well-settled rule was applied in a case in which the controversy was as to the efficacy of prior judgments upon demands for taxes for years other than those involved in that case, which judgments had been rendered in local courts of the state of Louisiana. In that case it was also contended that public policy forbade the application of the principle stated to controversies as to taxation. After saying that this argument, if meritorious, should be addressed to the lawmaking, and not to the judicial, department, Mr. Justice White said that it was "without real merit."

"In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation, or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that, when a matter is once ascertained and determined, it is forever concluded when it arises again, under the same circumstances and conditions, between parties or their privies. To admit the judicial power, on the one hand, and to deny, on the other, the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court, from the foundation of the government, declaring a particular tax or burden unconstitutional, imparts no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for, manifestly, if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

But the defendant says that, whatever the efficacy of such a judgment ordinarily, the judgment pleaded in bar, and as a conclusive adjudication of the question of exemption here involved, is a judgment of the supreme court of Tennessee, and that under the well-settled rule of that court a judgment in a tax case is not conclusive between the parties except as to the particular taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years, when relied upon as res adjudicata. State v. Bank of Commerce, 95 Tenn. 231, 31 S. W. 993; Union & Planters' Bank v. City of Memphis, 101 Tenn. 154, 167, 46 S. W. 557. The opinion of the court in that case was by Judge McAllister, who, upon this subject, said:

"We think the plea of res adjudicata in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a federal question, we decline to follow the ruling in City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202, in which it was held by a majority opinion that a judgment in a tax case is as conclusive of the taxes

of other years as it is of the taxes for the years actually involved. In State v. Bank of Commerce, 95 Tenn. 231, 31 S. W. 993, we said, 'These suits being for other years than those sued for in the Farrington Case, that decision is not, as an adjudication, conclusive of the present case;' citing Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Nesbit v. Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; Railroad Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450. We adhere to that ruling."

The effect of the judgment in Union & Planters' Bank v. City of Memphis as res adjudicata, in avoiding the efficacy of the prior judgment now relied upon as res adjudicata, is not now before us, inasmuch as that judgment has not been pleaded or proven; the present hearing being upon a demurrer to the bill of complainant, which does not set out the judgment in the case referred to. Turley v. Turley, 85 Tenn. 252, 261, 1 S. W. 891; Jourolmon v. Massengill, 86 Tenn. 81, 5 S. W. 719; Daniell, Eq. Pl. 659, 661; U. S. v. Bliss, 172 U. S. 321, 19 Sup. Ct. 216, 43 L. Ed. 463; Bryar v. Campbell, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. Ed. 926; Freem. Judgm. §§ 283, 332.

The case comes to this: The complainant pleads a judgment as conclusively establishing that a charter exemption exists, giving it immunity from the tax here involved, which judgment has no force or effect in the court which rendered it, other than as a bar to another suit for the same identical taxes then in litigation, and which, under the law and usage of that state, "is not conclusive in respect of taxes assessed for other and subsequent years." The exemption from the ad valorem taxation of its capital stock claimed in this suit exists only, if it exists at all, by reason of the conclusive character of the thing adjudged in the prior case. But, if that judgment would not be conclusive in respect to taxes for other years in the courts of the jurisdiction in which it was pronounced, upon what principle does it become of any greater efficacy when relied upon as res adjudicata in the courts of another jurisdiction? By the law of England as it existed when the separation from our mother country occurred, foreign judgments were only prima facie evidence upon the merits of the matter in litigation, and, when relied upon in the courts of England, were subject to re-examination not only as to the jurisdiction of the court, but upon the merits. By the law of this country, a money judgment, rendered by a court of a foreign country having jurisdiction of the parties and the cause, in a suit brought by one of its citizens against one of ours, is only prima facie evidence, and not conclusive, in an action brought here upon the judgment, when by the law of the foreign country judgments of American courts are not recognized as conclusive. Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. But such a judgment is conclusive, when sued upon here, as to all matters therein pleaded, and which might have been tried in the foreign court, if it be the judgment of a foreign jurisdiction which under like circumstances regards the judgments of our courts as conclusive. Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133. "Before the American Revolution," says Mr. Justice Gray in the great opinion delivered by him for the court in Hilton v. Guyot,

159 U. S. 113, 181, 16 Sup. Ct. 139, 150, 40 L. Ed. 95, 114, "all the courts of the several colonies and states were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits re-examinable in another colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be re-examinable in England." "It was because of that condition of the law, as between the American colonies and states, that the United States at the very beginning of their existence as a nation ordained that full faith and credit should be given to the judgments of one of the states of the Union in the courts of another of those states." By section 1 of article 4 of the constitution of the United States it is accordingly provided that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state; and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Under this power the congress did at an early day provide not only for the mode of authenticating the records and proceedings of the courts of any state, but enacted "that the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Rev. St. § 905. Judgments rendered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country only in respect to their conclusiveness upon the merits if rendered by a court having jurisdiction over the parties and the cause of action, and this difference is wholly due to the constitutional and legislative provision already cited. Mills v. Duryee, 7 Cranch, 481, 484, 485, 3 L. Ed. 411; D'Arcy v. Ketchum, 11 How. 165, 175, 176, 13 L. Ed. 648; Hanley v. Donoghue, 116 U. S. 1, 4, 6 Sup. Ct. 242, 29 L. Ed. 535.

In Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292, 8 Sup. Ct. 1370, 1375, 32 L. Ed. 239, 244, it was said:

"Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, within the United States differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

In Hilton v. Guyot, 159 U. S. 113, 182, 16 Sup. Ct. 139, 150, 40 L. Ed. 95, 115, it was said that "the decisions of this court have clearly recognized that judgments of a foreign state are prima facie evidence only, and that, but for these constitutional and legislative provisions, judgments of a state of the Union, when sued upon in another state, would have no greater effect."

The statutory provision (section 905) extends to every court "within the United States," and therefore to courts of the United States, and such courts are therefore bound to give to judgments of state courts the same faith and credit which the courts of another

state are bound to accord to them. Railroad Co. v. Morgan, 21 C. C. A. 468, 76 Fed. 429; Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565; Freem. Judgm. § 575. Neither the constitutional nor legislative provision referred to requires that any such judgment, when proven in a court of the United States or of another state, shall be given any greater efficacy or degree of conclusiveness than it has by the "law or usage" of the state from which it comes. The plain provision of the statute is that such judgments "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." Nor does any principle of general law or natural justice demand that any greater efficacy shall be accorded to a judgment of any state or foreign country, when either sued upon or pleaded as res adjudicata in the courts of another jurisdiction, than is accorded to it by the law or usage of the state or country from which the judgment comes. If such judgment be given the effect and conclusiveness accorded to it at home, every demand of the positive law as well as of justice has been answered. To give it any greater efficacy than it has in the state or country in which it was rendered would be in opposition to every principle of international law, and contrary to principles of moral justice. Those defenses which might be made to it at home, and those only, can be made in any other jurisdiction where it is sued upon or pleaded in bar. These principles find support in the utterances of a multitude of judges, though in none of the cases cited does the precise question here at issue seem to have arisen. Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 20, 1 Sup. Ct. 614, 27 L. Ed. 636; Chase v. Curtis, 113 U. S. 452, 460, 5 Sup. Ct. 554, 28 L. Ed. 1038; Suydam v. Barber, 18 N. Y. 468, 472, 75 Am. Dec. 254; Renaud v. Abbott, 116 U. S. 277, 287, 6 Sup. Ct. 1194, 29 L. Ed. 629; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Candee v. Clark, 2 Mich. 257; Armstrong v. Carson, 2 Dall. 302, 1 L. Ed. 391; Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755; Green v. Sarmiento, 3 Wash. C. C. 17, Fed. Cas. No. 5,760; King v. Asylum, 12 C. C. A. 145, 164, 165, 64 Fed. 331; Wood v. Watkinson, 17 Conn. 500, 504, 505, 44 Am. Dec. 562; Baugh v. Baugh, 4 Bibb, 556; Sweet v. Brackley, 53 Me. 346; Melan v. Duke de Fitzjames, 1 Bos. & P. 138; Smith v. Nicolls, 5 Bing. N. C. 208; Embry v. Palmer, 107 U. S. 3, 10, 2 Sup. Ct. 25, 27 L. Ed. 346; Poorman v. Crane's Adm'r, Wright, 347; Freem. Judgm. § 575; Wells, Res. Adj. § 531; Bates, Fed. Eq. Prac. § 424.

In Chicago & A. R. Co. v. Wiggins Ferry Co., cited above, speaking of the effect to be attached to the judgment of the state of Missouri construing a law of another state, the court said:

"So long as the judgment stands, it cannot be impeached collaterally in the courts of the United States, any more than in those of the state, by showing that if due effect had been given to the laws it would have been the other way. If it has the effect of an estoppel, as is claimed, it will continue to have that effect until reversed or set aside in some appropriate form of proceeding instituted directly for that purpose. The courts of the United States must give it the same effect as a judgment that it has in the courts

of the state. Whether, as a judgment, it operates as an estoppel, does not depend on the constitution or laws of the United States, but on the effect of a judgment under the laws of Missouri."

In Suydam v. Barber, 18 N. Y. 468, 472, 75 Am. Dec. 254, the suit was against the members of a firm upon a partnership obligation. One of the partners defended upon the ground that the plaintiffs had brought an action against another of the partners alone in a court of Missouri, and recovered judgment. This Missouri judgment was pleaded as operating as an extinguishment of the liability of the other partners. According to the common law, which prevailed in New York, a judgment against one of several joint debtors, obtained in an action against him alone, was a bar to an action against the others. But it was shown that all contracts which by the common law were joint only, were by the law of Missouri joint and several, and that the effect of a judgment against one thus jointly and severally liable was not to extinguish the obligation or discharge the liability of others. The New York court held the judgment inoperative as a bar, and, among other things, said:

"The consequences of a judgment, in respect to its effect as a merger or extinguishment of the original demand, are a part of the law under which the judgment itself is rendered, just as much as are those other common consequences of judgments,—that a party may have execution upon them, and that they are not re-examinable on the merits of the controversy determined by them. In all these particulars the effect of a judgment, in the government where it is rendered, is the subject of positive regulation by that government, just as it is the subject of positive regulation by what process and what courts judgments shall be rendered at all."

Referring to the effect of judgments of one state when pleaded in another under the constitutional and legislative provisions in respect to the faith and credit to be given to such judgments by the courts of the United States and of other states, the court said:

"While the rule just stated as to the effect of judgments of one state in the courts of another is clear, as is established by the cases cited by Judge Cowen, and by numerous others, yet no case can be found where a greater effect is given to the judgment of any state in the courts of another than belongs to it in the state where it was rendered. Indeed, such a rule would be against all reason, and not only out of the policy of the provisions of the constitution and laws of the United States on that subject, but against and irreconcilable with all policy and with the plainest and fundamental principles of justice."

Finding that under the law of Missouri the effect of the judgment was not to extinguish the obligation sued upon or discharge the other persons liable, it was held that no greater effect should be given to such a judgment when relied upon as a bar to a suit against the other parties liable upon the original contract.

In Wood v. Watkinson, cited above, the Connecticut court said:

"Taking it for granted that, when a judgment in the court of a sovereign state or one of the states of this Union is sought to be enforced in another state than that in which it was rendered, there is no objection to its validity on the ground of a want of jurisdiction in that court, it is well settled that no greater effect is to be given to it than it would have in the state where it was rendered. It has no higher dignity in any other state than in the one where it was pronounced; and, hence, if in the courts of the state where the judgment was rendered it is inconclusive, or if it is inquirable into there

during a particular period or on certain conditions, it will be open to investigation, to the same extent, everywhere else. Armstrong v. Carson's Ex'rs, 2 Dall. 302, 1 L. Ed. 391; Green v. Sarmiento, Pet. C. C. 74, Fed. Cas. No. 5,760; Spencer v. Sloo, 8 La. 290; Curtis v. Gibbs, 2 N. J. Law, 399; Baugh v. Baugh, 4 Bibb, 556; Rogers v. Coleman, Hardin, 413, 420, 3 Am. Dec. 733; Smith v. Nicolls, 5 Bing. N. C. 208, 35 E. C. L. 88. So, if a judgment operates in the state where it was rendered only in rem, it will not elsewhere be enforced in personam. It results conclusively from this principle, or is rather involved in it, that if a judgment, in a state where it is recovered, has not the effect of binding personally the defendants, or any of them, in the suit in which it was rendered, no greater effect will be given to it in any other state where it is endeavored to be enforced. It derives its obligation only from the laws of the state in which it is pronounced. A judgment creates a debt, on the ground that a liability is ascertained and established by the decision of a tribunal which might rightfully adjudicate upon it, and such adjudication derives its whole force and effect from the laws of the state under whose authority it is made. * * *"

That court added:

"There is nothing in our national constitution on this subject which, according to any construction which has ever been claimed for it, gives the judgment of one of the states, when sought to be enforced in another, a greater effect than it would have in the state where it was rendered."

There is nothing which precludes this court from determining for itself whether the charter exemption claimed exists to the extent of granting to the appellant immunity from the ad valorem taxes assessed against its capital stock by the defendant, the city of Memphis, except the supposed conclusive effect of the thing adjudged in the prior case, which is relied upon as settling the question, without looking into the terms of the contractual exemption. Finding, as we do, that the judgment in the prior case is not, under the law of Tennessee, conclusive when the second suit is a demand for taxes of other years, subsequently assessed, and that in the courts of that state neither party could plead that judgment as a bar to a suit for taxes for other years, we are, therefore, not precluded from looking into the charter. The opinion of the supreme court of the United States in the two cases of Bank of Commerce v. Tennessee, 161 U S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645, and Shelby Co. v. Union & Planters' Bank, 161 U. S. 149, 16 Sup. Ct. 558, 40 L. Ed. 650, are binding authorities upon us, and require that we shall hold that the capital stock of the appellant bank is not exempt from ad valorem taxation by reason of the charter exemption claimed by the Union & Planters' Bank.

The demurrers which raise the question we have discussed were properly sustained, and the decree dismissing the bill is accordingly affirmed.

DEWING et al. v. WOODS.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1901.)

No. 396.

QUIETING TITLE—RIGHT OF ACTION—TITLE OF PLAINTIFF.

A court of equity cannot entertain a bill to remove a cloud upon the title to real estate without clear proof of both possession and legal title in the complainant; and where the bill itself shows that taxes were assessed against the land which were not paid, that it was sold for such delinquent taxes and purchased by the state, and that a decree has been entered by a state court adjudging the title to be in the state, and asks, among other things, that the sale of the land as directed by such decree be enjoined, it fails to state a case upon which a federal court of equity can grant relief.[1]

Appeal from the Circuit Court of the United States for the District of West Virginia.

In Equity.

John Bassel (E. D. Talbot, on the brief), for appellants.

John H. Holt and J. Hop Woods (Samuel V. Woods, on the brief), for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The bill in this case was filed on the 27th day of March, 1896, in the circuit court of the United States for the district of West Virginia. Fred Fickey, Jr., the complainant, sold his title, claim, and interest in the land in controversy by deed of June 21, 1897; and by decree entered on the 30th December, 1899,—the said Fred Fickey, Jr., having departed this life,—the case was revived in the name of Frank Woods, who then owned such title to the lands mentioned as Fickey had theretofore possessed. The object of the suit was to remove a cloud upon complainant's title to a tract of 5,000 acres of land situated in the counties of Randolph and Pocahontas, in the state of West Virginia. It appears from the record that the state of West Virginia on the 10th day of June, 1866, granted said tract of land to W N. McVeigh and others, and that by regular mesne conveyances the said Frank Woods claimed title thereto; that the defendants below, when this suit was instituted, claimed said tract of land by virtue of two deeds made by A. H. Winchester to James H. Dewing, dated February 25, 1886, and August 23, 1887. The said Winchester claimed part of the land by virtue of certain deeds connecting him with the patent to Henry Banks for 36,000 acres, dated July 11, 1795, granted by the commonwealth of Virginia; other part by a deed made by Elihu Hutton and wife, dated August 19, 1887; another portion under a tax sale in the year 1881 by the commissioner of school lands for Pocahontas county; and another portion (the southern part thereof)

[1] Necessity of possession in suits to quiet title, see note to Jackson v. Simmons, 39 C. C. A. 522.

under a tax sale made in the year 1887 by the commissioner of school lands for said county. The deeds under which the defendants below claimed title to the land in controversy covered the entire 5,000-acre tract described in the bill as the property of the plaintiff, but during the pendency of the suit in the court below the defendants disclaimed as to 947 acres, known as the "Hutton Land"; and as to this part, on the 15th of June, 1897, a decree was entered confirming the complainant's right and title thereto. The record discloses that the Banks survey covers about 2,800 acres of the McVeigh grant, and it also plainly shows that the Banks title was, and had been for years, at the time the McVeigh patent issued, forfeited, both for the nonentry and nonpayment of taxes. Therefore the land covered by it was again open to entry and grant, and consequently the 5,000-acre patent to McVeigh and others was valid and binding, even though a great part of it was included in an older grant. It also appears by the record that the said tract of 5,000 acres of land was duly entered upon the land books of Randolph county in the names of McVeigh and others for the years 1869, 1870, 1871, and 1872, and properly assessed and charged with taxes, but that the taxes were not paid, and the land was therefore returned as delinquent, and in due time sold by the sheriff of said county because of the nonpayment of such taxes, and purchased by the state of West Virginia; that on the 1st day of May, 1876, the commissioner of school lands of Randolph county instituted, pursuant to chapter 105 of the Code of West Virginia, proper proceedings in the circuit court of Randolph to have said land sold for the benefit of the school fund, and an order was passed by said court, after said land had been surveyed into lots, and the taxes duly ascertained, directing the school commissioner to sell the said tract of 5,000 acres at public auction, which order is still in force, but has not been executed, for the reason that the court below inhibited such sale pending this suit, and until its further order. The case, having been fully matured, came on to be heard on the pleadings, proceedings, and evidence, when the court below, on the 21st day of June, 1900, entered a decree in favor of the complainant, finding that he was the owner in fee simple of the land described in the McVeigh patent, and adjudging that the deeds under which the defendants claim constitute a cloud and an incumbrance upon the complainant's title to said land, and ordering that the same be canceled, set aside, and declared of no force and effect. To this decree the appeal we are now considering was allowed.

There can be no question as to the jurisdiction of equity of suits to remove clouds upon the title to real estate, but it is just as well determined that only those who have a clear legal title, connected with the possession of land, have any right to ask the aid of a court of equity in removing a cloud on the title to the same. We are unable to find with the court below that the complainant is the owner of the legal title to the land embraced in the McVeigh survey, for it plainly appears from the record of this cause that such title to said land is held by the state of West Virginia, as adjudged by the decree of the circuit court of Randolph county,—a judicial

finding that we in this proceeding are not at liberty to ignore. In addition, the complainant's bill admits the nonpayment of the taxes due on the land claimed by him, concedes the sale of said land and its purchase by the state, refers to the decree of the circuit court of Randolph county adjudging the title to be in the state, and ordering the sale of the land for the benefit of the school fund, and asks, among other things, for a decree restraining such sale.

Mr. Justice Gray, speaking for the supreme court of the United States in Frost v. Spitley, 121 U. S. 552, 556, 7 Sup. Ct. 1129, 1131, 30 L. Ed. 1010, 1012, says:

"Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. Alexander v. Pendleton, 8 Cranch, 462, 3 L. Ed. 624; Peirsoll v. Elliott, 6 Pet. 95, 8 L. Ed. 332; Orton v. Smith, 18 How. 263, 15 L. Ed. 393; Crews v. Burcham, 1 Black, 352, 17 L. Ed. 91; Ward v. Chamberlain, 2 Black, 430, 17 L. Ed. 319. As observed by Mr. Justice Grier in Orton v. Smith, 'Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title.' 18 How. 265, 15 L. Ed. 394. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for, if his title is legal, his remedy at law by action of ejectment is plain, adequate, and complete, and, if his title is equitable, he must acquire the legal title, and then bring ejectment. United States v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110; Fussell v. Gregg, 113 U. S. 550, 5 Sup. Ct. 631, 28 L. Ed. 993."

It was alleged in the bill that complainant had a fee simple title to the land in controversy, and that he was in possession of the same. The record shows that complainant did not when the bill was filed, and does not now, have the legal title to the land, and therefore it is entirely unnecessary that we consider the matter of possession. The facts disclosed by the record relating to the title of appellee are as we have stated, and, the law applicable thereto being as we have quoted, it follows that there was error in the decree entered by the court below on June 21, 1900. As the bill must be dismissed because it appears that the complainant did not have the legal title to the land in controversy at the time this suit was instituted, and that such title was then and is now vested in the state of West Virginia, it will not only be useless, but really improper, for us to further consider the questions of law and fact raised by the pleadings, testimony, and argument. On the bill alone the case is against the complainant below.

The decree appealed from is reversed, and this cause is remanded, with directions that the bill be dismissed. Reversed.

McILWAINE et al. v. ELLINGTON et al.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1901.)

No. 351.

1. BUILDING AND LOAN ASSOCIATIONS — CONTRACTS WITH BORROWING STOCKHOLDERS—LAW GOVERNING.

Where the bond given by a borrowing stockholder in a building and loan association is dated and made payable at the home office of the association, and it is expressly declared therein that the contract shall be governed and construed by the laws of the state where such home office is situated, such provision being made to secure uniformity in the contracts of all stockholders, and not for the purpose of evading the usury laws of other states, the contract is solvable under such laws, although the security is situated in another state, where the stockholder resides.

2. SAME—INSOLVENCY—RULE OF SETTLEMENT WITH BORROWING STOCKHOLDER.

Where the contract between a building and loan association and a borrowing stockholder is governed by the law of the state of the association's domicile, under which it is valid, such law determines the rights of the parties and the amount due on the contract in a suit in a federal court to foreclose the mortgage after the association has become insolvent, and its affairs are being wound up by a court of equity in its home state, notwithstanding the laws and decisions of the state in which the suit is brought, and where the mortgaged property is situated, provide a different rule, and the courts of the state refuse to apply any other to suits affecting property therein, in the absence of any statute declaring such contracts against the public policy of the state, and nonenforceable against mortgaged land therein situated.

3. SAME—COLLECTION OF ASSETS BY RECEIVER.

The receiver of an insolvent building and loan association appointed in a proceeding to wind up its affairs is not entitled, in a suit to foreclose a mortgage given by a borrowing stockholder, to an order authorizing him to sell the stock of the defendant, also pledged as security for the loan, the purpose of the proceeding in which he was appointed being to pay off such stock by an equitable distribution of the assets.

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

The Covenant Building & Loan Association is a Tennessee corporation with its principal office at Knoxville, Tenn. Having become insolvent, a bill was filed by stockholders and creditors in the circuit court of the United States for the Northern division of the Eastern district of Tennessee, sitting at Knoxville, and the complainants in this case were appointed receivers of said association March 1, 1897, to wind up its affairs, and ratably distribute its assets. Subsequently the same complainants filed an ancillary bill in the circuit court of the United States for the Western district of North Carolina, sitting at Greensboro, in which cause said court took ancillary jurisdiction of the matters pending under the original bill in the court in Tennessee, and the complainants in this suit were appointed receivers of the assets and effects of the said association within the state of North Carolina. Among the assets and effects of said association deposited in its home office in Knoxville, Tenn., which came to the hands of said receivers, was a sealed note or bond for $1,000, dated January 9, 1891, executed by the defendants, W. W. Ellington and Laura Ellington, his wife, secured by a mortgage of a lot of ground in Greensboro, N. C., belonging to said Laura Ellington. At the time of the application for the loan of $1,000 secured by said bond and mortgage, the said Laura Ellington was the owner of 10 shares of the fourth series stock of said association, which had been issued to her April 28, 1890, which said stock she transferred to the association as collateral for said loan. By the note Ellington and wife promised on or before nine years from date to

pay to the Covenant Building & Loan Association, at its home office in Knoxville, Tenn., $1.000, together with a premium of $5 per month, and interest at 6 per cent. per annum, payable monthly. The note further read as follows: "This note is for money borrowed on ten shares of the fourth series stock of said association, and is secured by a mortgage of even date herewith upon a lot of land in the county of Guilford and state of North Carolina. Now, if we pay promptly the monthly interest on said sum of $1,000, and the monthly premium of $5.00 bid by us for said loan, and the monthly payment on said shares of stock, and any fines assessed under the rules of said association, and the taxes, * * * and the premium necessary to keep the house on said lot insured * * * until the said stock becomes fully paid in and of the value of $100 per share, then it is understood that upon the surrender of said stock to said association this note shall be deemed fully paid and canceled. But if we fail to pay promptly, when due and payable, the said taxes and insurance premiums, or default in payment of said monthly interest, fines, monthly premiums, and monthly payments on said stock for a period of six months after the same are due, or any installment thereof is due, then, at the option of said association, the whole indebtedness evidenced by this obligation (including the taxes and insurance premiums due or paid by said association) shall at once become and be due and collectible, and a foreclosure of said mortgage in the manner therein provided may be had. It is further understood that this note is made with reference to and under the laws of the state of Tennessee, and, if paid before seven years from its date, such rebate from the premium included therein will be allowed as the board of directors of said association shall deem equitable." The mortgage, in its conditions, followed the terms of the note, with the usual provisions for a foreclosure sale in case of default. Default having been made in the payment of the balance claimed by the receivers as due under said note and mortgage, the said receivers prayed leave of the said circuit court of the United States for the Western district of North Carolina to file a foreclosure bill against the said W. W. and Laura Ellington in said court, which leave was granted, and thereupon this bill was filed by McIllwaine and Ashmore, citizens of Tennessee, against said Ellington and wife, citizens of North Carolina, praying that account be taken of the amount due under said note and mortgage, which the complainants claimed amounted to $592.50, and for a sale in default of payment.

The complainants, in their said foreclosure bill, averred as follows: "(14) That, as your orators are advised and believe, and so aver, the insolvency of the said association, and the appointment of the said receivers as aforesaid, has caused all the bonds and mortgages held by it and owing to it, including the bond and mortgage aforesaid, to mature, and become immediately payable. (15) That the contracts were made payable and solvable in the state of Tennessee, at the home office of said corporation, a Tennessee corporation. That they were made with express reference to the laws of Tennessee, and that under said laws, as your orators are advised and believe, and so aver, that they were and are valid, legal, and binding, and free from any and all illegality. (16) That there has been paid to the said association upon the said stock of the defendant the sum of $462. That there has been paid as interest upon said loan $359.50, and as premiums thereon $359.50. (17) That as your orators are advised and believe, and so aver, in view of the insolvency of said association, the proper mode of settlement with the defendants as borrowers is that which has been adopted by the circuit court of the United States for the Northern division of the Eastern district of Tennessee in the principal cause, and by this honorable court in the cause of I. S. Lauer et. al. vs. The Covenant Building and Loan Association, by decree dated May 3, 1897, as the rule of settlement between the said receivers and all borrowers from said association. That a copy of said decree, marked 'Exhibit C,' is hereto attached, and made a part thereof. (18) That, in accordance with this general rule, the said defendants should be charged with, and required to pay, the amount actually borrowed by them from the said association, together with simple interest thereon at the rate of six per cent. per annum from the date of the loan. That they should be credited on said bond with the interest and all premiums paid to the associa-

tion as of the dates of the payments of such interest and premiums, the calculation being made upon the principle of partial payments. (19) That in arriving at the amount due from said defendants there should not be credited upon said mortgage debt the payment of any dues upon stock, and they should not be regarded as partial payments upon said indebtedness. That said defendants should be treated, as to the payment of dues made upon stock, the same as investing stockholders. That, after all liabilities of defendant herein and all other borrowers from said association shall have been paid, the fund ought to be distributed pro rata among the borrowing and nonborrowing stockholders upon the basis of the amount paid by them, respectively, as dues upon stock. (20) That all questions as to the amounts of monthly dues upon the said stock, and their application, and the rights and liabilities of the defendant herein as a stockholder should be reserved until the final settlement of the affairs of said association in the hands of the said receivers and under the direction of the circuit court of the United States for the Northern division of the Eastern district of Tennessee and for the Western district of North Carolina, when the value of the stock, as depending upon the monthly dues paid in upon it, and the losses of the association, the risk of which was assumed by the said defendant and other stockholders, shall be determined, and the rights of the said defendant in the premises and of all other stockholders shall be ascertained and declared by the said court, or else your orators, receivers as aforesaid, should be authorized and empowered by the court, for the purpose of making final settlement and compromise with the defendants herein, and with all other borrowers, to allow such borrowers credit upon the balance found due from them as said borrowers the value of their stock, or stock payments, after making a careful and conservative estimate of such value, taking into consideration the conditions and surroundings of the assets in their hands and making due allowance for all probable losses and depreciations in value, as well as probable expenses to be incurred in the collection of the assets and administration of the trusts."

The rule of settlement established and decreed by the circuit court of the United States for the Northern division of the Eastern district of Tennessee, a copy of which decree was "Exhibit C," and which was adopted by the circuit court of the United States for the Western district of North Carolina by a special order signed June 19, 1897, as the general rule of settlement for all settlements by the receivers with the borrowers in the Western district of North Carolina, was, in substance, as follows: (1) That the borrower be charged with the amount actually borrowed, together with 6 per cent. interest from the date of the loan. (2) That the borrower be credited upon the loan with the interest and premium paid as of the dates of payment, the calculation to be made upon the principle of partial payments. (3) That the borrower be not credited with the payment of dues upon stock, they not to be regarded as partial payments upon the indebtedness. (4) That the borrower be treated, as to the payments of dues upon stock, the same as investing stockholders; the fund for distribution to be distributed pro rata among borrowers and nonborrowing stockholders upon the basis of the amount paid by them, respectively, as dues upon stock. The receivers were further authorized, in making settlements with borrowers, for the purpose of settlement and compromise to allow borrowers credit for the estimated value of their stock payments, after making a careful estimate of such value, allowing for all probable losses and depreciations and the probable expenses to be incurred in collecting the assets and administering the trusts.

The defendants, Ellington and wife, answered the bill. They alleged that the note or bond and mortgage were made and executed in the state of North Carolina, and not in Tennessee, and were North Carolina contracts, and to be construed, and effect to be given them, according to the laws of North Carolina; that the association had a local board and a secretary in Greensboro, N. C., and that the contract was made payable in Tennessee to avoid the usury law in force in North Carolina; that the 10 shares of stock were issued to said Laura Ellington upon the understanding that, if she subscribed for the stock, she was to have a loan of $1,000 at 6 per cent., which was the highest legal rate in North Carolina, and that the money borrowed was to

be expended in building a house upon the mortgaged land; that said contracts are not legal and binding, but were a scheme to obtain usurious and illegal interest, and are void so far as they exact a greater rate of interest than 6 per cent.; and that all payments made by her, whether as interest, premium, or dues, ought to be credited on said loan, and that upon a legal computation they have fully repaid said loan, with legal interest, and have in fact overpaid said debt.

Testimony was taken to show that by the statute law of Tennessee, and by the construction put upon those statutes by the courts of Tennessee, the foregoing rule of settlement adopted by the United States circuit court at Knoxville was the rule of law established by the state courts of Tennessee applicable in that state to settlements between insolvent building and loan associations and borrowing stockholders; also to prove that upon a careful estimate of the value of the stock payments, allowing for losses and expenses, 40 per cent. was found to be a fair estimate of the value of the stock to be credited on loans of borrowing shareholders. The cause came to a hearing on the bill, answer, and testimony, and the circuit court, by its decree of December 8, 1899, held that the monthly payments for stock dues, to wit, $6, and the monthly payment of $5 for interest and $5 for premium, making $16 per month, were to be credited on the loan, and that the defendant had overpaid the amount of the loan and interest $9.42. The court further decreed that the defendants, as stockholders of the association, were liable to the receivers for their share of the losses of the association, and that the mortgage should not be released, but should remain as security for the defendants' pro rata share of said losses and deficiencies; and charged the costs of the case against the defendants, Ellington and wife. From this decree the receivers have appealed. They assign as error that the court should have decreed that the receivers were entitled to recover the amount claimed in their bill of complaint, and were entitled to foreclose the mortgage if the amount was not paid; that the court erred in allowing the stock dues to be credited, and in not decreeing that defendants were not entitled to credit on the mortgage debt for the stock dues paid by them; that, the contract being a Tennessee contract, the court erred in not holding that the rule of settlement established by the laws and decisions of Tennessee should be followed; that the court erred in not decreeing that the stock, being also pledged for the debt, should be sold to meet any deficiency caused by the land not bringing the amount of the debt, costs, and expenses of sale.

John W. Hinsdale, for appellants.

John N. Wilson (Levi M. Scott, on the brief), for appellees.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

MORRIS, District Judge (after stating the facts). The learned circuit judge had questions identical with those in this case before him in the case of McIlwaine v. Iseley, and, having very carefully considered them, he announced his conclusions in an opinion which is reported in 96 Fed. 62, and in the supplemental opinion in the same volume at page 775. Having considered all the facts of Iseley's Case, which in essentials did not differ from the present case, he found that by express terms, and by the explicit understanding and intention of the parties as expressed in the note, the subscription to stock and the loan were Tennessee contracts; that they were consummated at Knoxville, in that state, and all dues and payments were required to be paid there; and that it was not so made a Tennessee contract to evade the usury laws of North Carolina, but for the reason that, the association having borrowing and nonborrowing shareholders in many other states, it was necessary

that it should have one uniform rule of construction of its contract, in order to insure equality, uniformity, and mutuality among all its members. We fully agree with the learned circuit judge that the contract in this case was a Tennessee contract. The circuit judge further found that under the rule of law of Tennessee the contract in this case was legal and valid, and free from the imputation of usury. Had the association still been a solvent and going concern, the mortgagors would have been required to settle with it according to the terms of their contract. The Tennessee law was proved in the case by the testimony of Tennessee lawyers familiar with the rulings of the courts of that state, and the circuit judge also referred to the decisions of the following Tennessee cases, which fully establish these rules: McCauley v. Association, 97 Tenn. 421, 37 S. W. 212, 35 L. R. A. 244, 56 Am. St. Rep. 813; Post v. Association, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201; Rogers v. Hargo, 92 Tenn. 35, 20 S. W. 430; Hughes v. Association (Tenn. Ch. App.) 46 S. W. 362.

The circuit judge further found that by the laws of North Carolina —the state in which the mortgaged land was situated, and in which this proceeding to foreclosure was prosecuted—the rule was different, and that by the decisions of the supreme court of North Carolina such a contract would be held unconscionable and usurious, and not to be enforced, and, if the association were solvent, the rule of settlement under the North Carolina decisions would be to charge the borrower with the sum loaned and interest from the date of the loan, and to credit him with all sums paid as interest, premium, and stock dues as partial payments. Meroney v. Association, 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Rowland v. Association, 116 N. C. 878, 22 S. E. 8. The rule of settlement between the association and its borrowing members would be very different under the North Carolina law from that which would be the rule if the Tennessee law governed. While this association, if solvent, would have been entitled to have collected a considerable sum from the defendants had the account between them been stated in accordance with the Tennessee law, the defendants would have overpaid by $9.42 the amount which the association could have claimed from them if the relations between them were governed by the North Carolina laws. This association is, however, not solvent, but is insolvent. The rule of settlement between the borrowing members and the association is in both Tennessee and North Carolina different, when the association has become insolvent, from that which prevails in each state when it is solvent. In Tennessee, when the association has become insolvent, its receivers are by the law of Tennessee, in settling with the borrowing members, permitted to charge them with the amount loaned and interest thereon at 6 per cent., and to give them credit for all payments of interest and premium as partial payments, but not to credit them with the monthly payments for stock dues or membership fees, as to which they are treated as other stockholders, and are entitled to only their pro rata share in the distribution of the corporate assets. See Tennessee cases heretofore cited. In North Carolina, as the circuit judge has held, borrowing stockholders of an insolvent

association, in addition to the amount which they would owe the association were it solvent, are liable to contribute their proper proportion of the losses chargeable to their share of advanced stock for the benefit of the other members of the association. Meares v. Davis, 121 N. C. 126, 28 S. E. 188; Thompson v. Association, 120 N. C. 420, 27 S. E. 118; Williams v. Maxwell, 123 N. C. 586, 31 S. E. 821. It thus appears that, while the rule of settlement between an insolvent association and its borrowing shareholders is stated in different language by the courts of Tennessee from that which is used by the courts of North Carolina, yet those rules are in their practical results hardly distinguishable. The question as to which rule should govern, however, was strenuously contested before the circuit judge, and subsequently on appeal before this court. The circuit judge, having found the stock subscription and loan to be a Tennessee contract, then considered the question whether, as the performance of the contract was secured by a mortgage of land in North Carolina, and the object of this suit was a foreclosure and sale of the land because of default, the circuit court was controlled by the North Carolina decisions for the purpose of such a proceeding in North Carolina, and was bound to treat the contract as a North Carolina court would treat it. As to this question the circuit judge held that the gist of the action was the mortgage of land in North Carolina, and as the North Carolina courts had decided that such a mortgage to secure a loan of money under such a contract, when the money was to be used in North Carolina on the mortgaged land, could not be enforced except to the extent of requiring the repayment of the principal and simple interest at 6 per cent., crediting all payments as partial payments on the loan, the circuit court of the United States sitting in that state was controlled by those decisions as in the nature of a rule of property. The circuit judge accordingly held that the North Carolina rule of settlement should be applied, and so decreed. The appellants assigned this as error.

In accordance with an accounting under the North Carolina rule, the circuit judge decreed that the defendants were found to have overpaid the amount with which they were chargeable by the sum of $9.42, but that they were still liable for their proper proportion of the losses chargeable to the shares of advanced stock for the benefit of the other members of the association, and that the defendants were not entitled to have the mortgage released, but that it should stand as security for the ultimate payment by the defendants of their pro rata contribution to such losses and deficiencies. We do not agree with the learned circuit judge in his conclusion that, because this was a suit to foreclose a mortgage of land in North Carolina, given to secure the performance of the Tennessee contract, the North Carolina rule for the construction of the contract must prevail. When, by the rule applicable to the construction of the contract, the amount due thereunder is ascertained, then the mortgage stands as security for the payment of that amount. As to the proceedings to foreclose the mortgage and the manner and terms of sale, the terms of redemption of the land from the sale, and similar matters, the laws of the state where the land lies do control. Brine

v. Insurance Co., 96 U. S. 627, 24 L. Ed. 858; Insurance Co. v. Cushman, 108 U. S. 51, 2 Sup. Ct. 236, 27 L. Ed. 648. But the present question is not with regard to the proceedings to obtain payment by a sale of the land, but the question is whether the amount due under this contract, which is valid by the Tennessee law, is to be determined by that law, or whether the contract is to be treated as usurious, as it is held to be under the decision of the North Carolina courts. The weight of authority would seem to be that, if the contract is valid by the laws of the state where made, the amount due under it is to be ascertained by those laws, and the security is liable for that amount, although situated in another state. It is to be noticed that there is no legislation of North Carolina declaring such a contract as this against the public policy of North Carolina, and nonenforceable against mortgaged land there situated.

In Bendey v. Townsend, 109 U. S. 665–668, 3 Sup. Ct. 482–484, 27 L. Ed. 1065, 1066, speaking of a decree for foreclosure of a mortgage of land in Michigan, the supreme court said:

"The land is in Michigan, the notes and mortgage were made and payable in Michigan, and by the law of Michigan, as settled by repeated and uniform decisions of the supreme court of that state, the stipulation to pay an attorney's or solicitor's fee of a fixed sum is unlawful and void, and cannot be enforced in foreclosure, either under the statutes of the state or by a bill in equity. * * * Upon such a question affecting the validity and effect of a contract made and to be performed in Michigan concerning land in Michigan, the laws of the state would govern in proceedings to enforce the contract in a federal court held within the state."

In Bedford v. Association, 181 U. S. 227–242, 21 Sup. Ct. 597–602, 45 L. Ed. 834–845, which was a foreclosure suit brought in the circuit court of the United States for the Western district of Tennessee to enforce a mortgage of land in Tennessee, executed to a New York corporation, among the other defenses it was urged that the contract was usurious, and as to that defense the supreme court of the United States said:

"Besides, the transactions were not usurious under the laws of New York, where the notes were payable. * * * Therefore the principle expressed in Miller v. Tiffany, 1 Wall. 298, 17 L. Ed. 540, applies. It was said in that case: 'The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and, if the interest allowed by the law of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. The converse of this proposition is also well settled. If the rate be higher at the place of the contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate.' See, also, Andrews v. Pond, 13 Pet. 78, 10 L. Ed. 61; Junction R. Co. v. Bank of Ashland, 12 Wall. 226, 20 L. Ed. 385; Scotland Co. v. Hill, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261; Cromwell v. Sac Co., 96 U. S. 57, 24 L. Ed. 681; Cockle v. Flack, 93 U. S. 344, 23 L. Ed. 949."

In Loan Co. v. Cannon, 96 Tenn. 599, 36 S. W. 386, 33 L. R. A. 112, 54 Am. St. Rep. 858, a note secured by mortgage of land in Tennessee was given to a Minnesota building association, and made payable in Minneapolis. The court said:

"The second assignment of error is that the note and mortgage were both usurious on their face and nonenforceable. As already stated, the note

stipulates on its face to pay five per cent. interest per annum and five per cent. premium per annum at the office of the company at Minneapolis, Minnesota. This contract is a Minnesota contract, and is expressly authorized by the charter of the company and the laws of that state, which have been distinctly proved and appear on the record."

Another case in point is Association v. Rector, 38 C. C. A. 686, 98 Fed. 171. This was an appeal from the circuit court for the Eastern district of Arkansas in a suit to foreclose a mortgage of land in Arkansas. The appellant was an Alabama corporation. The circuit court of appeals for the Eighth circuit said:

"Is this contract valid under the laws of Alabama? This is the only question in the case. The contract was made and was to be performed in the state of Alabama, and its validity and effect must be determined by the laws of that state. * * * The validity and legal effect of this contract must be tested by the laws of Alabama and the decisions of the supreme court of that state construing those laws, and not by the laws and decisions of other states. Applying that test, we find that under the laws of Alabama, as construed by the supreme court of that state, the contract in suit is not usurious."

The decree of the circuit court for Arkansas was reversed, and the case remanded, with instructions to render a decree for the sum found due, treating the contract as valid, and not usurious.

Another case is Andruss v. Association, 36 C. C. A. 336, 94 Fed. 575. This was a bill to foreclose a mortgage of land in Texas, executed to a building and loan association incorporated in New York. The circuit court of appeals for the Fifth circuit held that, under the laws of the state of New York, the contract was valid, and not usurious, and that the mortgage of land in Texas was enforceable according to the terms of the contract.

The case of MacMurray v. Gosney, 106 Fed. 11, in the circuit court of the United States for the Western district of Pennsylvania, was a suit by the receivers to foreclose a building association mortgage given to an Illinois corporation on land in Pennsylvania. Circuit Judge Acheson applied the rule of settlement adopted by the United States circuit court for the Southern district of Illinois, and refused to apply the rule, more favorable to the borrower, established by the supreme court of Pennsylvania in like cases.

These decisions in building and loan association cases, several of them decided since the ruling in the present case now appealed from, appear to us, in the absence of legislation by the state of North Carolina controlling the enforcement of a mortgage of land in that state given to a foreign building and loan association, to establish the rule that such a mortgage is enforceable for the amount of the contract secured, provided it is a contract to be performed in the foreign state, and to the extent that it is lawful under its laws. The circuit judge, while not applying the rule of settlement in this case established by the Tennessee decisions, did, by his final decree, adopt the method of settlement sanctioned by the decisions of the supreme court of North Carolina by the cases hereinbefore cited, by which the borrowing stockholder is required to contribute to the losses in respect to his advanced shares. In accordance with this method of settlement, it was decreed that Ellington and wife were

liable as stockholders for their pro rata share of the losses of the Covenant Building & Loan Association, and that the mortgage should not be released, but that their pro rata share of the losses and deficiencies should be secured by said mortgage, and the mortgaged land remain charged with that liability. This although not strictly the rule of settlement adopted by the court of primary jurisdiction in this receivership, which we hold to be the proper rule, yet it is for practical results hardly distinguishable and quite equitable, and was not appealed from by the defendants, and therefore we do not think the appellees should be charged with the costs of this appeal.

The further contention of the appellants that in a proceeding like the present one to wind up and distribute the assets of an insolvent building and loan association the pledged stock should be decreed to be sold in the event that the land should not bring sufficient to pay the borrowers' debt, is without merit. The object of the proceeding is to pay off the stock by an equitable distribution of the assets.

Decree modified in accordance with this opinion.

PENNSYLVANIA R. CO. v. MARTIN.

(Circuit Court of Appeals, Third Circuit. November 11, 1901.)

1. RAILROADS—INJURY TO LICENSEE — PERMITTING USE OF PATH ON RIGHT OF WAY.

   Plaintiff was walking along a path on the right of way of defendant's railroad, near the track, when he was struck and injured by a piece of brake shoe, which broke and flew off from a passing car. The path was used to some extent, without objection from defendant, by passengers going to and from a station near by, and plaintiff testified that, when injured, he was on his way to such station to meet a passenger, who was expected to arrive an hour later, and whom he desired to see on business of his own. Plaintiff and others also used the path in going to and from their work. *Held* that, conceding that plaintiff might have been considered as being on the right of way by defendant's invitation, had it been near the time for the arrival of the train which he expected to meet, under the circumstances shown he was at most merely a licensee, to whom defendant owed no duty of protection, except from wanton or willful injury.

2. SAME—NEGLIGENCE—BREAKING OF BRAKE SHOE.

   A railroad company is not chargeable with negligence because of the breaking of a brake shoe on a car in one of its trains, where it was not too much worn for use, and, so far as any inspection would have shown, had no defect which ought to have prompted its rejection, and where the car and shoe were fully inspected but a few hours previously, and no defect was at that time apparent, either in the shoe or wheel, which would cause the shoe to break.

3. TRIAL—DIRECTION OF VERDICT.

   Where the evidence is so conclusive that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it, the trial judge should direct a verdict, when requested.

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

Alan H. Strong, for plaintiff in error.
C. H. Beasley, for defendant in error.

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

DALLAS, Circuit Judge. The plaintiff (below) sued to recover damages for personal hurt, which (as he claimed and we may assume) was inflicted upon him by a piece of iron, part of a brake shoe, which was projected from one of the cars of a rapidly moving train of the defendant (below) and struck the plaintiff, who was walking alongside the track. It has been properly conceded that, if the case should have been submitted to the jury at all, the instructions which accompanied its submission would not have been open to criticism; but the learned trial judge was asked to direct a verdict for the defendant, and his refusal to do so is here assigned for error. Consequently, the question now for decision is, was there any evidence to sustain the verdict, which was in fact, and by allowance of the court, rendered for the plaintiff? Or, to state it with more particularity, was there any evidence to support the findings which were in law essential to warrant that verdict, viz. (1) that the defendant owed the plaintiff a duty of care, and (2) that that duty, if owing, had not been discharged?

1. The plaintiff was employed in the Equitable Pottery, from a gate of which there was a path upon the defendant's right of way, running alongside the rails for a considerable distance to a station platform, and thence over that platform to a public street in the city of Trenton, called "Lalor Street," which adjoined the station and crossed the track at, or nearly at, right angles therewith. This path had for a long time, without objection by the railroad company, been used by the employés of the pottery in going to and from their work. The plaintiff was walking upon it at the time of the accident, and, if he had then been going to his home, he would have been, though not a trespasser, a licensee simply, to whom the defendant would not have been liable, except for wanton or intentional injury. But there was evidence that this path had been also used, with the company's acquiescence, as a way to and from its station, by persons taking or leaving trains at that point; and the plaintiff testified that upon the occasion in question he was going to the station to await the arrival of a passenger by a train which was due there about an hour later. He said:

"I was going there to meet a friend of mine on some business. * * * I did not make any appointment with him, but I wanted to see him on particular business. * * * I wanted to see Mr. Ristow for the purpose of getting some prices of saggers by him."

This testimony was adduced to maintain the plaintiff's theory that he was upon the defendant's property, not by sufferance merely, but by its implied invitation, and that therefore the company's relation to him was such as entitled him to the exercise of care upon its part. We, however, are of opinion that, assuming the truthfulness of the testimony, the facts shown by it do not admit of the inference which

the jury was permitted to deduce from them. The learned judge in his charge said:

"Now, then, if you come to the conclusion that he was on his way across the land of the defendant by the implied invitation of the defendant, for a purpose connected with the business of the railroad company, then you have to consider a still further question [the question of negligence]."

We agree that, if there had been any evidence from which the conclusion that the plaintiff was on the defendant's land by its implied invitation could have been legitimately reached, this instruction would have been unobjectionable; but, as we have said, we are of opinion that such conclusion was legally impossible upon any view which could reasonably be taken of the facts shown, and therefore we think that the peremptory instruction which was requested ought to have been given. Had the plaintiff been upon the platform, at or about the time for the arrival of a train, for the purpose of meeting a passenger to arrive by that train, it may be that his motive or reason for desiring such meeting would not have been a material subject of inquiry. In Gillis v. Railroad Co., 59 Pa. 143, 98 Am. Dec. 321, it was said:

"Had it been the hour for the arrival or departure of a train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of the defendants, as much as if he was actually a passenger."

But, assuming, without now deciding, that one who goes to a railroad station, at or near the hour for the arrival of a train, to meet a passenger, is, without regard to his inducing purpose, there by invitation to be implied from a general and allowed custom, still the facts of this case are peculiar and distinguishing. The plaintiff was upon the defendant's right of way, as were several others of the pottery workmen who were admittedly but licensees; and it is he who sets up the object he had in view, as taking him out of that category and authorizing him to be there as much as if he had been actually a passenger. But he was where even one who purposed to become a passenger would not, at the time and under the circumstances, have been entitled to protection. The defendant was under no obligation to exercise especial care respecting this particular part of its roadbed beyond what was requisite to avoid injury to those whose use of it was that which had been sanctioned. Its acquiescence in the adoption of the adjacent path by passengers, as a means of going to and from the Lalor Street station, did not impose upon it a duty to regard the condition of all cars which might pass near it at any time, without reference to the hours for the arrival and departure of its trains at or from Lalor street. It was not bound to take precaution for its safety, except when the authorized use could properly be made of it, and might reasonably be anticipated. In allowing passengers to go by this path to trains ready or about to become ready to receive them, the company did not invite any one, even when intending to ultimately become a passenger, and, a fortiori, if not so intending, to go by that way, or by any other, to its station long before train time, in order that he might loiter there for an hour or more to await an interview with a third person upon a subject with which the com-

pany was not in the least concerned. Such a use can in no way be connected with the purposes for which the station was constructed. It is not a use which passengers usually make, or are impliedly invited to make, of it. The purpose is solely that of the particular user, and consequently he is, at most, but a licensee, to whom the company owes no duty but such as pertains to that voluntarily assumed relation. Gillis v. Railroad Co., 59 Pa. 129, 98 Am. Dec. 317; Railroad Co. v. Aller (Ohio) 60 N. E. 205. As was said in Hargreaves v. Deacon, 25 Mich. 1 (quoted with approval in Railroad Co. v. Schwindling, 101 Pa. 263, 47 Am. Rep. 709):

"We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant."

2. If the existence of the duty alleged to have been owing by the defendant to the plaintiff had been established, yet the issue as to defendant's negligence should, in our opinion, have been withdrawn from the jury. It is undoubtedly true that in actions like this the question of negligence is ordinarily for the jury, under proper direction. But it is too well settled for controversy that when the evidence is so conclusive that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it, the trial judge not only may, but should, when requested, give binding instructions; and the present case, we think, plainly called for the application of this rule. The brake shoe, a part of which struck the plaintiff, was not too much worn for use, and, so far as any inspection would have disclosed, there was nothing which ought to have prompted its rejection. A slight flaw in the iron became apparent after it broke, but could not have been previously observed. These facts were not controverted. On the contrary, the plaintiff tried his case upon the theory that the fracture of the brake shoe was caused by a flattened wheel, and to sustain this theory he produced but a single witness, who testified that it was his opinion that the breaking of the shoe was due to that cause. He also testified that a flattening of "about half an inch in the center" might produce such a fracture; that a wheel might become flattened to that extent in running one mile, and that "it would make the wheel go thud, thud, * * * every time it revolved around," which "would be quite a noticeable thing." This is the substance of all the evidence which the plaintiff produced upon the question of negligence, and we strongly incline to the opinion that, if a judgment of nonsuit had been entered, the case would have been properly disposed of; for it had not been made to appear that the railroad company had omitted any precaution which it ought to have taken, or that by the exercise of ordinary care the flattening of a wheel could have been either prevented or remedied while the train was running between stations situated more than a mile apart.

The action of the court below in overruling the nonsuit is, however, not subject to review. The only specification to be dealt with is that which alleges that the court erred in refusing the motion of the defendant to direct a verdict in its favor, and under that specifica-

tion all the evidence, as well that adduced by the defendant as by the plaintiff, is for consideration; and that which was presented on behalf of the defendant, and in no way met or answered on behalf of the plaintiff, absolutely refutes his charge of negligence. It shows that the cars which composed the train in question were in Camden for about four hours before they started for Trenton; that the company had an established system of inspection, the reasonable adequacy of which seems to be unquestionable, and at all events was not impugned. In pursuance of this system, and during the time that the car to which this brake shoe was attached was at Camden, it was several times inspected, and at each inspection the wheels, brake shoe, etc., were examined, and no flat wheel, or defect in the shoe, was discovered. Moreover, the engineer and the conductor of the train testified that they listen for flat wheels, and can hear the noise they make, but that they did not discover the presence of any such wheel upon that train on that day. There was other testimony tending to prove due care, but it is unnecessary to refer to it. It is enough to say that we have found no evidence whatever of any negligence on the part of the defendant, and it follows that the judgment of the circuit court must be reversed, and it is so ordered.

UNITED STATES, to Use of SCHUMACKER, v. McINTYRE et al.

(Circuit Court, D. Colorado. November 5, 1901.)

No. 4,049.

1. CONTRACTS—CONSTRUCTION.

The principal defendant had a contract with the United States for the erection of a government building, and contracted with one R. to furnish the stone; the contract giving him the right, on R.'s default, to take possession of the quarry and complete the contract at R.'s expense. R., not having sufficient money to open and operate his quarry, borrowed from plaintiff, giving his note, secured by an assignment of his interest in the contract. Afterwards a tripartite agreement was made, by which defendant was to pay to plaintiff all sums due R. under his contract until the note was paid, plaintiff was given the right to complete the contract in case of R.'s default, and it was further agreed that, in case defendant took possession under the terms of the original contract, he should account to plaintiff for any profits which might become due to R. to the amount of the note. R. was unable to provide the stone as required, and he and plaintiff united in a proposition to defendant to take possession of the quarry and produce the stone as their agent, but without expense to them or the creation of any debts for which they should be liable. This offer defendant accepted, and he produced the stone to complete the contract, but at an expense largely exceeding the contract price. *Held* that, while his entering upon the work as agent for R. relieved the latter from liability under the original contract for the loss, it did not render defendant liable to plaintiff; it not appearing that the amount expended by him in completing the contract was excessive, but that his only obligation, under all the agreements construed together, was to account to plaintiff for any profit which might accrue to the benefit of R. under the original contract.

2. PRINCIPAL AND SURETY—RELEASE OF SURETY BY CHANGE IN CONTRACT OF PRINCIPAL.

Any change in a contract for the performance of which a surety is bound, made without his consent, will operate to relieve him from liabil-

ity; and, where a change has been made in such contract, the burden rests upon one seeking to charge the surety to prove that he knew of and assented to such change.

At Law. Action on the bond of a contractor for government work, for the use and benefit of a creditor of a subcontractor.

Edward L. Shannon and Thomas, Bryant & Lee, for plaintiff.
Hartzell & Steele and A. W. Gillette, for defendants.

RINER, District Judge. It is alleged in the complaint, and admitted in the answer, that in March, 1898, the defendant McIntyre entered into a contract with the United States of America to furnish material and to perform the work required for the construction of the foundation, superstructure, and roof of the United States Mint building in the city of Denver. The record further shows that stone from the Cotapaxi quarries had been selected to be used in the superstructure of the building. In April, 1898, McIntyre furnished his bond to the government, with the defendant the United States Fidelity & Guaranty Company as surety. The bond is set out at length in the complaint, and it is unnecessary to be stated here. It is sufficient to say that it is in the usual form of such surety bonds. In July, 1898, McIntyre entered into a contract with one John H. Routt, under which Routt was to furnish McIntyre stone from the Cotapaxi quarry for the superstructure of the mint building. The testimony tends to show that, at the time Routt made the contract with McIntyre to furnish the stone, he did not have sufficient means to carry on the work of opening the quarry. He applied to Schumacker, the present plaintiff, for a loan of $1,500. The loan was made; Schumacker taking Routt's note for the amount, and Routt assigning to Schumacker, as security, his interest in the contract with McIntyre. At that time a tripartite agreement between Routt, McIntyre, and Schumacker was entered into in respect to the repayment to Schumacker of the $1,500 loaned by him to Routt. The $1,500 proving insufficient to open and operate the quarry, Routt applied to Schumacker for an additional loan of $1,000, which was made, and a new note for $2,750 was given by Routt to Schumacker, dated September 30, 1898. This note was secured by Routt's reassignment of the contract between Routt and McIntyre, and a new tripartite agreement was entered into between these parties with respect to the repayment of this sum of $2,750, including the interest due upon the original loan. The stone from the Cotapaxi quarries proving not satisfactory, the government, as it had a right to do under its contract with McIntyre, changed the stone from the Cotapaxi to Arkins stone, and a new contract, dated October 15, 1898, was entered into between Routt and McIntyre with respect to furnishing the stone from the Arkins quarry, whereby McIntyre agreed to pay Routt 55 cents per cubic foot for all stone delivered and accepted, f. o. b. the cars at Arkins; payments to be made on the measured stone in the building, monthly, from estimates given by the proper government officers, less 10 per cent., which 10 per cent. was to be paid upon the final estimate. Routt's interest in this

contract was also assigned to Schumacker as security for the payment of the $2,750 and the interest, and a new tripartite agreement, dated the same day, was entered into between Routt, McIntyre, and Schumacker, whereby it was provided, among other things, that Routt should assign his interest in his contract with McIntyre to Schumacker as security for his loan; that he would keep Schumacker fully informed with respect to the quantities of stone furnished under said contract, the time of the monthly estimates to be made by the proper government official, and the times when payments of money were to be made by the said McIntyre on account of said contract; that he would not draw any money from McIntyre under the contract without first informing Schumacker in writing of his intentions so to do; that he would, upon the written request of Schumacker, furnish written statements from time to time as to the amount of stone furnished, amounts received therefor or due therefor; and that he would faithfully perform the contract. He further expressly authorized McIntyre to pay over to Schumacker from time to time all moneys due and coming to him upon the contract when the same should become due, payments being based upon the monthly estimates of government officers as set forth in the original contract, until the note and the interest thereon, at the rate of 6⅔ per cent, per month, should be fully paid. He further agreed to furnish McIntyre with a good bond as in the original contract provided. McIntyre, upon his part, agreed that Routt might assign his contract to Schumacker for the purposes above stated; that, in case of default on the part of Routt in the performance of the contract, he would give Schumacker or his legal representatives the eight days' notice provided for in the contract between Routt and McIntyre; that Schumacker, or his legal representatives or assigns, might carry out and perform the contract in the same manner and to the same effect as though the original contract had been entered into with him; and that, upon three days' notice in writing from Schumacker of his intentions to do so, he (Schumacker) should have the right and privilege of entering into possession of the quarry and performing the contract between McIntyre and Routt. He further agreed that he would accept the order of Routt to pay Schumacker all moneys becoming due to Routt from him as the same should become due under the original contract, payments to be based upon the estimates of the proper officials of the government as set forth in the contract between Routt and McIntyre, and that he would immediately pay to Schumacker all moneys becoming due from time to time to Routt from him under said contract between Routt and McIntyre, until Schumacker's note had been paid in full; and he further agreed that in case he (McIntyre) should enter into possession of the quarries and perform the contract, as therein provided he might do in a certain event, he would pay to Schumacker any moneys due from him (McIntyre) to Routt, up to the amount of the note and the interest. He further agreed that, until the note and the interest had been fully paid according to its tenor, he would, at all proper, seasonable, and necessary times, provide and furnish Routt sufficient money, or

available and marketable credit, to enable Routt to open up and operate the quarries known as the "Chambers Quarries," to remove the stone therefrom, and to keep the men working at that place paid; the amount to be furnished and provided not to exceed $1,500 prior to the 15th of November, 1898. Schumacker, upon his part, agreed that all notices provided for by the contract might be sent to his attorney; that out of the moneys paid to him by McIntyre he would turn over to Routt such an amount as might be necessary to enable Routt to meet the running and operating expenses of the quarry, not to exceed 50 per cent. of the amount so by him (Schumacker) received under the first two estimates, and not to exceed 40 per cent. of the amount received by him under subsequent estimates, and to turn over to McIntyre 20 per cent. of the balance left at such times in the hands of Schumacker, until McIntyre should be fully reimbursed for his advances of cash and credit furnished to Routt. The parties then agreed as follows (and I quote from the contract):

"It is agreed by all of the parties hereto that the said contract of July 6, 1898, and the said tripartite agreement of September 30, 1898, shall not be considered abrogated, annulled, or superseded, so far as the said Schumacker is concerned, or the rights or claims of the said Schumacker thereunder waived, surrendered, canceled, or satisfied, until said contract of October 15, 1898, between the said Routt and McIntyre, shall by its terms go into full force and effect, and not until the said McIntyre shall have furnished to the said Routt the full sum of fifteen hundred dollars ($1,500) in cash or available and marketable credit, as is in said contract provided, or such part thereof as may be reasonably necessary to open up and operate said quarry in a proper and workmanlike manner."

Routt entered upon the work under his contract, and had shipped to Denver several cars of stone (my recollection is that the testimony shows eight cars), although it is in evidence that that particular stone did not go into the mint building by reason of some defect in color. Routt for some reason was unable to prosecute the work as rapidly as required, and on the 25th day of January, 1899, Routt and Schumacker gave McIntyre the following appointment (plaintiff's Exhibit G):

"Denver, Colo., Jany. 25, 1899.

"Mr. John A. McIntyre, Denver, Colo.—Dear Sir: You are hereby authorized and empowered by us, for and on our behalf and as representing us as our agent, but without any expense to us, or either of us, and without incurring any debt for which we, or either of us, may be liable, and in keeping with the terms and provisions of the certain contract now in force and effect between you and the undersigned John H. Routt, and of the certain contract now in force and effect between you, the said Routt, and the undersigned George P. Schumacker, and for the purpose of opening up, quarrying, and removing granite from said quarry, to be used in the construction of the U. S. Mint now in course of erection at Denver, Colorado, to enter into and take possession of the McIntyre quarries at Arkins, Colo.; and it is expressly understood and agreed that this permission and authority is hereby given without waiver of any of the terms and provisions of said contracts, or either of them.

"[Signed] John H. Routt,
"George P. Schumacker."

And McIntyre thereupon proceeded to get out the stone at a cost to him, as shown by Mr. Tuxton's testimony, of $46,536.62.

While I have referred briefly to the contracts relating to the Cotapaxi quarry, they have no particular bearing upon the controversy now before the court, other than to show the relation of the parties and the circumstances which led up to the contracts of October 15, 1898. The rights of the parties in this suit are to be determined under the contracts executed on the 15th day of October, 1898, and the authority from Routt and Schumacker to McIntyre to operate the quarry, dated January 25, 1899.

It was contended in the argument, and the same contention was repeated in the brief, that Routt's inability to prosecute the work was caused by McIntyre's failure to put up the necessary amount of money to open and operate the quarry as provided in the tripartite agreement, which, it was contended, binds him to furnish funds for that purpose in an unlimited amount. This contention is based upon the following paragraph in the contract:

"And the said McIntyre further covenants and agrees that, until the said note and interest thereon have been fully paid according to its tenor, he will, at all proper, seasonable, and necessary times, provide and furnish the said Routt sufficient money or available and marketable credit to enable the said Routt to open up and operate said Chambers quarry, and remove stone therefrom, and to keep paid the men working at and upon the same; but the amount so furnished and provided shall not exceed the sum of $1,500, prior to November 15, 1898."

Even if this paragraph of the contract should be construed as contended by the plaintiff, the conclusion does not necessarily follow that this was the cause of Routt's inability to comply with the terms of his contract. It is not at all clear, however, that this provision of the contract is entitled to the construction contended for, and was so understood by the parties at the time the contract was entered into. In the closing paragraph on the same page of the contract, we find this provision:

"It is agreed by all of the parties hereto that the said contract of July 6, 1898, and the said tripartite agreement of September 30, 1898, shall not be considered abrogated, annulled, or superseded, so far as the said Schumacker is concerned, or the rights or claims of the said Schumacker thereunder waived, surrendered, canceled, or satisfied, until said contract of October 15, 1898, between the said Routt and McIntyre shall by its terms go into full force and effect, and not until the said McIntyre shall have furnished to the said Routt the full sum of fifteen hundred dollars ($1,500) in cash or available and marketable credit, as is in said contract provided, or such part thereof as may be reasonably necessary to open up and operate said quarry in a proper and workmanlike manner."

This last paragraph would indicate that it was the intent and understanding of the parties, by these several clauses in the contracts referring to the advancements to be made by McIntyre, that they should not exceed the sum of $1,500, or so much thereof as might be necesssary to properly open up and develop the quarry mentioned therein; and this view is strengthened by the fact, clearly established by the testimony, that McIntyre was under no obligation whatever to Schumacker in the premises, further than the agreement, on his part, to pay over to Schumacker any moneys in his hands which might become due to Routt, together with his volun-

tary agreement that he would advance Routt temporarily not to exceed $1,500. Taking both of these contracts, and construing them together, it seems to me that the latter construction is not, to say the least, unreasonable. I think that the record clearly shows that the true purpose of this tripartite agreement was to secure to Schumacker, to be applied to the payment of his note, any and all moneys which might become due to Routt from McIntyre under the original contract. However this may be, I think the testimony tends to show that Routt's failure to perform his contract was due to the fact that the expense of getting out the stone exceeded by far the contract price. This is clearly shown by Mr. Tuxton's testimony to the effect that it cost McIntyre $46,536.62 to get the stone, which was largely in excess of the amount to be paid under the contract. I say this is clearly established, because there is no testimony in the case tending to show that McIntyre, after taking charge of the quarry, did not operate it economically, and produce the stone as cheaply as it was possible for any one to do. Having failed to perform his contract, and for the reason just stated, as I think the record tends to show, the memorandum of January 25, 1899, was executed. This memorandum authorized McIntyre, as the joint agent of Routt and Schumacker, to take possession of the quarry, develop it, and produce the necessary granite at his own cost and expense, in accordance with the terms of the contract.

Here we have a new element in determining the rights of parties, namely, that of agency. This appointment authorized McIntyre, as the agent of Routt and Schumacker, to carry out the provisions of the contract between Routt and McIntyre and the tripartite agreement, so that, in ascertaining the true relation of the parties after McIntyre entered upon the work, we must look, not only to the contracts, but also to the new relation—that of an agent—which by acceptance of the appointment, McIntyre sustained to the other two parties. McIntyre's acceptance is not in writing, but he acted upon the appointment, and is bound to all intents and purposes by its provisions. He undertook, as their agent, to get out the granite in question without contracting any indebtedness for which they should be held liable, and without calling upon them for any cash to carry on the work. The effect of this (and which was undoubtedly the purpose of the parties in making it) was to relieve Routt and Schumacker from the liability imposed on them by that clause of the Routt-McIntyre contract which provides that, in case McIntyre should take possession of the quarry to complete the contract, he should charge the entire expense thereof against the contract. By acceptance of the appointment, he did bind himself to procure the granite without calling upon the others to make up any deficiency; but it does not necessarily follow that, because the effect of this appointment and its acceptance relieves Routt and Schumacker from being called upon to make up any deficiency, McIntyre was to turn over to them the entire proceeds of the granite secured, without any repayment to himself for moneys which he, as their agent, was obliged to advance for the purpose of procuring

the stone. It is undoubtedly true that under these agreements and this appointment, construing them together, if McIntyre had been able to produce the granite for less than 55 cents per cubic foot, he would be bound to account to Routt and Schumacker for any surplus. It is, perhaps, equally true that by the acceptance of the appointment he relieved them from liability for any amount in excess of 55 cents per cubic foot that he might have to pay for its production; but it would be a harsh rule, indeed, that would preclude him, as their agent, from reimbursing himself for expense incurred up to the amount of the contract price, namely, 55 cents per cubic foot. If it cost less than that amount, Routt would have the difference between the contract price and actual cost coming to him, which would inure to the benefit of Schumacker. If it cost that amount, Routt would have nothing coming to him, consequently nothing to apply to the payment of his indebtedness to Schumacker, for which McIntyre would be liable. Under the contract between McIntyre and Routt, Routt was to pay the expenses out of the proceeds. Is it not equally true that, under every principle of agency, Routt and Schumacker having appointed an agent to carry on the work, that agent would be entitled to pay the expenses of getting out the stone out of the funds received, as Routt was bound to do under his contract,—at least, the expense up to the amount of the contract price, namely, 55 cents per cubic foot? For anything in excess of that amount, we have already indicated, McIntyre has perhaps relieved them from liability by accepting the appointment and undertaking the work. As I have already suggested, I think a fair construction of all of these agreements, when taken together and construed in the light of the circumstances surrounding them and the object and purpose sought to be accomplished by them, is that Schumacker was to be protected so far as any moneys coming due to Routt under his contract with McIntyre would serve to protect him; that if it became necessary for McIntyre, as agent of the other two parties, to pay more than the contract price—55 cents per cubic foot—in procuring the granite, he would have to advance it and stand the loss. On the other hand, if, as a result of his efforts as their agent, the granite was procured for less than 55 cents per cubic foot, then Schumacker was to receive the benefit thereof on account of Routt's indebtedness to him.

Under the testimony, Routt not only has nothing coming to him, but, if a specific performance of his contract had been enforced, he would have had a liability of approximately $28,000 over and above the contract price, from which liability, fortunately for him, McIntyre relieved him by accepting the contract or appointment of January 25, 1899. There being nothing due Routt under his contract, Schumacker is not entitled to recover upon his note against the defendant McIntyre. The view taken of the case, so far as the principal (McIntyre) is concerned, relieves the surety company, the other defendant, from liability, and renders it unnecessary to comment at any length upon the defenses insisted upon by the surety company at the hearing. I will observe, in passing, however, that

the changes, without stopping to enumerate them, made in the original agreement by the tripartite agreement, and the failure of Routt to give a bond for the faithful performance of his contract, without notice to the surety company, would in any event relieve it from liability in this action. I think it is fundamental that any change in the contract for which the surety is liable, made without his consent, will operate his discharge. The surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of that particular contract. As stated by a distinguished judge:

"He who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however iron-bound it may be; for there is for the surety, in the enforcement of his bond, no equity nor latitude beyond its strict terms."

At the hearing application was made by the defendant to amend its answer, setting up certain matters with which counsel are familiar, by way of affirmative defense. The court is of the opinion, however, that that is unnecessary, as we cannot assent to the proposition that the burden of the proof is on the surety to show that the alterations in the contract were made without its consent. However, if counsel deems it advisable to so amend the surety's answer, they have the permission of the court to do so.

In order that the rights of all parties may be preserved, I call attention to some objections to testimony, which was received subject to the objections; the ruling to be announced at the time the case was disposed of. The last question on page 25 of the stenographer's transcript was objected to on the grounds there stated. The objection is now overruled, and an exception allowed. The objection to the last question on page 36 of the stenographer's transcript is overruled, and an exception allowed, The motion to strike out certain answers, preceding the motion, on page 38 of the stenographer's transcript, is overruled, and an exception allowed, if the parties desire it. The objection to the first and second questions on page 46 of the stenographer's transcript is overruled, and an exception allowed. The last three questions on page 48 of the stenographer's transcript may stand, to which the plaintiff may object, if he desires to note exceptions thereto. As to the last two questions on page 50 of the stenographer's transcript, objected to on page 51, the objection is overruled, and an exception allowed.

Let a judgment be entered in favor of both of the defendants.

SOUTH PENN OIL CO. v. LATSHAW.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1901.)

No. 378.

1. APPEAL — QUESTIONS REVIEWABLE — RULING ON MOTION FOR NEW TRIAL.
Under the practice of the federal courts, the ruling on a motion for new trial is not reviewable.

2. SAME—QUESTIONS PRESENTED BY RECORD—REFUSAL OF INSTRUCTIONS.
The refusal of instructions asked cannot be reviewed on appeal unless the bill of exceptions contains the evidence relied on to make such instructions applicable to the case as submitted to the jury.

3. SAME—EXCEPTIONS AND ASSIGNMENTS OF ERROR—FAILURE TO COMPLY WITH RULES.
Where but a single exception was taken, and a single assignment of error is made, covering the giving of certain instructions, the refusal to give others, and the charge as given, no question is presented which will be considered by the appellate court.

4. CONTRACTS—CONSTRUCTION—DRILLING OIL WELL.
In an action to recover for the drilling of an oil well, which was made under a written contract by which the plaintiff agreed to complete and clean the well and deliver it to defendant for a stipulated price per foot, he cannot recover for time lost in fishing for tools in such well, the necessity for which was one of the risks he assumed by his contract.

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

T. P. Jacobs and R. F. Fleming (A. B. Fleming, M. F. Elliott, and U. N. Arnett, on the brief), for plaintiff in error.

V. B. Archer (Wm. Beard, on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and WADDILL, District Judge.

GOFF, Circuit Judge. This is an action of trespass on the case in assumpsit, the declaration consisting of the common counts with a bill of particulars. The defendant in error was plaintiff below, where he sued the South Penn Oil Company to recover a sum claimed by him to be due by it for the drilling of an oil well in Marion county, W. Va., and for "fishing for lost tools" in said well during the time it was being so drilled. The defendant below pleaded the general issue. The case was tried to a jury, and a verdict returned in favor of said Latshaw for the sum of $10,768, on which a judgment was duly rendered. The writ of error now under consideration was then applied for and granted.

A great number of errors are assigned, but a few only of them will, for reasons hereinafter given, be considered by this court.

The assignment relating to the refusal of the court below to set aside the verdict because it was contrary to the law and the evidence is without merit. The ruling of the court below on a motion for a new trial is not reviewable in this court. Pomeroy's Lessee v. Bank, 1 Wall. 592, 17 L. Ed. 638; Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. Ed. 803; Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58; Improvement Co. v. Frari, 58 Fed. 171, 7 C. C. A. 149.

The assignments of error pertaining to the refusal of the court

to give certain instructions asked for by the defendant below should not be considered by this court, for the reason that the evidence, if any there was, by which the relevancy of the instructions refused could have been shown, is neither quoted in full nor its substance set forth in the bill of exceptions relating thereto. Indeed, there seems to have been in the preparation of the bill of exceptions an utter disregard of the rules of this court, as also of the practice in matters of this character as established by the decisions of this court and of the supreme court of the United States. The reasons for the making and for the enforcement of said rules, as well as for the observance of the practice so established, have been frequently given. Insurance Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476; Van Gunden v. Iron Co., 8 U. S. App. 229, 3 C. C. A. 294, 52 Fed. 838; Newman v. Iron Co., 42 U. S. App. 466, 25 C. C. A. 382, 80 Fed. 228. Such being the bill of exceptions, we must presume that there was an utter absence of such testimony as made the instructions refused pertinent, in which event the court below properly rejected them. The bill of exceptions should have shown all the testimony relied on to make the propositions of law included in the instructions applicable to the case as presented to the jury. Jones v. Buckell, 104 U. S. 554, 26 L. Ed. 841.

The assignments of error concerning the giving of certain instructions prayed for by the plaintiff below, as well as those having reference to the court's instructions and charge, must also be disregarded by this court, because they repeatedly and palpably violate its well-established rule which restricts an assignment of error to one distinct proposition. Clark v. Deere & Mansur Co., 25 C. C. A. 619, 80 Fed. 534; Newman v. Iron Co., 25 C. C. A. 382, 80 Fed. 228. A separate assignment of error in respect to each part of the court's charge alleged to be erroneous, as well as to each instruction given, should have been taken. Vider v. O'Brien, 10 C. C. A. 385, 62 Fed. 326. In the case we are now disposing of, the giving of certain instructions, the refusal to give others, and the exceptions to the court's charge are all combined in one exception and in one assignment of error.

After all the evidence had been submitted, the defendant below asked the court to instruct the jury that the plaintiff was not entitled to recover because of anything in his bill of particulars relating to fishing for lost tools during the time the well was being drilled. The court refused to give that instruction, an exception was duly noted, and in the bill of exceptions appears all the testimony offered bearing on that point. The proper disposition of this prayer of the defendant below required not only a careful examination of all the testimony, but also of the pleadings, as well as the construing by the court of the written contract, under which it is clear that the well was drilled. It appears from the record that the South Penn Oil Company, on the 27th day of August, 1894, entered into a written contract with Latshaw, by which he was to drill for said company, in Mannington district, Marion county, W. Va., an oil or gas well in the manner, to the depth, and for the compensation, and under the

terms set forth in said contract; that Latshaw began drilling at a point selected by the officials of said oil company, and prosecuted the work for a short time, when he was informed by them that the company had decided to change the location to a certain other locality, which was pointed out to him; that the rig and tools were then removed to said new location, and that Latshaw there drilled the well to about the depth of 2,926 feet, and before he had completed the same the tools became fastened in the well and could not be removed; that the charge for fishing for the lost tools, set forth in the bill of particulars, was for labor expended in endeavoring to recover the tools so stuck in the well. The plaintiff below testified that he drilled the well so located at the second point under the terms and condition of the written contract. In fact, all the testimony clearly shows that the drilling was proceeded with under the written contract, and that there was simply a change in the location of the well. The instruction asked for by the defendant below required the construing of said contract by the court, and the determination of the question whether, by the terms of the same, the contractor was entitled to charge for labor attending the fishing for lost tools. We think that it clearly appears by the written contract that Latshaw was to complete the well, clean the same, and deliver it to the South Penn Oil Company, before he was entitled to any compensation therefor. This was not only so by the terms of the written contract, but also by the usage or custom of that oil field, concerning which quite a number of experts testified. The expense attending the completion of the well, which certainly included all expenditures made on account of fishing as well as those for drilling, was chargeable to Latshaw, and his compensation was to have been determined by the depth of the well, a certain sum per foot having been agreed upon. There is no evidence tending to show that the contract was abandoned, or that any of its terms were changed. Such being the case submitted to the jury, we are of the opinion that the instruction so asked for by the defendant below should have been given. Under the contract the plaintiff should have been restricted to the items in his bill of particulars relating to the drilling of the well, and testimony concerning other matters should have been excluded. This may, under the unfortunate circumstances attending said work, produce a result far from satisfactory to the contractor, and it may entail considerable loss upon him, but that, while much to be regretted, cannot be avoided, and it was one of the elements of the risk he assumed when he undertook to drill the well. The contract was made by parties capable of entering into it, and they must now stand by their agreement, whatever be the result reached by its observance.

For the error referred to, the judgment of the court below must be reversed, the verdict of the jury set aside, and a new trial awarded. Reversed.

THE GEORGE W. ROBY (three cases.)

(Circuit Court of Appeals, Sixth Circuit. October 8, 1901.)

Nos. 914-916.

1. COLLISION—PASSING STEAMERS ON GREAT LAKES—RULES GOVERNING NAVIGATION IN FOG.

The steamer Florida, passing down Lake Huron in a dense fog at a speed of not less than six miles by the testimony of her own witnesses, first heard a passing signal of two whistles from a vessel almost directly ahead and not over half a mile distant. She answered with the same signal, and starboarded her helm, but kept her speed. A minute later she saw the other steamer two lengths away and on a course crossing her own, and she then increased to full speed in an attempt to cross ahead, but a collision occurred, in which she was at once sunk. *Held*, that she was in fault in respect to her speed, in violating Rule 15 of the rules governing the navigation of the Great Lakes (28 Stat. 645), which provides that "a steam vessel hearing, not more than four points from right ahead, the fog signal of another vessel, shall at once reduce her speed to bare steerageway and navigate with caution until the vessels shall have passed each other," and because prudent and cautious navigation required her, under the circumstances, on hearing the signal so near, to at once stop and reverse until the position and course of the other vessel could be ascertained with certainty, and she was not justified upon the apparent hearing of a single passing signal in neglecting such precautions [1]

2. SAME.

The statutory rules enacted in 1895 to govern navigation on the Great Lakes (28 Stat. 645) expressly provide, in Rule 28, that they shall not operate to exonerate any vessel from the consequences of "any neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case," and such rules do not supersede any usual requirement of prudent navigation not inconsistent with their positive provisions. In determining what constitutes the "cautious" navigation required by Rule 15, after vessels approaching in a fog have reduced their speed as therein provided, under the circumstances of any particular case, resort must be had to the general principles and requirements established by the decisions of courts of admiralty; and a vessel will be held in fault for a failure to stop and reverse in such case, where prudent navigation required it.

3. SAME—EXCESSIVE SPEED IN FOG.

The steamer George W. Roby, going up Lake Huron in a dense fog, heard fog signals some three miles ahead, which proved to be from the Florida passing down. She checked speed to four or five miles, which the evidence tended to show was not as low as she might have reduced and maintained steerageway. She continued to hear the fog signals, which were approaching and apparently keeping the same bearing, from one to three points off the port bow. When the vessels were some half a mile apart she blew two passing signals, of one blast each, at intervals, which were unanswered, and she then blew an alarm. There was a confusion of signals, but a passing agreement of two whistles was finally established, each vessel thinking such signal first came from the other. The Roby, on answering the supposed passing signal from the Florida, starboarded, and reversed her engines, but had not lost her headway when she struck the Florida and sunk her. The Roby had a lookout, but he was not on duty, the only lookout being the master on the pilot house, who was also engaged in navigating the vessel, giving

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[1] Collision rules, see notes to The Niagara, 28 C. C. A. 532; The Mount Hope, 29 C. C. A. 368.

the signals, and blowing his fog whistle by hand. *Held*, that the Roby was in fault, (1) for not reducing speed to bare steerageway, as required by Rule 15, (2) for not maintaining a proper lookout, and (3) for not stopping and reversing, at least as early as the time when her second passing signal was not answered; since the fact that the bearing of the Florida as the vessels approached each other apparently remained unchanged should have advised the master that her course was drawing nearer his own, and that in proceeding he was running risk of collision.

4. SAME—FAILURE TO MAINTAIN LOOKOUT.
To exonerate a vessel from fault for a collision where she failed to maintain a lookout, although she was navigating in a dense fog, and with knowledge that another vessel was approaching ahead, the burden rests heavily upon her to show that the presence of a lookout could not have guarded against the collision.

5. SHIPPING—LIMITATION OF LIABILITY FOR COLLISION—NEGLIGENCE OF MASTER.
A vessel owner is not to be deprived of the right to a limitation of liability for damages caused by collision, under Rev. St. § 4283, for the misconduct of the officers or men of the vessel, to which he was not privy; and where a steamer was supplied with two watchmen, whose duty it was to serve as lookouts, the negligence of the master in failing to have a lookout properly stationed is not chargeable to the owners.[2]

6. COLLISION—TOTAL LOSS OF VESSEL—MEASURE OF DAMAGES.
Where a vessel is sunk in collision, and damages are awarded the owner on the basis of her total loss, he is not entitled to recover in addition for the loss of earnings under an unexpired time charter.

7. SAME—DISTRIBUTION OF DAMAGES BETWEEN VESSEL AND CARGO—EFFECT OF HARTER ACT.
The sole purpose of the Harter act is to modify the relations previously existing between the vessel and her cargo, arising from the contract of carriage; and the provision of section 3 exempting the owner from liability for faults or errors in navigation where his vessel was properly manned, supplied, and equipped, does not affect the operation of the equitable rule, which gives priority to the claim of the innocent cargo owners over that of the vessel owner against the fund available for the payment of damages sustained through a collision for which both vessels have been adjudged in fault.

8. SAME—STIPULATIONS IN BILL OF LADING.
Stipulations in bills of lading exempting the vessel from liability for cargo lost as the result of collision, or provisions that the carrier, if held liable for loss of cargo, shall have the benefit of insurance thereon, have no application to a case where the vessel is sunk and lost, with her cargo, through collision for which both vessels were in fault, and the second vessel is allowed to recoup one-half the cargo damages awarded against her from the damages awarded in favor of the sunken vessel; nor do they apply because the claim of the vessel sunk is postponed to that of her cargo owners, the fund being insufficient to pay in full. In such case the right of a recoupment does not depend upon the relation of the carrying vessel to her cargo, but upon the relation of the colliding vessels to each other, and the right of preference upon the equitable principle that where the fund available is insufficient to pay all claims those of the innocent cargo owners are to be preferred over those of one whose fault contributed to the loss; and no question of liability of the carrying vessel to her cargo owners is involved.

9. SHIPPING—PROCEEDINGS FOR LIMITATION OF LIABILITY—INTEREST ON BOND FOR RELEASE OF VESSEL.
Where the owners of a vessel, in proceedings for limitation of their liability for a collision, gave bond conditioned for the payment into court on its order of the appraised value of the vessel "and the interest on the

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[2] Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.

same as provided by law," and thereafter contested their liability, the result being an award against the vessel exceeding its value, the stipulators are liable for interest on the bond from the date of its execution at the legal rate.

Appeals from the District Court of the United States for the Eastern District of Michigan.

The lake steamers George W. Roby and Florida came into collision on Lake Huron on the morning of May 20, 1897, by which the Florida was almost instantly sunk, and became a total loss, together with her cargo. Two libels were filed against the Roby, one by the owners of the steamer Florida, and the other by the British & Foreign Marine Insurance Company, as underwriters upon nearly all of the Florida's cargo. Subsequently, the Lakeland Transportation Company, the corporate owner of the Roby, filed a petition to limit its liability. In response to the monition under this petition, the owners of the Florida, for themselves as owners of the Florida, and as trustees for cargo uninsured, and for the effects of her officers and crew, filed an answer and claim. The British Insurance Company also filed its claim and answer, both answers setting up substantially the same state of facts alleged in the original libels. The case was tried first upon the questions of fault, before the district judge in open court, the witnesses being examined orally. The Roby and Florida were both held at fault. Upon this branch of the case it is much regretted that we have not the benefit of any finding of facts or statements of the faults found against either vessel, and we are left to conjecture as to the views taken by the learned trial judge of the really controverted questions in the case. The appraised value of the Roby in the limited liability proceeding was $59,300, and bond with security was given for this sum, and the vessel released. The aggregate of the claims proven and allowed was $118,379.39, the value of the cargo being more than one-half of this aggregate loss, and exceeding the stipulated value of the Roby. The court below held that the owners of the Roby were entitled to the benefit of the limited liability act, and awarded priority of payment to the cargo interests over both the hull or vessel interest and the claim of the officers and men for their effects. 103 Fed. 328.

The case here comes upon three separate appeals: (1) The owners of the Roby appeal upon the question of fault, claiming that the Florida was wholly to blame. (2) The owners of the Florida appeal upon the question of fault, claiming that the Roby was alone at fault. They also appeal from the decree awarding priority in payment to the cargo interests, and from the decree allowing the owners of the Roby the benefit of the limited liability act. (3) The British & Foreign Marine Insurance Company appeals upon the single ground that the court below erred in not construing the stipulator's bond, entered into by the owners and surety of the Roby, as bearing interest from date of its execution. The said propeller Florida was bound from Chicago to Buffalo, and at the time of collision was bound down Lake Huron, the place of collision being a few miles below False Presque Isle point. The propeller George W. Roby was bound up the lake on a voyage to Lake Superior. The Florida had a full cargo of wheat and sundries. The Roby had in tow the schooner William D. Becker, neither being loaded. The Florida was 275 feet long, 41 feet beam, and her gross tonnage was 2,100. The Roby was of about the same length, beam, and tonnage. The collision occurred about 9 o'clock in the morning. A fog of considerable density prevailed, neither of these steamers seeing the other until they were within about two lengths of each other. The wind was very light, being northerly, and there was no sea. There is much conflict as to the passing signals given by these steamers to each other, and greater still as to the order in which signals were given, and as to most of the material facts in the case. The place of collision is in the general track of the great commerce bound up and down Lake Huron, and is a locality where vessels bound to and from Lake Michigan and Superior pass very close together upon varying and uncertain courses.

For the Florida it is contended: (1) That she first encountered the fog about 40 minutes before the collision, and that her engines were at once checked, and that she afterwards proceeded at a moderate speed; (2) that the course of the Florida, from Presque Isle point until changed in response to a two-blast passing signal from the Roby, was S. E. ¾ S., or a quarter of a point outside of her ordinary course; (3) that in from 20 to 25 minutes after checking she heard the fog whistle of a steamer between 2 and 3 points off her starboard bow, which proved to be from the steamer St. Paul, bound up the lake on a course substantially parallel with that of the George W. Roby; that the Florida was then also blowing her fog signals as required by law; that the master was then on the pilot house in charge of her navigation, her second mate alongside of the master, blowing fog signals, and a lookout on duty forward on the spar deck, and that this lookout had no other duty than to keep a lookout and report signals and sounds; that the St. Paul and Florida each blew fog signals two or three times; that then two or three exchanges of passing signals of two blasts each were given, and that as they were about abreast the Florida saluted, which was returned. Owing to the fog, these vessels did not see each other, but from the sounds their distance apart is estimated at from one-half to one mile when abreast. The evidence from the deck of the Florida is that no change in her course was made. The evidence from the deck of the St. Paul is that she had been on a compass course of N. W. by N., and starboarded about two and one-half points when passing signals were exchanged with the Florida, and that she held this altered course until nearly abreast of the Florida, and then returned to her original course. The evidence from the deck of the Florida is that the blowing of fog signals was continued after passing the St. Paul, at intervals of one minute, and that after two or three such signals a signal of two blasts was heard about one point on her starboard bow, at an estimated distance of three-eighths of a mile ahead. This was immediately replied to by a like signal of two blasts, and her wheel put hard a-starboard. After the wheel had been thus put over, the Florida blew two whistles again, which was answered by two. About this time there came in sight the top of a spar, and then the pilot house of the Roby. Thereupon the captain of the Florida blew a long whistle to his engineer to put on all his steam, his theory being that his best chance to avoid collision was to get out of the way by crossing the probable course of the Roby as rapidly as possible. It is then claimed for the Florida that after this long engine whistle had ceased blowing there was heard from the steamer, which proved to be the Roby, a series of engine whistles, three to check, one to stop, two to back, and that these were followed by a long whistle, which was blown until the Roby struck her. The distance at which the spar was first seen is estimated at from seven to eight hundred feet, and the pilot house at about two lengths, or six hundred feet. The bow of the Roby struck the starboard side of the Florida at a right angle, about amidship, and penetrated a distance of from ten to twelve feet, making a wound about twenty-five feet wide, from which she sank in about fifteen minutes. The Florida witnesses say that when the bow of the Roby came in sight she was carrying a "big bone in her teeth" and going at a speed which they estimated at from eight to ten miles per hour. They also say that she was apparently not under a starboard helm, as she was not swinging in accordance with her passing signal. It is claimed for the Florida that she began to swing under her starboard wheel as soon as it was put over, and had swung so far as that her head was pointed N. E. by E. when struck, being a change of seven and three-quarters points to port from her course before starboarding.

From the witnesses from the Roby and her tow, the Becker, we get a story which in most points differs radically from that given by the officers and crew of the Florida. (1) The Roby was proceeding up the lake upon a course N. W. by N. ¼ N., a course substantially parallel with that claimed to have been the course of the Florida. This course, it is claimed, was not altered until changed by starboarding under a passing agreement supposed to have been made with the Florida just before the collision. (2) The Roby was passed by the St. Paul, bound up the lake upon a course substantially

parallel with and about one mile on the port side of the Roby. As the Roby and St. Paul were about abreast, there was a rift in the fog, and each vessel saw the other, and from this sight, as well as from signals and engine whistles, the distance between the two steamers is judged to have been closely in the neighborhood of one mile. (3) After the St. Paul had passed, the fog signals of a steamer "in the same direction as the St. Paul, but further up the lake," were heard. This turned out to be the Florida. They heard her blow a passing signal of two blasts to the St. Paul, which were answered by the latter. These signals were estimated by the master of the Roby as about three points off his port bow. For the Roby it is claimed that on hearing these passing signals her speed was checked down, and according to her engineer this checking down occurred just ten minutes before the collision. In respect to the speed of the Roby under this check, the evidence from her deck is that it was between four and five mile an hour. According to the testimony of her master, this speed was as low as consistent with the handling of the steamer. Her master says on this subject that he had some time before come to an understanding with his engineer that when he received a checking signal in a fog he should check down "as low" as his engine would "turn easily," and that the engineer said that she "would turn at about thirty turns and handle the engine nicely," and that this would give a speed of between four and five miles. The mate of the Roby was, however, of opinion that a speed of two miles would maintain steerageway. The engineer, though examined, did not testify upon the speed necessary to maintain her course. The captain of the Roby says that, "After checking we heard another exchange of passing signals." From the time the first fog whistle of the Florida was heard the only lookout on the Roby was the master himself, and this continued to be the case until the collision with the Florida. In addition to looking out, the master was navigating his boat and sounding engine signals. Ordinarily the Roby's fog whistle was operated by an automatic device, a Chase machine, but from the time of the Florida's passing agreement with the St. Paul the master blew the fog whistle by hand, by means of a brass lever with a wire, which he could reach from his place on top of the pilot house without moving. The fog whistles of the Roby were blown at regular intervals of one minute continuously from the time of hearing the Florida's fog whistle, as had been the case for some time prior thereto. The second or third set of passing signals between the St. Paul and Florida was followed by a salute from the Florida, answered by the St. Paul. The master of the Roby says he judged the salute from the vessel bound down the lake to be about three points off his port bow.

The master of the Roby then testified as follows: "A. After the salute was blown by the Florida and answered by the St. Paul, I heard the Florida blow three whistles, the fog signal, and I was blowing my regular fog signal then. I immediately blew one long passing signal, and the Florida again blew three fog whistles. I waited a reasonable length of time, and I blew one long passing signal again, and I didn't get any answer to that. I waited a reasonable length of time, and I didn't get any answer, and I blew the danger signal. I was about to stop my boat, had reached over to get hold of the lever to stop her, when I heard two whistles from the Florida. Q. Where was that? A. It wasn't over three points on our port bow. Q. And how far, in your best judgment, did it seem away? A. Well, I don't think it was less than half a mile. Q. Then what occurred? A. I answered her with two whistles, and stopped and backed my boat, ordered the wheel a-starboard before I blew my two whistles, and stopped and backed, and backed wide open. Q. Now, when you blew your danger signal, what was your idea in blowing or what was the situation to you? A. I could not get any answer from the Florida, and I thought I ought to have some understanding with her as to where she was going. Q. Now, you blew the danger signal, as you have stated, and how did the two-blast signal of the Florida after your danger signal, in point of time? A. Right immediately after. Q. What did the bearing of that signal and its distance, taking into account the bearing of the previous signals and their distance, indicate as to the

approach of that vessel? A. Well, it indicated that she was not heading on a parallel course with us. Q. Did it indicate anything about how she was bearing from that? A. Yes, sir; it indicated that she was heading out on a broadening course. Q. What did it indicate as to the position of the two vessels with relation to each other, if it indicated anything as to how she was making you? A. She must have been making us on the starboard side, or I would not have blown two whistles. Q. And taking the character of the whistle and starboard whistle with this indication from the direction of the different signals you had there, what was your conclusion at the time as to how the Florida was making you? A. Well, I supposed he was coming down and had us on his starboard bow, and intended to passing outside of us, and I thought he might as well pass outside as anything else. Q. Now, after you had replied with the two, and giving your reversing signals, was there any further signaling between the two boats? A. The Florida blew two whistles, and I again answered him with two. Q. In what kind of succession did those come in point of time? A. I replied immediately as quick as I heard it. It was a short time after he blew the first time. Q. And did you reply the second time? A. I replied immediately. Q. Now, captain, at that time you may state whether you did or did not have fear of collision with that boat. A. I had no fear of collision. Q. You may state when the circumstances there transpiring first indicated to you danger of collision. A. I didn't think there was any danger of collision until I seen him coming across our bow, about a length and a half away, probably, and then I didn't think we were going to do any damage. Q. Now, captain, when you first saw him, as you state, where was he from your vessel? A. About four points on our port bow, and probably two lengths away. Q. What was your boat doing at that time, when you first saw her, as you described? A. She was backing. Q. How was she backing? A. Wide open, full speed. Q. What personal knowledge had you of that? A. Well, I could see by the water that her way was stopping very fast, and she was shaking things up lively, rattling things up forward. Q. During the approach of the Florida how, if at all, was your vessel swinging? If she was swinging at all, which was it? A. She swung to port very slow. Q. Do you know anything of her heading? Can you tell us anything on the subject of her heading at the time of the collision? A. She was heading between N. W. and W. Q. How are you able to say that? A. I looked at the compass, and she was heading to the westward of N. W. Q. And did you take an accurate observation of the heading? A. I did not. Q. Now, the Florida, how did she come, and how did the vessels get in collision? A. Well, the Florida came across our bow. He was coming very fast, and he was swinging very fast. Q. What, if anything, indicated her speed to you? A. Well, she was throwing a white foam up in front of her, and I could tell she was coming fast by looking at her. She came on against us at a lively rate. Q. And during her approach what about your vessel's headway, and at the time of striking? A. Our headway was just about stopped when we came together."

The evidence from the deck of the St. Paul, so far as important, was in substance: That she passed up on port side of the Roby, the vessels when abreast being visible as a result of a rift in the fog, the Roby being apparently on a course about parallel, at a distance of from three-quarters to one mile. Heard Florida's fog signal when she was about two miles ahead, their bearing being "very near ahead, possibly on our starboard, not to exceed one-half a point." Also heard fog signals of Roby regularly up to and after passing Florida. When about one mile from Florida, passing signals of two blasts exchanged with Florida. Starboarded about two and one-half points after an agreement to pass starboard to starboard, and resumed course of N. W. by N., when nearly abreast of the Florida, which was her course before deflecting under passing agreement, as well as when the Roby was passed. A second, and perhaps third, set of passing signals of two blasts were next exchanged with the Florida, and as the boats were about abreast the Florida blew a salute of three long and one short whistle, which was returned with a like signal. Owing to the density of the fog, the Florida was not seen at all, but judged her to be about one-half mile outside; that

is, on starboard side of St. Paul. From fog whistles of Roby judged she was close on two miles behind when salute was blown. Speed of St. Paul on passing Roby and Florida about eleven and one-half miles.

Captain Jackson, of the St. Paul, says that after the salute the first thing that attracted his attention was that the boats approaching each other were "blowing together, both at the same time." The Roby was blowing one whistle and the Florida two. He states that he heard the Roby blow a single blast signal twice, and that she then changed her whistle, and blew two blasts, "and her engine whistle, a back-up signal and one long whistle." He also says he heard the Roby blow a danger signal, and that this danger signal was "the last signal of the big whistles that I heard." Says the Florida's whistle was a big bass whistle, while the whistle of the Roby and St. Paul were nearly alike. Thinks the Florida was a mile down the lake behind him when he heard the cross signals. When he heard the first cross signal, remarked to his mate that there would be trouble, to which the mate agreed and noted the time. Crash of collision not heard on the St. Paul.

The mate and lookout of the St. Paul, in the main, agree that there were heard cross signals between the Roby and Florida. The mate says, after the salute between the Florida and St. Paul, he "heard the Roby blow one long whistle." The Florida answered with a regular fog signal of three blasts. "Then they got to blowing together, one was blowing one and the other two, and I heard the alarm and then the engine signals." This witness, as well as the lookout, thinks the alarm was the last big whistle heard from either of those boats.

The evidence from the deck of the schooner Becker, as might be expected, is in substantial accord with that from her towing steamer.

John C. Shaw, for Miller and others and the Florida.
Harvey D. Goulder, for the Roby.
F. H. Canfield, for British & Foreign Marine Ins. Co.

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

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

Upon an attentive examination of the whole of the evidence,—evidence which presents something more even than the usual conflict found in all such cases,—we have reached the conclusion that the court below did not err in finding both vessels at fault.

1. The Florida was clearly at fault in respect to her speed. Rule 15 of the "Act to regulate navigation on the Great Lakes and their connecting and tributary waters" (28 Stat. p. 645) is as follows:

"Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rainstorms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel, shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

It is not unlikely that while the Roby was blowing her two signals of one blast the Florida was blowing her fog whistle, and that the last fog signal blown by the Florida was mistaken by the Roby for a two-blast passing signal, and returned as such. This theory explains the blowing together testified to by the witnesses from the St. Paul, and partly explains why the Roby's single-blast signals, which we must believe were blown by her, were not heard on the Florida. But it is unnecessary to undertake to reconcile the

evidence in respect to the signals blown by the Roby. For the purposes of this case we may accept the account of the matter given by the Florida witnesses, namely, that no signal, fog or passing, was heard on the Florida until the colliding vessels were within a little less than half a mile of each other, and that there was then heard a passing signal of two whistles, which seemed to come from nearly ahead. Upon the weight of evidence, the Florida's speed was at that moment not less than six miles per hour. Upon the seeming bearing of that single passing whistle, and without being able to see the approaching vessel, she changed her course by putting her wheel hard a-starboard, and kept her speed. In a moment the top of the spar of the Becker, in tow of the Roby, came in sight, and a second or so later the top of the Roby's wheelhouse was seen. In this situation she was put under full speed in the desperate hope that the seeming course of the Roby could be crossed before the latter could reach the point of intersection. The effort failed. The Roby's bow struck the Florida about amidship, cutting very deeply into her hull, and penetrating her cargo. Upon hearing the whistle of the Roby so near, and apparently right ahead, prudent navigation required that she should at once stop and reverse, until the location and course could be ascertained with certainty by either sound or sight. The City of New York, 147 U. S. 72, 84, 13 Sup. Ct. 211, 37 L. Ed. 84; The Umbria, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. Ed. 1053; The Fountain City, 10 C. C. A. 278, 62 Fed. 87, 22 U. S. App. 301, 309; The North Star, 10 C. C. A. 262, 62 Fed. 71, 22 U. S. App. 242. The fog was dense. The vessels appeared to be very near and to be drawing nearer. The only indication of the location and course of the Roby was the apparent bearing of a single passing whistle. Upon this uncertain basis for an opinion, the Florida maintained her speed and put her helm hard a-starboard. In the case of The New York, cited above, the court, in speaking of the duty of a steamer in a fog upon hearing the fog horn of an approaching vessel, said:

"Upon hearing the fog horn of the bark only one point on her starboard bow, the officer in charge should at once have checked her speed, and, if the sound indicated that the approaching vessel was near, should have stopped or reversed until the sound was definitely located or the vessels came in sight of each other. Indeed, upon the testimony in this case, it is open to doubt whether, if the engine had been at once stopped, the steamer would have come to a standstill before she had crossed the course of the bark. There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it by a change of the helm, without taking the additional precaution of stopping until its location is definitely ascertained." The Hypodame, 6 Wall. 216, 18 L. Ed. 794; The Kirby Hall, 8 Prob. Div. 71; The Sea Gull, 23 Wall. 165, 23 L. Ed. 90; The Ceto, 6 Asp. 479, 14 App. Cas. 670.

We think this is just as applicable to a fog whistle as to a fog horn, and as applicable to two steamers in a fog as to a steamer and sailing vessel. The observation of the court in that case was bottomed upon a line of English and American cases, many of which were discussed by Judge Taft in delivering the opinion of

this court in the North Star Case, cited above, and need not be again discussed.

In the case of the Umbria, cited above, Justice Brown, after an elaborate consideration of the English and American cases, reached the conclusion that:

"The general consensus of opinion in this country is to the effect that a steamer is bound to use only such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law. In a dense fog this might require both vessels to come to a standstill until the course of each was definitely ascertained. In a lighter fog it might authorize them to keep their engines in sufficient motion to preserve their steerageway."

Here the fog was dense, and the circumstances of the case admitted of no modification by reason of the light character of the fog. But it is said that the right of vessels on the Great Lakes to navigate in a fog has been regulated by the act of 1895, known as the "White Law," and that under the rules of navigation there prescribed vessels are no longer under any duty to stop and reverse, provided they have agreed upon how they shall pass each other. But rules 15, 23, 26, 27, and 28 of the act of 1895 must be read and construed together. Rule 15 requires, without regard to nearness, that, on hearing a fog signal of another vessel within four points of right ahead, speed shall be reduced at once to "bare steerageway." Rule 26 is intended to apply to the ordinary circumstance of a failure to come to an agreement as to passing before coming within a half mile of each other. In such case the duty to reduce speed, and to stop and reverse, if necessary, is imposed, regardless of fog conditions, when the vessels come within the distance named by the statute. But under rule 15 the duty of such reduction of speed is imposed when the bearing of a fog whistle is within four points of right ahead, without regard to the distance of the vessels apart. The reduction of speed required by the rule must also be accompanied by "cautious" navigation "until the vessels pass each other." By rule 27 it is required that in obeying and construing these rules "due regard shall be had to all dangers of navigation and collision," etc., and by the 28th rule it is declared that the rules shall not operate to exonerate any vessel from the consequences of any "neglect to carry lights or signals, or of any neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

What would be the "cautious" navigation required after a vessel had reduced her speed as required by rule 15, or what precautions should be taken by vessels approaching each other in a fog, would depend upon the special circumstances, and in the determination of any question arising out of the navigation of colliding vessels, where the regulations prescribed by congress do not expressly apply, resort must be had to the sailing usages and principles of navigation which are not superseded by the positive terms of the statute. These rules or sea laws defining the precautions required by

good seamanship and cautious navigation are to be deduced from the decisions of courts of admiralty, and are not to be regarded as superseded, except in so far as they are inconsistent with the statutory regulations. The Sea Gull, 23 Wall. 165, 173, 23 L. Ed. 90. To our minds, there can be no doubt but that under a long line of well-settled decisions there was apparent risk of collision in proceeding even at a reduced speed, with no other knowledge of the location and precise course of the Roby than that afforded by the first passing signal heard on the Florida. Confessedly, the vessels were within a half mile of each other, and apparently the Roby was nearly right ahead. If both vessels were moving at the speed each claims for itself, the vessels would meet in three or four minutes. The density of the fog prevented any sight of either vessel from the other. To go ahead on the chance of safety from the change of course authorized by the passing agreement was to take a risk not justified by sound principles of navigation nor authorized by the positive rules of congressional legislation. Upon hearing the passing signal of the Roby so near ahead and so close at hand, the Florida should have stopped and come to a standstill until the location and course of the Roby could be definitely ascertained.

2. For the Roby it is very earnestly urged that she checked down about 10 minutes before the collision, on hearing the Florida exchange passing signals with the St. Paul, and that she ran under bare steerageway until about a minute and a half before the collision, when her engines were stopped and backed wide open, and that her headway was nearly gone when the collision occurred. It is insisted that the Roby's speed under check was between four and five miles, and that this speed was as low as was possible to maintain her steerageway. The fifteenth rule was plainly applicable to the situation of the Roby, and it devolves upon her to show that she reduced her speed as required by the statute. "Bare steerageway" means the lowest speed consistent with the maintenance of headway. We are not satisfied that a speed of 5 miles per hour was the lowest speed at which the Roby could maintain headway. The evidence of Captain Smith, the master of the Roby, that 30 revolutions of her engine per minute were necessary in order that her engine should be "handled easily," and that 30 revolutions gave a speed of from 4 to 5 miles, was based on what his engineer had said to him. Oddly enough, the engineer was not examined on this point. The evidence of Captain Smith, taken as a whole, leads to the impression that he took a distinction between speed which "easily" enabled his vessel to keep her course and gave the helmsman little "trouble" to keep her from falling away, and that low speed required by the emphatic words of the statute which might suffice to keep a vessel on her course, even if much shifting of the helm be necessary to keep her from falling away. The mate of the Roby recognized this difference, and was of opinion that two miles per hour would enable the maintenance of steerageway. Certain it is that the speed of the Roby was such as to render fruitless

all efforts to stop her, which were begun shortly before the vessels became visible to each other. The direction and force of the blow tend to corroborate the witnesses from the Florida that when she came in sight she showed a considerable "bone in her teeth." The estimate that her speed was then about ten miles per hour is doubtless much exaggerated, but we are convinced that her speed was considerable when she came within two lengths of the Florida, and that her headway had by no means been lost when the collision occurred. These conclusions lead to two results: First, that while running under check her speed was not as low as it should have been; and, second, seasonable efforts were not made to stop and back. We shall not attempt to reconcile the conflicting evidence in respect to the signals blown by the Roby. On her own account of the matter she blew two signals of one blast each, which were not returned. She then blew an alarm. Between each of these signals there was the usual interval. The silence of the Florida while these signals were being blown was only broken by a fog whistle blown after the first passing signal. Assuming that this alarm was blown as claimed, it is not improbable that it was mistaken on the Florida for a two-blast passing signal, and replied to as such. The helm of the Roby was then put hard a-starboard. A second two-blast was then heard. Thereupon the engine whistle was blown to stop, back, back strong, etc. Before her headway had been stopped, and before she had swung but little under her starboard helm, the collision occurred. The effort to stop and back was postponed too long. Captain Smith had every reason to fear he was running a risk of collision. He could not know the position or course of the Florida with any such certainty as to justify him keeping on after he failed to get a response to his first signal of one blast. He had judged that the first fog signals he heard from the Florida were three points off his port bow. This was when the Florida was about three miles up the lake. When this distance was reduced about one-half he judged her passing signals to the St. Paul to be still three points off his port bow. When she saluted the St. Paul when abreast he still judged her whistle to have the same bearing. The fog whistle which he heard after his first signal of one whistle was still judged by him to be three points off his port bow. That the Florida was approaching all the time he recognized. The fact that although she was approaching the bearing of her whistle did not broaden off his port bow was high evidence that if his original judgment of her bearing was correct the Florida was on a course which was drawing nearer and nearer to his own, and that in proceeding he was running a risk of collision. The North Star, 10 C. C. A. 262, 273, 62 Fed. 71.

"In practice, one of the most usual indications of risk of collision is that the approaching ship remains upon the same bearing from the observing ship for an appreciable length of time." Mars. Mar. Coll. (2d Ed.) 350.

The captain of the Roby, testifying as an expert, said, in speaking of the means of locating an unseen approaching vessel by sounds, "that after she approaches you she will broaden off if she

is on a parallel course." As she did not broaden off, he ought to have realized that she was on a course which was not parallel to his own, but a course which was drawing nearer and nearer his own. But if the benefit of a doubt be given in respect to the duty of coming to a standstill when the Florida's fog whistle was heard in reply to the first passing signal of one whistle, we have no doubt but that, when a second passing signal failed to elicit a reply, every effort should have been made to stop and come to a standstill until the Florida could be located. The sequel shows, as is most always true in such cases, that a difference of a few seconds would have saved a collision. Instead of stopping then, an alarm was blown, which was followed by two whistles in reply to what was supposed to be two whistles from the Florida. The duty of stopping and definitely locating the approaching vessel rested strongly upon the Roby under her own view of the facts, and we are agreed that for this fault, as well as for failing to reduce her speed to bare steerageway when she first checked down, she must be condemned. The Roby is also to be condemned for not maintaining a proper lookout. The lookout enrolled as such was engaged in scrubbing deck during the whole of the events which resulted in a collision. The captain and his wheelsman were the only men forward on the deck engaged in the navigation of the ship. The Roby was then traversing a peculiarly crowded pathway for lake commerce, in a dense fog. The situation was one which demanded the utmost vigilance and caution. The duty of having as a lookout one giving his undivided attention to the duties required of lookouts is not lessened by anything in the act of 1895. Captain Smith, standing on top of the pilot house, was upon this occasion engaged in directing the navigation of his vessel, blowing engine whistle signals to his engineer and blowing by hand his fog whistle. True, his engine and fog whistles were operated by means of cranks, which could be moved without changing his place on the pilot house. In addition to all these duties he was the sole lookout. It is a plain fault for the master of a vessel to also assume the duties of a sole lookout. Chamberlain v. Ward, 21 How. 548, 16 L. Ed. 211; The Ottawa, 3 Wall. 268, 18 L. Ed. 165; Mar. Coll. 496. In the situation of the Roby the necessity for the undivided vigilance and attention of a lookout was particularly urgent. The only defense made upon this point is that the Roby should not be condemned for the failure to maintain a lookout, if the presence of one would not have availed to prevent the collision. The Blue Jacket, 144 U. S. 371, 389, 12 Sup. Ct. 711, 36 L. Ed. 469; The Dexter, 23 Wall. 69, 23 L. Ed. 84; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716. But the absence of the lookout from duty under the circumstances of this case was flagrant negligence, and the burden of showing that the collision could not have been guarded against by a lookout rests heavily upon the Roby. The Farragut, 10 Wall. 334, 19 L. Ed. 946; The Ariadne, 13 Wall. 479, 20 L. Ed. 542; Robinson v. Navigation Co., 20 C. C. A. 86, 73 Fed. 883; The Emma Kate Ross (D. C.) 41 Fed. 826, 828. For the Roby it is urged that no num-

ber of lookouts could have added anything to the information which Captain Smith had "as to the presence, course, and purpose of the Florida, or gathered any information to change the navigation of the Roby." We are not prepared to say that Captain Smith had all of the information a vigilant lookout could have given him touching the approach and course of the Florida, and especially touching the bearing of her whistle sounds. He does not pretend to have taken the exact bearings of the signal whistles he heard from the Florida. Possibly he could not, and possibly an attentive, watchful lookout in the eyes of the ship could not. But are we authorized to say that such a lookout might not have noticed that the bearing of the Florida was not so far off the port bow of the Roby as Captain Smith judged? The captain's judgment was that the bearing was about three points, while his wheelsman judged that the bearing of the same sounds was from one to two points off her port bow. Who was right? The men on the Florida judged that the bearing of the Roby was nearly right ahead, and not over a half point off their starboard bow. Which of these estimates was right? Estimates of the distance between the St. Paul and the Florida, when they passed each other, varied from one-half to one mile. The Florida was inside of the St. Paul, which had passed up about one mile inside the Roby and on a course about parallel with that of the Roby. The St. Paul and Florida passed each other under a starboard agreement. Did the Florida starboard in accordance with the agreement? If so, this must have drawn her nearer to the course of the Roby. The evidence from the deck of the Florida is that she did not starboard her wheel until she received a two-blast signal from the Roby. But the Roby people say that they gave no such signals until they received one of that character from the Florida. Was a fog signal from the Florida mistaken for a two-blast passing signal? If not, how does it happen that Captain Smith supposes he heard such a signal? Upon that assumption he starboarded his wheel. The disinterested witnesses from the St. Paul unite in saying that the Florida blew simultaneously with the Roby; the former blowing one blast, while the latter blew two. The Roby people say that they did blow two signals of one blast and got no response to either. Was this due to the fact that the Florida's whistle was not heard, or are the St. Paul witnesses wholly mistaken in saying that both boats blew together? For the purpose of determining the knowledge that each boat had of the signals heard from the other, and of determining what signals were blown on each boat, we have, in a former part of this opinion, assumed the truth of the story which comes from the deck of each boat as to signals given and heard. But can it be said that a watchful and attentive lookout might not have confirmed the testimony concerning the simultaneous blowing of cross signals before the Roby confessedly changed to a signal of two blasts? The course of the Florida before she changed her wheel to starboard, according to her wheelman, was S. E. ¾ S. At the time of the collision it was N. E. by E. This involved a change of

7¾ points. So remarkable a change has been the subject of much very sensible comment by counsel for the Roby, and it has been very plausibly argued that the course of the Florida was not correctly given by her wheelsman. If counsel are right in the argument that the change in the Florida's course under starboard wheel was not 7¾ points, but 4 and a fraction, it only results that the course of the Florida, before the exchange of signals of 2 blasts, must have been a course which was drawing nearer and nearer to the course of the Roby, and which would carry her across her bows. But Captain Smith made no discovery of this sort in the changed bearing of signals. Down to the last signal he heard, he judged the Florida to be 3 points off his port bow, and entertained no fear of a collision until the Florida came in sight. These considerations, and others which arise upon the very conflicting evidence of a very voluminous record, induce the feeling that it is not satisfactorily shown that Captain Smith had all the information which could have been derived from a lookout giving undivided attention to his duties.

3. It is next insisted that it was error to give to the owners of the Roby the benefit of the limited liability act (9 Stat. 635). The contention is that the Roby was insufficiently manned in respect to a lookout. By virtue of his office and the rules of maritime law, the master's duty was to select and station his crew. Butler v. Steamship Co., 130 U. S. 527, 554, 9 Sup. Ct. 612, 32 L. Ed. 1017. Among the crew were two watchmen, whose duty it was to serve as lookouts. It is in evidence that the master was accustomed to require from these watchmen certain other services in the daytime, and that on this occasion the watchman on duty as a lookout had been ordered aft to scrub deck. Under the circumstances existing, this was an act of grave negligence. But it was the duty of the master, and not that of the owners, to see that a competent lookout was always on duty. If the master chose to assign to the lookout a duty which took him from his station or divided his attention, how could the owners prevent it? A case might be made against the owners if it was shown that they were privy to such an act of negligence, or that they knew that the master was in the practice of keeping no lookout, or of requiring other duties inconsistent with the watchfulness and undivided vigilance constantly due from a lookout. No such case is made here. The owner is not to be deprived of the benefit of the limited liability act, afforded by the provisions of section 4283 of the Revised Statutes, for the misconduct of the officers or men of the vessel, to which he is not privy. Walker v. Transportation Co., 3 Wall. 150, 18 L. Ed. 172; Butler v. Steamship Co., 130 U. S. 527, 554, 9 Sup. Ct. 612, 32 L. Ed. 1017; The Longfellow, 45 C. C. A. 379, 104 Fed. 360.

4. We come now to the question of damages and their apportionment. Both vessels being at fault, the damages must be divided. The appraised value of the Roby was $59,300. The claims against her and allowed were as follows: (1) The value of the Florida's cargo, represented by the British & Foreign Insurance

Company, with interest to date of commissioner's report, August 28, 1899, $65,293.33; (2) the claims of the appellants Peter P. Miller and others, as trustees for cargo not represented by the British & Foreign Insurance Company, including interest to same date, $6,026.71; (3) the claims of same as trustee for the effects of officers and seamen of Florida, $1,462.79; (4) the claim of the same as owner of the Florida for one-half the value of that steamer, including interest to same date, less one-half the damage sustained by the Roby, $45,596.56. The owners of the Florida also preferred a claim for the loss of the unexpired term of the charter for the steamer for the season of 1897, a value reported by the commissioner as $13,889.52. This claim was disallowed. (a) The claim of the owners of the Florida to recover the value of the unexpired term of a season charter in addition to the full value of the lost vessel and her freight pending was properly rejected. The general rule is that, where the loss is total, the estimated profits of a charter not yet entered upon are always rejected. Where the loss is partial, the damages, for very apparent reasons, include all loss due to detention for repairs, which may include the profits of a charter not yet entered upon. In such case the question is as to the value of the use of the vessel while undergoing repairs. The distinction is elaborated and the authorities cited in the case of The Umbria, 166 U. S. 404, 421, 17 Sup. Ct. 610, 41 L. Ed. 1053, which case was followed by this court in the case of Mason v. Insurance Co. (decided at June session) 110 Fed. 452. The fact that the Florida was under a charter party for the season affords no reasonable room for a distinction. The compensation was payable in monthly installments. One installment had been earned and paid. Appellants were also permitted to recover for freight pending. The future installments were not earned nor entered upon, but as a compensation the owners were permitted to recover the full value as a substitute for the vessel and all her future earnings. (b) The fund applicable to pay all the damages consists in the appraised value of the Roby, the owners of the latter having availed themselves of the benefit of the limited liability act. That fund does not more than equal one-half of the total damages. If all of the claimants stood upon an equal footing, in consequence of their equal innocence or equal contribution to the cause of the disaster and loss, the fund should be distributed pro rata upon their several claims, as provided by the fifty-fifth rule in admiralty. Transportation Co. v. Wright, 13 Wall. 104, 122, 20 L. Ed. 585. In the case just cited it appeared that the steamer Norwich came into collision with the schooner Van Vleit, and that the schooner and her cargo were a total loss. The Norwich, which was solely at fault, availed herself of the benefit of the limited liability act. The Norwich herself sustained damage, and her cargo was lost. The owners of the schooner and her freight and the owners of the cargo on the Norwich, being equally innocent, were permitted to share pro rata in the fund which represented the value of the Norwich and her pending freight. Touching the claim of the libelants, the owners of the sunken schooner and her cargo, the court said:

"But the claim of the libelants alone is not alleged to be greater than the value of the steamer and her freight. The libelants, therefore, would be entitled to receive the whole amount of this damage, if they were the only persons who sustained damage, or if, by reason of the nature of their claim, their lien was superior to that of the owners of the cargo lost on the steamer. Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause. We think, therefore, that the lien of the libelants for the loss of the schooner and her cargo, arising from the collision, is on an equality with the lien for the loss of the cargo of the steamer from the same cause. This being so, the case for the application of the statute arises; for it is alleged by the libelants that the damage to the schooner and her cargo, together with the damage arising from the loss of the steamer's cargo, greatly exceeds the value of the steamer and her freight for the voyage."

The fifty-fifth rule preserves "to all parties any priority to which they may be legally entitled." In consequence of the supposed innocence of the owners of cargo lost on the Florida, they were awarded by the court below priority of payment out of the fund to be paid in by the owners of the Roby. The ground upon which the cargo owners were preferred by Judge Swan, who heard this cause in the district court, is thus stated by him:

"It is recognized equity, however, that the claim of an injured party wholly innocent of fault or dereliction resulting in a loss should be more favorably regarded than that of a creditor against the same fund whose negligence aided to cause the loss. Such a case would present an exception to the general rule of pro rata division among sufferers by a common disaster, and that rule should be limited to cases where all the parties seeking reparation are equally innocent of fault, unless statutory or judicial authority has otherwise determined."

The soundness of this rule of distribution is not denied by the learned counsel representing the owners of the Florida as a general rule of equity, applicable in maritime cases prior to the enactment by the congress of the act of February 13, 1893 (27 Stat. 445) generally known as the "Harter Act." The contention is that the third section of the Harter act "places it beyond the power of the cargo to take the proceeds which would have gone to the hull interests had the Florida been without cargo." That section is in these words:

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

The argument of counsel against any preference to the cargo interests is: That "if the Florida had been without cargo, her owners would receive their full half damage under the decree dividing

damages as entered in the district court. * * * Being with cargo, if such cargo is given priority, and absorbs what would otherwise have gone to the hull, then, by such priority, the owners of the Florida shall become or be responsible for damages or loss resulting from fault or errors in navigation, or in the management of said vessel, in direct derogation of the statute." In short, the contention is that the well-settled equitable rule which prefers an entirely innocent claimant upon a fund over another whose fault contributed to the common loss shall be set aside, because its operation will be to prevent a realization of the decree in favor of the Florida against the Roby. The equitable preference accorded the superior equity of the cargo owner in the fund from which all losses must be paid is wrongfully described as an indirect imposition of cargo liability contrary to the statutory exoneration intended. The trouble lies further back. But for the limited liability act, there would have been no occasion to call into operation the rule for distribution of a common fund insufficient to pay all. The question to be decided comes to this: Is the third section of the Harter act to be construed as operating to restrict the operation of general and well-settled principles of law beyond the plain and explicit relief afforded from their operation by the words of the statute? The Harter act has several times been under consideration by the supreme court. In the case of The Delaware, 161 U. S. 459, 471, 474, 16 Sup. Ct. 516, 40 L. Ed. 771, it was sought to have the act construed as exonerating a vessel and its owners from all liability for a collision resulting from the fault and mismanagement of those responsible for her navigation. This view of the act was rejected, the court, among other things, saying that "the whole object of the act is to modify the relations previously existing between the vessel and her cargo," and that its "provisions have no possible application to the relation of one vessel to another." In the case of The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130, there was involved the question whether the owner of a seaworthy vessel, stranded through the negligence of her master, was entitled to a contribution in general average for sacrifices made and suffered in unsuccessful efforts to save the vessel and her cargo by reason of the exoneration of the vessel from liability to her cargo for the negligence of his master and crew. It was conceded that prior to the Harter act no such claim was admissible, if the stranding was due to faults of navigation. The contention was that as the Harter act had relieved the vessel and her owners from lability to the cargo owners when the loss was due to negligent navigation, that a right to contribution now existed notwithstanding the negligence of the master was the cause of the stranding. The court, in its opinion, said:

"We are unable to accept this view of the operation of the act of congress. Plainly, the main purposes of the act were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and, in event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility for damage or loss resulting from faults or errors in navigation or in the management of the

vessel. But can we go further, and say that it was the intention of the act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship? Doubtless, as the law stood before the passage of the act, the owner could not contract against his liability and that of his vessel for loss occasioned by negligence or fault in the officers and crew, because such a contract was held by the federal courts to be contrary to public policy, and, in this particular, the owners of American vessels were at a disadvantage as compared with the owners of foreign vessels, who can contract with shippers against any liability for negligence or fault on the part of the officers and crew. The inequality, of course, operated unfavorably on the American ship owner, and congress thought fit to remove the disadvantage, not by declaring that it should be competent for the owners of vessels to exempt themselves from liability for the faults of the master and crew by stipulations to that effect contained in bills of lading, but by enacting that, if the owners exercised due diligence in making their ships seaworthy, and in duly manning and equipping them, there should be no liability for the navigation and management of the ships, however faulty. Although the foundation of the rule that forbade shipowners to contract for exemption from liability for negligence in their agents and employés was in the decisions of the courts that such contracts were against public policy, it was nevertheless competent for congress to make a change in the standard of duty, and it is plainly the duty of the courts to conform in their decision to the policy so declared. But we think that for the courts to declare, as a consequence of this legislation, that the shipowner is not only relieved from liability for the negligence of his servants, but is entitled to share in a general average rendered necessary by that negligence, would be in the nature of a legislative act. The act in question does, undoubtedly, modify the public policy as previously declared by the courts, but, if congress had intended to grant the further privilege now contended for, it would have expressed such an intention in unmistakable terms. It is one thing to exonerate the ship and its owners from liability for the negligence of those who manage the vessel; it is another thing to authorize the shipowner to do what he could not do before, namely, share in the general average occasioned by the mismanagement of the master and crew."

In the case of The Chattahoochee, decided by the circuit court of appeals for the First circuit, and reported in 21 C. C. A. 162, 33 U. S. App. 510, 74 Fed. 899, the facts were that the steamer Chattahoochee collided with the schooner Golden Rule. The owners of the schooner filed their libel in the district court in their own behalf and in behalf of the officers and crew, and as bailees of her cargo, against the steamship Chattahoochee, to recover for the loss of the schooner and her cargo, and the personal effects of the master and crew, through the collision. The district court held both vessels at fault, and gave the libelants a decree for one-half the value of the vessel and the full value of the cargo, "with the usual right to recoup." From this decree the libelants alone appealed. Judge Putnam, for the court, thus states one of the issues raised by the appeal:

"Both vessels being in fault, the district court, on the well-settled rule, allowed the steamer, which was not damaged, to recoup against one-half of the value of the schooner and one-half of the value of the cargo, still leaving a net balance for which a decree was made in favor of the schooner, her officers and crew, after fully satisfying and paying the loss to the cargo owners. In this way the schooner indirectly suffers the loss of one-half of the value of the cargo, though it was by a diminution of the damages awarded her."

She claims that this was in violation of section 3 of the act of February 13, 1893 (27 Stat. 445, c. 105), commonly called the "Harter Act." The court held, following the case of The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, that the Harter act has no relation to the claim for the loss of the schooner herself, and furthermore said:

"The general purview of the statute limits it to the relations between a vessel and her owners and the cargo aboard and its owners, and merely gives a statutory bill of lading, as was said partly in terms and partly in effect in The Delaware. It has no proper relation to claims between colliding vessels or to the rusticum judicium of the admiralty, which established the rule by which such claims are divided in case of mutual fault; or, consequently, to the qualification of that rule by means of which the net damages are diminished by recoupment. The liability to which the statute appertains is that arising from a bill of lading, or other contract of carriage; while that with which we are dealing comes from the relations of colliding vessels to each other, and is precisely the same as though the cargo lost had been the lading of a third vessel, involved in the collision, but in no way at fault."

The court further held that the rule stated and applied in The North Star, 106 U. S. 17, 1 Sup. Ct. 41, 27 L. Ed. 91, was not affected by the Harter act, that rule being that "in cases of collision occurring by the fault of both parties the entire damage to both ships is added together in one common mass, and equally divided between them, and thereupon arises a liability of one party to pay to the other such sum as is necesssary to equalize the burden." The decree of the district court was affirmed in so far as the Chattahoochee had been allowed to set off the decree against her for one-half the value of the schooner by one-half of the decree for cargo damages. This case was taken to the supreme court on writ of certiorari, where the decree of the court of appeals was affirmed, the opinion being by Mr. Justice Brown, and reported in 173 U. S. 540, 552, 19 Sup. Ct. 491, 43 L. Ed. 801. The argument in behalf of the owners of the sunken schooner against the right of the Chattahoochee to set off her liability for one-half the value of the schooner by one-half the decree against her for cargo damages was precisely the argument now made to avoid the application of the rule of priority which gives preference to the claims of innocent cargo owners over the claims of the vessel owners whose vessel had contributed to the collision. Thus (at page 552, 173 U. S., pages 495, 496, 19 Sup. Ct., and page 807, 43 L. Ed.) Justice Brown states that the contention was that—

"The exemptions of the Harter act are not intended for the benefit of the steamship or any other vessel by whose negligence a collision has occurred, but for the benefit of the carrying vessel alone; and, if she be held liable in this indirect manner for a moiety of the damages suffered by the cargo, the act is to that extent disregarded and nullified. That the amount which is paid by recoupment from the just claim of the schooner against the steamship is paid as effectually as it would be by a direct action by the owners of the cargo against the schooner."

This the court answered by saying:

"But if the doctrine of the North Star be a sound one, that in cases of mutual fault the owner of a vessel which has been totally lost by collision

is not entitled to the benefit of an act limiting his liability to the other vessel until after the balance of damage has been struck, it would seem to follow that the sunken vessel is not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability has been fixed upon the principle of an equal division of damages. This is in effect extending the doctrine of the Delaware Case, wherein the question of liability for the loss of the cargo was not in issue, to one where the vessel suffering the greater injury is also the carrier of a cargo. In other words, if the Harter act was not intended to increase the liability of one vessel towards the other in a collision case, the relations of the two colliding vessels to each other remain unaffected by this act, notwithstanding one or both of such vessels be laden with a cargo. We are therefore of opinion that the court of appeals did not err in deducting half the value of the cargo from half the value of the sunken schooner, and in limiting a recovery to the difference between these values. The decree is affirmed."

It may be conceded that the precise question here presented did not arise in the case of The Chattahoochee, nor in any other case to which we have been referred. The opinion and decree in the Chattahoochee Case would, however, require that the Roby should have the right to set off against the decree in favor of the Florida for one-half the value of that vessel and her freight one-half of the decree against the Roby for cargo losses, and that the decree in favor of the owners of the Florida, in their own right, against the Roby, should be for the difference between the two sums only. If that were done, the matter would stand thus:

Amount of the decree against the Roby in favor of the British & Foreign Insurance Co., underwriters on cargo		$65,295 33
Amount of decree in favor of the owners of the Florida as bailees for cargo unrepresented by the intervening underwriters		6,026 71
Total of decree for cargo damages against the Roby		$71,322 04
Amount of the decree against Roby for one-half value of the Florida	$45,596 56	
Amount of decree for one-half value of effects of crew of Florida	1,462 79	
	$47,059 35	
Deduct one-half of the decree against the Roby for cargo damages	35,661 02	
Net decree in favor of the Florida		$11,398 33

But the appraised value of the Roby is less than the decree for cargo damages, and this at once raises the question as to whether the claims must be paid pro rata or the cargo claim before the net amount due to the Florida. From the interpretation placed upon the Harter act in the cases we have cited we deduce the conclusion that that act is not to be construed as affecting the operation of the equitable rule which postpones the claims of one whose fault contributed to the common loss as against the claims of innocent cargo owners. In the case of The Irrawaddy, already cited, Mr. Justice Shiras, in announcing the opinion of the court touching the meaning and effect of the Harter act, said:

"Upon the whole, we think that in determining the effect of this statute in restricting the operation of general and well-settled principles our proper

course is to treat those principles as still existing, and to limit the relief from their operation afforded by the statute to that called for by the language itself of the statute."

5. For the owners of the Florida it is next urged that, aside from the effect of the Harter act in exonerating the Florida from cargo liability, her bills of lading contain stipulations exempting her from liability for cargo lost as a result of collision, and that certain of her bills of lading also provide that any carrier by water, "liable on account of loss or damage," on account of the property shipped thereunder, "shall have full benefit of any insurance that may have been effected upon or on account of said property." Neither one of these stipulations has any bearing upon any question here presented. Neither cargo owners nor cargo underwriters are endeavoring to hold the Florida liable for cargo losses. The right of recoupment, which we hold to exist in favor of the Roby, by which one-half of the decree against her for cargo lost on the Florida has been set off against the decree against the Roby for one-half the value of the Florida, does not depend upon the liability of the Florida for cargo damages, but rests upon the liability of the two colliding vessels to bear equally the burden resulting from a collision due to their mutual fault. In other words the right of recoupment does not depend upon the relation of the carrying vessel to her cargo, but upon the relation of the colliding vessels to each other. Neither does the postponement of the balance due to the owners of the Florida, after recoupment, rest upon the liability of the Florida to cargo owners, but upon the general equitable principle that where the fund out of which the losses are to be paid is insufficient to pay the demands of all of the claimants, the claim of an innocent cargo owner shall be preferred over the claim of one whose fault contributed to the common disaster. In the last analysis the decree in favor of the Florida owners is ineffective, because, under the limited liability act, the fund for the payment of the Roby liabilities is not sufficient to pay both classes of claims. To say that the preference given to the cargo liability operates indirectly to make the Florida liable to cargo owners, contrary to the terms of the Harter act, and to deprive her of the benefit of her bill of lading stipulations for exemption from liability for cargo lost by a collision, as well as from the benefit of insurance taken on cargo by shippers, is to say no more than was said by the hull interests in the Cases of the Irrawaddy and Chattahoochee, already cited. The answer to the objection now under consideration is that the Florida has not been held liable to cargo owners, and, therefore, the bill of lading stipulations have not come into effect.

6. One other question remains for decision. The district court disallowed interest upon the bond given for the release of the Roby. The Roby was appraised at $59,300, and a bond with security executed for that amount, by which the owners of the Roby and their surety bound themselves, "in the sum of $59,300, unto whom it may concern, that the said Lakeland Transportation Company shall abide and answer the decree of the court in said matter, and shall

pay into the registry of the court said $59,300, and the interest on the same, as provided by law, the appraisal value of the said steamer, whenever such payment shall be ordered and required by the court." The district court had undoubted authority to require that the owners of the Roby, as a condition of the release of their vessel, should enter into a stipulation to pay the appraised value, either with or without interest, when ordered. The authority for the release of a libeled vessel, or for a vessel surrendered upon an application for the benefit of the limited liability act, is found in the fifty-fourth admiralty rule. Under that rule the owners of a vessel seeking the benefit of the limited liability statute might convey their vessel to a trustee to be named by the court, or the court might appraise the vessel and require the value to be paid at once into court, or release the vessel upon a stipulation to pay the appraised value into court when ordered. If the appraised value had been at once paid into court the fund might have been made productive by lending it out at interest or by investing in approved bonds. In such case the fund for ultimate distribution would have been enlarged. As such a course was open to the court it is clear that it might, as a condition of release upon bond, require that the stipulators' bond should bear interest from date. The Wanata, 95 U. S. 600, 24 L. Ed. 461; In re Harris, 6 C. C. A. 320, 57 Fed. 243. In The Favorite (D. C.) 12 Fed. 213, Judge Blodgett held that the owners might, irrespective of any prior order or stipulation, be required to pay interest upon the value of the vessel from the date of collision, the decree going against the owners and their surety in the stipulation for the value only, there being no provision binding the surety to pay interest before default. Where the stipulators defend the suit it is not unusual to charge them with interest from the date of the filing of the bond, upon the ground that they are responsible for the delays incident to the defense made. The Maggie M. (D. C.) 33 Fed. 591; The Wanata, 95 U. S. 612, 24 L. Ed. 461; The Maggie J. Smith, 123 U. S. 356, 8 Sup. Ct. 159, 31 L. Ed. 175. The question here arises upon the bond actually given and the liability of the makers of the bond. The liability of stipulators in a bond is limited to the amount therein named, and, if the stipulation does not bear interest, they are only bound for interest in case they make default in paying according to the terms of the obligation. The Wanata, 95 U. S. 600, 24 L. Ed. 461. Here the stipulation is that they shall pay "said $59,300, and the interest on the same, as provided by law." Do the words, "and the interest on the same, as provided by law," imply an agreement to pay interest from the date of the obligation? The words used in the obligation must determine the rights of the parties. What did the stipulators mean by agreeing to pay the principal sum "and the interest on the same, as provided by law," if they did not mean to pay interest at the rate provided by law for like contracts from the date of the agreement? By the execution of this obligation the owners obtained the use of their vessel. Their liability was for the value of the vessel at the time of the collision. Why shall they be allowed the use of that value during a protracted

litigation carried on by themselves? The justice of the matter was that the value at date of collision should be made productive. An agreement to pay that value "and the interest on the same, as provided by law," can have no reasonable meaning attached to it unless it implies an agreement to pay interest, at the rate provided by law, upon the principal sum from the date of the agreement. It may be that the words used are somewhat ambiguous. But any ambiguity in such an obligation is to be construed against the makers of the instrument. 2 Pars. Notes & B. 392; Brandt, Sur. (2d Ed.) § 92. Unless these words are construed as an agreement to pay the legal rate of interest from the date of its execution, the language is idle, for without them the stipulators would be liable for interest from the time of its maturity, which would be the time when the court should order payment. We think the district court erred in not ordering the payment of interest at the rate allowed by the law of Michigan from the date of this obligation. In this respect the decree of the court below must be modified. In other respects the decree is substantially affirmed. Peter P. Miller and others will pay one-half of all the costs, and the Lakeland Transportation Company will pay the remainder.

THE MARGARET B. ROPER.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1901.)

No. 392.

COLLISION—SAILING VESSELS CROSSING—REVIEW OF FINDINGS ON APPEAL.

Findings of fact made by a court of admiralty, which were determinative of the question of fault for a collision at sea between two sailing vessels, considered and affirmed on appeal.

Appeal from the District Court of the United States for the District of South Carolina.

For former opinion, see 103 Fed. 886, and 106 Fed. 740.

C. V. Meredith and J. N. Nathans, for appellant.

J. P. K. Bryan and Robert M. Hughes (Wm. H. White, on the brief), for appellee.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

PER CURIAM. This is a case of collision between two three-masted schooners in the nighttime, December 26, 1899, on the Atlantic Ocean, about 25 miles northeast from Cape Hatteras. The question of fault depended upon which of these two sailing vessels was under the obligation to keep out of the way of the other. Under article 17, International Rules for Preventing Collisions at Sea, Aug. 19, 1890 (1 Supp. Rev. St. 781), and Proclamation of the President, Dec. 31, 1896 (29 Stat. 885), their respective rights and duties

depended upon which was closehauled and which was sailing free, and the finding of that fact depended upon the direction of wind, as to which there was irreconcilable conflict of testimony.

The libelant's vessel was so injured that she sank in about 40 minutes, but her crew were all rescued by the claimant's vessel, and at the hearing the masters and crews of both vessels were examined, and testified in the presence of the court, as did also the independent witnesses, whose testimony tended to establish the direction of the wind.

The experienced district judge before whom the case was tried, as appears from the opinion filed by him, gave it even more than his usual careful attention, and in his opinion examines and discusses the testimony and the pivotal facts and the surrounding circumstances with painstaking analysis. 103 Fed. 886. He comments upon the impression made by the witnesses in respect to intelligence and apparent truthfulness, and upon their opportunities of knowing the facts they undertake to state. He finds in the result that the libelant failed to establish the facts which would cast the fault of the collision upon the claimant; and, further, he finds affirmatively that the preponderance of credible testimony and the inherent probabilities to be deduced from the angle at which the vessels collided, and the nature of the blow and its consequences, lead to the conclusion that the claimant's vessel was closehauled on the starboard tack, and that the libelant's vessel was either running free or was closehauled on the port tack, in either of which cases the obligation rested upon the libelant's vessel to keep out of the way.

We have gone over the record with care, and, notwithstanding the very able and closely reasoned argument and briefs of the learned counsel for the appellant, we are satisfied that the conclusions of the district judge are well founded. The argument of the appellant's counsel, based upon the probable course and location of the claimant's vessel at points on her voyage from New York along the coast, may, perhaps, raise a doubt as to some of her master's testimony, but is not sufficient to overcome the many probative facts and circumstances immediately connected with the collision, upon which the district judge rightly, as we think, based his conclusions.

The case involves solely findings of fact, and it would serve no useful purpose to discuss the testimony, which is clearly and fairly set out in the opinion filed in the district court.

The decree is affirmed.

WATERFIELD v. RICE et al.

(Circuit Court of Appeals, Sixth Circuit. November 11, 1901.)

No. 958.

1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.
Where the amount claimed in a bill to enforce a lien exceeds $2,000 the jurisdiction of a federal court is not defeated by the fact that it appears on the face of the bill that an action to recover a portion of the claim is barred by limitation, under a state statute.[1]

2. PARTIES—SUIT TO ENFORCE LIEN—TENANTS IN COMMON.
A testator devised lands to two persons in undivided moieties for life, with remainder to their children, subject to the payment by each of an annuity to the testator's widow during her life, which annuity was made a charge upon the land. *Held* that, in a suit by the widow against one of such devisees to enforce a lien for unpaid installments of the annuity due from him against an undivided half of the land, neither the other devisee nor her children were necessary parties.

3. WILLS—CONSTRUCTION—DEVISE OF LANDS CHARGED WITH ANNUITY.
A testator devised lands for life, subject to the payment by the life tenant of an annuity to the widow of the testator "during each and every year of her natural life," which annuity should "be and remain a charge and lien upon said lands, houses, and real estate in this item mentioned." By a subsequent clause in said item he devised the remainder in fee to the children of the life tenant or their descendants living at the death of the life tenant. *Held*, that it was the intention of the testator to secure the payment of the annuity during the life of his widow, and that it was a charge upon the estate of the remainder-men as well as upon the life estate.

4. SAME—ELECTION BY WIDOW—PRESUMPTION.
Rev. St. Ohio, § 5964, requiring an election by a widow to take under the will of her husband, applies only to domestic wills, so far as it relates to the time and manner of making an election; and in a suit by a widow to enforce a lien for an annuity, given by the will of her husband, alleged to have been probated in another state, and a copy to have been filed and recorded in Ohio, it must be presumed that such will was a foreign will, proved in the domicile of the testator, and that complainant elected to take thereunder.

5. SAME—ANNUITY CHARGED UPON LANDS—LIMITATION OF SUIT TO ENFORCE LIEN.
Rev. St. Ohio, § 4981, does not bar a suit to enforce a lien upon lands for installments of an annuity which have been in arrears for more than six years, where the will by which the lands were devised expressly provides that the annuity "shall be and remain a charge and lien" thereon.

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

This is a bill to sell land devised under the will of William Waterfield, for the purpose of enforcing the payment of unpaid installments of an annuity for the life of complainant, the devise being made subject to a lien to secure this annuity. Eleven installments, aggregating $2,750, are averred to be due and unpaid. William Waterfield died August 1, 1888, leaving a last will and testament, which was proven and admitted to probate in the state of Kentucky. It is also averred that a "duly-certified copy thereof, according to the act of congress, was admitted and ordered recorded in the office of the probate judge of Clermont county, Ohio." The third clause of said will was

[1] Jurisdiction of circuit courts, as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Shoe Co. v. Roper, 36 C. C. A. 459.

in the words and figures following: "I give, bequeath, and devise unto George W. Rice and Lizzie Keen (wife of George A. Keen), of Clermont county, state of Ohio, jointly, share and share alike and in equal proportions, for and during their and each of their natural lives,—that is, an equal undivided moiety thereof to said George W. Rice during his natural life, and an equal undivided moiety thereof to said Lizzie Keen during her natural life,—all my lands, houses, and real estate, held and owned by me in my own name and as my individual property and estate, and not in conjunction with or jointly with any other person or persons, lying, situate, and being in the county of Clermont and state of Ohio, and also all farming implements and utensils of every nature and kind owned by me, in whole or in part, on any of said lands in said county; subject, however, to a charge and annuity of five hundred dollars ($500) to be paid by said George W. Rice and Lizzie Keen in equal amounts—that is, $250 by each of them—to my beloved wife, Minerva I. Waterfield, during each and every year of her natural life, which annuity shall be and remain a charge and lien upon said lands, house, and real estate in this item mentioned. Should, however, my wife at any time not to desire to collect or demand said annuity in whole or in part from said George W. Rice and Lizzie Keen, or either of them, who shall be at liberty, and she is hereby empowered, to receipt for and acquit said parties or either of them from the payment to any part or all of said annuity in any manner or amount or for any length of time in her own and sole discretion and at her own pleasure. Should either of said persons, George W. Rice and Lizzie Keen, desire to sell and convey to the other the undivided interest in and to said lands, houses, and real estate in this item set forth, so as to vest the title to the whole thereof in one of them, he or she shall be at liberty, and is hereby authorized and empowered, to make such sale and conveyances, but upon these terms and conditions only, viz.: That the entire proceeds and purchase money arising from said sale and conveyance shall be immediately, by the one so selling, invested in good and suitable real estate, at fair purposes and parties, and subject to all the conditions in this item mentioned and enumerated as to the said lands, houses, and real estate in said Clermont county, in this item devised; provided, further, that my executrix and executor hereinafter named, or the survivor of them, consent to such sale and reinvestment of proceeds as contemplated by the parties. At the death of the said George W. Rice, his said undivided one-half interest aforesaid, or any other lands or real estate that may be purchased with the proceeds of sale thereof, as above provided for, shall go and belong, and I hereby devise and give the same, to his children, in equal proportions, share and share alike, living at the time of his death; but should any child of said George W. Rice die before his or her father, leaving a child or children surviving him or her, who shall survive said George W. Rice, said child or children of such deceased son or daughter of said George W. Rice shall take, hold, receive, and own the share which said son or daughter of said George W. Rice would take, hold, and receive hereunder if living at the death of said George W. Rice, and said child, children, or grandchildren who shall take hereunder at the death of said George W. Rice shall take the fee."

The defendants are the said George W. Rice, his wife, his children, and the husbands and wives of children. Separate demurrers were filed by George W. Rice and his children, covering substantially the same grounds: (1) That the court is without jurisdiction; (2) that the bill is without equity; (3) that there is a defect of parties; (4) that the installments due and payable more than six years before the filing of the bill are barred by the Ohio statute of limitations. The circuit court held that the bill was without equity, and upon this ground dismissed the bill, not passing upon the other grounds of demurrer. The complainant has appealed, and assigned this as error.

A. E. Painter, for appellant.
Wm. W. Prather, for appellees.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

1. Diversity of citizenship exists and furnishes the ground for federal jurisdiction. The bill shows that eleven installments of the annuity claimed are due and unpaid, so that the amount in controversy is more than $2,000, excluding interest and costs. That some of these installments may be barred by the Ohio statute of limitations, and that this fact may appear upon the face of the bill, does not affect the fact that the amount sued for exceeds the sum necessary to give the circuit court jurisdiction. The determination of the question as to the application of the statute thus made involves the exercise of jurisdiction in respect of the merits of the case. The demurrer to the jurisdiction of the court is not well taken.

2. The defendants demur because Lizzie Keen and her children are not made parties defendant. Whether Lizzie Keen is now living, or has any children or representatives of children, does not appear. If, in the absence of any averment on the subject, we should assume that there are persons in being who would take in the contingency that George W. Rice shall die leaving at his death no child or representative of children, we are of opinion that, for the purpose of the relief sought, neither Lizzie Keen nor her children are necessary parties. The liability of George W. Rice is individual, and not joint. He is charged with the payment of $250 annually to the widow of the testator during her life. Mrs. Keen is charged with the payment of a like sum. Neither is liable for the default of the other. The annuity payable by George W. Rice is charged upon the undivided one-half of the Clermont county lands devised to him and his children. The bill only seeks to enforce the lien subject to which that particular undivided one-half was devised. For this purpose neither Mrs. Keen nor her children are necessary parties. Whether the children of George W. Rice who are parties do not, as a class, sufficiently represent the persons substituted for them in the contingency that they shall all die leaving no issue before the falling in of the life estate, we need not decide.

3. The complainant seeks to have the interest devised to George W. Rice for life, and the remainder devised to his surviving children or their representatives, sold for the purpose of enforcing the lien declared by the will to secure the annuity payable by the said George W. Rice. This brings us to the only question seriously contested, and that is whether the payment of the annuity is charged as a lien only upon the life estate devised to George W. Rice or upon the remainder estate as well. The learned trial judge reached the conclusion that the annuity was a charge only on the life estate of George W. Rice, and not upon the remainder devised to his children. To this interpretation we find ourselves unable to agree. The annuity is payable, not during the life of George W. Rice or the continuance of his life estate, but is a sum to be paid "to my beloved wife, Minerva I. Waterfield, during each and every year of her natural life." How is this annuity to be secured? From what source is it to come? The testator answers this by making the devise of his Clermont county farm "subject, however, to a

charge and annuity of five hundred dollars to be paid by said George W. Rice and Lizzie Keen in equal amounts; that is, $250 by each of them." The annuity, therefore, is to continue during the natural life of the widow, and is to "be and remain a charge and lien upon said lands, houses, and real estate in this item mentioned." The "lands, houses, and real estate in this item mentioned" are in the foregoing part of the item described "as all my lands, houses, and real estate held and owned by me in my own name, and as my undivided property and estate, lying, situate, and being in the county of Clermont and state of Ohio." Now, did the testator mean that this lien and charge should rest upon the fee in the property described, or upon the mere estate which had just been carved out of the fee for the life of George W. Rice? There are a number of reasons which seem to lead to the conclusion that the testator intended that this annuity should be a charge upon the fee of his Clermont county lands. Primarily, we may assume that the testator's intentions would be most nearly carried out by construing this charge as one resting upon the fee. The annuitant was his widow. The provisions made for the widow are presumptively in lieu of dower. The annuity is for the life of the widow, not the life tenant. It was possible that the widow might outlive the life tenant. In such case could the testator intend that her provision should cease or that it should depend upon the solvency of the estate of the life tenant, assuming that the liability of the devisee would continue after expiration of the life estate and of the annuitant's lien? It is difficult to believe that the testator intended that the charge or lien of this annuity should be of less duration than the life of the annuitant; for we may well assume that the comfort and maintenance of his widow was an object of prime importance. That he has employed the words "lands and real estate" as descriptive of the estate upon which the lien is to rest is in accord with what may be regarded as the intention of the testator concerning the secure payment of this annuity. A devise of "my land," "plantation," "real property," or "real estate" will, under the well-settled rule in Ohio, convey the fee in the absence of words plainly showing an intent to devise a less estate. Winton v. Cornish, 5 Ohio, 478; Smith v. Berry, 8 Ohio, 365, 369; Thompson's Lessee v. Hoop, 6 Ohio St. 480; Niles v. Gray, 12 Ohio St. 320, 329; Townsend's Ex'rs v. Townsend, 25 Ohio St. 477; section 5970, Rev. St. Ohio. A like rule of construction exists in Kentucky. Mitchell v. Walker, 17 B. Mon. 61, 62. Unless, therefore, it plainly appears from the will that the testator intended to charge a less estate than the fee with a lien for the payment of this annuity, the usual and technical meaning of the words, "lands, houses, and real estate," should be regarded as the sense in which the testator used them. The remainder estate is devised to the children of the life tenant living at the death of the latter, or to representatives or deceased children, who, the testator says, "shall take the fee." These words do not operate to discharge the lien of this annuity should the widow survive the falling in of the life estate. The "fee" which they are to take will be no less a fee because subject to the charge in favor of this

annuitant. The word "fee" is used to indicate the remainder of the estate, which, on termination of the particular estate, will constitute the fee. But appellees say the remainder estate should not be charged with this annuity, lest thereby we defeat the intended bounty of the testator to the remainder-men. This result they say may come about by the accumulation of a burden upon the land greater than the value of the life estate through the failure of the life tenants to meet their obligations, or by the indulgence of the annuitant in demanding payment. Manifestly, such contingencies as these cannot affect the interpretation of this will as written, nor does their suggestion affect the conclusion we reach as to the purpose of the testator. That he should prefer his own widow over remote and uncertain remainder-men is an obvious presumption, and that he should secure the provision made for her, even at the risk of burdening the bounty intended for distant remainder-men, is quite in accord with natural impulse.

4. But it is said that the appellant does not aver that she had elected to take under the will in pursuance of section 5964, Rev. St. Ohio, and that she cannot, therefore, claim under the will. That statute applies only to domestic wills, and is inapplicable to the case of foreign widows, in so far as the act relates to the time and manner of making an election. Jennings v. Jennings, 21 Ohio St. 56, 77. But this will does not appear to be a domestic will. The bill avers that the will of the testator "was filed, proven, established, and admitted to probate as and for the last will and testament of William Waterfield," and was so ordered and placed of record on the 8th day of August, 1888, in Kenton county, Ky., "and that a duly-certified copy thereof, according to the act of congress, was admitted and ordered recorded in the office of the probate judge of Clermont county, Ohio." From this averment we are authorized to infer that this will was recorded as a foreign will, which had been properly proven in the state of the domicile of the testator. The complainant is not seeking to claim dower or any right hostile to the will, but is claiming under the will. We must presume upon the bill that she has in fact elected to take under the will, and has estopped herself to claim dower. Millikin v. Welliver, 37 Ohio St. 460.

5. The defendants demurred to the bill so far as it was sought to obtain relief either against them individually or against the land devised to them for or on account of installments of annuity accruing more than six years before the filing of the bill. In support of this demurrer, section 4981 of the Revised Statutes of Ohio is relied upon, as construed and applied by the supreme court of Ohio in Yearly v. Long, 40 Ohio St. 27. In Yearly v. Long it appeared that a father devised land to his son, and required the son to pay to a daughter a legacy of $1,500, in installments of $100 each year. The daughter sought to enforce her legacy as a lien upon the land, and to her suit the statute of six years was pleaded. The court held that the legacy constituted only an equitable charge upon the land devised to the son, and that an action by the daughter to recover the unpaid installments was barred after the lapse of six

years from the time her right of action accrued on said installments, respectively. So far as it is sought to obtain any personal decree against the life tenant, George W. Rice, for installments due more than six years, the statute, as there construed, may be applicable. So far as the opinion in that case is supposed to conclude the right of complainant to enforce the charge and lien declared to secure the payment of unpaid installments, it is not in point. In Yearly v. Long the legacy was not made an express charge and lien upon the land devised. In the case at bar the will provides that this annuity "shall be and remain a charge and lien upon said lands, houses, and real estate in this item mentioned." Thus the land devised to the defendants is charged with an express lien, which, under the law of Ohio, is not barred by the statute of six years, although the debt itself may be. Gary v. May, 16 Ohio, 66; Fisher's Ex'r v. Mossman, 11 Ohio St. 42; Kerr v. Lydecker, 51 Ohio St. 240, 37 N. E. 267, 23 L. R. A. 842.

The demurrer was too broad, and was properly overruled, inasmuch as the remedy in equity to enforce the express lien which exists to secure these installments is not barred by the statute of six years, or by any other provision of the Ohio statute applicable to the facts in this case.

The decree must be reversed. The cause will be remanded, with direction to overrule the several demurrers, and that such other proceedings may be had not inconsistent with this opinion.

UNITED STATES v. LEWIS.

(Circuit Court, W. D. Texas, San Antonio Division. November 9, 1901.)

No. 338.

1. CRIMINAL LAW—JURISDICTION OF OFFENSE—UNITED STATES COURTS.
Whether a homicide committed within the boundaries of a state constitutes an offense against the laws of the United States, of which a federal court has jurisdiction, depends on two questions: First, whether there has been such a cession by the state to the United States of the territory upon which the act alleged to constitute the crime was committed as to render such territory a "place or district of country under the exclusive jurisdiction of the United States," within Rev. St. § 5339, which is a question of law for the court; and, second, if such cession was made, whether the act was committed within the territory so ceded, which is a question of fact, to be submitted to the jury.

2. HOMICIDE—UNDER LAWS OF UNITED STATES.
The elements of felonious homicide under the laws of the United States are to be determined by the rules of the common law.

3. SAME—ELEMENTS OF HOMICIDE DEFINED.
The elements of the crime of murder, under the laws of the United States, and of the included crime of manslaughter, and the facts which must appear to render the homicide justifiable on the ground of self-defense, defined and explained in a charge to the jury.

Indictment against Reuben Lewis for murder, charged to have been committed at Ft. Sam Houston, Tex.,—a place under the exclusive jurisdiction of the United States.

Henry Terrell, U. S. Atty.

C. L. Bates, for defendant.

MAXEY, District Judge (charging jury). The indictment preferred against Reuben Lewis, the defendant in this case, is for the murder of Samuel Brown. An important question affecting the jurisdiction of the court has arisen, the disposition of which must, under the facts in evidence, be remitted to your determination. It is alleged in the indictment that the offense was committed in the county of Bexar, within the Western district of Texas, at and within the limits of the United States military station of Ft. Sam Houston, in the city of San Antonio; and it is further alleged that the site of said military station of Ft. Sam Houston had been prior to the year 1900 ceded to the United States by the governor of the state of Texas, and, further, that said military post of Ft. Sam Houston was prior to February 7, 1900, and still is, within the exclusive jurisdiction of the United States. This court could not entertain jurisdiction of the offense charged against the defendant unless it be made to appear that the homicide was committed "within any fort, arsenal, dock yard, magazine or any other place or district of country under the exclusive jurisdiction of the United States." Rev. St. U. S. § 5339. Ordinarily offenses of this character are tried and determined by the courts of the respective states, and it is only when they are committed (following the words of the statute) in some "place or district of country under the exclusive jurisdiction of the United States" that the jurisdiction of the federal courts attaches.

It is insisted by counsel for the government that jurisdiction is complete in this case for the reason that the chief executive of the state of Texas, acting pursuant to a general law of the state, has, by public proclamation, ceded to the United States exclusive jurisdiction over the site or territory occupied by the military station or post of Ft. Sam Houston. A copy of that proclamation, duly authenticated by the secretary of state, has been admitted in evidence. You are charged, as a matter of law, that the instrument executed by the governor of the state of Texas which is in evidence before you cedes to the United States exclusive jurisdiction over the lands therein particularly described. But in thus holding I do not mean to say to you that the offense charged against the defendant, if offense it be, was committed within the limits of the boundaries set forth in the instrument. That is a question of fact for you to determine from a consideration of the evidence, and, if you find that the homicide was not committed within the boundaries covered by or included within the cession, then it would be your duty to acquit the defendant. It devolves upon the government to prove to your satisfaction that the killing was done at a place within the exclusive jurisdiction of the United States, and in this case the burden is upon the government to show that the homicide was committed within the boundaries described in the cession made by the governor. See U. S. v. Cornell, 2 Mason, 65, Fed. Cas. No. 14,867; Railroad Co. v. Lowe, 114 U. S. 533, 5 Sup. Ct. 995, 29 L. Ed. 264; Benson v. U. S., 146 U. S. 325, 13 Sup. Ct. 60, 36 L. Ed. 991; In re Ladd (C. C.) 74 Fed. 31; U. S. v. Meagher (C. C.) 37 Fed. 875.

If you are satisfied that the said Samuel Brown was killed by the defendant at or within a place under the exclusive jurisdiction of the United States, it will next be your duty to inquire into the circumstances of the homicide, in order to determine the question of the guilt or innocence of the defendant. The specific offense charged against the defendant is murder. But the crime of manslaughter is included in that of murder; and if, after a careful investigation, you should conclude that the defendant is not guilty of murder, you may still find him guilty of manslaughter, if such finding be warranted by the evidence and the law as given in charge by the court (Rev. St. § 1035; U. S. v. Carr, 1 Woods, 480, Fed. Cas. No. 14,732; Stevenson v. U. S., 162 U. S. 313, 16 Sup. Ct. 839, 40 L. Ed. 980; Wallace v. U. S., 162 U. S. 466, 16 Sup. Ct. 859, 40 L. Ed. 1039), or you may find him not guilty of any offense.

Your attention will first be directed to the offense specifically charged against the defendant, to wit, murder. There are only two kinds of felonious homicide known to the laws of the United States,—one is murder and the other is manslaughter. Under the statutes of the United States there are no degrees of murder, nor do such statutes contain a definition of murder. To define it, resort must be had to the common law. By that law, "murder is where a person of sound memory and discretion unlawfully and feloniously kills any human being, in the peace of the sovereign, with malice prepense or aforethought, express or implied." Malice, you observe, is a necessary ingredient in the crime of murder, and its presence or absence marks the boundary which distinguishes the two offenses of murder and manslaughter. It is necessary, therefore, that you should understand its meaning. Malice, when attempted to be defined, has been necessarily given a more comprehensive meaning than enmity or ill will or revenge, and has been extended so as to include all those states of the mind under which the killing of a person takes place without any cause which will in law justify, excuse, or extenuate the homicide. McCoy v. State, 25 Tex. 39, 78 Am. Dec. 520. Malice, as applied to the offense of murder, need not denote spite or malevolence, hatred or ill will, to the person killed; nor that the slayer killed his victim in cold blood, as with a settled design and premeditation. Such a killing would, it is true, be murder; but malice, as essential to the crime of murder, has a more extended meaning. "A killing flowing from an evil design in general may be of malice, and constitute murder; as a killing resulting from the dictates of a wicked, depraved, and malignant spirit—a heart regardless of social duty and fatally bent upon mischief—may be of malice, necessarily implied by law from the fact of the killing without lawful excuse, and sufficient to constitute the crime of murder, although the person killing may have had no spite or ill will towards the deceased. Malice, as thus described, is either express or implied. Express malice is where one with a sedate and deliberate mind and formed design doth kill another, which formed design is evidenced by external circumstances, discovering that inward intention; as by lying in wait, antecedent menaces, former grudges, and concerted schemes to do

bodily harm." Jordan v. State, 10 Tex. 492; 3 Russ. Crimes (6th Ed.) 1, 2. It rarely, if ever, occurs that express malice is proved upon the trial of a case. The existence or nonexistence of malice is a matter to be determined by the jury from a consideration of all the facts in evidence. "The proof of homicide, as necessarily involving malice, must show the facts under which the killing was effected, and from the whole facts and circumstances surrounding the killing the jury infers malice or its absence. Malice, in connection with the crime of killing, is but another name for a certain condition of a man's heart or mind, and, as no one can look into the heart or mind of another, the only way to decide upon its condition at the time of the killing is to infer it from the surrounding facts, and that inference is one of fact for the jury." Stevenson v. U. S., 162 U. S. 320, 16 Sup. Ct. 842, 40 L. Ed. 983; Wallace v. U. S., 162 U. S. 476, 16 Sup. Ct. 863, 40 L. Ed. 1043. "Malice is to be inferred from all the facts in the case. If malice is found, it must be drawn as an inference from everything that is proved, taken together and considered as a whole. Every fact, no matter how small, every circumstance, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time that they consider the use of the deadly weapon; and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred." U. S. v. King (C. C.) 34 Fed. 312. The malice which distinguishes the crime of murder must be aforethought. It implies premeditation,—a prior intent to do the act. It may have existed but for a moment,—an inappreciably brief period of time,—or longer. No limit has been, nor can be, fixed as to its duration. If it in fact existed for any period, however brief, the killing would be murder; but, if malice was wanting, the homicide could not be of a higher grade of offense than manslaughter. If, then, upon a consideration of all the facts and circumstances in evidence, you are satisfied beyond a reasonable doubt that the defendant killed Samuel Brown with malice aforethought, as above defined, it would be your duty to find him guilty of murder, as charged in the indictment. But, if you conclude that he is not guilty of murder, you will next determine whether he is guilty of manslaughter.

It is not necessary to read to you the words of the statute defining manslaughter, for the common-law definition is substantially the same as that given by the Revised Statutes. 162 U. S. 320, 16 Sup. Ct. 842, 40 L. Ed. 983; 162 U. S. 476, 16 Sup. Ct. 863, 40 L. Ed. 1043. And at common law voluntary manslaughter, which is the only kind of manslaughter necessary here to be considered, was the unlawful and intentional killing of another without malice, on sudden quarrel or in heat of passion. 2 Whart. Cr. Law (6th Ed.) § 931. To reduce the killing from murder to manslaughter, the provocation, to be available, must have been reasonable and recent, for no words or slight provocation will be sufficient; and, if the party has had time to cool, malice will be inferred, and the homicide will be murder. 2 Bouv. Law Dict. p. 100; see U. S. v. Carr, 1 Woods, 480–487, Fed. Cas. No. 14,732; U. S. v. Cornell,

2 Mason, 60, 25 Fed. Cas. 646 (No. 14,867). The provocation which is allowed to extenuate in the case of homicide (that is, reduce the killing from murder to manslaughter) must be something which a man is conscious of,—which he feels and resents at the instant the act which he would extenuate is committed. All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool, deliberate judgment, and previous malignity of heart, but solely imputable to human infirmity. 1 Russ. Crimes (6th Ed.) p. 38, § 6. Manslaughter differs from murder in this: that, though the act which occasioned the death be unlawful, or likely to be attended with bodily mischief, yet the malice, either expressed or implied, which is the very essence of murder, is presumed to be wanting, and, the act being imputed to the infirmity of human nature, the punishment is proportionably lenient. 2 Whart. Cr Law (6th Ed.) § 932. In this connection it has been said by the supreme court (and you are so instructed) that:

"The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood, produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offense of a less heinous character than murder. But if there be sufficient time for the passion to subside, and shaken reason to resume its sway, no such distinction can be entertained. And if the circumstances show a killing 'with deliberate mind and formed design,' with comprehension of the act and determination to perform it, the elements of self-defense being wanting, the act is murder. Nor is the presumption of malice negatived by previous provocation, having no causal connection with the murderous act, or separated from it by such an interval of time as gives reasonable opportunity for the excess of fury to moderate." Anderson v. U. S., 170 U. S. 510, 511, 18 Sup. Ct. 697, 42 L. Ed. 1126.

The facts in this case you may readily recall. There is evidence in the case tending to show that prior to the killing, in February, 1900, bad feeling existed on the part of the deceased against the defendant, and, further, that the defendant and the deceased a short time prior to the killing became engaged in a personal altercation. In killing the deceased in the manner and under the circumstances as detailed by the testimony, was the defendant actuated by malice, or was the fatal shot fired in the heat of passion, and upon sufficient provocation? This question you must answer for yourselves. After all, as the court has already stated, the question to be determined is the existence or nonexistence of malice accompanying the killing, so far as the offenses of murder and manslaughter are concerned. Did the defendant kill the deceased with malice? If so, the crime is murder. Was the killing unlawfully committed without malice, but in sudden heat of passion? If yea, the offense is manslaughter. In all cases the question is one for the jury to determine, and in solving it they should consider and analyze all the facts and circumstances in evidence, and from a consideration of them all they must say whether the defendant is guilty of the one crime or the other.

You will next inquire whether the homicide was committed in necessary self-defense, and was hence excusable in the eye of the law. The taking of human life in defense of one's person cannot be ex-

cused except upon the ground of necessity. Such necessity must be imminent, or, rather, it must be apparently imminent, as hereinafter explained, at the time the mortal blow is given; and no man can avail himself of such necessity if he bring it upon himself. Beard v. U. S., 158 U. S. 561, 15 Sup. Ct. 962, 39 L. Ed. 1086. See Bird v. U. S., 180 U. S. 361, 362, 21 Sup. Ct. 403, 45 L. Ed. 570. "Where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defense." Wallace v. U. S., 162 U. S. 471, 16 Sup. Ct. 861, 40 L. Ed. 1042. It is said by a learned author (and you are so instructed) that in fact and experience the boundaries separating homicide in self-defense and manslaughter are in some instances scarcely perceivable, though in consideration of law they have been fixed. In both cases it is supposed that passion has kindled on each side, and blows have passed between the parties; but in the case of manslaughter it is presumed that the combat on both sides has continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. And the true criterion between them is stated to be this: When both parties are actually combatting at the time the mortal stroke was given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or, having begun, endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction or the infliction upon himself of serious bodily injury, this is homicide excusable by self-defense. Before a person can avail himself of the defense that he used a weapon in defense of his own life, the jury must be satisfied from the testimony that the defense was necessary, that he did all he could consistently with his own safety to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and if he retreated as far as he could with safety to himself, the homicide would be excusable. 3 Russ. Crimes (6th Ed.) 207, 208. To illustrate: If, not having brought the trouble upon myself, an assailant comes against me with a deadly weapon, apparently meaning to use it, and manifests that it is his intention to take my life or to inflict upon me great bodily harm, then I may kill him, when necessary to repel the assault, to save my own life, or to protect myself from great bodily injury; and in such case the homicide would be excusable in law. That is the general rule, but it must be taken with its qualifications. And (1) it is my duty when attacked to retreat as far as the fierceness of the assault will permit; that is, it is the duty of the person assailed to abstain from the infliction of death until he has retreated as far as he can with safety to himself. (2) The danger apprehended from the assailant need not be actually imminent and irremediable. It need only be apparently so; that is, the belief of danger that the assailed person has must be an honest and sincere belief, and it must not be negligently formed, but it must be founded upon reasonable

grounds. And, in determining whether it is founded upon reasonable grounds, the jury are not to conceive of some ideally reasonable person, but they are to put themselves in the position of the assailed person, with his physical and mental equipment, surrounded with the circumstances and exposed to the influences with which he was surrounded and to which he was exposed at the time. If, with these tests applied,—that the belief is honest and sincere; that it is not negligently formed, but is reasonably grounded,—the jury are satisfied that there was then an apparently imminent danger of death or serious bodily harm to the person assailed, he is entitled to act upon the appearances. U. S. v. King (C. C.) 34 Fed. 308, 309. Applying, then, the law to the facts of the case, and remembering the testimony as to the threats made by the deceased against the defendant, the feeling of the former against the latter, and recalling the situation and circumstances of the parties at the time the fatal shot was fired, and all other facts and circumstances in evidence, you will determine whether the homicide committed by the defendant was committed in self-defense, and was therefore excusable, or whether it was murder or manslaughter, and return your verdict accordingly.

You are further instructed that the presumption of law is in favor of the innocence of the defendant until his guilt shall have been established to the satisfaction of the jury beyond a reasonable doubt. If, therefore, upon a consideration of the evidence in this case, you entertain a reasonable doubt of the defendant's guilt, you will give him the benefit of it, and acquit him. In a criminal case, as is the present one, the burden is upon the government to establish by evidence the guilt of the defendant beyond a reasonable doubt, and that burden rests upon the government throughout the entire case. "Reasonable doubt" has been defined (and you are so instructed) as follows:

"A reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence; and if, after an impartial comparison and consideration of all the evidence, you can candidly say you are not satisfied of the defendant's guilt, you have a reasonable doubt. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in more weighty and important matters relating to your own affairs, you have no reasonable doubt."

You are the exclusive judges of the credibility of the witnesses and of the weight to be attached to their testimony, and you will give it such weight as you deem it to be entitled to under all the circumstances of the case.

In concluding this charge, your attention is directed to the form of verdict which you may return. In cases of this character the law mercifully provides that, "when the accused is found guilty of the crime of murder, * * * the jury may qualify their verdict by adding thereto, 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487. Hence, if you find the defendant guilty of murder, and wish to

add the qualification mentioned to your verdict, you will return it in the following form: "We, the jury, find the defendant, Reuben Lewis, guilty of murder, as charged in the indictment, without capital punishment." If, however, you do not wish to add the qualifying words, "without capital punishment," your verdict should be simply: "We, the jury, find the defendant, Reuben Lewis, guilty of murder, as charged in the indictment." Under the latter form of verdict, the death penalty necessarily attaches. If you conclude that the defendant is not guilty of murder, but is guilty of manslaughter, your verdict should be as follows: "We, the jury, find the defendant, Reuben Lewis, not guilty of murder, but guilty of manslaughter." And, if you find that he is not guilty of either offense,—murder or manslaughter,—you will say: "We, the jury, find the defendant not guilty."

Verdict of manslaughter.

ADRIANCE, PLATT & CO. v. NATIONAL HARROW CO.

(Circuit Court, S. D. New York. November 25, 1901.)

INJUNCTION—GROUNDS — THREATENING SUITS FOR INFRINGEMENT OF PATENTS.

The owner of patents cannot be enjoined from issuing letters or circulars to the trade asserting the validity of his patents, and that they are infringed by goods manufactured and sold by another, and giving notice that infringers will be sued, where such circulars contain no false statement of fact. In so giving notice of his claims in good faith, the owner of a patent is acting within his rights, and a court of equity can take cognizance of the matter only to prevent fraud and falsehood.

In Equity. Suit for injunction. On final hearing.

This is an action to restrain the publication of circulars and letters stating that spring-tooth harrows manufactured by the complainant infringe certain patents owned by the defendant. The case was before the court on demurrer to the bill and the demurrer was overruled for the reason that under the sweeping allegations of the bill a case might be proved showing that the circulars were false, fraudulent and malicious and were published with intent to injure and destroy the complainant's business. 98 Fed. 118. The circulars and all the publications complained of are now before the court so that nothing is left to conjecture. The circular, dated November 14, 1898, is the one chiefly discussed and will serve as a sample of all the others. It is as follows:

"Office of National Harrow Co.

"Auburn, N. Y., Nov. 14, 1898.

"To Dealers in Spring-Tooth Harrows: Your attention is called to a decree of the United States court, printed on the opposite side of this sheet. This litigation came to an end about the first of last February. The letters patent, No. 329,371, dated October 27, 1885, and known as the 'Davis Patent,' owned by this company, were declared to be good and valid. The first claim of this patent reads as follows: 'Claim—A harrow composed of separate and distinct frames detachably connected, and each provided with a set of teeth and supported independently of the other by rollers connected with said frame, substantially as set forth and shown.' [Here appears a cut of a spring-tooth harrow.] The Buckeye, manufactured by Adriance, Platt & Co., Poughkeepsie, N. Y., and claimed by us to be made in infringement of our patents. Those who manufacture or sell spring-tooth harrows (embodying our patents) not made by our licensees are infringers and will be held ac-

countable to us for damages. Several of our patents must be used in manufacturing a modern, up to date spring-tooth harrow, and dealers are cautioned against buying harrows embodying the claim quoted and, to be on the safe side, are cautioned not to buy any spring-tooth harrows not bearing the license label of this company, for we have yet to find the harrow of recent and modern construction that does not embody one or more of our patents. Dealers have ample opportunity to buy licensed goods from our licensees who make up to date harrows, and in order that you may not be misled, we give you herewith their names: [Here appear the names of the licensees, nine in all.] We regret that we are obliged to hold dealers responsible, but this cannot be avoided, as in many cases the manufacturer would not be financially able to settle our claims. Dealers are too ready to believe the stories of the representatives of infringing manufacturers and accept their various guaranties, but when it comes to the time of carrying out the promises, the dealer foots the bill. Let infringing harrows alone, or do not complain when we bring suit against you. We give you every opportunity to know where you can buy licensed goods and avoid liability for infringement of patents. We cannot aid you further in these matters. Obtain a bond of indemnity from the manufacturer with sureties such as your own attorney will accept, if you continue to handle infringing goods. We will furnish form of bond upon request. To aid us in protecting those who are desirous of selling nothing but the licensed article, we would like the names of any dealer or dealers that you may know of who are selling infringing harrows.

"Very truly yours, National Harrow Co."

S. D. Bentley, for complainant.

E. H. Risley, for defendant.

COXE, District Judge (after stating the facts). Upon the decision of the demurrer the court plainly intimated that there could be no recovery should it appear that the defendant was the owner of patents relating to spring-tooth harrows and that the circulars complained of asserted simply the validity of these patents, that they were infringed by the complainant's harrows and that infringers would be prosecuted. The circulars in evidence show nothing more. There is not a false statement of fact to be found in the circular quoted above or in any of the other circulars or letters in evidence. Necessarily the claim of infringement is based upon opinion, but it is an opinion which a perfectly sincere and honest man might entertain. Certainly it cannot be said that the opinion was without justification, malicious and false. Where the owner of a patent honestly believes that his patent is being infringed not only has he a right to say so, but unless he does say so he is in danger of having his rights forfeited through laches.

Section 4900 of the Revised Statutes, after providing that the word "patented" must be marked on all patented articles, continues:

"And in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented."

But the theory of the bill, carried to its logical conclusion, enjoins the owner of a patent from doing what the statute commands him to do. Which way is the perplexed patentee to turn? If he notifies supposed infringers that he intends to enforce his rights he is punished for contempt in violating the injunction and if he fails to notify them he is turned out of court with the information

that he has "slept upon his rights." Cases are constantly occurring where equity refuses all redress to a patentee because he has permitted his patent to be plundered without a word of protest. Lane & Bodley Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049; Fosdick v. Machine Shop (C. C.) 58 Fed. 817; Richardson v. D. M. Osborne & Co. (C. C.) 82 Fed. 95. It would seem that there is a perfectly safe rule for the guidance of the court in these causes. So long as the patentee keeps within the domain of truth there can be no libel and there should be no interference by injunction. If equity is to take cognizance of this subject at all it should only do so to prevent fraud and falsehood. Here it is on safe ground, but when it assumes the role of censor and undertakes to edit the circulars of trade it becomes a meddlesome interloper creating infinitely more evil than it can ever hope to cure.

The motions to strike out testimony are denied. As often pointed out, these motions are inconsequential and result in nothing whether granted or denied. Every record contains a percentage, and oftentimes a large percentage, of irrelevant and incompetent testimony. The only effectual remedy is to compel the party responsible for its presence on the record to pay the expenses incurred in placing it there.

The bill is dismissed.

MUMFORD et al. v. ECUADOR DEVELOPMENT CO. et al.

(Circuit Court, S. D. New York. November 25, 1901.)

1. CORPORATIONS—RIGHTS OF MINORITY STOCKHOLDERS.
   Although the majority stockholders of a corporation may lawfully make a contract with the company, such contract will be scrutinized with much greater care than if made with a third party; and unless it appears that it was made honestly, and for an adequate consideration, a court of equity will interpose to prevent it from being used oppressively, and in violation of the rights of the minority stockholders, no matter in what form or by what subterfuge such rights are invaded.

2. SAME—SUIT BY MINORITY STOCKHOLDERS—SUFFICIENCY OF BILL.
   A bill filed by minority stockholders, which alleges, in substance, that the majority have, by electing directors who act solely in their interests, caused contracts to be entered into by the corporation transferring all of its property to a second corporation, of which they are owners, for a wholly inadequate consideration, states a cause of action which entitles complainants to relief.

3. SAME.
   A bill filed by minority stockholders to set aside a contract made by the corporation as having been obtained by the majority stockholders in their own interest and in fraud of the rights of complainants, need not set out such contract in hæc verba, especially where it is alleged to be in the possession of the defendant corporation.

4. SAME—PARTIES.
   In a suit by minority stockholders against the corporation and a second corporation alleged to be owned by the majority stockholders to set aside a contract between them as in fraud of the rights of complainants, a person alleged merely to have executed such contract on behalf of the second corporation, and to have represented it as agent to vote its stock in the first corporation in favor of the contract, cannot be joined as a

party defendant, since he is not shown to have any interest in the transaction, or to have taken any part therein except as an agent for one of the defendant corporations.

In Equity. On demurrers to bill.

Justus P. Sheffield, for complainants.

Lawrence E. Sexton, for defendants Ecuadorian Ass'n, Limited, and W. Lyon Mackenzie.

Benoni Lockwood, Jr., for defendant Ecuador Development Co.

COXE, District Judge. This is an action commenced by the complainants, as minority shareholders of the Ecuador Development Company, to set aside as fraudulent a contract made between said company and the Ecuadorian Association, Limited, which was and is the majority shareholder of the said development company. By this contract, substantially, all of the property of the development company was transferred to the Ecuadorian Association. The bill is demurred to on the ground that it fails to state a cause of action and the defendant Mackenzie demurs also on the ground that he is improperly made a defendant.

The bill alleges as follows: That in the year 1897 a contract was entered into between Archer Harman and the republic of Ecuador whereby Harman and his associates agreed to build and equip a railroad between Guayaquil and Quito, Ecuador. That thereafter the Guayaquil & Quito Railway Company was organized under the laws of New Jersey and took over said contract and entered upon its performance. That in the latter part of 1897 the South American Railway Construction Company was organized for the purpose of building said railway and by agreement with the railway company the said construction company was to receive a large proportion of the bonds and preferred stock of the railway company as a consideration for building the road. That in September, 1899, both said companies were without funds, the construction company was unable to carry out its agreements with the railway company and the concession granted to said company by the republic of Ecuador was in danger of lapsing. That the defendant the Ecuador Development Company was organized in September, 1898, for the purpose of taking over the rights of the construction company, and thereafter the entire property of said company was transferred to the development company, which latter company undertook the construction of said railway. That the number of directors provided by the charter of the development company was five, three being chosen by the common and two by the preferred stock, the former controlling the management of the company. That in January, 1899, the said Harman and one Norton conspired together to obtain a controlling interest in the stock of the development company, purchased large amounts of said stock and caused to be elected a board of directors controlled by them and subservient to their interests, Norton being elected president and Harman manager of said company. That the said Harman and Norton thereupon procured the said board of directors fraudulently to allot to them all of the remaining common stock in the treasury of the

said company, amounting to 200 shares of the par value of $20,000, which, with their previous purchases, gave them a majority interest and absolute control of said company. That the Ecuadorian Association is an English corporation and was organized in March, 1899, for the purpose of acquiring from Harman and Norton 500 shares of the stock of the development company and a large amount of bonds of the railway company, which they claimed to own, which said stock and bonds were actually transferred to the said association. That Harman and Norton, notwithstanding the said transfer, continued to own a controlling interest in the common stock of the development company and they agreed to sell to the association $250,000 of the bonds of the railway company at par for which the association was to issue to them £50,000 par value of the shares of the association. That the complainant was a director of the development company in January, 1900, and while he was acting in that capacity a contract was proposed giving certain valuable rights, privileges and mining interests belonging to the development company to the association for an inadequate consideration. That the complainant opposed this contract and procured a postponement of its consideration, but before it was again examined by the board of directors he was removed from office. That after his removal Harman and Norton, having control of the board of directors of the development company, procured a large number of other contracts to be entered into which transferred various rights and privileges to the said association without adequate consideration and in fraud of the rights of the stockholders of the development company. That in pursuance of a fraudulent design to transfer all of the valuable assets of the development company without adequate consideration and in fraud of the rights of the minority stockholders the said Harman and Norton, in the summer of 1900, transferred to the association their majority holdings of the common stock of the development company and the preferred stock held by them and took in exchange therefor stock of the association to an amount many times the par value of the stock so transferred. That in this manner the association has become the owner of 80 per cent. of the capital stock of the development company. That Harman and Norton were and are directors of the association and of the development company, the said Norton resigning as president of the latter and causing a confidential agent of his to be elected in his place. That after the removal of the complainant from the board neither Norton nor any of the officers of the development company, who were under his control, allowed the minority stockholders any information regarding the assets of the development company, though frequently requested so to do. That Harman and Norton, holding a majority of stock in the development company, prevented the annual meeting, which should have been held in June, from being held until September 15, 1900. That at an adjourned meeting held on that day the defendant Mackenzie appeared as proxy for the Ecuadorian Association and in its name voted a majority of the stock of the development company. That at said meeting no statement of the business, assets or finances

of the development company was made, but its president presented, as part of his report, a contract, bearing date September 6, 1900, between said company and the Ecuadorian Association, which was executed by the said Mackenzie on behalf of the latter corporation. The contract was voluminous, reciting a large number of previous contracts between the said parties, and, in general, purported to transfer to the said association all the property of the said development company of every name and nature. That the only consideration for this transfer was the assumption of certain obligations of the development company and an agreement to pay the said company, when the said railway should be completed, one-tenth of the net profits which should appear to have accrued from the completion of the contract with the government of Ecuador. That the contract was adopted, Mackenzie casting the vote of the association in its favor, the minority stockholders, including representatives of the complainants, voting against it and strenuously opposing its ratification. That pursuant to the terms of this contract all the property of the said company, including $17,000 cash, was turned over to the said Ecuadorian Association. That at the date of said meeting—September 15, 1900—the development company was entirely solvent, owning assets far in excess of its liabilities. That its contracts to build the Guayaquil & Quito Railway were of great value and it was the owner of between one and two million dollars of 6 per cent. first mortgage bonds of the said railway company, which were guarantied by the government of Ecuador and were worth about par, and although certain sums had been loaned upon the security of said bonds other loans for large amounts could have been obtained. That the entire cost of completing the said railway had been estimated not to exceed $6,000,000 and for this work the said development company was to receive in stock and bonds of the railway company the sum of $20,782,000, leaving a profit of nearly $15,000,000, estimating the stock and bonds at par, and a profit of over $6,000,000 on the bond issue alone.

The bill charges that the contract of September 6, 1900, and the various contracts which preceded it were and are fraudulent and void as against the shareholders of the Ecuador Development Company and that they were made pursuant to a conspiracy to defraud the minority shareholders and to benefit the said Harman and Norton. That to this end and in furtherance of this scheme the property of the development company was squandered and it was induced to assume improvident, reckless, and unnecessary obligations for the purpose of depressing the value of its stock and giving color to the assertion that it was insolvent in order that its entire property might be transferred to the Ecuadorian Association. That Harman and Norton, through their creatures, absolutely controlled the affairs and dictated the policy of the development company, and, pursuant to their scheme to secure all its property for their own use and to defraud the minority shareholders, refused to give any information regarding the affairs of the said company and kept the minority in total ignorance of its financial condition until the transfer to the Ecuadorian Association was accomplished. That no de-

mand has been made upon the development company to bring this suit for the reason that it is in the absolute control of the defendant, the Ecuadorian Association.

The relief demanded is: First. That a discovery be had. Second. That the contract of September 6, 1900, and all previous contracts be set aside as void. Third. That an injunction issue restraining the defendants from transferring said contracts. Fourth. That an accounting be ordered.

The foregoing is a synopsis of the salient features of the bill. The bill is unnecessarily prolix and abounds in needless vituperation. Were the verbosity squeezed out of the bill by passing it through a mental condenser it would, undoubtedly, be a more symmetrical pleading. However, the bill is now before the court on demurrer and the question, therefore, is not whether the allegations of the bill could be more concisely stated, but whether the bill states a cause of action; if it does, it matters not what else it states. The bill, condensed to a few paragraphs, alleges as follows: First. The existence of the Ecuador Development Company, a solvent and flourishing corporation, holding a contract from which not less than $6,000,000 will probably be realized. Second. A fraudulent conspiracy on the part of the majority stockholders of the development company to secure for their own benefit and at the expense of the minority stockholders all of the assets and potentialities of the company. Third. The formation of the Ecuadorian Association, Limited, which is in reality only the corporate name of the majority stockholders, and the transfer to it of all the assets of the development company for an inadequate consideration. Fourth. The various proceedings by which the transfer of the property from all the stockholders to the majority stockholders was accomplished, namely, the packing by the conspirators of the board of directors with their dummies; the partial wrecking of the company to give a semblance of truth to the charge of insolvency; the arbitrary refusal to give any information to the minority stockholders; the absolute control of both corporations by the conspirators through their creatures, and the secret contract and transfer to the Scotch corporation.

If the complainants are able to prove all that they have alleged it will entitle them to relief within the rule of the following authorities, which are selected from many as approximating most closely the facts in the case at bar: Mason v. Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Ervin v. Navigation Co. (C. C.) 20 Fed. 577; Meeker v. Iron Co. (C. C.) 17 Fed. 48; De Neufville v. Railroad Co., 26 C. C. A. 306, 81 Fed. 10. The rule deducible from all these cases is that although a majority may lawfully make a contract with the company such contract will be scrutinized with much greater care than if made with a third party, and unless it appears that it was made honestly and for an adequate consideration a court of equity will interpose to prevent such contract from being used oppressively and in violation of the rights of the minority. It matters not in what form these rights are invaded; it is the business of equity to pene-

trate through subterfuges and discover the actual transaction stripped of all disguises. If then it shall appear, no matter what may be the machinery employed, that the majority have sold the corporate property to themselves for a wholly inadequate consideration a court of equity will grant relief to the minority who have thus been despoiled of their property. In short, if the complainants are able to show that Harman, Norton and their associates have transferred to themselves under the name of the Ecuadorian Association, Limited, a contract worth $6,000,000, leaving for the other stockholders nothing but a right to share, sometime in the future, in one-tenth of the net profits to be ascertained from books kept by Harman and Norton, they, the complainants, will have established a cause of action entitling them to a decree.

The theory upon which the courts interfere in such cases is tersely expressed by Sir William M. James, in Menier v. Telegraph Works, 9 Ch. App. 350. He says:

"The minority of the shareholders say in effect that the majority have divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so, the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged by the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the court can do it, and given to them."

It is argued for the defendants that if the contract of September 6, 1900, were set out in full it would show ample consideration and would, in short, demonstrate the falsity of the allegations of the bill regarding it. It is said that until profert is made of the contract the "court ought not to permit complainants to put defendants or any of them to the trouble, expense and annoyance of filing an answer herein." It should be remembered that the cause is before the court on demurrer and bill. The bill must be judged as it is, not as it might be. The action is not founded on the contract of September 6th; it is an action to set that contract aside because it was obtained in fraud of complainants' rights. It is not necessary that the contract should be pleaded in hæc verba. It often happens, in these circumstances, that there is a vast and fatal discrepancy between the pleading and the proof. Documents which are painted black in the pleading often turn out to be white and innocent when finally offered to the court for inspection. And yet the court on demurrer cannot pronounce the bill bad even though it is probable that the papers referred to therein if produced will make it plain that the action cannot be maintained. Adriance, Platt & Co. v. National Harrow Co. (C. C.) 98 Fed. 118. In this case the demurrer to the bill was overruled, but the bill was dismissed on final hearing for the reason that the circulars, which were alleged to be false and malicious, were found when produced to contain nothing but truth. Id. 111 Fed. 637. Assuming the case at bar to be a case where the contract should be pleaded a sufficient excuse for not pleading it is alleged in the bill.

As to the defendant Mackenzie the demurrer must be allowed. The bill states nothing regarding him, except that he executed the contract of September 6th on behalf of the Ecuadorian Association, and as agent and proxy for said association appeared at the meeting of September 15, 1900, offered a resolution advocating the adoption of the contract and voted the shares of the association in favor of the said resolution. The association which profits by the contract is a party and a decree against it will involve its officers and agents sufficiently, at least, to render the decree effectual. Colonial & U. S. Mortg. Co. v. Hutchinson Mortg. Co. (C. C.) 44 Fed. 219. Mackenzie was merely a messenger for the Ecuadorian Association to perform a single act from which he personally received no benefit which was a corresponding injury to the complainants. If the bill had alleged that the property of the development company had been delivered to Mackenzie and that he still holds the same a different proposition would be presented. Berwind v. Van Horne (C. C.) 104 Fed. 581. The complainants have argued in the brief submitted that Harman and Norton, the active instigators and participators in the alleged frauds, are not necessary parties. The brief says:

"They are not alleged to be the owners or in possession of the property, for the return of which the action is brought; and the controversy between the present parties can be completely decided without their presence or intervention and without any decree being entered which can affect them in any way except indirectly as stockholders of the Ecuadorian Association."

Surely, no reason can be suggested for failing to sue them which does not apply with infinitely greater force to Mackenzie. The bill contains no allegation implicating him in a conspiracy to defraud or charging him with knowledge of the existence of such a scheme. Any officer of the court receiving a similar commission to appear at a stockholders' meeting and vote the stock of his principal in favor of a certain specified resolution might accept the service and act as directed with perfect innocence and good faith. No authority has been cited or found by the court where a bill of this character has been maintained against one who was neither a director nor stockholder, but was merely an attorney who did no act, except to vote the stock as he was directed to do by his client.

The demurrer filed by the defendant Mackenzie is allowed, with costs.

The demurrers of the other defendants are overruled, with leave to the defendants to answer the bill within 30 days upon paying the costs of the demurrers.

COLUMBIA BUILDING & LOAN ASS'N v. JUNQUIST et al.

(Circuit Court, D. Wyoming. May 24, 1899.)

1. BUILDING AND LOAN ASSOCIATIONS—MEMBERS—CONSTRUCTIVE NOTICE OF BY-LAWS.

A stockholder in a building and loan association is bound to take notice of the law under which it is incorporated and of the provisions of its by-laws.

2. SAME—CONTRACTS WITH BORROWING STOCKHOLDERS—LIMITING NUMBER OF PAYMENTS.

The essential principle of building and loan associations is that of mutuality between all the members, whether borrowers or nonborrowers; and such an association cannot contract with a borrowing member, to whom it has advanced the par value of his shares, that his indebtedness shall be canceled on the payment of interest and stock dues for a certain number of months, regardless of whether such payments in fact mature his stock.

In Equity.

Gibson Clark and J. Norman, for complainant.
McMicken & Blydenburg, for defendant.

RINER, District Judge. This is a suit in equity, brought to foreclose a trust deed given by the defendants to the plaintiff to secure the payment of the sum of $3,000. The plaintiff is a building and loan association. On the 4th of June, 1890, the defendant, William Junquist, became a member of the association by subscribing for 30 shares of its stock designated as "Stock A," and on that day a certificate for the stock was issued to him. On the 11th of December of the same year he borrowed the sum of $3,000, due six years after date, with interest and installments thereon, according to the by-laws and rules of the association; these amounts to be paid on or before the 5th day of each and every month, or to be counted as principal. While I have examined the evidence and briefs of counsel with great care, I have not had the time to prepare an opinion in writing, and shall only briefly state the grounds upon which my conclusions in this case are based. The plaintiff is a building and loan association organized under the laws of Colorado with the powers usually conferred upon associations of this character. While the statute may differ in some respects from the statutes of other states upon this subject, yet I think the powers conferred upon the corporation in this cause are substantially the same as those conferred upon and exercised by like corporations in other jurisdictions. The principle underlying its method of transacting business is mutuality, its object being to raise funds from its members to be loaned among themselves, or to such as may desire to avail themselves of the privilege. This is done by the payment, monthly, of certain amounts of interest and installments; and the stockholders, whether borrowers or nonborrowers, participate alike in the earnings of the association, and alike must assist in bearing the burden of any loss which it may sustain. All of the stock is matured and all of the loans are made from what is called the loan fund; indeed, this necessarily follows from the fact that there is no other fund from which the stock can be matured. All members receive the same per cent. of profit, for the reason that the dividends are declared on the entire business; and all payments made by every member go into the common fund, the profits of which are divided among the shareholders, and they must continue to pay until the stock is in due course matured. To allow payments to be applied to mature the loan of a borrowing member by a definite and fixed number of payments would destroy the essential principle

upon which the business is transacted, viz. that of mutuality. The true test in the determination of questions of this character is very clearly stated by the supreme court of Ohio in the case of Eversmann v. Schmitt, 41 N. E. 139, in the following words:

"And the exact test of his right to call for a cancellation of the mortgage given to secure his obligations as a borrower is the inquiry whether he would have been entitled to receive from the association the par value of the shares on which the loan was made had he not become a borrower."

Mr. Junquist became a member of the association in June, and it was not until December that he secured the loan. I think he was bound, as a member of the association, to take notice of the law under which the association was incorporated, and also of the by-laws of the association; and, as I understand the by-laws, if his stock matured within 6 years,—or 72 months,—and was worth 100 cents on the dollar, his loan would be paid; if not, he would be obliged to continue his payments until that result was attained. In this case, at the expiration of the six years, the stock had not matured, and therefore the debt was not paid; and, having failed to continue his monthly payments until the maturity of the stock, the right of the plaintiff to resort to its security for the collection of the balance became perfect. A decree will be entered finding the defendants indebted to the association in the sum of $3,000, with interest and dues according to the by-laws of the association, —that is to say, at the rate of $27.25 per month from and including June, 1896, to the date of the decree,—and for the amount of the insurance paid by the plaintiff to keep the premises covered by the trust deed insured; and, if the sum so found to be due be not paid within 30 days from the date of the decree, then the 30 shares of stock in the association issued by plaintiff to the defendant shall be sold for a price not less than its withdrawal value, the proceeds to be applied toward the payment so found to be due, and for any deficiency the property covered by the trust deed shall be sold in the manner provided by law.

CUMBERLAND BUILDING & LOAN ASS'N et al. v. SPARKS et al.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1901.)

No. 1,547.

1. MORTGAGES—DEFECTIVE ACKNOWLEDGMENT—EFFECT UNDER ARKANSAS STATUTE.

It is a rule of property in Arkansas, established by decisions of the supreme court of the state, and binding on the federal courts, that under Sand. & H. Dig. § 5091, which provides that a mortgage shall be a lien only from the time it is filed for record, a mortgage does not become a lien as to third parties, although recorded, and although they have actual notice of its existence and knowledge of its contents, unless it was properly acknowledged as required by the statute.

2. SAME—PURCHASERS OF MORTGAGED PROPERTY—ACTUAL KNOWLEDGE OF DEFECTIVE MORTGAGE.

A mortgagee cannot impute fraud to a purchaser of the mortgaged property because he bought with actual knowledge of the mortgage, and

with the intention of defeating the same on the ground that it was not properly acknowledged, where by the laws of the state such a mortgage did not create a lien as against purchasers.

3. SUBROGATION—PERSON ADVANCING MONEY TO PAY INCUMBRANCE.
Where money is lent in pursuance of an express agreement that it is to be used to discharge an existing incumbrance on the borrower's property, and that the lender is to have a first lien upon the property to secure its repayment, such lender may be subrogated to the rights of the incumbrancer whose debt has been paid, not only as against the borrower, but as against any one else who subsequently acquires an interest in the property with knowledge of the circumstances under which the money was lent.[1]

4. SAME—SUBSEQUENT PURCHASER—NOTICE.
Defendants purchased real estate after one of them, who was an attorney at law, had examined the records as to title. Such records disclosed a mortgage from the vendor to complainant for borrowed money, but which was not properly acknowledged, and for that reason, under the laws of the state, did not create a lien as to purchasers. But such records also showed a prior valid mortgage on the property for nearly the same amount which had been discharged of record in consideration of payment of the debt secured within two or three days after the date of complainant's mortgage. Defendants also had actual knowledge of complainant's mortgage. *Held*, that such facts were sufficient to charge defendants with notice not only that the money borrowed from complainant was used in discharging the prior mortgage, but that it was so used pursuant to an agreement to that effect between complainant and the borrower, which was a fair inference from the facts known, and that they took title subject to the right of complainant to be subrogated to the lien of the discharged mortgage.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

The Cumberland Building & Loan Association and A. Moore Berry, as trustee, the appellants, on February 12, 1900, exhibited a bill of complaint against G. N. Sparks and Parmelia J. Sparks, his wife, and against J. W. Killough and O. N. Killough, the appellees, to foreclose a mortgage on certain property, being the S. E. ¼ of block 5 in Brookfield's Original division of the town of Wynne, Cross county, Ark., which mortgage was executed by the defendants G. N. Sparks and Parmelia J. Sparks on March 25, 1895, to secure a loan evidenced by a promissory note in the sum of $2,000. The bill averred that said loan was made to Sparks and wife to enable them to pay off a prior incumbrance on the property aforesaid in the sum of about $1,800, which was held at the time by R. G. Oliver, as guardian for the minor heirs of C. D. Oliver; and that the sum of $2,000 loaned as aforesaid was in fact used to pay and discharge the last-mentioned incumbrance. The bill further alleged that on May 17, 1897, Sparks and wife conveyed the mortgaged property to the defendants J. W. Killough and O. N. Killough for a consideration which was declared to be the full value of the property, but that said conveyance was in fact made without any consideration, for the purpose of hindering, defrauding, and delaying the creditors of G. N. Sparks. It was further averred that the aforesaid loan to Sparks and wife was made originally by the Southern Saving Fund & Loan Company, and that the mortgage or deed of trust securing the same conveyed the property to A. Moore Berry, one of the complainants, as trustee for said Southern Saving Fund & Loan Company; that the mortgage indebtedness and the mortgage securing the same were assigned to the complainant the Cumberland Building & Loan Association on November 18, 1896, and that default had been made in the payment of the indebtedness secured by the mortgage. In view of the premises, the complainants prayed that a decree of foreclosure and sale

[1] Subrogation to rights of mortgagee, see note to Rachel v. Smith, 42 C. C. A. 304.

might be entered, or, if such relief was not deemed proper, then that the satisfaction of the prior mortgage existing on the premises in favor of R. G Oliver, as guardian (which mortgage bore date May 1, 1894), might be set aside and for naught held, and that the Cumberland Building & Loan Association might be subrogated to all the rights and privileges of the beneficiaries under the last-mentioned mortgage, and that the property be sold to enforce the payment of the indebtedness evidenced by the Oliver mortgage. To the aforesaid bill the defendants J. W. Killough and O. N. Killough filed an answer, wherein they admitted the purchase of the mortgaged premises from Sparks and wife on or about May 17, 1897. They denied that said purchase was without consideration, or that the purchase was made for the purpose of hindering, defrauding, or delaying the creditors of Sparks. They averred, on the contrary, that they paid full value for the mortgaged property, first having satisfied themselves from an examination of the record that the title to the mortgaged premises was clear, and not subject to any lien; and that in point of fact the mortgage of March 25, 1895, in favor of the Southern Saving Fund & Loan Company was not executed in a manner which entitled it to go of record, and for that reason, under the laws of the state of Arkansas, was no notice to them of any subsisting lien upon the property in controversy. They further averred that they took possession of the property, having paid for it in full, shortly after the conveyance of the same to them by Sparks and wife, and had been in the open, notorious, and continuous possession of the same since the date of said conveyance. Sparks and wife filed a separate answer, in which they admitted the conveyance of the property in controversy to J. W. Killough and O. N. Killough on May 17, 1897, but they denied that such conveyance was made by them without consideration, or that it was made with a view of hindering, delaying, or defrauding the creditors of said Sparks. After a trial upon these issues, the lower court held that the bill was without equity, and directed that the same be dismissed, at the complainants' costs. 106 Fed. 101. From this decree the complainants below have prosecuted an appeal to this court.

G. B. Webster, for appellants.

N. W. Norton (J. M. Prewett, on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge

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

The laws of Arkansas (Sand. & H. Dig. §§ 707, 5090) require deeds and mortgages conveying real property located in that state to be executed in the presence of two disinterested witnesses, or, if not so executed, that they be acknowledged in the presence of two persons, who shall then subscribe their names to the deed or mortgage as attesting witnesses. The mortgage or deed of trust which was executed on March 25, 1895, by Sparks and wife in favor of the Southern Saving Fund & Loan Company was neither executed nor acknowledged in the presence of two disinterested witnesses, as the local law required, and for that reason it is conceded that it was not entitled to go of record. Moreover, the laws of the state of Arkansas (Sand. & H. Dig. § 5091) contain the following provision:

"Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage."

This statute has been construed repeatedly by the supreme court of the state of Arkansas. Beginning with the decision in Main v.

Alexander, 9 Ark. 112, 47 Am. Dec. 732, it has been held in a long line of cases, and the doctrine is so well established as to have become a rule of property in that state which is binding upon the federal courts, that, unless a mortgage is properly acknowledged, the record thereof imparts no notice of its contents to a third party, although he has actual notice of its existence and knowledge of its contents; the theory being that by virtue of the statute aforesaid no lien is created by a mortgage, so far as strangers to the instrument are concerned, unless it is first acknowledged and recorded as the law directs. Under the statutes and decisions of that state, a mortgage is good, as it seems, between the parties thereto, after it is delivered to the mortgagee; but it has no force or effect as against strangers, although they have knowledge of the same, until it is placed of record, first having been properly acknowledged. Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; Jarratt v. McDaniel, 32 Ark. 598, 602; Neal v. Speigle, 33 Ark. 63, 68; Martin v. O'Bannon, 35 Ark. 62, 68; Ford v. Burks, 37 Ark. 91, 94, 95; Dodd v. Parker, 40 Ark. 536; Wright v. Graham, 42 Ark. 140, 148; Watson v. Lumber Co., 49 Ark. 83, 4 S. W. 62; Milling Co. v. Mikles, 61 Ark. 123, 128, 32 S. W. 493. Such being the local law, it follows, of course, that the defendants J. W. Killough and O. N. Killough, who purchased the mortgaged property on May 17, 1897, from Sparks and wife, the mortgagors, acquired a good title thereto, free from the lien of the mortgage in favor of the Southern Saving Fund & Loan Company, which the complainant, as assignee of the mortgage, seeks to foreclose, unless it be true, as is alleged in the bill, that the conveyance by Sparks and wife to J. W. Killough and O. N. Killough was made without consideration, and with intent on the part of the persons concerned in that transaction to hinder, delay, or defraud the creditors of G. N. Sparks. The finding of the lower court, however, as respects this latter issue, was in favor of the defendants and against the complainants. The evidence of all the witnesses who were produced tended to show that the Killoughs purchased the mortgaged property from Sparks on May 17, 1897, at an agreed price of $2,500, which sum was paid in full at the time of the purchase by conveying to Sparks a one-half interest in a stock of goods valued at about $2,250, and by discharging certain debts which Sparks owed to the purchasers and certain other persons, amounting in the aggregate to something over $1,300. The complainants produced no evidence which tended to show that the mortgaged property was not paid for in the manner aforesaid. It did appear, however, that the Killoughs, as they admit in their answer, were aware of the existence of the outstanding mortgage in favor of the Southern Saving Fund & Loan Company, but, as the laws of the state permitted them to make the purchase notwithstanding such knowledge, and to hold the property exempt from the lien of the mortgage, because it was not properly acknowledged, fraud cannot be imputed to the purchasers because they saw fit to exercise this legal right. Aside from the fact that they did buy the mortgaged property with knowledge of the existing incumbrance, there is no other evidence in the record which will serve

to cast suspicion on the conduct of the purchasers, or which would justify the conclusion that they hold the property in secret trust for Sparks, or that their motive in buying it was to enable Sparks to perpetrate a fraud upon his creditors. It is most probable, we think, that the Killoughs were induced to purchase the property because it was offered to them at a low price, and because by so doing they could make a profit by the transaction, and at the same time obtain payment of certain debts which Sparks appears to have owed them. If they were induced to make the purchase for the reasons last stated,—as they probably were,—then their conduct cannot be pronounced fraudulent, since they did nothing more than the local law permitted and encouraged them to do. The statutes of the state allowed them to take advantage of the defect in the complainants' mortgage, and to profit by the mistake of the mortgagee; and, however reprehensible such conduct may seem to be when judged from a purely moral standpoint, it cannot be pronounced fraudulent from a legal point of view, nor will such conduct justify the imputation of fraud. We accordingly conclude that the mortgage in question cannot be enforced as against the purchasers of the mortgaged property.

The next and the most important question in the case is whether, on the principle of subrogation, the complainant company can be treated as the equitable assignee of the deed of trust held by R. G. Oliver, as guardian of the minor heirs of C. D. Oliver, and whether the indebtedness secured by that deed of trust can be treated as still subsisting, and be enforced against the mortgaged property for the benefit of the complainant company, although it has been discharged of record. This latter deed of trust, as stated above, was executed about May 1, 1894, by Sparks and wife. It was properly acknowledged and recorded, and was paid and discharged of record on March 27, 1895, out of the proceeds of the loan which was made by Sparks and wife from the Southern Saving Fund & Loan Company, hereafter termed the "Saving Fund Company." For these reasons counsel for the complainant company insists that it ought in equity to be subrogated to all of the rights of the beneficiaries under the aforesaid deed of trust. Courts of equity are most frequently called upon to enforce the right of subrogation where one pays the debt of another which he was under a legal obligation to pay, either because he was a surety or a guarantor. In such cases privity exists between the surety or guarantor and the creditor whose debt is discharged in such a sense that, when the creditor receives payment from the surety or guarantor, he is under an obligation to make over or assign to him all property or securities which may have been pledged or hypothecated by the principal debtor to secure the payment of the debt. The law creates or implies a contract on the part of the creditor that such property or securities will be turned over to the one who is secondarily liable as soon as he pays the creditor's claim. It is manifest, however, that in the case at bar no privity of contract existed between the Saving Fund Company and the holder of the Oliver deed of trust when the latter incumbrance was discharged. The last-named company was under no obligation, either as a surety or

a guarantor, to pay the debt secured by the Oliver deed of trust, nor could it have compelled Oliver to accept payment of the debt from it. The evidence shows that the negotiations for the loan from the Saving Fund Company were conducted wholly by Sparks, and the most that can be said concerning these negotiations is that Sparks undoubtedly agreed at the time the loan was made that the Saving Fund Company should have a first lien on the property in controversy to secure the repayment of the loan, which lien could not be given or created until the Oliver deed of trust was discharged of record. This agreement, however, between Sparks and the Saving Fund Company, which contemplated the execution of a new deed of trust, did not create any privity as between Oliver and the Saving Fund Company, for in advancing the money to pay off the latter deed of trust the Saving Fund Company acted merely as a volunteer, being at the time under no obligation to advance the money or make the payment.

It is urged, however, that, notwithstanding the want of privity, the complainant is entitled to be treated as the equitable assignee of the Oliver deed of trust because it made the loan in question upon the understanding that it was to have a first lien on the mortgaged property, and in support of that contention the following authorities are cited: Association v. Thompson, 32 N. J. Eq. 133; Tyrrell v. Ward, 102 Ill. 29; Bank v. Bierstadt, 168 Ill. 618, 48 N. E. 161, 61 Am. St. Rep. 146; Draper v. Ashley, 104 Mich. 527, 62 N. W. 707; Wilton v. Mayberry, 75 Wis. 191, 43 N. W. 901, 6 L. R. A. 61, 17 Am. St. Rep. 193; Levy v. Martin, 48 Wis. 198, 4 N. W. 35; Trust Co. v. Peters, 72 Miss. 1058, 18 South. 497; Dillon v. Kauffman, 58 Tex. 696. Without going over these authorities in detail, it will suffice to say that they sustain the following propositions: That where money is advanced to a debtor in pursuance of an express agreement that it is to be used to retire existing liens or incumbrances on his property, and that the creditor who loans the money is to have a first lien upon the property to secure its repayment, such creditor may be subrogated to the rights of the incumbrancer or lienor whose debt has been paid, not only as against the borrower, but as against any one else who subsequently acquires an interest in the property with knowledge of the circumstances under which the money to pay off the incumbrances or liens was advanced. They further hold that, if money is advanced to a debtor to discharge an existing first mortgage upon his property, and in pursuance of an agreement that the lender is to have a first lien upon the property for the repayment of the sum loaned, the lender is entitled, as against a junior incumbrancer, to be treated as the assignee of the first mortgage which has been paid off and discharged with the money loaned, whenever it becomes necessary to do so to effectuate the agreement with the lender, and to prevent the junior incumbrance from being raised accidentally to the dignity of a first lien, contrary to the intention of the parties. The species of subrogation mentioned in both of these instances is what has been termed "conventional subrogation," and does not depend upon the establishment of any privity of contract. Now, it is true that the Killoughs were not junior incumbrancers

when the deed of trust in favor of the Saving Fund Company was executed. They became purchasers of the mortgaged property, for value, two years later, and, as they say, bought it on the faith of the title as it appeared of record; so that the last of the two propositions stated above has no application to the case in hand. But the first of the above propositions is applicable to the present controversy, and as the doctrine enunciated is reasonable, and well supported by authority, the point to be determined is whether the evidence contained in the present record is sufficient to justify the conclusion that when the Killoughs became the purchasers of the mortgaged property on May 17, 1897, they were aware of the agreement between Sparks and the Saving Fund Company that the Oliver deed of trust was to be paid off and discharged with the proceeds of that loan, so as to give the lender a first lien on the mortgaged property. If they were aware of that understanding when they made the purchase, then the complainant is entitled to be subrogated to all the rights of the beneficiaries under the Oliver deed of trust before it was paid, and the same may be enforced at this time as an unpaid incumbrance for the complainant's benefit. Turning to the record, the evidence, as already stated, clearly shows that Sparks expressly agreed with the Saving Fund Company, as a condition of the loan which he sought to obtain, that the money to be loaned should be applied to retiring the Oliver debt and releasing the property from the prior mortgage, so that the Saving Fund Company should have a first lien upon the property for the repayment of the loan. Pursuant to that agreement, the Saving Fund Company advanced the money and issued its check payable to Sparks for the net proceeds, $1,973. This check was indorsed to Oliver, and by him collected. He retained about $1,800, which was due to him on the deed of trust by him held, and accounted to Sparks for the balance. The Oliver deed of trust was thereupon released of record by a deed of release which recited the execution of the Oliver mortgage, and that the debt secured thereby had been paid. This was done on March 28, 1895. The deed of trust in favor of the Saving Fund Company was dated March 25, 1895, and acknowledged March 27, 1895, and, although it was not a recordable instrument under the laws of the state of Arkansas, yet it was in fact recorded in the land records of Cross county. O. N. Killough, who had charge of the transaction in behalf of himself and his father, in the course of which they purchased the property from Sparks on May 17, 1897, was an attorney at law with at least 10 years' experience. He admitted that he examined the records before he and his father made the purchase, and that he found the mortgage of the Saving Fund Company, and examined the same. Prior to the purchase, therefore, both he and his father had actual knowledge of the facts disclosed by it, namely, that on or about March 25, 1895, Sparks obtained a loan from the Saving Fund Company and had executed a mortgage upon the land in question to secure its repayment. They also had constructive knowledge from the records of the original Oliver mortgage and of the contents of the deed whereby it was released, and knew that this release was made contemporaneously with the execution of the deed of trust in favor of the Sav-

ing Fund Company. They also had constructive knowledge that the deed of release then on record recited that Sparks had paid off the Oliver debt, and of the date when it was paid. So much information, at least, was conveyed by the record, and cannot be denied. From what has been said, it is manifest, therefore, that the Killoughs knew, before they purchased the land in question, that Sparks had, on March 25, 1895, borrowed $2,000 from the Saving Fund Company, and at the same time had paid the Oliver mortgage amounting to $1,800; and these facts, with the reasonable and fair inferences deducible therefrom, are, in our opinion, entirely sufficient to charge the Killoughs with knowledge not only that the Saving Fund Company's money was actually used to discharge the Oliver debt and mortgage, but that it was so used pursuant to an agreement to that effect between said company and Sparks. It is impossible, we think, that the transactions disclosed by the foregoing deeds and records, producing the result of substituting one mortgage security for another, could have been conducted between the parties to it without a prior agreement or understanding to that end, and it is equally impossible to believe that any one, and particularly an attorney at law, could have been aware of the facts aforesaid without also knowing, or at least having sufficient ground to believe, that the money was obtained from the Saving Fund Company for the purpose of paying off the Oliver deed of trust, and under an agreement with the lender that it would be used for that purpose. In considering such evidence the trior of the fact cannot close his eyes to the usual and ordinary course of procedure in such transactions. "The law is well settled," says the supreme court of Indiana in Mettart v. Allen, 139 Ind. 644, 39 N. E. 239, "that a man is regarded as notified of whatever appears on the instrument which constitutes his chain of title, and whatever is sufficient to put him on inquiry is sufficient to charge him with whatever an ordinarily diligent search would have disclosed, and that all deeds referred to as being in any way connected with the title, as well as those upon which the title is based, must be examined as to any facts they may contain, at the purchaser's peril." See, also, Knowles v. Williams, 58 Kan. 221, 48 Pac. 856; Martind. Conv. (2d Ed.) §§ 74, 277.

There are other persuasive facts which deserve consideration. Sparks failed in business in 1893, owing a large number of mercantile debts, and at the time of the transactions involved in this suit was a bookkeeper working on a salary. The Killoughs had known him for a long time, and they admitted knowledge of his financial embarrassments and condition after 1893. Surely, they ought to have known, or to have had a strong suspicion, that Sparks did not have $1,800 to pay Oliver in 1895, unless it was part of the money which he borrowed from the Saving Fund Company; and they ought to have known, and doubtless did know, that the Saving Fund Company would not have loaned him the amount of money which it did except in pursuance of his agreement to discharge the Oliver deed of trust, so as to make its deed of trust a first lien. Besides, the Killoughs admit that they deliberately went about the business of purchasing the land from Sparks with actual

knowledge of the real rights of the Saving Fund Company, and with the deliberate purpose of profiting by its mistake. The testimony of the Killoughs shows that Sparks first informed them of the defect in the acknowledgment of the deed of trust in favor of the Saving Fund Company, but they say that they did not make the purchase until they had made an examination of the record to confirm Sparks' statement. Their scheme, therefore, was a deliberate one to take advantage of a known mistake of the Saving Fund Company. In view of the knowledge which the Killoughs derived from the foregoing sources, as well as from the knowledge shown to have been acquired by them by reason of their intimate relations with Sparks, we are constrained to believe, and so find, that the Killoughs, when they bought the property in controversy, had knowledge that the Oliver deed of trust had been paid off with money obtained from the Saving Fund Company, and that the money was loaned by the latter company pursuant to an express agreement that it would be used for that purpose, and that the money advanced should be secured by a first lien on the mortgaged property. To give effect to this agreement, which was known to the Killoughs, and to accomplish the ends of justice, the complainant is entitled to be subrogated to the rights of the beneficiaries under the Oliver deed of trust, treating that as still unpaid, and as having been assigned, in effect, to the Saving Fund Company at the time it was released of record.

It is accordingly ordered that the decree below be reversed, and that the cause be remanded to the circuit court, with directions for further proceedings therein in accordance with this opinion.

NEILSON v. CHAMPAIGNE MIN. & MILL. CO. et al.

(Circuit Court, D. Colorado. November 15, 1901.)

No. 4,108.

MINING CLAIMS—EFFECT OF ENTRY—RELOCATION.

After entry of a mining claim in the land office, a re-location of the premises cannot be made by another so long as that entry stands; and such a relocator acquires no rights, of possession or otherwise, which will sustain a suit by him in the courts to compel a conveyance to him of the legal title.

In Equity. On demurrer to bill.

Darwin T. Mason, for complainant.
A. T. Gunnell, for respondents.

HALLETT, District Judge (orally). This is a bill to enforce the conveyance of certain mining claims in the Cripple Creek district. The bill charges that in April, 1896, the Champaigne Mining & Milling Company owned the property in controversy, and then made application for patent; that the sum of $500 had not been expended on each of the claims, and only $1,630 had been expended on all of them, towards the improvement of them; that the annual work was not

done upon the claims in the years 1897 or 1898 or 1899; and that only $27 was expended upon them in the way of annual work in any of those years. Nevertheless the Champaigne Company proceeded to patent or to make entry for the claims on February 18, 1899. On that date they got a land office receipt for the claims, but in order to obtain this receipt they made false proof as to the amount of work done upon the claims, and therefore were not entitled to make entry as they did. Afterwards, and on May 1, 1899, the plaintiff entered upon the claims and relocated them. The manner of location and the amount of work done are set out in the bill. After he made the location, and in June, 1899, he filed a protest in the land office against the issuance of any patent to the Champaigne Company. This protest was twice amended afterwards. It was brought before the commissioner of the general land office, who overruled it, and afterwards before the secretary of the interior, who affirmed the decision of the commissioner of the general land office. The substance of the bill is that the respondent the Champaigne Mining & Milling Company made entry of the four claims upon false proof, and afterwards (the entry being in the month of February, 1899) the plaintiff entered upon the claims and relocated them May 1, 1899. The bill proceeds upon the hypothesis that the complainant had the right to relocate the claims after the entry in the land office, and that the decision of the commissioner of the general land office and of the secretary of the interior upon the various points raised by him as to the insufficiency of proof made at the time of entering the claims in the land office was an error of law, which may be reviewed in the courts, and he may have the title given to the Champaigne Company transferred to himself, as the person rightfully entitled to the claims. There is a demurrer to the bill which challenges its sufficiency.

The subject has been considered by the supreme court in the case of Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., reported in 145 U. S., at page 428, 12 Sup. Ct. 877, 36 L. Ed. 762. In that case the property in controversy was relocated after an entry in the land office by James C. Luttrel, who was well known in Colorado, though the case arose in Arizona. The ground upon which Mr. Luttrel proceeded was that annual work had not been done upon the claims after the entry in the land office, and up to the time the patent was issued for the claim. The court states the proposition in this way:

"Upon these facts appellant claims that although the mine was fully paid for by the locators in 1879, and a certificate of purchase received, inasmuch as the patent did not issue until January 10, 1884, and because the plaintiff failed to do a hundred dollars worth of work in the year 1882, its rights ceased, and the relocation by Luttrel was valid and vested in him the property."

The court then proceeds to consider the question with reference to the law and the decisions of the supreme court and of the land department upon that question, and arrives at the conclusion that annual work was not required after the entry in the land office, and this upon the ground that the government parted with the property upon that entry, although the title remained in the government until the

patent was in fact issued. After some consideration of the question and discussion of the statute, the court says:

"In other words, when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the land department causes delay. But such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties."

And further on, after discussion:

"There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and that no third party can acquire from the government interests as against him. The decision of the trial court was correct. The attempted relocation by Luttrel was void, and gave him no rights of possession or otherwise."

This case decides the whole question presented in this bill, which is that after entry in the land office a relocation of the premises cannot be made so long as that entry stands. The only remedy for the parties is to induce the government to proceed towards setting aside the entry. In that respect complainant in this suit sought to have the entry set aside in the land office, and was overruled, but the ruling of the land office in that particular is not subject to review in this court.

The bill of complaint states no case, and it will be dismissed.

SOUTHERN BUILDING & LOAN ASS'N OF KNOX COUNTY, TENN., v. JOHNSON.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1901.)

No. 401.

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—SETTLEMENTS WITH BORROWING STOCKHOLDERS.

A building and loan association organized under the laws of Tennessee, and whose contracts were expressly made subject to such laws, made loans to its stockholders to an amount equal to only one-half the par value of their stock; the borrower being required to mature one half his stock to pay the principal of the loan, and the other half for the benefit of the association, as a premium on such loan. The state statute authorized the charging of premiums only as fixed by competitive bidding, and, as construed by the supreme court of the state, rendered premiums otherwise fixed usurious and illegal. *Held* that, on the winding up of such association in insolvency, in settlements between the association and borrowing stockholders the latter were entitled to credit on their loans for all dues paid on such premium stock, whether paid before or after the loan was made, since on the making of the loan they were required, in effect, to surrender such stock to the association, advanced towards maturity by the dues previously paid, as a usurious consideration for the loan.

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

This is an ancillary bill filed in the circuit court for the Western district of Virginia to wind up the affairs in that state of an insolvent building and loan association incorporated in Tennessee. The court of primary jurisdic-

tion was the chancery court of Knox county, Tenn., in which receivers had been appointed on April 16, 1897, to wind up said association on a general creditors' bill, which alleged that the association's assets were insufficient to pay all its stockholders in full, that under its by-laws many of the withdrawing stockholders were entitled to receive all they had paid in, with 10 per cent. interest or profits per annum thereon, that notices of withdrawal were on file for $300,000 of stock, and that to permit such withdrawals to be paid upon the terms mentioned would leave the association without sufficient assets to meet the claims of those stockholders who had not filed notices of withdrawal. There were a number of borrowing stockholders of this association in the Western district of Virginia, and in this ancillary cause the court ordered a reference to a special master, and he reported to the court the amount due by each of these borrowing stockholders. To the special master's report ascertaining these amounts the building association filed five exceptions. Of these the court overruled the first and second, and sustained the third, fourth, and fifth. From the decree of the court overruling the first and second exceptions the building association has taken this appeal.

The rule of settlement with borrowing stockholders adopted by the special master is stated by him as follows: He has charged the borrower with the money borrowed, and with interest thereon from the time when received by him, and has credited him with all payments made on "premium stock," as well prior to the loan as after, with interest thereon, and with one-half of all fines paid; the statement of the account being made upon the principle of partial payments, the payments being applied at the dates when made. No credit is given to the borrower on his loan for the payments made by him on "borrowing stock," since the value of such stock could not be ascertained at that time. On this stock the borrower will be entitled to dividends, when ascertained, in proportion to the amount paid thereon by him. The exceptions of the defendant association to the special master's report were, in substance, as follows: (1) Because the special master credited each borrower with all the payments on premium stock made prior to the loan, and with interest thereon. That this was error, for the reason that prior to the loan there was no premium stock, but all was investment stock, and the payments on all said stock should be treated as payments on investment stock. (2) Because the special master failed to include in the amount of stock payments made by the borrower on which he was entitled to merely a dividend all the payments made by the borrower on all his stock prior to the date of the loan.

The special master, in his report, thus states his understanding of the general scheme of the association:

"A person wishing to borrow $1,000 was required to subscribe for 20 shares of the stock of the association. Ten shares of this the borrower was expected to mature to pay or cancel the loan, by paying 60 cents per share per month, and he was to pay as interest on the loan $5 per month; and as a premium or bonus for the privilege of the loan he was required to mature the other ten shares for the benefit of the association, by paying 60 cents per share thereon per month until all 20 shares reached the par value of $100. When thus matured the borrower's loan of $1,000 and interest was considered paid, and all the stock canceled or redeemed; ten shares having been matured as premium for the benefit of the association. Hence we designate one half as 'borrowing stock,' and the other half as 'premium stock,' although in the pass books of the borrower payments on all the stock were placed under the head of 'Dues.' Thus the payments on a loan of $1,000 per month would be as follows:

Dues	$ 6 00
Interest	5 00
Premium	6 00
	$17 00

"A member taking a loan was required to execute his bond to the association for double the amount borrowed, and secure the same by a deed of

trust upon real estate. These bonds * * * were payable to the Southern Building and Loan Association on demand at its home office at Knoxville, Tennessee, * * * and both bond and deed of trust contained a clause stating that the loan was 'made with reference to the laws of the state of Tennessee,' and that the said 'bond is a Tennessee contract, and in all respects subject to and governed by the laws of said state.' By the bond and the deed of trust the borrower agreed to pay the monthly interest on the loan at six per cent., and the monthly dues on all the shares of stock until the stock should become fully paid in and of the par value of $100 per share, and then to surrender the stock to the association."

The master reported as part of his findings that the loans in question were not made upon competitive bids on the part of the borrowers in open meetings of the board of directors, as required by the statute law of Tennessee, but a uniform premium was fixed and regulated by the by-laws, and exacted from the borrower, as a condition of obtaining his loan, by the scheme which required the borrower to mature for the benefit of the association half of the stock subscribed for.

The following is the substance of the opinion of the court below (PAUL, District Judge):

"The Southern Building & Loan Association excepts to the report of the special commissioner filed in this cause on September 29, 1899. The first exception thereto is as follows: '(1) Because on page 7 of said report, in stating the basis on which he has computed the amounts due by the borrowers, and on pages 46 to 964 of said report, the special commissioner shows that he has credited each borrower with "all payments made on premium stock prior to the loan, with interest thereon." This was error, because there were no premium payments until after the date of the loans, and the payments made prior to the date of the loans, one-half of which are treated as premium payments by the special commissioner, were really payments of investment stock, and should have been so treated by the special commissioner. The correct result would be reached by adding to the amount found by the commissioner to be due by each borrower the amount of the so-called premium payments in each case up to the date of the loan, with interest from that date up to January 1, 1899; and your exceptor files herewith, as Schedule A, and as a part of these exceptions, corrected calculations showing the true amount due by each borrower on the basis of this exception.' The gist of the foregoing exception is that the commissioner erred in allowing credits for payments made by the borrower on premium stock prior to the date of the loan, with interest thereon; 'that such payments were really payments on investment stock, and should have been so treated by the commissioner.' Should this exception be sustained? is the question to be determined. The exception treats all stock held by the borrower as investment stock up to the time of granting the loan, and that there was no premium stock or premium payments until after the date of the loan, whereas the commissioner in his report follows the rule which maintains the distinction between the stockholder as such and the stockholder as a borrower, which charges him, as a borrower, with the money he actually received, with interest from its receipt, and credits him with all payments of premium and interest as of the date when paid, and allows him no credit for payment of dues upon his stock; that is, dues upon one-half of his stock, designated as loan or borrowing stock. As to these payments he is treated as a nonborrower, and the fund remaining after all prior liabilities are paid is distributed pro rata among stockholders upon the basis of the amounts paid them, respectively, as dues, whether borrowers or not. The exception by the association treats the premium for the loan as consisting merely of the monthly payments of 60 cents per share on one-half of the stock, made after the loan, as the premium on the loan, whereas the commissioner finds as a fact that the premium charged was one-half of the stock held by the borrower, which he was required to mature or bring to par for the benefit of the association; the same being matured, like the other half or loan stock, by monthly payments thereon at 60 cents per share. One-half of the stock held by the borrower brought to par being the pre-

mium required and charged by the association, it can make no difference whether the premium payments were made before or after the loan. All of them were made by the borrowers for the purpose of maturing the premium stock,—the same stock which the association required to be matured as a premium for the loan, and for its benefit. Payments made on such stock prior to the loan were nothing more than advance payments on the premium charged,—just advanced the premium stock that much towards maturity before the loan was made, and shortened the time by that much for bringing the stock to par. The commissioner finds that the loans reported in this cause were illegal and usurious because the premium charged was greatly in excess of that authorized by the statute of Tennessee (sections 1751, 1752, Mill. & V. Code), which premium was not to be at a rate in conflict with the law of the state, which is six per cent. interest; 'that the uniform premium charged by the association was fifty (50) per cent. per share of stock, it requiring the borrower to mature for the benefit of the association half of the stock subscribed for'; and this finding of fact by the commissioner is not excepted to by the association; hence, the premium charged being illegal and usurious, it was right and proper to credit the borrower with everything paid on the premium stock, whether before or after the loan, including one-half of the fines paid by the borrower. In no other way would the contract or loan be entirely purged of the usury. To allow credit only for premium payments made after the loan would give but partial relief from the illegal and usurious premium charge; and, had the commissioner found and reported in accordance with the exemption of the association, the report would be liable to exception on the part of the borrowers, as only giving partial relief from the illegal and usurious premium. It would allow the association to receive and keep money paid by the borrower, for which he would receive nothing in return, and to that extent permit the association to reap the benefits of its illegal gains. If prior to the insolvency of the association any borrower had paid his loan in full, still retaining his loan stock, and had received no credit for the shares upon which he borrowed, as he might have done, he could now claim and recover the entire amount paid as such premium, according to the case of Douglass v. Kavanaugh, 33 C. C. A. 107, 90 Fed. 373–377. There Adkins and wife borrowed and paid off their loan without receiving any credit for the withdrawal of the shares upon which they borrowed, but retained or held their stock; that is, their loan or borrowing stock. They were allowed to present their claims as creditors to the extent of the premium actually paid by them. They had not participated in any unlawful gains by receiving credit on their loans for the withdrawal value of their loan stock, and were for that reason allowed to present their claims as creditors for the amount of the premium actually paid by them, and this was right. To have held otherwise would have been to allow the association to have and retain the benefit of the illegal and usurious premium paid by Adkins and wife. So, here, to sustain the said exception of the association would be to allow the association the benefit of the illegal premiums to the extent of the advance payments complained of, while to apply the said payments, with interest thereon, as a credit on the loans, as was done by the commissioner, gives the entire benefit to the borrower who made them, takes nothing from the association to which it is lawfully entitled, purges the contract entirely and completely of the usury, and cancels or eliminates the premium stock from the case.

"Counsel for the association, in their brief, state that when the application of the borrower 'was accepted he thereafter made monthly payments upon one-half his stock, which was set apart and designated as premium stock.' This is in accord with the finding of the commissioner that the borrower was required to mature half of the stock subscribed for the benefit of the association; that the premium charged the borrower was (50) fifty per cent. per share of the stock subscribed for. Counsel in their exception do not show or pretend that the payments made before the bid or loan were set apart or credited in any way to the borrower, either on his loan stock or the loan itself, but merely one-half his stock was set apart and designated as 'premium stock.' It would seem from this statement of the matter that the payments before the loan went to mature the premium

stock,—as much so as these made after the loan,—and that they have been properly credited on the loans as part of the illegal and usurious premium charged. Upon what principles of justice could the association require the borrower to mature half the stock subscribed for by him as a premium for his loan, and then deny him credit for part of the payments made by him on such stock, and which would otherwise go towards its maturity? The contention of the counsel seems to lose sight of or ignore the illegality and usury in the entire premium charged, but they seem to think that it attaches only to payments after the loan. The premium charged was an entire thing. Maturity of half the stock for the benefit of the association, and the payments thereon, cannot be made part legal and part illegal on the ground assigned in the exception. Counsel claim that they are sustained in their position by the Post Case, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201, the Richardson Case, 101 Tenn. 178, 46 S. W. 452, and the Kavanaugh Case. We do not so understand the cases. In none of them was the question made in the form here presented. In the Richardson Case the premium paid was $18.90, including interest, and it does not appear whether it was made before or after the loan, or whether part before and part after,—that it was 'cash dues paid on the $450 premium stock which was to be matured for the company.' For this amount the lower court allowed the borrower credit, and its action was approved and confirmed. The borrower insisted that she should have the value of her stock upon her loan,—referring, as we understand the case, to the value of loan stock, which the court refused to allow her. Nor is the question of legality of the premium charged in that case brought in question. The syllabus of that case seems to be misleading and wrong. In the Post Case it does not appear that the borrower was required to mature half the stock for the benefit of the association as premium for the loan. There was a fixed premium of 30%, and it does not appear when or how it was paid. It may have been paid in advance, or deducted from the loan. If the plan of the association involved there was the same as in the McCauley Case, 97 Tenn. 421, 37 S. W. 212, 35 L. R. A. 244, 56 Am. St. Rep. 813, the premium was deducted from the loan. The dues upon the stock for which credit was asked were dues upon the borrowing or loan stock, so far as anything to the contrary appears. The premium was fixed at 30%, and the loan was evidenced by notes payable in six years after date, and the principal and interest were secured by mortgage upon real estate. The mortgages further secured the dues and fines prescribed by the by-laws. The notes were enforceable at maturity, irrespective of the maturity of the stock hypothecated to secure the loans. There is nothing said about premium stock. In the McCauley Case the borrower borrowed $1,600, for which she gave her note, bearing interest. She received upon the note $1,120, and the remaining $480 was claimed by the association as premium or bonus required for the loan. The borrower filed her bill to recover $340.72, claimed to be usury exacted on the loan by the building and saving association. The court below gave her a decree for the amount claimed, and the supreme court affirmed such decree. The loan was usurious, as having been made at a uniform premium of 30%, without free and competitive biddings; and the court said: 'Usurious loans of a building and loan association will be set aside at any time, and before the scheme has been matured, at the suit of the borrower; he being required in such case to pay back the money borrowed, with legal interest, after crediting payments already made with proper interest.' In the McCauley Case the association was solvent, as appears from the case, and the court purged the loan of the usury by allowing the borrower credit for the entire amount of the illegal premium paid by her, with interest thereon. There is nothing in the case of Douglass v. Kavanaugh which goes to sustain the exception of the association. That case says that where illegal premiums were exacted, which render the loans usurious, the borrowers should be charged with the sum actually received, and credited with payments made of premiums and interest as of the date when paid, and applying the sums paid as dues on the stock. In the Foster Case (C. C.) 94 Fed. 592, there is no such distinction made as raised in the exception, but 'payment of dues and fines on the premium stock are credited on the loan, and the stock canceled, while the aggregate dues paid on the

remainder or loan stock would constitute the amount of paid-up stock on which he would be entitled to dividends at the same rate paid on other paid-up stock.' Commissioner Gray's report states the account with the borrowers exactly in accord with the rule in the Foster Case, where the court said: 'Evidently $2,000 of this stock covered the $2,000 borrowed, and may be, for convenience, called "loan stock."' The other $2,000 in stock for convenience may be called "premium stock,"—the borrower there holding 40 shares, of $100 each, or $4,000 in stock.

"This exception is overruled."

Jerome Templeton (Fulkerson, Page & Hurt, on the brief), for appellant.

I. H. Larew, for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and BOYD, District Judges.

MORRIS, District Judge. The question raised by the appeal in this case is a narrow one. The contract is a Tennessee contract, and is to be construed by the law of Tennessee. It is settled by the supreme court of Tennessee that the premium exacted, not being by competitive bidding, was illegal, and must be credited on the loan. McCauley v. Association, 97 Tenn. 421, 37 S. W. 212, 35 L. R. A. 244, 56 Am. St. Rep. 813; Post v. Association, 97 Tenn. 408, 37 S. W. 216, 34 L. R. A. 201. This premium was exacted by the following device: The intending borrower was required to subscribe for twice as many shares as at their matured value would equal the loan. He was required to give security that he would mature all the shares for the benefit of the association, and in payment of the loan. This was illegal and usurious under the laws of Tennessee. By the rule of settlement adopted by the special master and approved by the decree of the circuit court, half of the stock was treated as "borrowing stock," and the other half as "premium stock." This was in accordance with the actual transaction, and is not excepted to, and it is admitted to be in conformity with the decisions of the supreme court of Tennessee. It was directly so held by the supreme court of Tennessee in Carpenter v. Richardson, 101 Tenn. 178, 46 S. W. 452. In that case it was shown that altogether a certain sum had been paid in on the premium stock. The chancellor ruled that this should be credited on the loan. On appeal this was urged as error, but the supreme court affirmed the ruling of the chancellor. This rule of settlement was also accepted as the Tennessee rule in Bowman v. Foster & Logan Hardware Co. (C. C.) 94 Fed. 592–599, the circuit court saying, "It will be seen by this rule that all dues paid on premium stock and all interest are credits on the note."

The only matter assigned as error is this: The by-laws provided that no loan should be granted to a member until three months from the date of his certificate, and it frequently happened, before the loan was actually consummated and the money paid, that the borrower had paid in several months dues both on the borrowing stock and the premium stock. The sole question raised by this appeal is whether the dues paid on the premium stock before the date when the money loaned was actually paid over are to be cred-

ited to the loan, as well as the dues paid afterwards. To obtain the loan the borrower contracted to mature his borrowing stock, and to pay 6 per cent. interest on the loan during the time required to mature it. This was legal, and every payment of dues he had already made and every payment of dues thereafter made on that stock went to his benefit, because it contributed to the maturing of his stock, dating from his first payment. With regard to the "premium stock," every payment he had already made before obtaining the loan and every payment thereafter made went to the benefit of the association, because he, in effect, surrendered the premium stock to the association as a bonus or usurious exaction. He surrendered to the association all he had already paid in and all he agreed thereafter to pay as dues on the premium stock, as the consideration for obtaining the loan on his borrowing stock. As to this stock he ceased to have any beneficial interest. It went to the association as a premium for the use of the money advanced. This was not sanctioned by the Tennessee law, and was usurious and illegal; and in settlement he is entitled, we think, to credit for all those payments from the commencement, because under the scheme they were usurious exactions. Counsel for the association urge that until there was a loan there was no premium stock, and that prior to the loan all was investment stock; but, as is pointed out in the opinion of Judge PAUL, the payments made before the loan, as well as those made afterwards, were paid for the purpose of maturing this premium stock, and these payments advanced the stock towards maturity. The transaction exacted of the borrower that he should surrender all interest in this premium stock to the association, and it was a usurious consideration for the loan. Equity requires that all payments thereon should be credited.

There is no other question raised by this appeal of the Southern Building & Loan Association. None of the borrowing stockholders have appealed.

Finding no error in the decree, it is affirmed.

LOUISVILLE HOME TEL. CO. v. CUMBERLAND TELEPHONE & TELEGRAPH CO.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1901.)

No. 1,005.

1. APPEAL—REVIEW—ORDER GRANTING PRELIMINARY INJUNCTION.
An order granting or refusing a preliminary injunction will not be reversed on appeal, unless the lower court has manifestly fallen into some mistake of law or fact material to its decision.

2. TELEPHONES—RIGHTS IN STREETS—PRIORITY OF OCCUPATION.
While the prior occupancy by a telephone company of space in a street for its poles and wires under a franchise granted for such purpose will entitle it to the continued enjoyment thereof, without substantial impairment, so long as it continues to perform its obligations, its right to such space is not absolutely exclusive, but is sub-

ject to the right of another company to enjoy a like privilege therein granted under power reserved by the municipality, provided there is no unreasonable or unnecessary interference with the operation of its own line, and it will suffer no serious injury therefrom.[1]

3. SAME.

A telephone company constructed its line in the streets of a city under a franchise granted therefor which expressly reserved the right to the city to grant similar rights to other companies. Thereafter a franchise was granted to a second company, which was required to construct its line under the directions of the board of public works, and such board required its line on certain streets to be placed on the same side and over the same space occupied by the first company. The poles were planted in line with those of the first company, but were extended 25 feet higher, with the cross arms 20 feet above those of the old line. *Held*, that there was no such substantial interference with the rights of the first company, or serious injury threatened to the operation of its line, as entitled it to a preliminary injunction to prevent the placing of wires on the poles of the second company and their use pending the trial of a suit for a permanent injunction.

4. SAME—POWER OF CITY TO DESIGNATE LOCATION.

It is within the power of a city to designate on what part of its streets a telephone company shall construct its line, and the exercise of such power is presumptively valid, and cannot be interfered with by the courts, unless shown to have been arbitrary and unreasonable.

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

This is an appeal from an order of the circuit court granting a preliminary injunction in a suit in equity brought by the Cumberland Telephone & Telegraph Company against the Louisville Home Telephone Company for the purpose of restraining the latter company from erecting or maintaining telephone poles and wires along the south side of Park avenue and the north side of Hill street, in the city of Louisville, within the limits of the space occupied by the complainant. 110 Fed. 593. The bill alleged that the complainant (who is here the appellee) was a consolidated company, the constituents of which were the Ohio Valley Telephone Company, a local company at Louisville, and another company bearing the same name as that assumed by the consolidated company. This last-named constituent was doing business in the state at large outside of the city of Louisville. The Ohio Valley Telephone Company was incorporated by an act of the legislature of Kentucky approved April 3, 1886. By the fifth section of the act it was provided that "the said company may construct, equip and maintain said telephone systems and exchanges, and erect poles and string wires thereon, and operate its telephone lines over, along or under any highway, street or alley in the city of Louisville, with and by the consent of the general council of said city; and it may purchase or lease from any corporation created under the laws of this commonwealth, on such terms as may be agreed on, any telephone system or exchange, its poles, wires, apparatus, contracts, licenses, patents or interests therein, equipments, rights of way, easements and servitudes, in the highways, streets and alleys in the city of Louisville, together with all of its properties, and when purchased or leased shall have the power to maintain and operate the same along, over or under the highways, streets and alleys of the city of Louisville: provided, however, that such telephone poles, lines and systems have heretofore been granted the right of way or easements in the highways, streets and alleys in the said city of Louisville by the general council thereof. And the said company may also construct, equip and maintain telephone lines along, over or under the

[1] Rights of telegraph and telephone companies to use of streets, see note to Southern Bell Telephone & Telegraph Co. v. City of Richmond, 44 C. C. A. 155.

highways, streets and alleys, and across any water course within this commonwealth, so as not to obstruct the same, and said company may connect its lines with those of any other company on such terms as may be agreed on." 1 Acts 1885–86, p. 1175.

On the 17th of August the common council of the city passed an ordinance, which, after reciting the preceding fifth section of the act of the legislature, proceeded as follows: "Therefore be it ordained that the said act, in so far as it refers to constructing, equipping, operating, and maintaining telephone systems and exchanges, and erecting poles and stringing wires thereon; to constructing, operating, and maintaining conduits and manholes; to laying pipes, cables, conductors, and wires, and operating telephone wires over, along, or under the highways, streets, and alleys in the city of Louisville, is hereby ratified and confirmed, and the right is hereby granted and confirmed to the said the Ohio Valley Telephone Company, its successors and assigns, to construct, equip, operate, and maintain telephone systems, and construct, operate, and maintain conduits and manholes, to lay pipes, cables, conductors, and wires, and operate its telephone lines over, along, or under any street, avenue, alley, or sidewalk in the city of Louisville." The ordinance contained this further provision: "Nothing in this ordinance shall be so construed as to give to the said telephone company, its successors or assigns, any exclusive right to erect poles, or to lay underground conduits, pipes, cables, conductors, or wires, in the streets, avenues, alleys, or sidewalks of the city of Louisville." And by the ninth paragraph of the ordinance it was ordained: "That within thirty days from the passage of this ordinance the said the Ohio Valley Telephone Company, its successors and assigns, shall formally agree, in writing, to accept the terms of the provisions of this ordinance, and file the said written copy of said agreement, and also the aforementioned bond, with the mayor of the city of Louisville, and from and after the date of said acceptance this said accepted ordinance shall take effect and be in force as a contract between the said city of Louisville and the said the Ohio Valley Telephone Company." The provisions of the ordinance were accepted by the company, and it proceeded to construct, and thereafter maintain, a telephone system in the streets of Louisville until June 27, 1900, when it was consolidated under the constitution and laws of Kentucky with the Cumberland Telephone & Telegraph Company, as above stated. Since that time the consolidated company has continued to maintain and operate the telephone system in the city under the power granted to the Ohio Valley Telephone Company and devolved upon the consolidated company by operation of law. Among the sets of lines so constructed and operated was one on the south side of Park avenue, extending from Sixth street to the alley between Fifth and Fourth streets, and another on the north side of Hill street, extending from Sixth street to the alley between Fifth and Fourth streets, upon each of which lines poles and cross arms had been erected and numerous wires were strung.

Some time in 1900 the Louisville Home Telephone Company was incorporated under the laws of Delaware, and on November 5th of that year the common council of the city of Louisville passed an ordinance, entitled "An ordinance to provide for the sale of the franchise or privilege to construct, establish, maintain, and operate a telephone system in the city of Louisville," and containing the following provisions:

"Section 1. That there shall be sold to the highest and best bidder for a term of twenty years the franchise or privilege to construct, establish, maintain, and to operate a telephone system for public and private use in the city of Louisville, including the necessary conduits, subways, manholes, wires, poles, and other equipments, and also the right of way over, along, under, through, and in the streets, avenues, alleys, lanes, parks, squares, bridges, and other public places in said city, for the purpose of running the subways, manholes, poles, wires, and other equipments necessary to construct, establish, maintain, and operate said telephone system in the city of Louisville in accordance with the conditions, terms, and limitations of this ordinance."

"Sec. 5. That any person, firm, or corporation owning or exercising such franchise or privilege may assign or transfer the same, but it shall not be assigned or transferred directly or indirectly, in whole or in part, or for the

benefit of the owner or owners of any competing telephone system operating in the city of Louisville.

"Sec. 6. That the said telephone system shall be located and constructed in the public ways and places in the city of Louisville under the supervision of the board of public works."

"Sec. 14. That the franchise or privilege herein provided for shall not be construed as being in any way exclusive, or as preventing the general council of the city of Louisville from providing for the sale of similar franchises or privileges to other persons, companies, or corporations."

The Home Company became the purchaser at the sale of the franchise for the price of $10,000. Desiring to construct lines, each of several squares in length, along Park avenue and Hill street, upon some portion of which the other company had, as above stated, already constructed its lines, the Home Company made application to the board of public works to locate its line in those streets. By resolutions of the board, duly passed, the Home Company was permitted to construct its pole routes along the north side of Hill street and the south side of Park avenue. That company proceeded to erect its poles accordingly, and in that portion of those streets which was already occupied by the other company, set its poles in the same line with those of the other company and run them up between the wires, 25 feet higher than those of the other company. The reasons which induced the location of the Home Company's poles and lines on the same route with that of the other company on this portion of the streets appear to have been mainly these: The only feasible place for setting the poles is by the side of the street at the curbstones. On the south side of Hill street that place was already occupied by the poles and wires of an electric light line, which, on account of the greater voltage required in that service, rendered the proximity of telephone wires not only dangerous to the system itself, but to the lives of those employed about them. On the south side of Park avenue there were no residences. The other company was located there, and for a distance of two or three poles there was an electric light line. On the north side of the avenue there were no electric lines, but the territory north of the street was filled with residences, and fine shade trees were standing by the side of the street, which would have to be mutilated if electric wires of any kind were strung there. Other reasons are suggested for the determination of the board of public works, but in the view taken of the case by the court here it is not necessary to detail them. The Home Company having erected its poles and cross arms for the wires, the Cumberland Company filed this bill, alleging that by reason of the prior location of its poles, cross arms, and wires, which covered a width of 8 feet, it was entitled to retain that space free from interruption; that, although the Home Company proposed to carry its poles 25 feet higher than its own, and string its wires some 20 feet or so higher than its own, such construction would be injurious to its rights, for the reasons that by the breakage of wires, which frequently happens, the lines above would fall down upon its wires and disturb its operations; that the poles would abrade its wires and cables and destroy their insulation; that its workmen would be imperiled while making additions or repairs, and that it intended to extend its own lines upward and would require the space above.

Affidavits were filed in support of the averments of the bill, and upon these (the bill and affidavits) the motion for a preliminary injunction was brought on. The Home Company filed affidavits controverting the grounds on which substantial injury would be likely to result to the complainant from the intended construction, offering to provide means for insulating complainant's wires and cables from the structures of the Home Company, and averring that it had tendered the choice of location for the wires, whether above or below, to the complainant, which offer had been rejected. Upon the hearing, the court made the following order, granting the injunction prayed: "In consideration thereof it is now adjudged and decreed that until the further order of court it [defendant] be, and it is, restrained and enjoined from erecting or maintaining any poles or cross arms, or stringing any wires thereon, any of which shall encroach on a space of the breadth of 8½ feet, which space is the line of telephone poles of complainant on the south side of Park avenue between Sixth street and the first alley west of Fourth street, and the north

side of Hill street from Sixth street west [east?] to the first alley west of Fourth street." From this order the defendant appeals.

Helm Bruce, for appellant.
David W. Fairleigh, for appellee.

Before DAY and SEVERENS, Circuit Judges, and THOMPSON, District Judge.

SEVERENS, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

This being an appeal from an interlocutory injunction, we are required, in making our determination, to recognize the rule, which we have announced and applied in several previous cases, that we should not disturb the order unless the lower court has manifestly fallen into some mistake of law or fact material to its decision. Garrett v. T. H. Garrett & Co., 24 C. C. A. 173, 78 Fed. 472; Proctor & Gamble Co. v. Globe Refining Co., 34 C. C. A. 405, 92 Fed. 357; Thomas G. Plant Co. v. May Co., 44 C. C. A. 534, 105 Fed. 375, 379. The circuit court appears to have accepted as correct the contention of the complainant that, by its prior occupation of the space which it occupied by erecting its poles, cross arms, and wires over a width of 8 feet and at the height of 25 feet, it acquired an exclusive right to occupy that width of space from the ground upward without limitation, and this without any intrusion by another party; for the order must be construed by reference to the fact that the intrusion which the defendant was charged with intending to make when the injunction was moved for was that of stringing its wires above and out of contact with the structures of the complainant. In this the court misconceived the nature and extent of the rights of the complainant. It may properly be conceded that its prior occupation of space under the franchise granted by the statute and ordinance would entitle it to the continued enjoyment thereof, so long as it continued to perform its obligations, without substantial impairment. But its right is not absolutely exclusive. It is subject to such incidents as result from the exercise of the rights of other parties who have acquired a valid franchise of similar character. It is implied in such grants as were here made to the first company that the grant is subject to such limitations as will enable another company to enjoy a like franchise, and no property right is invaded by the adoption of such measures by the second company as will enable it to exercise its privilege, provided there is no unreasonable and unnecessary invasion of the operations of the first occupant. For the property right of the first is not to a monopoly. It is bound to exercise its privilege in such a way as to give room to another coming in under the power reserved. In the present case the common council of the city expressly reserved the authority to grant to others, if it should deem it for the public interest, the same privileges in its streets as it granted to the complainant. Its determination that it was expedient to grant the Home Company the same privilege it had granted to the Ohio Valley Company cannot be gainsaid, and the old company is bound to recognize the new-

comer and grant all reasonable accommodation. Upon principle it may be doubted whether the first company could block the way in any of the streets so as to prevent the possible exercise of the power reserved to the common council.

It is not intended, of course, to say that the first occupant may be despoiled, or the substance of its right appropriated. But this does not happen from merely giving place to a rival company, whose presence was expressly stipulated for by the contract, nor, probably, if the presence of the new party was the result of the exercise of a power reserved by implication in such a grant of privileges. The distinction between the actual invasion of the property of a former licensee engaged in supplying public utilities and those incidental consequences which result from the authorized exercise of the privileges granted to a subsequent licensee for similar purposes was pointed out in an elaborate opinion by Judge Brown, now a justice of the supreme court, in Cumberland Telephone & Telegraph Co. v. United Electric Ry. Co. (C. C.) 42 Fed. 273, 12 L. R. A. 544, where the authorities are collated.

Mere inconvenience will not afford ground for complaint. The injury must be grave and unwarranted by the requirements necessary to such further exercise of the municipal authority in that direction as may be deemed expedient. The evidence in the record leaves no doubt whatever in our minds that the inconveniences likely to be suffered by the Cumberland Company in consequence of the proposed construction by the Home Company are comparatively trivial. The affidavits of experts and practical men show that the practice of constructing a system of lines by one company above the lines of another is very common in many cities which are enumerated, especially where both are telephone systems, and no substantial inconvenience has been found to result. The city at all times has the power of regulation. It may not be arbitrarily exercised, but within reasonable bounds the city authority may rightfully designate in what manner the public interests require public services to be rendered, to the extent, at least, of determining in what part of a street the facilities shall be located, and presumptively this exercise of the police power is valid. Its right to do this was not surrendered by the city when it made the grant of the franchise to the Ohio Valley Company. The power in this instance was delegated to the board of public works, and there is an entire lack of proof that the board acted arbitrarily, or without due regard to the rights acquired by the Cumberland Company. Com. v. City of Boston, 97 Mass. 555; Chicago, St. L. & N. O. R. Co. v. Louisville & N. R. Co. (Ky.) 58 S. W. 799; Gay v. Telegraph Co., 12 Mo. App. 485; Michigan Tel. Co. v. City of Charlotte (C. C.) 93 Fed. 11, and the authorities there cited. Besides, it follows from the conditions we have noted that there was no grave danger to be apprehended at the time this bill was filed. The poles of the Home Company had been already erected and the cross arms put on. No action appears to have been taken until after this was done. There appears no such impending danger of injury to the complainant from the stringing and maintenance of the wires pending the suit as would justify

the interference of the court before the final hearing and anticipating the entire purpose of the bill. Blount v. Societe Anonyme du Filtre, etc., 3 C. C. A. 455, 53 Fed. 98 (per Jackson, J.).

The order granting the preliminary injunction must be reversed, with costs.

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RY. CO. v. CONTINENTAL TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1901.)

No. 950.

1. RAILROADS—PREFERENTIAL DEBTS—RENTAL OF TERMINAL PROPERTY.
   A debt incurred by a railroad company for the rental of terminal property, under a 40-year lease which provided for its forfeiture, together with all improvements placed on the property by the lessee, on default in payment of rent, is not a debt of the income, and entitled to preferential payment from the net income of a receivership, under the usual order directing payment by the receiver of such claims accruing within six months; nor does the fact that the lessee covenanted to pay the taxes on the property render a claim of the lessor for taxes paid a preferential debt,—such taxes, as between the parties, being merely a part of the rental.
2. APPEAL—REVIEW—FINDINGS OF MASTER.
   Where the transcript on appeal does not contain all the evidence before a master with respect to a claim in controversy, the report of the master thereon cannot be set aside on any question of fact.
3. RAILROADS—PREFERENTIAL DEBTS—ORIGINAL CONSTRUCTION.
   A claim against an insolvent railroad company, made by a lessor to such company of terminal property, for the construction of new tracks thereon, which by the terms of the lease were subject to forfeiture to the lessor on default in payment of rentals, is not one for current repairs, nor for ordinary operating expenses, which entitles it to preferential payment from current income, but one for original construction, and not preferential.

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

Under the bill of unsecured judgment creditors, filed for the benefit of all creditors who might avail themselves of the benefits of the proceeding, a receiver was appointed in the court below, who took possession of the railway owned and operated by the Toledo, St. Louis & Kansas City Railroad Company. In the order directing the receiver to take possession and operate said railroad, it was, among other things, directed that the receiver, "out of the income" of the receivership and after paying his operating expenses and taxes due or to become due, should pay "all amounts due or to become due employés of said railroad company, all claims for labor and services, all claims for materials and supplies furnished said railroad company within six months prior thereto, and all balances due or to become due to other railroad or transportation companies on balance accruing out of the exchange of traffic accruing within six months prior hereto." The appellant, by leave of the court, intervened in said cause and asserted claims aggregating some $16,000 against the railway company, and asked to have same paid as preferential claims incurred within six months prior to the receivership, and payable out of receiver's income under the order above recited. Subsequently a mortgage foreclosure bill was filed in the same court. The receivership under the creditors' bill was extended to this foreclosure proceeding, and the two suits were consolidated. This intervening petition was answered, and the preferential character of the claims set up denied. The issues thus

arising were referred to a special master, "to take the evidence and report the same to this court, with his conclusions of fact and law." The special master reported against two items in the claim of appellant, which were as follows: (1) Rental of terminal property in St. Louis accruing within six months prior to the receivership, $14,328.64. (2) Construction of tracks on rented terminals, furnishing rails, ties, and other materials, and for blocking and planking same at crossings, $2,042.04. The master reported that the first item was not a preferential claim, being for rentals of terminal property. He reported against the preferential character of the second item, as being for the cost of original construction of railway tracks upon the leased terminal property referred to above, and not repairs or other expenditure reasonably necessary for the maintenance of a completed railway. Exceptions filed to this report by the intervener were overruled, and the report confirmed, and the equitable relief sought denied.

Alex L. Smith, for appellant.

Clarence Brown, for appellee.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The intervening petition filed by the appellant did not aver that there had been any diversion of income applicable to current expenses, either by the railroad company or the receiver, and the master reported that no diversion had been shown. To this part of his report no exception was taken. The master further reported that both claims were just liabilities of the railroad company, but were "not entitled to any preference over the claims of the common creditors of said railroad company." Under this report there was nothing in the way of a decree against the railroad company as upon a non-preferential, unsecured debt. If the appellant failed to take such a decree, it was its own fault, and no error has been assigned because it was not given such a decree.

2. The only exceptions to the master's report, and the only errors assigned upon the decree below, go to the preferential character of the debt due to appellant. If the claims of appellants are of the character which the court below directed the receiver to pay out of the income of the receivership, after the payment of the current expenses of the receivership, the appellant was entitled to have that fact determined, and the receiver directed to pay same out of any surplus of income, if any such surplus there was. Whether there was a surplus of income applicable to such claim was not referred to the master, reported on by him, or adjudged by the decree from which the intervener has appealed. That is a question for further reference and determination, if it shall be found that the intervener's debts are of the class ordered to be paid out of such surplus.

3. The contention of the learned counsel for the appellant is that the claims presented fall within the terms of the order in respect to the use of the income of the receivership. If this is so, it must be because the claims are of the class termed "debts of the income," and properly payable out of income, in preference to mortgage or other indebtedness of the railroad company. The direction of the court on appointing the receiver was in the terms of the usual order made for the payment of what are sometimes described as "six

months' claims," or "debts of the income,"—debts incurred in the current operation of the road, for the purpose of maintaining it as a going concern, and discharging its obligations as a common carrier. The direction to pay claims for material, labor, and supplies furnished within six months plainly implied that they must have been furnished under such circumstances as to constitute a preferential claim under the well-settled rules in respect of such claims. The effect of the order was to obviate the necessity for any evidence of a diversion by the railroad company of income primarily applicable to the payment of current operating expenses, and this was the construction placed upon the order by the master, as well as by the court below.

4. Neither claim was entitled to payment under this six months' order. The claim for $14,328.64 is a claim for rentals of certain terminal facilities. The railroad company's railroad terminated on the east side of the Mississippi river at East St. Louis. The appellant company owned a railroad bridge connecting St. Louis and East St. Louis, and a line of railroad on the St. Louis side of the river. Desiring to acquire terminals in St. Louis, and to extend its railroad into that city, the railroad company contracted with the bridge terminal company, the appellant here, that the latter should lease to it certain St. Louis property, to be used for terminal purposes by the railroad company, and that the latter should have access to same over the bridge and railroad of the lessor. The estate acquired by the railroad company was a leasehold for 40 years, with an option to purchase. For the use of this property the railroad company agreed to pay a rental equal to 6 per cent. per annum on the agreed value of the property and the taxes thereon. There was a provision for the forfeiture of the lease and all improvements thereon in default of payment of rent for a specified time. The suggestion that a part of this claim was for taxes, and therefore payable under the order of the court, is without substance. The taxes sued for were a part of the rentals, and were payable only because the total rent was arrived at by adding taxes to 6 per cent. upon the value of the leased property. The claim is therefore a claim for rentals of terminal facilities which were secured by a stringent forfeiture clause. They were properly disallowed. The case in this respect is governed by the decisions of this court in Louisville & N. R. Co. v. Central Trust Co. of New York, 31 C. C. A. 89, 87 Fed. 500, and the later case of Gregg v. Trust Co. (C. C. A.) 109 Fed. 220.

5. The claim for $2,042.04 was reported against by the master because it was a claim for original construction, as well as because he found that the appellant "depended more upon the general credit of the railroad company than upon the protection and interposition of a court of equity." The whole evidence in respect to this claim which was before the master is not in the transcript, and this itself furnishes an insuperable objection to setting aside the report of the master upon any question of fact. Rhode Island Locomotive Works v. Continental Trust Co., 47 C. C. A. 147, 108 Fed. 5. The evidence in the record upon the matter of this claim is meager, but from that which is in the transcript and the report of the master it is clear that

the account is for the construction of railway tracks upon the property leased to the railroad company for terminal purposes. Under the terms of the lease all structures and tracks placed upon the leased property were subject to forfeiture for default in payment of rentals. Manifestly the debt due appellant is no part of the current expenses of operating or maintaining the railroad as a going concern. It was a debt incurred in the scheme of extending the railroad from East St. Louis, across the Mississippi river at St. Louis, by the use of the bridge and railroad of the bridge terminal company; the new tracks constructed being essential to connect the leased terminal property with the railroad of the lessor company, as well as to fit the terminal property itself for use as a St. Louis depot. The construction of these new tracks, and furnishing the rails, ties, etc., was original construction, and neither current repairs nor ordinary operating expenses. The case is governed by Railroad Co. v. Hamilton, 134 U. S. 296, 302, 10 Sup. Ct. 546, 33 L. Ed. 905, and Porter v. Steel Co., 120 U. S. 649, 671, 7 Sup. Ct. 741, 30 L. Ed. 830.

The decree is accordingly affirmed.

BECKER v. OLIVER.

(Circuit Court of Appeals, Third Circuit. November 25, 1901.)

No. 28.

1. APPEAL—REVIEW—HARMLESS ERROR.

In an action on a number of notes given at the same time and for the same consideration, to all of which except the one last maturing the defense of limitation was pleaded, as well as other special defenses, where the jury returned a verdict for plaintiff as to the last note only, it cannot be presumed that any evidence admitted upon the other issues joined was prejudicial to plaintiff, even if its admission was error, since the jury must have found all such issues in his favor, and thereby negatived any inference that they were prejudiced against him by such evidence in considering the defense of limitation.

2. LIMITATIONS—REMOVAL OF BAR—PAYMENTS.

Payments made by the maker of notes to the payee after their maturity, in order to have the effect of postponing the running of limitation against such notes, must have been made under such circumstances as to amount to an acknowledgment of the validity of the notes, from which a promise to pay them can be implied, and the essential fact upon that issue is the intention of the payor. The fact that the payee applied the payments on any or all of the notes is of no probative value as evidence of the actual intention of the payor, unless it is further shown that such application was made by his direction or with his consent.

3. SAME—ACKNOWLEDGMENT OF DEBT—WHEN QUESTION FOR JURY.

Defendant executed his notes to plaintiff in payment for stock and bonds of a corporation, which he pledged as security for the notes. After the maturity of the notes the corporation was reorganized, and new stock and bonds issued, and defendant took up the old collateral, and substituted for it the bonds and stock issued by the new corporation in lieu thereof. In a subsequent action on the notes, defendant pleaded the statute of limitations, and also claimed and testified that they were to be payable only from the profits of the corporation accruing on the stock and bonds purchased. *Held*, that the question whether the substitution of collateral after the maturity of the notes was such an acknowledgment of the debt as to remove the bar of limitation was one of fact, properly submitted to the jury.

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

Henry A. Davis, for plaintiff in error.
Henry A. Fuller and Henry W. Palmer, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This action was brought in the court below February 16, 1900, to recover the money alleged to be due upon 10 promissory notes made by the defendant in favor of the plaintiff. The notes were all dated March 4, 1890; each being for the sum of $10,000, and payable to the order of the plaintiff,—the first, 18 months after date, and the others at intervals of 3 months, respectively, thereafter, the last falling due 48 months after date, to wit, on March 4, 1894. It appears from the pleadings and proofs in the record that the consideration of these notes were certain bonds and shares of the capital stock of a mining company, owned by plaintiff and sold to the defendant, and which remained in the possession of the plaintiff as collateral security for the payment of the said notes. In addition to the general issue, a number of special defenses were pleaded by the defendant, to which replications were filed by the plaintiff, and issue joined. Some of these special pleas allege fraud on the part of the plaintiff, by means of false representations made as to the condition of the mining company whose shares were the consideration of the notes. One of the special defenses as to which issue was joined was that at the time of the making of the notes it was specially, though verbally, agreed between plaintiff and defendant that the notes should be paid out of the dividends or profits of the mine, and should not be payable until the mine was profitable. Testimony in support of these pleas was in some cases admitted over objection of the defendant, although the court in its charge withdrew the subject-matter of some of the questions from the consideration of the jury, or greatly restrained their scope in submitting them. In addition to the special pleas referred to, there was a plea of the statute of limitations as to all these notes. There is no doubt that the bar of the statute applied to all except the one last coming due, unless the same was removed by some acknowledgment on the part of the defendant within the six-years period of limitation. In delivering its charge to the jury the court below discussed at length the various defenses which were the subject-matter of the pleas to which allusion has been made, and also the contention of the plaintiff that the bar of the statute as to the nine notes to which it applied had been removed by acknowledgments of the defendant of an existing indebtedness within six years, evidenced by payments alleged to have been made on account of these notes within the period named, and also by the alleged giving by the defendant of collateral security for their payment within the same period. At the close of its charge the court, in order to facilitate the labors of the jury, and that the grounds of their decision might be certainly known, prepared and submitted to them four forms of verdict, one of which might be adopted, in their discretion, in case their findings of fact warranted.

It was suggested that if none of the defenses, including that of the statute of limitations, should be considered to have been maintained by the defendant, a general verdict for the plaintiff for the amount due upon the face of the 10 notes should be returned by the jury, but if the jury should be of opinion that none of the defenses were good, except that of the statute of limitations, then they might find for the plaintiff for the amount of the one note which was not barred by the statute, and for the defendant as to the nine notes, on the ground that they were barred by the statute. The forms prepared covered these and other contingencies, and the jury in fact found in accordance with one of them, as follows:

"As to the first nine notes in suit, the jury find they are barred by the statute of limitations, and as to them we find in favor of the defendant. We find as to said tenth note, dated March 4, 1890, on the other issues involved in the case, in favor of the plaintiff, in the sum of $16,451.66."

The jury were not confined to these forms of verdict. They were advisory suggestions given by the court to assist the jury in reaching a logical conclusion, and in distinguishing the several questions of fact submitted for their consideration. As such, they were undoubtedly helpful, and within the competence of the court, under the Pennsylvania practice, to make, and the jury to adopt. From the verdict thus rendered there can be but one inference, to wit, that the jury found all of the facts in favor of the plaintiff, except those relating to the defense of the statute of limitations, and but for the statute would have rendered a verdict in favor of the plaintiff for the full amount of the 10 notes sued upon. It is natural to conclude, therefore, that the plaintiff was not harmed by any errors, if there were such, either in the admission by the court of testimony in support of the other pleas and defenses, or in the charge of the court to the jury in regard to the same. It is contended, however, by the plaintiff in error, that the admission of testimony in support of these special defenses, and the rulings of the court with reference to them, involving, as they did, the character and reputation of the plaintiff, were calculated to prejudice the minds of the jury in considering the evidence as to the facts relied upon by plaintiff to establish such an acknowledgment of indebtedness on the part of the defendant as would remove the bar of the statute. A careful reading of the record shows that the court below admitted much of the testimony objected to, in the preliminary stages of the trial, with the reservation of the right to withdraw it altogether from the consideration of the jury, or restrict its scope, if submitted. We do not see that the fact of the admission of such testimony upon issues joined by the plaintiff, or that the language of the court in submitting, withdrawing, or restricting it, can be presumed to have been prejudicial to the plaintiff in the final outcome of the case. In rendering a verdict for the plaintiff for the one note that was not barred by the statute, the jury has certified its finding that it negatived all inferences injurious to the plaintiff in the pleas and defenses objected to.

It remains only for us to consider whether there was any error made by the court below in submitting to the jury the evidence relating to the removal of the bar of the statute, or in not giving them

a peremptory instruction as to the effect of such evidence. It is not controverted that nine of the notes sued upon had matured more than six years prior to the bringing of suit, and the only question to be considered by the court and the jury was whether there had been such an acknowledgment by the defendant, within six years, of the indebtedness thereon, as would remove the bar of the statute as to these nine notes. The testimony adduced and relied upon by the plaintiff to remove the bar of the statute was, first, that of the plaintiff himself, who testified that the defendant, during the period that these notes were outstanding, from January, 1891, down to January, 1899, had made sundry payments on account thereof,—some 20 in all. Many of the credits appearing upon the said notes were of a date, and were testified by the plaintiff to have been so made, as to be within six years of the commencement of this suit. The plaintiff further testified that these payments were made generally by the defendant, without any specification as to how they were to be applied, but that he, in the absence of any direction on the part of the defendant, had apportioned them to the several notes by indorsing upon each one a credit of one-tenth of the total payment, and that these credits were made at the time they bear date. The credits so indorsed, and in evidence with the notes, were on each note substantially as follows:

Credit by cash paid Colorado taxes, January, 1891	$ 41 18
Credit by cash paid survey, April 1, 1891	193 20
Credit by cash paid Colorado taxes, January, 1892	41 18
Credit by cash paid surveys, March 29, 1892	156 80
Received of Paul A. Oliver eleven hundred and fifty-six $^{67}/_{100}$ (1,156.67) dollars, this August 12th, 1892. T. H. Becker. Pay to Theodore H. Becker.	
Credit by cash paid Colorado taxes, January, 1893	41 18
Credit by cash paid Colorado taxes, January, 1894	41 18
Credit by cash paid Colorado taxes, January, 1895	41 18
Credit by cash paid Colorado taxes, January, 1896	41 18
Credit by cash paid Black Hawk taxes, 1880–90, Nov. 26, 1896	86 97
Credit by cash paid Chase Withrow fees, March, 1897	15 00
Credit by cash paid Teller & Orohood, for Apr. 26, '97	53 33½
Credit by cash paid Colorado taxes, January, 1897	41 18
Credit by cash paid W. R. Polk, April 21, 1897	100 00
Credit by cash paid C. W. Jones, April 26, 1897	100 00
Credit by cash paid A. Knopf, May 1, 1897	100 00
Credit by cash paid T. H. B., Jan., 1897, to Jan., 1898	100 00
Credit by cash paid Colorado taxes, January, 1898	41 18
Credit by cash paid T. H. B., Jan., 1898, to Jan., 1899	100 00
Credit by cash paid Colorado taxes, January, 1899	41 18
Credit by cash paid satisfaction, filed March 28, '99	200 00
Credit by cash paid T. H. B. from Jan., '99, to July, '99	50 00

It will be observed that these various credits purport to have been cash paid for different purposes of the plaintiff, and are not stated to have been mere cash payments on the notes on which they are indorsed. The plaintiff testified, however, that the payments were made by the defendant to meet certain demands upon himself, of which memorandum is made by the indorsements, and that the defendant understood when he paid these debts of plaintiff that the payments so made were to be a credit upon his indebtedness generally on account of these notes. On the part of the defendant it is

contended that the handwriting in which the credits are made on the several notes is of such a character as to suggest that they were made contemporaneously. The defendant himself testified that he did not pay nor intend to pay upon the notes any of the matters indorsed; that the taxes credited were not paid for plaintiff, but were supposed by defendant to have been paid for the company whose bonds were taken by defendant as security for the advancement. As to the other amounts which were the subject-matter of these credits indorsed upon the notes, the defendant testified that some of them were loans to the plaintiff, made to him at various times, and charged up against him in defendant's private account with him, and that for some of these loans he took the notes of the plaintiff. There was also the testimony of two witnesses, including the defendant, that the notes were not to be paid unless the property proved profitable, and that the property never had proved profitable, but the reverse.

In this state of the testimony, there was no error in that part of the charge of the court which is made the subject of the first assignment of error, in regard to the bar of the statute of limitations. It is as follows:

"The plaintiff in this case has not brought suit within six years on nine of the notes, and therefore as to them the statute of limitations is a bar, unless there has something happened to remove the bar of the statute. The contention of Mr. Becker in that respect is that from time to time Mr. Oliver, the defendant, has paid certain sums of money in the shape of taxes and debts for Mr. Becker, and that he (Becker), with the consent and by the instructions of Oliver, has credited those payments upon the backs of these notes, and that these credits were entered at the times they purport to have been entered. If that is the case, gentlemen,—if Mr. Oliver paid any debts, taxes, or other obligations for Mr. Becker, and he agreed, as Mr. Becker testified, that these credits should be entered upon the notes,—then that would be a recognition of this debt by Mr. Oliver, which would remove the bar of the statute of limitations. On the part of the defendant, Oliver, it is contended that these taxes which were paid were not paid for Mr. Becker, as I understand it, but were paid for the Bonanza Company, and that he received bonds in payments or as collateral for these payments from the Bonanza Company, and that he never agreed to the entry of these credits. It will be for you to determine, gentlemen, what are the facts in relation to this. If you find that these payments were made by Mr. Oliver, and that they, or any of them, were made for Mr. Becker, and that he agreed that these entries should be made upon the notes, that would constitute such a recognition of this debt as would remove the bar of the statute of limitations."

So, also, there can be no doubt that the court correctly refused to affirm the point as stated in the next assignment of error, as follows: "Under the evidence before you, you cannot find that this action was barred by the statute of limitations as to any of the notes sued upon,"—and correctly submitted the question whether any of the notes were so barred to the jury, under the general charge of the court.

The next assignment of error, in regard to the bar of the statute, states that the court erred in its answer to plaintiff's second point, which point and answer are as follows:

"(2) The defendant having admitted that he paid the plaintiff sundry sums of money during the six years preceding the bringing of this action, if you

find that he did not state to the plaintiff how he wanted said sums applied, and that he owed the plaintiff no money except upon the notes in suit, and plaintiff applied the one-tenth of each of the sums so received to each of the notes, and indorsed the same when received, or shortly thereafter, upon the backs of the notes, such admission and application would prevent this action from being barred by the statute of limitations as to any of the notes. This point correctly states the law where a debtor pays money to a creditor; that is, where a debtor pays money to a creditor without specifying on what particular part of his indebtedness it should be credited. But that is not the case here. The payments here credited are not alleged to have been made by Oliver to Becker generally on these notes, but are alleged to be sums of money advanced or loaned, as contended by Oliver, or paid, as contended by Becker, or are payments made to third persons; and the right to credit them on these notes is in all cases based by Becker on the express agreement by Oliver that they should be credited on the notes. The question, then, is, did Oliver agree with Becker that these credits should be entered as payments on these notes, as contended by Becker? If the jury find that the credits were placed there by the agreement of Oliver, that would bar the statute of limitations. If they were not placed there by his consent, Mr. Becker having expressly testified that they were, then they would not bar the statute of limitations."

In view of the testimony, it is hard to conceive how the court below could have more fairly to the plaintiff discussed his second point. The point involves a mistaken view of the law relating to the application of payments and the removal of the bar of the statute. A payment on account of a claim "prevents the bar of the statute," because it amounts to a distinct acknowledgment on the part of the defendant of an existing indebtedness, from which the law implies a promise of payment. And whether such an acknowledgment and implied promise be considered as a revival of the original promise, or a new and independent one, it presents a new and substantive cause of action, from the date of which the statute of limitations will begin to run. It is manifest that the philosophy of the situation is that the defendant has, at a date within the period of limitation, by his act, intentionally acknowledged as existing his indebtedness to the plaintiff. But the act of payment on account must be so clear and unequivocal as to make it a necessary inference that the debtor thereby acknowledges an existing indebtedness. The law as to appropriation of payments, relied upon by the plaintiff, rests upon a different basis from that of actual intention on the part of the one making the payment. Where a general payment is made by a debtor, who owes money, upon different accounts, and evidenced in different ways, and by securities of different degrees of dignity or value, and nothing is said by the debtor as to the application of the payment made, convenience and justice require that the creditor should be allowed to appropriate the payment as he sees fit, giving him the advantage oftentimes of applying it to the account which is the least well secured. In such case there is postulated a certain and unequivocal general payment by the debtor on account of his general indebtedness. In the case in hand, however, the whole question is as to the actual intention with which the particular payments are made, because it is only from an actual intention to pay on account of a particular debt that an acknowledgment of an existing indebtedness can be inferred. The application by the plaintiff of the payments

to him of certain sums of money to these particular notes can in no wise aid us in ascertaining the real intention of the defendant in making such payments. What the real intention of the defendant was in making these payments is here a matter in dispute, and as to which there is conflicting testimony. The indorsements by the plaintiff of these payments, proportionately, upon the several notes, unless done by the direction or consent of the defendant, can throw no light upon the question here in dispute, to wit, whether these payments were such as to make the inference of a real intention to acknowledge an existing indebtedness a necessary one. The act of appropriating the money received from the defendant, and of placing the credits on the notes, was confessedly the act of the plaintiff, and as such could afford no ground for an inference as to the intention or state of mind of the defendant in regard to these notes. To make it relevant, it must have been clearly and unequivocally assented to by the defendant. That it was so assented to was asserted on one side and denied on the other, thus raising a question of fact that was properly submitted to the jury.

This brings us to the remaining ground upon which plaintiff contends that there was an acknowledgment by the defendant of an existing indebtedness within the period of limitation. This ground is set forth in the plaintiff's third point, and the answer of the court thereto, which is made the subject of the plaintiff's last assignment of error, in regard to the removal of the bar of the statute of limitations. The assignment is as follows:

"The court erred in its answer to plaintiff's third point, which point and answer are as follows, viz.:

" '(3) The defendant having admitted that he gave certain stock and bonds as collateral security for the payment of the notes when made, and said stocks and bonds having become worthless or having been canceled, and new stocks and bonds having been issued in their place, he gave the new stocks and bonds to plaintiff as collateral security for said notes within the period of six years immediately preceding the bringing of this action, in pursuance of the original arrangement between the parties. You should find that this action is not barred by the statute of limitations as to any of the notes.

" 'This point asks us to take the case from the jury so far as the statute of limitations is concerned. This we have already refused to do in answer to the first point, and we reaffirm our decision in that respect. It is true that where a man is indebted to another, and the debtor subsequently gives an additional collateral security, that is ground for holding that the statute is not barred, and so we hold in this case. The fact that the other bonds and stocks were given is a fact to be considered by the jury, and its proper weight given to it as an element for removing the bar of the statute of limitations. In view of the fact that these bonds and stocks were a substitution of securities after the reorganization of the company, and that it is contended by Mr. Oliver that these securities were given and were in Mr. Becker's hands as security for an indebtedness payable only in the event that the mine proved profitable, the effect of these acts in removing the bar of the statute of limitations is peculiarly within the province of the jury. If these acts constituted a recognition of the indebtedness here sued on, then they may be so regarded by the jury.' "

We think the answer thus given by the court below to this point of the plaintiff was correct in every particular, and the assignment of error founded thereon must be disallowed.

The judgment of the court below is therefore affirmed.

BERLINER GRAMOPHONE CO. v. SEAMAN.

(Circuit Court, S. D. New York. November 25, 1901.)

1. PLEADING—DEMURRER—PENDENCY OF ANOTHER ACTION.
Allegations in a complaint for breach of contract that defendant has commenced a suit in equity against plaintiff in another jurisdiction, and obtained an injunction ex parte, but which do not disclose the nature of the pleadings or the cause of action, afford no basis for a demurrer on the ground of the pendency of another action.

2. CONTRACTS—CONSTRUCTION—RIGHT TO TERMINATE FOR BREACH.
Plaintiff, which owned a number of patents, relating to talking machines known as "gramophones," granted an exclusive license to defendant to buy, sell, and deal in such machines, under a contract that defendant should buy exclusively of plaintiff, use his best efforts to promote the sale of such machines, and exhibit his books to plaintiff on request. The contract provided that plaintiff might, at its option, notify defendant of any breach on his part, and, if not remedied within 30 days, terminate the contract by another notice, in which case defendant should be bound to take and pay for only such machines and supplies as he had previously ordered, and that such remedy should be exclusive, so far as the obligation of defendant to purchase goods to any particular amount was concerned, but that "as to all other obligations of the licensee the remedy given in this section is merely cumulative, and shall not deprive the licensor of any of its legal or equitable remedies." *Held*, that such provisions did not deprive the plaintiff of the right to terminate the contract without notice because of deliberate, willful, and persistent violations, which left no doubt of his intention to repudiate the same, and to sue for damages for its breach.

3. ABATEMENT—VIOLATION OF INJUNCTION—MODE OF MAKING OBJECTION.
The question whether a plaintiff in commencing and prosecuting the action is violating an injunction issued in a suit between the parties in another jurisdiction cannot be presented or considered on the argument of a demurrer to the complaint, but must be brought properly and formally before the court by a motion for a stay, or other appropriate motion.

At Law. On demurrer to complaint.

Two grounds of demurrer are stated. First. That it appears upon the face of the complaint that there is another action pending between the same parties for the same cause. Second. That the complaint does not state facts sufficient to constitute a cause of action.

Edmund L. Baylies, for plaintiff.
Waldo G. Morse, for defendant.

COXE, District Judge. This is an action to recover damages for the alleged breach of a written contract made by the parties to this action October 10, 1896. By the terms of this agreement the plaintiff, who is the owner of several patents for talking machines, known as "gramophones," granted to the defendant an exclusive license to buy, sell and deal in the patented devices throughout the United States, except the District of Columbia. The complaint alleges that the plaintiff has performed every stipulation and covenant of this agreement on its part and that the defendant has repeatedly failed to perform on his part in the particulars fully stated and described. It is alleged in paragraph 14 of the complaint that in June, 1900, the defendant commenced a suit in equity against the plaintiff in the United States circuit court for the West-

ern district of Virginia, and, upon allegations which were false in many particulars, obtained, ex parte, an injunction restraining the plaintiff from selling gramophones to any person other than the defendant. This is all. The nature of the pleadings in the Virginia suit is not stated. It is not even alleged that an answer was filed. Nothing is known regarding the litigation except that it is a suit in equity in which an injunction was granted. As there is absolutely nothing to show what the cause of action in the Virginia suit is, there is, of course, no basis of comparison. The first ground of demurrer is, therefore, without foundation.

Does the complaint state a cause of action? The contract is an elaborate document stating in minute detail the reciprocal duties and obligations of the parties. The defendant agrees, inter alia, as follows: First. To exhibit his books of account to the plaintiff when requested to do so. Second. To "use his best efforts to promote the gramophone business in the United States, and shall advertise gramophones and gramophone goods prominently and freely as 'Berliner' gramophones and 'Berliner' gramophone goods." Third. Not to manufacture, buy, sell or use gramophones or gramophone goods, or any parts thereof, except such as he buys from the plaintiff. Fourth. Admitting and conceding the validity of the letters patent hereinbefore mentioned, he agrees not to dispute or contest them, and he agrees not to make use of any other name than that of Emile Berliner in connection with gramophones and gramophone goods.

The complaint contains the following allegations:

First. "That, although the plaintiff has formally demanded of the defendant that he exhibit his books of account to it, in order to determine whether he, the defendant, had complied with his contract of October 10, 1896, relating to advertising, said defendant has refused to comply with plaintiff's request, and has never at any time exhibited to the plaintiff the proper books of account which would enable the plaintiff to determine whether such advertising has in fact been done."

Second. "That the defendant has not used his best efforts to promote the gramophone business, but, on the contrary, has constantly endeavored to injure said business by combining with the National Gramophone Company, the National Gramophone Corporation of New York and the Universal Talking Machine Company in placing upon the market and promoting the sale of the 'zonophone,' a machine which infringes the gramophone. That instead of promoting the gramophone business, the defendant has done all in his power to promote the manufacture and sale of a machine made by a rival company. That the defendant has not advertised gramophones and gramophone goods prominently and freely as 'Berliner' gramophones and 'Berliner' gramophone goods, but, on the contrary, has systematically suppressed the name 'Berliner' in his advertisements, and in those of the National Gramophone Company and National Gramophone Corporation of New York, and in said advertisements he has substituted the name of 'zonophone' instead of the word 'gramophone,' and has advertised that the gramophone had been withdrawn, and the zonophone substituted in its place."

Third. "That the defendant secretly and without the knowledge of the plaintiff, in the year 1898, manufactured or caused to be manufactured gramophone records, for the purpose of rendering defendant independent of plaintiff in the matter of records."

Fourth. "That the defendant has caused to be organized and controlled the Universal Talking Machine Company, which manufactures the infringing machine, named the 'Zonophone.'"

Other breaches are alleged, but it is unnecessary to consider them, as sufficient appears to warrant the plaintiff in declaring the contract forfeited and ended, which was formally done by a resolution of its board of directors.

But it is argued that, no matter how flagrant or long continued the violations of the contract may have been, there was but one way in which the plaintiff could end the contract, namely, by giving the defendant a written notice pointing out the grievance and a locus pœnitentiæ of 30 days.

Section 16 of the contract is as follows:

"For breach of any covenant herein contained on the part of the licensee, the licensor may, at its option, give notice in writing to the licensee, pointing out the cause of complaint; and if, within thirty days after the delivery of the said notice to the licensee, the licensee shall not remove the cause of complaint and fully perform the covenant so broken, then the licensor may, by second notice in writing to the licensee, revoke the license hereby given, withdraw from all its covenants and annul all the licensee's rights thereunder; and in that case all liability of the licensee on his covenants in this agreement shall cease, except that he shall remain bound to take and pay for, in accordance with the terms hereof, all gramophones, gramophone goods and parts for the repair of gramophones for which he has at the time actually given orders. If the breach of covenant consists in the failure to pay money, the first notice may, after ten days have expired, at the option of the licensor, work the revocation, withdrawal and annulment hereinbefore described, without any further days of grace or second notice. The remedy given in this section is exclusive so far as the obligation of the licensee to purchase goods to any particular amount is concerned, and the agreement to make such purchases shall be enforced only in accordance therewith and not by any other remedy, legal or equitable; as to all other obligations of the licensee the remedy given in this section is merely cumulative and shall not deprive the licensor of any of its other legal or equitable remedies."

This provision should be construed in a liberal manner, having in mind the true intent and purpose of the arrangement between the parties and the ordinary rules of trade, which men of common sense are presumed to have in mind when entering into such an agreement. It is not the purpose of the court to attempt a construction of the contract further than is needed to determine this demurrer, as the testimony at the trial may throw new light upon the situation, and the trial court should not be hampered by unnecessary attempts to elucidate its somewhat ambiguous provisions. It suffices to say that the paragraph in question is capable of a construction which permits the plaintiff to terminate the contract because of deliberate, willful and persistent violations by the defendant without a 30-days notice. In other words, where a party repudiates his contract, or where his conduct is such that there can be no doubt of his intention to repudiate, notice to him to perform is an idle ceremony which the law does not require. Should such a situation exist here would it not be possible for the plaintiff under the general allegations of the complaint to prove it? It is not necessary, however, to go to this length; the breaches referred to do not relate to the obligation of the defendant to purchase goods, and, as to all other obligations, the paragraph in question is expressly stated to be cumulative and is in no way to deprive the plaintiff of "any of its other legal or equitable remedies." If the

defendant's interpretation be correct the plaintiff is deprived of a legal remedy, namely, the right to sue for damages on breach of the contract in the particulars heretofore stated. He is also deprived of equitable remedies which might be essential to maintain his rights and preserve his property.

An argument has been addressed to the court, based upon a number of papers which have not been submitted, to the effect that the decision on this demurrer should be withheld because of an injunction in the Virginia suit restraining the plaintiff from proceeding against the defendant. The question cannot be considered in this informal manner. If an injunction be actually in force, which is denied, and if the plaintiff has violated it, an application for a stay or other kindred motion will bring the matter properly before the court.

The demurrer is overruled, the defendant to answer within 30 days on payment of costs to be taxed by the clerk.

GEER v. SCHOOL DIST. NO. 11 IN OURAY COUNTY.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1901.)

No. 1,521.

1. SCHOOL DISTRICTS—POWER TO CREATE INDEBTEDNESS—COLORADO STATUTES

Under Const. Colo. art. 11, § 7, and the statutes of the state in force in 1892, a school district of the third class has power, when authorized by a majority vote of the qualified electors, to incur an indebtedness, without limit as to amount, for the purpose of procuring sites and erecting school houses thereon, which the statute makes it the duty of such district to provide. The only limitation upon such power is the provision of Mills' Ann. St. § 4057, that "in no case shall the aggregate amount of bonded indebtedness of any school district exceed three and one-half per cent. of the assessed value of the property of such district," which, construed in the light of the other constitutional and statutory provisions, does not affect the power to create a general indebtedness, to be liquidated by concurrent taxation.

2. SAME—SALE OF VOID BONDS—IMPLIED LIABILITY FOR CONSIDERATION RECEIVED.

A school district which had ample power to create a general indebtedness for the purpose of erecting school houses, and which exercised such power by a vote of its electors, at an election duly held, to borrow a sum of money for that purpose, and by borrowing such money and using it in the building of a school house, is liable to the lender for its repayment, and cannot avoid such liability because the lender innocently accepted bonds for the amount, which, by reason of a limitation on its power to issue bonds, were void ab initio; and a subsequent purchaser of the bonds from the original holder is subrogated to his rights against the district.

3. SAME—LIMITATION OF ACTION.

Where a school district issued and sold bonds which were void for want of power to issue the same, but the district continued to recognize their validity by levying taxes to pay the interest thereon, and by promising to pay the same for some years afterward, limitation did not begin to run against an action by the holder to recover the consideration paid until the district took some action indicating its intention to repudiate the bonds

Thayer, Circuit Judge, dissenting.

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

Robert C. Geer, the plaintiff in error, brought his action in the circuit court for the district of Colorado against school district No. 11 in the county of Ouray, defendant in error, to recover, as in indebitatus assumpsit, the sum of $10,000, alleged to have been paid by him for 10 certain bonds issued by the officers of the school district July 1, 1892, and interest thereon. The complaint sets forth in detail all the facts attending the original issue of the bonds; the laws of Colorado relating to the power of the school district to create the original indebtedness evidenced by the bonds, all of which will be sufficiently referred to in the opinion; the sale of the bonds by the school district to plaintiff's assignor, and by him to plaintiff, for their full face value; the receipt by the school district of the purchase price; the application of the same to the erection and equipment of a school building for the district; the use and enjoyment of the building by the district from the date of its erection until this suit was instituted; the assessment and levy of a tax for the payment of interest maturing on the bonds from 1892 to 1896; the actual payment of such interest for the year 1893; the repeated promise of the district to pay the interest accrued and accruing until November, 1897; the institution of a suit on November 29, 1897, to recover past-due interest on the same; the interposition of a defense by the district to the effect that the bonds to which the coupons were attached were void because in excess of the limit of 3½ per cent. of the assessed value of the property of the district, created by the statute of Colorado; the judgment of the trial court, and affirmance thereof by this court, sustaining the defense so made, and declaring the bonds void and of no effect in law. A demurrer was interposed to this complaint, alleging that it did not state facts sufficient to constitute a cause of action, that the right of plaintiff had been adjudicated in the former action on the bonds, and that plaintiff's right of recovery, if any he ever had, was barred by the statutes of limitations. This demurrer was sustained by the trial court, and final judgment entered in favor of defendant. From this judgment a writ of error was taken.

Albert E. Pattison, for plaintiff in error.

J. P. Cassedy, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The defendant was a school district in the county of Ouray and state of Colorado, and as such was a corporation empowered to make contracts, and to hold so much real estate as was necessary for the location and construction of a school house. Sections 4004, 4013, Mills' Ann. St. Colo. A positive duty was imposed upon the district to purchase a lot and build a school house when directed by a vote of the district to do so. Section 4015, Id. The district had power conferred upon it by the constitution of the state, when authorized by a majority vote of the tax-paying electors, to create a debt by loan, without limit in amount, for the purpose of purchasing such lot and building such school house. Section 7, art. 11, Const. Colo. School districts of the third class, to which defendant in error belongs, had power, when authorized by a majority vote of the qualified electors, to raise by taxation money sufficient "to purchase or lease a suitable site for a school house, or school houses." Section 4027, Id. Such school district also had the power to create a bonded indebtedness for the purpose of raising money to purchase

sites, and erecting thereon school buildings. Section 4057, Id. From the foregoing provisions of the laws of Colorado, it is obvious, in our opinion, that it was left to the voters of school districts to determine whether there should be one or more buildings, how much they should cost, and whether they would raise a tax to pay for the same themselves, or whether they would create a bonded indebtedness, and saddle the payment of the same upon posterity. The record of this case shows that they attempted to adopt the latter course. They secured a valuable school building, and attempted to pay for the same by the issue of bonds which were, ab initio, void. The question for our determination is whether, under the constitution and laws of Colorado, the proceedings taken and acts done by the district created an indebtedness which may be lawfully asserted against it, notwithstanding the fact that the person from whom it borrowed the money unwittingly accepted void bonds as evidence of his right against the district. As already stated, the constitution of the state imposes no limit as to the amount of indebtedness which a district may create for the laudable purpose of furnishing school facilities for its children. The provision referred to is as follows:

"No debt by loan in any form shall be contracted by any school district for the purpose of erecting and furnishing school buildings, or purchasing ground, unless the proposition to create such debt shall first be submitted to such qualified electors of the district as shall have paid a school tax therein in the year next preceding such election, and a majority of those voting thereon shall vote in favor of incurring such debt." Section 7, art. 11, supra.

By fair implication, this constitutional inhibition means that a debt by loan in some form or other may be created by a school district for the purpose of erecting and furnishing school buildings or purchasing grounds therefor, if the proposition to create such debt shall first be submitted to, and receive the approval of, a majority of the tax-paying voters. Acting under this ample grant of power, recognized and emphasized by subsequent statutory enactments, and in the discharge of an express statutory duty, as already pointed out, the district undertook to secure a school house. It proceeded under the provisions of section 4057, Mills' Ann. St. This section, so far as it is now necessary to notice it, is as follows:

"On the petition of twenty legal voters of any school district, the secretary of said district shall give notice not less than twenty days before any regular or special meeting, held under the provisions of this chapter, that the question of contracting a bonded debt for the purpose of erecting and furnishing school buildings or purchasing ground or for funding floating debts, will be submitted to such qualified voters of the district as have paid a school tax therein in the year next preceding the said meeting. * * * The electors aforesaid shall first agree by a majority vote on the amount of indebtedness to be created, if any, (but in no case shall the aggregate amount of bonded indebtedness of any school district exceed three and one-half per cent of the assessed value of the property of such district) and shall then proceed to vote by ballot 'For the bonds' or 'Against the bonds' and the ballot-box for this purpose shall be kept open as provided in section forty-four (44) of this act, and if it appear that a majority of all the votes cast are 'For the bonds,' the board of directors, as soon as practicable, shall issue coupon bonds of the district, bearing interest," etc.

The complaint avers that:

"Prior to the first day of July, A. D. 1892, the said defendant pursuant to the authority upon it conferred by the laws of this state, and in due accordance therewith, being thereunto duly authorized by the vote of the duly qualified electors of the said defendant, cast at an election properly called and duly held in accordance with the statute in such case made and provided, determined to erect a school building within said district and also to create a debt to defray the cost and expense of the erection of said building to the amount of $10,000."

For the purposes of this case, the facts so pleaded must be taken to be true. The proceedings so charged to have been taken are in strict accord with the statute (section 4057) just quoted. It there appears that the first question to be submitted to the qualified electors, and upon which they are first to vote, is whether the district shall create an indebtedness for the erection of a school building, and, if so, in what amount. If this first proposition is carried by a majority vote, the electors then, and not till then, proceed to vote upon the proposition of issuing the bonds of the district; and, if a majority of the votes cast are "for the bonds," the board of directors of the district is authorized to issue the same. So far this section is in perfect harmony with the fundamental law of the state and the statutes to which reference has been made, namely, that a debt may be created, large or small, according to the judgment of the qualified electors of the district, for the purpose of building such a school house, as they, in their discretion, deem necessary and advisable. But it appears that there is a certain limitation found in the statute (section 4057, supra). It is there enacted, following the provision for submission to the popular vote of the question whether any indebtedness shall be created, and, if so, how much, that "in no case shall the aggregate amount of bonded indebtedness of any school district exceed three and one-half per cent. of the assessed value of the property of such district." It was on the strength of this last provision of section 4057 that this court held that the bonds issued by the county were void, because it appeared they were issued largely in excess of 3½ per cent. of the assessed value of the property of the district. Geer v. School Dist., 38 C. C. A. 392, 97 Fed. 732. It would seem clear from the language employed that the limitation above referred to relates exclusively to the amount of bonded indebtedness which the district might create, and does not relate at all to the amount of indebtedness the electors of the district might create for themselves to pay by a tax to be authorized by section 4027, supra. In fact, the limitation is, by the very language employed, confined to bonded indebtedness. Not only is this so, but the statute in question affords strong intrinsic evidence that there might be another kind of indebtedness to which no limitation applied. The electors at the meeting were first to vote on a proposition whether they would create any indebtedness, and, if so, how much. If this proposition was not carried, no vote on the proposition to issue bonds would be possible. If, on the other hand, this proposition was carried, the next proposition, to issue bonds, manifestly might be defeated, in which case the district

might be relegated to section 4027, supra, to provide means for paying the created indebtedness by taxation. It is urged upon us that the only indebtedness which the district might create for the building of school houses was a bonded indebtedness, and that, inasmuch as there was a statutory barrier against the creation of any such indebtedness in excess of 3½ per cent. of the assessed value of the property of the district, such barrier interposed a fatal objection to a recovery on the original consideration paid for bonds issued in excess of that limit. In the light of the foregoing analysis of the constitution and laws of Colorado, we cannot agree with this view. On the contrary, we are of opinion that the constitution and all the statutes relating to the subject in question, including section 4057, upon which reliance is mainly placed, clearly contemplate and provide for the creation of a general indebtedness to be liquidated by concurrent taxation if the qualified electors of the district so determine, as well as for the creation of a bonded indebtedness to be paid at a distant time in the future. It follows that the limitation as to the amount of permissible bonded indebtedness has no application to the other kind of indebtedness which might be created for the building of school houses, and which by the provisions of the law is limited only by the necessities of the district according to the judgment of the duly-qualified electors. This necessitates the conclusion that there was in 1892 no constitutional or statutory limit as to the amount of the general indebtedness which the tax-paying voters of a school district like the defendant in error might voluntarily impose upon themselves for the purpose of building a school house; that the only limit created by the statute is upon their voting a bonded indebtedness, entailing the payment of it upon posterity.

The next question relates to the effect of issuing void bonds in payment of an indebtedness which the properly qualified voters of the district had power to create, and which by the necessary majority vote they did create. Does the innocent acceptance of these void undertakings of the district, supposed to evidence valid obligations for money borrowed, preclude recovery on the original consideration as for money had and received? We may readily concede that, if the district had no power to create the indebtedness at all (that is to say, if the limit of 3½ per cent. found in section 4057 applied to any kind of indebtedness besides bonded indebtedness), there could be no recovery either on the original consideration, or upon the bonds which might be issued in evidence thereof. But, as already seen, such is not the fact. For this reason the case of Litchfield v. Ballou, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132, upon which the learned judge who tried the case below predicated his judgment, and upon which defendant in error mainly relies in argument, has no application. In that case plaintiff sought to recover the original consideration paid for bonds of a municipality which had been declared void in an action brought on them because in excess of a limit of indebtedness fixed by the constitution of Illinois. So far that case is parallel to the one now under consideration, but here the parallelism ceases. The constitution of Illinois (article 9, § 12) ordained that:

"No county, city, township, school district, or other municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding five per centum of the value of the taxable property therein."

Mr. Justice Miller, in delivering the opinion of the court, analyzes this constitutional provision as follows:

"It [the municipality] shall not become indebted. Shall not incur any pecuniary liability. It shall not do this in any manner. Neither by bonds, nor notes, nor by express or implied promise. Nor shall it be done for any purpose,"—and concludes thus: "If this prohibition is worth anything, it is as effectual against the implied as the express promise, and is as binding in a court of chancery as in a court of law."

Neither the constitution nor the statutes of Colorado contain any such prohibition. On the contrary, as already pointed out, the school district was fully empowered by many direct and positive provisions to create any amount of indebtedness for providing school houses for its children, provided only it did not issue bonds therefor, and thus make a charge upon futurity, in an amount in excess of 3½ per cent. of the value of its taxable property. The natural indisposition on the part of tax-paying voters to burden themselves with a present indebtedness obviously was considered a sufficient safeguard against extravagance even in the praiseworthy object of educating their children.

We think the case under consideration has now been reduced to about the following proposition: Can the school district, which had ample power to create a general indebtedness for the purpose of erecting school houses, which exercised the power, by voting at an election duly called, to create such indebtedness in the sum of $10,000, which borrowed the money for the purpose of erecting, and with the money so borrowed actually erected, the school house, which it has ever since used and enjoyed, escape payment of the same because, forsooth, it persuaded the lender to unwittingly accept void bonds therefor? In our opinion, it cannot. Any other conclusion would be a sad commentary on the efficiency of courts of justice to do justice. The authorities, in our opinion, fully sustain this conclusion. In the case of San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453, 469, 472, the late Mr. Justice Field, then a member of the supreme court of California, said:

"Under some circumstances a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party, and screen itself from responsibility under the plea that it never passed an ordinance on the subject. As against individuals, the law implies a promise to pay in such cases, and the implication extends equally against the corporations. This is as well established by the authorities as any law can be. * * * Where the contract is executory, the corporation cannot be held bound, unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it."

The supreme court of California, speaking also by Judge Field, in the case of Argenti v. City of San Francisco, 16 Cal. 255, 282, made use of the following language:

"If the city obtain the money of another by mistake or without authority of law, it is her duty to refund it, not from any contract entered into by her

on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or, if used by her, to render an equivalent to the true owner, from the like general obligation. In these cases she does not in fact make any promise on the subject, but the law, which always intends justice, implies one, and her liability thus arising is said to be liability upon an implied contract. * * *"

In Paul v. City of Kenosha, 22 Wis. 266, 94 Am. Dec. 598, the supreme court of that state, treating of the general subject under consideration, said:

"The city bonds, it appears, were void when the agents of the city sold them to the plaintiff. Is it just and equitable that the city retain the money which it has received for its own worthless bonds? The plaintiff took the bonds upon the presumption that they were valid securities, and paid his money, or its equivalent, to the city for them. They turned out to be void for want of power on the part of the city to issue them, and he seeks to recover back the money paid as upon a failure of consideration. Can he not recover the amount he has paid to the maker for its worthless paper? It seems to us unnecessary to go into the authorities upon this question. * * * Upon the ground, therefore, that the amount recovered was paid upon a consideration which has failed, we think the judgment right."

This last-mentioned case is apt authority for the conclusion reached in the present case, where there was no want of power to create the original indebtedness, but only a want of power to issue the bonds.

Mr. Justice Field, who wrote the opinions in the California cases referred to, speaking for the supreme court of the United States in the analogous case of Marsh v. Fulton Co., 10 Wall. 676, 684, 19 L. Ed. 1040, says:

"We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial; and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

In the case of Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153, the following facts appear: On March 28, 1872, the general assembly of Missouri passed an act which declared that, before any bond issued by a municipality should obtain validity or be negotiated, such bond should be presented to the state auditor to be registered. On July 16, 1872, after this act had become effective, the town of Louisiana issued its bonds in the sum of $21,000. They were antedated to January 1, 1872,—a period prior to the enactment of the act of March 28th,—and were not registered as required by that act. After these bonds had been declared invalid by the supreme court of the United States in Anthony v. Jasper Co., 101 U. S. 693, 25 L. Ed. 1005, an action was brought to recover back the money paid for the bonds. In affirming the judgment in favor of the plaintiff, Chief Justice Waite, among other things, said:

"In Moses v. Macferlan, 2 Burrows, 1005, it is stated as a rule of the common law that an action 'lies for money paid by mistake or upon a consideration which happens to fail, or for money got through imposition.' The present action can be sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not in fact valid obligations of the city. * * * While, there-

fore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As we took occasion to say in Marsh v. Fulton Co., 10 Wall. 676, 19 L. Ed. 1040, 'The obligation to do justice rests upon all persons, natural or artificial, and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.' "

In Chapman v. Douglas Co., 107 U. S. 348, 356, 2 Sup. Ct. 62, 69, 27 L. Ed. 378, 381, Mr. Justice Matthews, speaking for the supreme court, discusses propositions essentially like those now under consideration, and says in part:

"The principle was applied in the case of Morville v. Society, 123 Mass. 129, 137, 25 Am. Rep. 40, 43, where it was said: 'The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. The illegality is not that which arises where the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault, in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money, and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmance of an illegal act.' The decision of this court in Hitchcock v. City of Galveston, 96 U. S. 341, 350, 24 L. Ed. 659, 662, covers the very point. There a recovery was allowed for the value of the benefit conferred upon the municipal corporation, notwithstanding, and indeed for the reason, that the contract to pay in bonds was held to be illegal and void. 'It matters not,' said the court, 'that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law.' "

In the case of Read v. City of Plattsmouth, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414, it appears that the city of Plattsmouth, a city of the second class, had issued its bonds in the amount of $25,000; the same being $10,000 in excess of the limit created by statute. These bonds were sold, and the proceeds applied to the erection of a high school building. The legislature of Nebraska subsequently passed a curative act providing that "all bonds heretofore issued by any city of the second-class in good faith for the erection of or to procure the means for erecting a high school building within such city * * * shall be legal and valid." The primary question involved in the case was as to the validity of this last-mentioned act of the legislature. The supreme court held the act to be valid, predicating its decision upon the principle that although the bonds were in fact void, because in excess of the statutory limit, yet, as the city of Plattsmouth had received their proceeds, it was bound to make restitution, and accordingly held that the legislation in question acted upon the remedy, and not upon the rights of parties; and in making this ruling the supreme court announced principles which are applicable to the present case. Mr. Justice Matthews, in delivering the opinion of the court, said:

"In the present case the statute in question does not impose upon the city of Plattsmouth, by an arbitrary act, a burden without consent and considera-

tion. On the contrary, upon the supposition that the bonds issued as to the excess over $15,000 were void because unauthorized, the city of Plattsmouth received the money of the plaintiff in error, and applied it to the purpose intended, of building a school house on property, the title to which is confirmed to it by the very statute now claimed to be unconstitutional; and an obligation to restore the value thus received, kept, and used immediately arose. * * * As the city of Plattsmouth was bound by force of the transaction to repay to the purchaser of its void bonds the consideration received and used by it, or a legal equivalent, the statute which recognized the existence of that obligation, and, by confirming the bonds themselves, provided a medium for enforcing it according to the original intention and purpose, cannot be said to be a special act conferring upon the city any new corporate power."

In the case of Hedges v. Dixon Co., 150 U. S. 182, 14 Sup. Ct. 71, 37 L. Ed. 1044, the principle announced in Read v. City of Plattsmouth, supra, was fully recognized and approved; and after referring to the prior adjudications of the court, consisting in part of the authorities hereinbefore referred to, the court said:

"The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case now under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate."

The principles announced in the foregoing cases are also further recognized or applied in the following: City of Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; City of New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521; Hitchcock v. City of Galveston, 96 U. S. 341, 24 L. Ed. 659; Travelers' Ins. Co. v. City of Johnson City, 40 C. C. A. 58, 99 Fed. 633, 49 L. R. A. 123.

The case now under consideration by us shows ample power to create the original indebtedness in evidence of which the unauthorized and void bonds in question were issued, and also shows that the money derived from the sale of these bonds, to the full measure of their face value, was received and employed by the school district for the purpose originally and lawfully intended, and that the district has been for a long time, and now is, enjoying the advantage of a school building constructed with the money so secured. These facts, in our opinion, bring the present case squarely within the principles laid down in the long line of decisions hereinbefore referred to, and, by the authority of those decisions, entitle the plaintiff in error to recover in this action. The case of City of Parkersburg v. Brown, supra, is authority for his recovery, notwithstanding the fact that his assignor actually paid the money to the school district for the bonds in question. The court holds in the last-cited case that the holder of the bonds, who purchased them from the original taker, succeeds to the same right of recovery on the implied obligation which the original purchaser from the municipality enjoyed.

This disposes of the main question in the case, namely, that the complaint stated a cause of action.

It necessarily follows from the principles already announced that the adjudication in the prior action as to the validity of the bonds

themselves is not res adjudicata of the question involved in the present case.

It is next contended that the remedy of the plaintiff is barred by the statute of limitations. The statute of Colorado requires that "all actions of assumpsit or on the case, founded on any contract or liability express or implied shall be commenced within six years next after the cause of action accrued." Mills' Ann. St. § 2900. The complaint, which, for the purposes of this case, must be taken to be true, shows that the bonds in question were executed July 1, 1892; that interest was paid thereon in accordance with the promise found in the coupons attached to the bonds on January 1 and July 1, 1893; that defendant in error failed to pay the coupons maturing January 1st and July 1st of the years 1894, 1895, 1896, and 1897; that a special tax was duly assessed and levied for the purpose of paying all interest coupons maturing on the bonds during the years 1894, 1895, and 1896; that the same remained a lien and charge upon the taxable property in the district until after the suit was instituted on the coupons in November, 1897; that during these years the school district repeatedly promised to pay the coupons representing the interest maturing in 1894, 1895, 1896, and 1897; that, because of a failure to keep the promises so made, suit was instituted November 29, 1897, to recover on the past due coupons. The present suit was instituted April 16, 1900,—more than six years after the bonds were purchased, but less than six years after the assessment, levy, and promises aforesaid were made. Plaintiff avers in his complaint that he had no intimation that the school district intended to repudiate its obligation on the bonds and coupons until its answer was actually filed, repudiating the same, and that nothing was done in the way of such repudiation until that time. The foregoing facts amount, in our opinion, to an election on the part of the district to recognize, at least until it filed its answer, the bonds and coupons as valid obligations. It not only treated them as such by the significant act of levying a tax for their payment, but by repeatedly promising to pay the same. The legal as well as the highly moral obligation to pay interest on the money borrowed was such as fully warranted the district in recognizing the coupons as valid and binding obligations. As long as the district so recognized the same, and elected to treat them as legal obligations, we know of no reason requiring the plaintiff to take any steps to rescind the contract, or obligating him to resort to the courts to enforce the implied obligation. It would be a harsh and thoroughly impracticable rule to establish that the holder of a claim against a municipality is bound by any consideration of statutes of limitations to take steps to rescind an express contract to pay the same, as long as the municipality itself recognizes such express contract as a valid and binding obligation. The effect of such a rule would be to permit the municipality to lull the holders of its obligations into inaction, and thereby, taking advantage of its own wrong, deprive them of a valuable right. It results, in our opinion, that plaintiff in error had a lawful right to institute suit to recover upon the implied obligation at any time within six years after the district repudiated the express obligation. We think

this conclusion is supported by the following authorities: Chapman v. Douglas Co., supra; Merrill v. Town of Monticello (decided by the circuit court of appeals for the Sixth circuit) 18 C. C. A. 636, 72 Fed. 462; Morton v. City of Nevada (C. C.) 41 Fed. 582; Id., 3 C. C. A. 109, 52 Fed. 350; Everett v. School Dist. (C. C.) 102 Fed. 529; Ætna Life Ins. Co. v. Lyon Co. (C. C.) 82 Fed. 929; Id. (C. C.) 95 Fed. 325.

It follows from the conclusions already reached that the trial court erred in sustaining the demurrer to the complaint and rendering a judgment in favor of the defendant. The judgment must accordingly be reversed, and the cause remanded for a new trial.

THAYER, Circuit Judge, dissents.

REYNOLDS v. MINK et al.

(Circuit Court of Appeals, Eighth Circuit. November 4, 1901.)

No. 1,485.

RAILROADS—COLLISION WITH HAND CAR—ACTION FOR INJURY.

The complaint in an action against a railroad company alleged that plaintiff and others were constructing a telegraph line along defendant's right of way, and that through an arrangement made by the telegraph company, for whom they were working, defendant furnished them with a hand car to use in going to and from their work over defendant's track; that when they were coming in from work one evening, and after they had entered the city and were approaching the station, the hand car was struck by a train coming from behind them, and thrown from the track, killing one of the men and injuring plaintiff; that the train was not on regular time, was running at a much greater speed than permitted by the city ordinances, which were set out, and that it failed to give any of the station or crossing signals required by said ordinances, by reason of which facts plaintiff and his companions, who were facing the other way, did not know of its approach until they were struck; also that the engineer could have seen them for half a mile before striking their car. *Held*, that such complaint was not subject to a general demurrer on the ground that it did not state facts constituting a cause of action.

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

S. E. Browne, for plaintiff in error.

Willard Teller and C. C. Dorsey, for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

THAYER, Circuit Judge. This case was decided in the lower court on a demurrer to the complaint, which was pronounced insufficient, and a judgment was rendered in favor of Oliver W. Mink and Thomas P. Wilson, receivers, who were the defendants below. The sole question presented by the record is whether the complaint which was filed by Joseph H. Reynolds against the receivers stated a cause of action. The complaint was, in substance, as follows:

The plaintiff alleged that in November, 1897, the Union Pacific Railway was in the possession of and being operated by certain receivers, who had been succeeded in office by Oliver W. Mink and Thomas P. Wilson as receivers; that during said month the plaintiff was in the employ of the Western Union Telegraph Company, and was engaged for and in behalf of the latter company in the construction of a line of telegraph along the right of way of the Union Pacific Railway Company in the county of Weld, in the state of Colorado; that on the 17th day of November, 1897, he was working at a point about 10 miles north of the city of Greeley, in said county; that by an arrangement between the telegraph company and the receivers it was agreed that the receivers should furnish to the employés of the telegraph company a hand car, and should permit them to use the track of the railway and the hand car to carry the employés of the telegraph company to and from their place of work; that in pursuance of said arrangement on the day last named the receivers did supply to the plaintiff and his colaborers a certain hand car for the purpose last aforesaid, to be used in carrying them to and from their place of work, and that the use of the hand car and the track of the railway was with the knowledge and consent of the receivers; that on said day plaintiff and two other employés of the telegraph company, having finished their day's work at a point about 10 miles north of the city of Greeley, started to return in the evening from said point to their boarding place in said city, using for that purpose the hand car and the track of the railway company, in compliance with the agreement aforesaid between the telegraph company and the railway company; that they were at the time exercising due diligence, and on their return had reached a point within the limits of said city, and within the yard limits of the railway company, and were proceeding carefully to the depot of said company, when a locomotive engine drawing a heavy train of passenger cars, which was owned, controlled, and operated by the receivers, came into the city of Greeley from the north, ran into and collided with the hand car upon which the plaintiff and his co-employés were riding, and threw said hand car off the track, killing one of the persons thereon and severely injuring the plaintiff. It was further averred, in substance, that at the time he sustained such injuries the plaintiff was not in the employ of the receivers, and was never in their employ, but was working for the telegraph company, and had no connection whatsoever with the management of the railway or with the operation of the trains thereon. The complaint also contained averments to the following effect: That there was a whistling post within the limits of the city of Greeley a short distance north of the point where the collision occurred, which had been provided as required by the ordinances of said city; that the locomotive and train last aforesaid passed over numerous highways within and near the city of Greeley; that it was run past said whistling post without sounding any whistle, or ringing any bell, or giving any warning whatever of its approach; that it continued on its course within the city limits without giving any signal or warning of its approach until it struck the hand car; that said train was running at the time at a rate of speed not less

than 30 miles an hour,—all of which acts were in violation of the ordinances of said city; that said train was not at the time running on schedule time, but was an hour and a half late; that neither the plaintiff nor his coemployés on said hand car had any notice of the approach of said train, nor had they any information that any train would be upon the railway track at that hour coming from any direction; that the plaintiff and his companions had every reason to believe and did believe that they were operating the hand car in perfect safety, and that they had a clear track to their point of destination in the city of Greeley; that at the time of the accident the plaintiff and his companions were propelling said hand car, and were standing on the same with their faces to the south, the direction in which they were moving, and that their backs were to said train; that the persons in charge of said train had a clear view of said hand car for more than half a mile before they struck the same, and by the exercise of ordinary care, or by giving the proper signal of the approach of the train, could easily have prevented the collision and avoided the accident; and that the acts so as aforesaid alleged were negligent, and were done and performed by the operatives upon said train in reckless disregard of human life and safety. Said complaint further alleged and set forth therein certain ordinances of the city of Greeley, which, without stating the same in detail, made it the duty of every engineer in charge of a locomotive engine within the city of Greeley, when approaching a public crossing, street, or highway, to ring a bell, or cause the same to be rung, until the engine had cleared the crossing; also prohibiting every railroad company having a line of railroad running through said city from moving a train within the city limits at a greater rate of speed than six miles an hour; also requiring such railroad companies to place at the city limits a whistling post, and making it the duty of train operatives upon approaching said post to blow the whistle. The plaintiff also averred that as the result of the collision his left shoulder was dislocated, both bones of his left arm were broken, his left wrist badly sprained, his entire body was wrenched and bruised, and that he had sustained damages in the sum of $10,000.

After reading the complaint and examining the short brief with which we have been favored by learned counsel for the defendants in error, we have been unable to discover any defect in the complaint which would warrant us in holding the same to be insufficient. It clearly states and describes acts of negligence committed by the employés of the receivers, and injuries sustained by the plaintiff in consequence of such acts, which, if proven on the trial, would entitle the plaintiff to a judgment. We are of opinion, therefore, that the lower court erred in sustaining a general demurrer to the complaint, based on the ground that it failed to aver facts sufficient to constitute a cause of action.

The judgment below is accordingly reversed, and the cause is remanded to the circuit court, with directions to enter an order overruling the demurrer and requiring the defendants to answer the complaint.

WARREN-SCHARF ASPHALT PAVING CO. v. LACLEDE CONST. CO.

(Circuit Court of Appeals, Eighth Circuit. November 4, 1901.)

No. 1,542.

CONTRACTS—CONSTRUCTION AND VALIDITY—STIPULATION FOR RIGHT TO SUSPEND WORK IN BUILDING RAILROAD.

Plaintiff contracted with defendant to furnish the materials and construct a line of railroad. The contract contained a clause giving defendant the right at any time, and for any reason satisfactory to it, to suspend the prosecution of the work, "either temporarily or permanently," on giving 10 days' notice, and further providing that such suspension should not give plaintiff "any claim for damages therefor" against defendant. After the work had been partly done, defendant gave notice, and suspended the same permanently. *Held*, that such provision was one which it was competent for the parties to make, and was valid and governed their rights, and that under it plaintiff was entitled to recover only the amount earned under the contract to the date of suspension, without damages for loss of profits.

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

William Pierrepont Williams (James L. Blair and James A. Seddon, on the brief), for plaintiff in error.

James F. Meagher (Silas H. Strawn and Frederick S. Winston, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THAYER, Circuit Judge. The Warren-Scharf Asphalt Paving Company, the plaintiff in error, sued the Laclede Construction Company, the defendant in error, upon a contract dated March 14, 1899, whereby the former company agreed with the latter company to furnish the materials and perform the necessary work and labor in the construction of a railroad from Peoria, Ill., to East Clinton, in the state of Illinois. In one count of the petition it was alleged that the defendant company was indebted to the plaintiff company in the sum of $11,159.12 for work actually done and performed in the execution of said contract, for which sum the plaintiff prayed judgment. In another count of the petition it was alleged, in substance, that after work to the value of $11,159.12 had been performed, and on or about May 27, 1899, the defendant company, without any default on the plaintiff's part, abrogated the contract and refused to allow the plaintiff to proceed further in the performance of the same; that, if the plaintiff had been allowed to perform its said agreement, it would have realized a profit in the sum of $130,000, for which latter amount it prayed judgment in addition to a judgment for the value of the work actually performed at the time the contract was abrogated. The defendant company pleaded, in substance, that the contract in question contained the following provision, known as "Paragraph 12":

"The party of the second part (namely, the Laclede Construction Company) shall have the right at any time, and for any reason which may appear satis-

factory to said party, to suspend the prosecution of the work embraced in this contract, either temporarily or permanently, upon giving ten days' notice to the party of the first part (namely, the Warren-Scharf Asphalt Paving Company) of his intention so to do, in which event said party of the first part shall be entitled to payment in full for the work done by it up to the time of such suspension, subject to such deductions as are herein elsewhere provided for; but such suspension shall not give to the party of the first part any claim for damages therefor against said party of the second part."

The defendant company further pleaded that on May 27, 1899, by virtue of the aforesaid provision of the contract, it notified the plaintiff to permanently suspend the prosecution of the work embraced in the contract upon the expiration of 10 days from said date, and that the plaintiff then and there agreed that it would suspend the prosecution of the work, and agreed to waive the 10 days' notice required by the provisions of the contract.

On the trial of the case the defendant company admitted an indebtedness to the amount of $11,159.12 on account of work actually done at the time the contract was abrogated, and made a tender of that amount, whereupon a judgment was entered therefor on the second count. Upon an inspection of the contract the trial court ruled that the provision of the contract above quoted empowered the defendant company to abrogate the contract on 10 days' notice without liability for damages, and, in accordance with that view of the case, directed a judgment to be entered in favor of the defendant company on the first count of the petition, wherein the plaintiff sought to recover unearned profits. The case was brought to this court upon a writ of error by the plaintiff company. The sole question, therefore, which the record presents, is whether the trial court properly construed the twelfth paragraph of the agreement. We are of opinion that the clause of the contract in question was properly interpreted and enforced by the trial court. Indeed, the meaning of the clause is too plain to admit of any controversy. The parties to the agreement had in mind both a temporary and a permanent suspension of the work, and, in language which cannot be misunderstood, stipulated that the defendant company might suspend operations under the contract, either temporarily or permanently (that is, abrogate the contract altogether), on 10 days' notice. And as if to make their purpose and intent more clear, and to put the matter beyond dispute, they further agreed that, if operations under the contract were suspended, the party of the first part should not have any claim for damages. In other words, the right was reserved by the defendant company to put an end to the agreement at any time on 10 days' notice, without liability for damages. It was entirely competent for the parties to enter into such an agreement, and such stipulations are sometimes found in contracts for the construction of railroads, and for the doing of other work of a like character, where unforeseen events may occur to render a temporary or permanent suspension of the work both desirable and necessary. We perceive no reason whatever for indulging in the assumption that, when the parties agreed that the work might be suspended permanently at the election of the defendant company, they did not mean what they said, but used the word "permanently" in some new and strange sense. Nor do we perceive that

there is any force in another suggestion of counsel,—that because 15 per cent. of the value of the entire work was to be retained by the defendant company until the whole work was completed, and that because the clause above quoted provides that, if the contract is suspended, payment in full for the work done up to the time of such suspension shall be made, "subject to such deductions as are herein elsewhere provided for," and that because the amount of work actually done did not amount to 15 per cent. of the whole work contracted for, therefore the plaintiff cannot recover anything in this action if the construction of the clause aforesaid which was adopted by the lower court prevails. Among the general stipulations found in the agreement was one to the effect that the defendant company, to protect itself against liens, might make payment for labor and supplies directly to any subcontractor, "and deduct the amounts so paid" to a subcontractor from any amount found to be due to the plaintiff company. The deductions referred to in clause 12 evidently have reference to such payments as may have been made to any subcontractor for the purpose of protecting the defendant against liens at the time the work should be suspended. It has no reference whatever to the 15 per cent. of the total value of the work which was to be retained by the defendant company until the work was fully completed. Under the provisions of the contract, if it was abrogated on 10 days' notice it became the duty of the defendant company to pay the full value of all the work done up to that time, deducting therefrom only such sums as might have been paid directly to subcontractors to protect the work against liens.

Finding no error in the record, the judgment below is accordingly affirmed.

QUEEN INS. CO. OF AMERICA v. UNION BANK & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. November 11, 1901.)

No. 953.

1. INSURANCE—AVOIDANCE OF POLICY FOR BREACH OF CONDITIONS—ESTOPPEL.
Where the owner of a marketable commodity applies to an agent of an insurance company for insurance thereon, stating his purpose to obtain a warehouse receipt for the property, and to give such receipt, together with the policy, to a third party, as security for a loan, and has the loss made payable to the lender as his interest may appear, the insurer is charged with knowledge of such purpose, and, after issuing the policy, cannot avoid the same on the ground that the procuring of the warehouse receipt and the pledging of the same effected a change in the ownership of the property which rendered the policy void by its terms.

2. SAME—AGENCY—EFFECT OF CUSTOM.
The owner of property applied to a firm of insurance agents, representing a number of companies, for insurance thereon. The firm,—not desiring to write the insurance in one of its own companies,—in accordance with a custom prevailing among the insurance agents of the city, turned the application over to the agent of defendant, who issued the policy and delivered it to the firm, which pasted its business card thereon and delivered it to the insured, collecting the premium, which was paid to defendant; the commissions being divided between the two agencies, as was the custom. The transaction was in good faith, and

the insured knew no other agent therein than the firm. *Held*, that the firm was not his agent in the transaction, but the agent of defendant, which must be presumed to have had knowledge of the custom, and, by receiving the premium and assuming the risk, ratified the agency of the firm through whom the application was received in accordance with such custom.

8. SAME—ACTION ON POLICY—PARTIES PLAINTIFF.

Although under the state practice a creditor to whom a loss under an insurance policy is made payable as his interest may appear may maintain an action thereon in his own name, the debtor in whose name the insurance is taken has such an interest in the recovery as to make him a proper party plaintiff; and in any event the defendant is not prejudiced by the fact that the action is brought in the name of the debtor for the use of the creditor, where the statute in such case makes the person for whose use the action is brought the real plaintiff of record, and a judgment otherwise correct will not be reversed on appeal because of such fact.

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

This action was brought to recover on an insurance policy issued by the Queen Insurance Company for $6,000 on a lot of Irish potatoes. Verdict and judgment were rendered in favor of the plaintiff. The facts pertinent to the main issues are as follows: W. M. Jameson carried on a produce business in the city of Nashville, Tenn., under the name of the Nashville Produce Company. One B. B. Bond did a warehouse business in the same building. Murray & Cole were fire insurance agents in Nashville, representing several companies. Nestor & Co. were the local agents of the Queen Insurance Company. There was a custom among the local fire insurance agents of Nashville to the effect that, if any of them received an application for insurance which he did not wish to carry in one of his companies, he might prepare a form, and the risk could be placed with other agencies. The agent issuing the policy and the agent to whom the application had originally been made divided the commission; the latter taking two-thirds, and the former one-third. Mr. Odil was the business manager of the produce company. On January 12, 1898, the day the policy in question was issued, he made application to Murray & Cole, at their office, for a policy for $6,000 on 10,000 bushels of potatoes which the produce company had stored on the second floor of the building in which they were doing business. The building was rented by B. B. Bond. The produce company subrented it from him. Intending to effect a loan, the produce company applied to Mr. Bond for a warehouse receipt for the potatoes, in order to borrow $6,000 from the Union Bank & Trust Company on said receipt and an insurance policy. The agent of the produce company stated to Murray & Cole the intention to procure Bond's warehouse receipt and the loan from the trust company, secured by it and the policy of insurance. He also asked that the policy be written payable to the Union Bank & Trust Company as its interest might appear. Murray & Cole's clerk assented to this, and stated that the produce company would have to send all the other policies to Murray & Cole's office, to have them put in shape. After effecting this arrangement the produce company drew up its note to the Union Bank & Trust Company for $6,000. A warehouse receipt was written for 10,000 bushels of potatoes. Murray & Cole prepared a form of policy, and the insurance was written on "Irish potatoes, in bags, contained in two-story brick, metal-roof building, situated at No. 149, on the west side of South Market street, Nashville, Tennessee; loss, if any, payable to the Union Bank and Trust Company as its interest might appear." Murray & Cole, not wishing to carry the insurance in any of the companies of their agency, took the form to Nestor & Co., the Nashville agents of the Queen Insurance Company, and the policy was prepared with the form attached as presented by Murray & Cole. That firm pasted its business card on the policy and turned it over to Mr. Jameson, who took it to the Union Bank & Trust Company with the note for $6,000 and the warehouse receipt. This

was done upon a previous understanding with the bank as to the making of the loan. The warehouse receipt was changed at the request of the bank, and in the desired form was delivered to the bank, together with the policy of insurance, and the $6,000 was loaned to the produce company. Murray & Cole received two-thirds of the commission on this insurance, and Nestor & Co. one-third. Murray & Cole kept a record of the policy in their office. While it appears that Mr. Jameson knew that Nestor & Co. were the agents at Nashville of the Queen Insurance Company, it does not appear that he had any dealings with them in reference to this policy. The policy contained the condition that it should be void if the interest of the insured should be other than the sole, unconditional ownership of the property insured; likewise if any change, other than by the death of the insured, should take place in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard, whether by legal process or judgment, or by voluntary act of the insured, or otherwise.

John J. Vertrees, for plaintiff in error.

M. T. Bryan and James S. Pilcher, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

It is claimed that the policy of insurance in this case is avoided because at the time of the application for and the issuance of the policy the property in question was owned by Jameson, doing business as the Nashville Produce Company, and was at that time in his possession; that after the issuance of the policy the possession was transferred to Bond, and likewise the title transferred by the assignment of a warehouse receipt to the Union Bank & Trust Company. There is no dispute in the testimony as to the good faith of Jameson in making the application to Murray & Cole, or that they were advised of the purpose of the assured as to the property to be covered by the policy. Murray & Cole were told that it was the purpose of the applicant to obtain a warehouse receipt for the potatoes, and to give this receipt, together with the insurance policy, as security for a loan to the Union Bank & Trust Company. This knowledge, fairly and fully brought home to the agent of the company, is the knowledge of the company; and, in view of this fact, it could not avail itself of such conditions as are relied upon in the present case as a defense to the action. Attributing the knowledge of the agent to the company, it could not accept the risk upon such representations of the purposes of the assured, and then, because of conditions contained in the policy, avoid liability because of subsequent changes of possession or transfer of title, made exactly as the insured advised the company was his purpose to do when the policy was issued. The overwhelming weight of authority sustains this proposition, and we do not understand the learned counsel for the plaintiff in error to contend that if Murray & Cole were the agents of the Queen Insurance Company in the transaction, and had knowledge of the purposes for which the policy was taken out, the company could avoid its liability. The important question in this case is, whose agents were Murray & Cole? Were they the agents of the produce company or of the Queen Insurance Company? The produce company sought to obtain a policy of insur-

ance upon this property. It had dealt with Murray & Cole, and knew them to be the agents of a number of insurance companies in Nashville. The produce company did not apply to a broker to go out and obtain a policy of insurance. It sought persons dealing in insurance, and undertook to buy from them, as agents of the insurance companies, $6,000 of indemnity against loss by fire. In obtaining the amount of insurance the produce company had no go-between. It dealt as a principal with those who were dealing in insurance. The application was made to persons known to have authority to receive applications and to issue policies of insurance. To these persons it made a fair and full statement of its purposes in procuring the insurance. The produce company employed no agent in the transaction. It received from Murray & Cole a policy upon which it paid the premium. It did not know that Nestor & Co. were in the transaction, and never had dealings with them concerning it. It obtained the policy of insurance from the agents to whom it applied. So far as the produce company is concerned in the payment of the premium and the obtaining of the policy, it is as though Murray & Cole had issued a policy in one of their own companies. How stands the transaction in view of the part the Queen Insurance Company has taken in it? A custom prevailed in Nashville, which it must be presumed to have known, permitting agents to place insurance with other companies, dividing the commissions. Nestor & Co. turned over this policy to Murray & Cole, who received two-thirds of the commission. By them it was delivered to the insured, with the imprint of Murray & Cole thereon. The insurance company received the premium and assumed the risk. We see no reason why the general principle that an agency may be ratified is not applicable to this case. By accepting the risk and receiving the premium the Queen Insurance Company ratified the action of Murray & Cole in issuing the policy. By this ratification it made them its agents for the purpose of issuing this policy as effectually as it would have done had Murray & Cole been its regular agents in Nashville. These conclusions are supported by a number of well-considered cases. May v. Assurance Co. (C. C.) 27 Fed. 260; Mesterman v. Insurance Co., 5 Wash. St. 524, 32 Pac. 458, 34 Am. St. Rep. 877; McGraw v. Insurance Co., 54 Mich. 145, 19 N. W. 927; McElroy v. Insurance Co., 36 C. C. A. 615, 94 Fed. 990; Insurance Co. v. Hartwell, 123 Ind. 177, 24 N. E. 100; Insurance Co. v. Wiard, 59 Neb. 451, 81 N. W. 312. In the case of Insurance Co. v. Ewing, 32 C. C. A. 532, 90 Fed. 217, decided in this court November 9, 1899, it was held, under circumstances similar to those in the present case, that the agent obtaining the policy was not the agent of the insured. Whether he was the agent of the insurance company was left undetermined. We think the reasoning in that case in harmony with the conclusion we have reached. In the present case the court left it to the jury to say whether, in view of the language of the policy and the circumstances of the case, Nestor & Co. had knowledge of the intended purposes of the insured in reference to this policy. Upon the undisputed facts, we are of the opinion that the jury might

have been instructed that the knowledge of Murray & Cole prevented the insurance company from making the defense relied upon as to the subsequent changes of title and possession of the insured property. In this view, the instruction complained of worked no harm to the plaintiff in error.

A further question is urged upon our attention, and concerns the manner in which the suit was prosecuted. The action was originally brought by the Union Bank & Trust Company, the Nashville Produce Company, and the Produce Company for the use of the Union Bank & Trust Company. The defendant demurred, contending that the Union Bank & Trust Company was the only party in interest entitled to recover upon the policy. The demurrer was sustained, and the plaintiff granted leave to amend, and to elect to sue either in the name of the Union Bank & Trust Company alone, or in the name of the Nashville Produce Company or W. M. Jameson for the use of the Union Bank & Trust Company. It seems to be held in Tennessee that a mortgagee who insures the mortgaged property in the name of the mortgagor, loss payable to the mortgagee as his interest might appear, himself paying the premiums, where the mortgage debt exceeds the insurance, may sue alone upon the policy. Donaldson v. Insurance Co., 95 Tenn. 280, 32 S. W. 251. Other well-considered cases hold that the party with whom the contract of insurance is made is at least a proper party to the action. He has an interest to see that the debt is paid. He is liable on the contract to the insurer. He may end the rights of the lienor, to whom the loss is to be paid as his interest may appear, by liquidating the debt, and has hence an interest in the action. Winne v. Insurance Co., 91 N. Y. 185; Williamson v. Insurance Co., 86 Wis. 393, 57 N. W. 46, 39 Am. St. Rep. 906. It is to be remembered that we are dealing with the question now in an appellate court, and the inquiry is whether there is substantial error in the record, to the prejudice of the plaintiff in error. If, under the Tennessee practice, the Union Bank & Trust Company were alone entitled to bring the action, what prejudice has resulted to the plaintiff in error by permitting the suit to be prosecuted in the name of the produce company for its use? The Tennessee Code provides (section 2795), "In all suits prosecuted in the name of one person for the use of another, the person for whose use the suit is brought will be held the real plaintiff of record." Under this statute the real party in interest was in court, and, if appellant's contention be correct, was entitled to the sole recovery in the case. It is effectually barred from any further recovery on the cause of action sued upon, and, assuming that it might have brought the action alone, the plaintiff in error has not been prejudiced, and a judgment otherwise correct should not be disturbed for this reason.

Other errors assigned are not pressed in the argument. Finding no error in the proceedings of which the plaintiff in error may complain, the judgment will be affirmed.

LANCASHIRE INS. CO. OF MANCHESTER, ENG., v. BARNARD.

TRADERS' INS. CO. OF CHICAGO, ILL., v. SAME.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1901.)

Nos. 1,545, 1,546.

1. INSURANCE—ADJUSTER—AUTHORITY OF.
An adjuster sent out by insurance companies to determine the amount of and settle an alleged loss is authorized to exercise their option to pay the damages or to reconstruct or repair the building injured.

2. SAME—OPTION TO REBUILD—WHEN EXERCISED.
The option to pay the damages for an alleged loss or to rebuild the injured structure secured in policies of insurance may be exercised by the companies at any time after the loss and before the expiration of the time prescribed for its exercise in the policies.

3. SAME—PLANS AND SPECIFICATIONS—REQUEST FOR WHEN TOO LATE.
A request by an insurance company for plans and specifications of a burned building after it has exercised its option not to rebuild, and after the amount of the loss has been fixed by the award of appraisers, is too late, and the failure of the insured to grant it is no defense to an action on the policy.

4. SAME—FACTS AND DECISION.
An insured building was burned November 26, 1896. The preliminary proofs were delivered December 20, 1896. The adjuster of the companies notified the insured on January 5, 1897, that they would not rebuild. The award of the appraisers under the policy fixing the amount of the loss was published June 5, 1897. On June 18, 1897, the companies requested plans and specifications of the burned building. *Held*, the demand came too late, a compliance with it would have been useless, and the refusal of the insured to grant it constituted no defense to actions upon the policies and the award.

5. CONTRACTS AND REMEDIES GOVERNED BY LAW OF STATE WHERE FORMER ARE MADE AND LATTER ARE ADMINISTERED.
Matters relating to the execution and validity of contracts are governed by the law of the place where they are made; matters relating to remedies by the law of the place where suit is brought. A policy of insurance covering property in Illinois made and delivered in Nebraska, and upon which action is brought in Nebraska, is subject to the law of Nebraska relative to interest upon the amount due thereon.[1]

6. INSURANCE—PAYMENT OF LOSS WHEN DUE.
Where a policy provides that the loss shall be payable 60 days after the delivery of proofs, and does not make the award of appraisers a part of the proofs, the damages are due immediately after the filing of an award subsequent to the expiration of the 60 days.

(Syllabus by the Court.)

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

Charles J. Greene and Ralph W. Breckenridge, for plaintiffs in error.

Frank H. Gaines (James E. Kelby and John A. Storey, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

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[1] What law governs insurance policies, see note to Corley v. Association, 46 C. C. A. 287.

SANBORN, Circuit Judge. These are actions against two insurance companies upon an award of appraisers under the provisions of their policies fixing the amount of the loss from the burning of a hotel at Peoria, in the state of Illinois, which was owned by Lura D. Barnard, the plaintiff below, and was insured against fire by eight companies, two of which are the plaintiffs in error here, the Lancashire Insurance Company of Manchester, England, and the Traders' Insurance Company of Chicago, Ill. The defense of the Lancashire Company was that it demanded verified plans and specifications of the hotel injured, under the provisions of its policy, which requires the insured to furnish them if requested, and the plaintiff refused to provide them. The Traders' Company made the same defense, and also alleged that the suit against it was prematurely brought. To the defense that she failed to furnish plans and specifications when requested, the plaintiff replied that this request was not made until after the award of the appraisers, which was dated June 15, 1897; and that long before this award was made the companies had notified her that they would not rebuild or repair the burned building. The trial developed these facts: The fire which injured the building occurred on November 26, 1896. On December 20, 1896, the plaintiff furnished to each of the companies proofs of loss. On January 5, 1897, the adjuster of the companies waited upon the husband and attorney in fact of the plaintiff, and negotiated for a settlement of the loss, which she had claimed in her proofs to be $19,876.65. During this negotiation the adjuster stated to Mr. Barnard that he would not pay the amount claimed by the plaintiff, and Mr. Barnard replied, "Go ahead and rebuild." The adjuster answered: "No; we won't rebuild. Wherever we have rebuilt as companies jointly, it has cost us one-third more than it would you. But, if you will go into this appraisement, as soon as the appraisement is over I will write you a check on the companies' agents, and we will waive the 60-days time, and you can proceed to rebuild at once." Thereafter the parties entered into an agreement for an appraisement pursuant to the terms of the policies, and on June 15, 1897, the appraisers made an award, wherein they found the amount of the loss to be $19,681. On June 18, 1897, the companies requested the plaintiff to furnish plans and specifications of the building in order to enable them to determine whether they would pay the award or rebuild the hotel. The plaintiff refused to comply with this request. In this state of the case the court below instructed the jury that the declaration of the adjuster in January, 1897, that the companies would not rebuild or repair was an election on their part to pay the damages, and not to rebuild; that the plans and specifications at the time they were demanded, after the award had been made, could have been of no benefit to the defendants; and that they must find a verdict against each of them for one-eighth of the amount of the award, with interest on the amounts due from the defendants in these actions at the rate of 7 per cent. per annum from August 16, 1897. This charge of the court and many other rulings are assigned as error, but the conceded facts of the case are such that, if this instruction was right, the other rulings of which complaint is made are immaterial, and the judgment below

must be affirmed. The only real controversy in this court arises over the correctness of this instruction.

It is contended that the declaration of the adjuster in January, 1897, that the companies would not rebuild or repair, did not constitute an exercise of their option to pay the damages or to rebuild, because the adjuster had no authority to make the election, and because the companies had no power to make it until after the award of the appraisers was published. The argument in support of this position is based upon the following provisions of the contracts: The policy of the Lancashire Company provides that where fire occurs the insured shall within 60 days after the fire furnish proofs thereof, "and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged"; that, in the event of a disagreement as to the amount of loss, the same shall be ascertained by appraisal, and that "the loss shall not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required." It also contains provisions to the effect that it shall be optional with the company to "take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within reasonable time, on giving notice within 30 days after the receipt of the proof herein required of its intention so to do"; that the company "shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for"; and that "no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto," nor unless such waiver is written upon or attached to the policy. The stipulations of the policy of the Traders' Company reserve to it the option to reconstruct the building or to pay the damages, and provide for an appraisal of the amount of the loss in case of disagreement; but they are not quite as favorable to the defendants as the provisions of the Lancashire Company's contract, and for that reason will not be set forth at length.

Upon the provisions of the policy of the Lancashire Company, which have been recited, counsel for the plaintiffs in error base an argument to the effect that the attempted election in January, 1897, by the adjuster, to pay the damages, and not to reconstruct the hotel, was ineffectual, because he had no authority to waive any provision of the policy, or to make the election, and because the company had no right or power to exercise its option until after the award of the appraisers had been published. But an adjuster is empowered to settle the alleged loss. A settlement of the loss necessarily involves the exercise of the option to pay the damages sustained, or to rebuild or repair the building injured. The whole is always greater than and includes all its parts, and the authority to settle a loss includes the power to do any lawful act and to make any legal

contract to fix the amount of and to discharge the liability. An adjuster of an insurance company authorized to settle an alleged loss has the power to determine its amount, and how, when, and where it shall be paid; and hence he necessarily has the authority to determine whether it shall be paid in money or by the reconstruction of the injured building, and the power to exercise the option of the company in that behalf. Snowden v. Insurance Co., 122 Pa. 502, 510, 16 Atl. 22; Platt v. Insurance Co., 153 Ill. 113, 122, 38 N. E. 580, 26 L. R. A. 353, 46 Am. St. Rep. 877. No provision of the policy forbids the exercise of this power, and hence no stipulation of the agreement is either violated or waived by its use.

But the position upon which counsel seem to place their chief reliance is that the company had no power to exercise its option until after the award of the appraisers had been made. They sharply call attention to the fact that the policy provides that the loss shall not become payable until 60 days after the proof of loss, including the award of the appraisers, has been received by the company; and that it shall be optional with the company to repair or rebuild, upon giving notice of its intention so to do within 30 days after the receipt of the proof of loss; and they insist that it is only within this 30 days that the option to rebuild can be exercised by the corporation. It may be conceded that, in the absence of any prior exercise of the option, the insurance company has until the expiration of 30 days after the publication of the award in which to make its choice. Langan v. Insurance Co. (C. C.) 96 Fed. 710. But it does not follow from this concession that the company had no right to exercise its option prior to the filing of the award. The provision of the policy which allows the company 30 days after the completion of the proofs, including the award of the appraisers, in which to determine whether it will pay the damages or reconstruct the building, is a stipulation for the benefit of the company. It provides an extended period within which its option may be exercised, and it definitely fixes the termination of that period. But it does not prescribe or limit the time of its commencement. It does not prohibit it from making its choice at any time after the fire and before the award. Any other rule would make an appraisal and award a condition precedent to the exercise of this option at all. This is not the true meaning of the stipulation, and was not the intent or purpose of the parties to the agreement. The fire occurred on November 26, 1896. The preliminary proofs of loss, stating the claim of the plaintiff, were delivered on December 20, 1896. They contained no appraisal, but no appraisal was necessary if the parties agreed upon an adjustment. The stipulation of the policy made it optional with the company to pay the damages claimed or to rebuild the hotel. It had the same right to exercise that option at any time after the fire that it had to exercise it within 30 days after the filing of the award of the appraisers. No stipulation of the policy was violated by its exercise in January, 1897. No power of the company was exceeded, and no right of any party to the contract was infringed. An insurance company, which has the right, under its policy, to exercise an option to pay the damages or to reconstruct an injured building by giving

notice of its intention within 30 days after the receipt of proofs of loss, including an award of appraisers, may make its choice at any time after the fire and before the expiration of the 30 days. Wynkoop v. Insurance Co., 91 N. Y. 478, 482, 43 Am. Rep. 686; Association v. Rosenthal, 108 Pa. 474, 1 Atl. 303; Insurance Co. v. Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613; Brady v. Insurance Co., 11 Mich. 425; Morrell v. Insurance Co., 33 N. Y. 429, 88 Am. Dec. 396; Beals v. Insurance Co., 36 N. Y. 522; Heilmann v. Insurance Co., 75 N. Y. 9. The declaration of the adjuster for these companies in January, 1897, that they would not rebuild the hotel, was an exercise of the option of the companies to pay the damages, and not to rebuild or repair. The award of the appraisers on June 15, 1897, conclusively fixed the amount of the loss. After that date plans and specifications of the building injured were useless for any purpose connected with the contracts of insurance, and the request to furnish them was unwarranted by the stipulations of the policy and futile. They could not aid the insurance companies to ascertain the amount of the loss which they should pay, because that was fixed by the award. They could not assist them to rebuild the property, because they had made their choice to pay the damages, and had irrevocably abandoned their right to rebuild. The failure of the defendant in error, therefore, to furnish the plans and specifications which were first requested after the company had exercised its option not to rebuild, and after the amount of the damages it had chosen to pay had been fixed, constituted no defense to these actions.

The Traders' Company presents two other questions for our consideration. The plaintiff resided in the city of Omaha, in the state of Nebraska. She procured her insurance through brokers resident in that city, who obtained the policy of the Traders' Company from its agents residing in the state of Illinois. The property insured was situated in the state of Illinois. The premium was paid and the policy was delivered in the state of Nebraska. The rate of interest in the state of Nebraska for default in the payment of moneys due upon contracts of this character is 7 per cent. per annum, while the rate in the state of Illinois is 5 per cent. per annum. The circuit court instructed the jury to allow interest at 7 per cent. upon the defendant's share of the award from a date 60 days after its publication. It is claimed that this was an Illinois contract, and that the defendant should not have been charged more than 5 per cent. interest upon the amount it owed. But the statute of Nebraska provides that "any person or firm in this state who shall receive or receipt for any money, on account of or for any contract of insurance made by him or them, or for any such insurance company or individual aforesaid, or who shall receive or receipt for money from other persons, to be transmitted to any such company or individual aforesaid, for a policy or policies of insurance or any renewal thereof, although such policy or policies of insurance may not be signed by him or them, as agent or agents of such company, or who shall in any wise, directly or indirectly, make or cause to be made any contract or contracts of insurance, for or

on account of such company aforesaid, shall be deemed to all intents and purposes an agent or agents of such company, and shall be subject and liable to all the provisions of this chapter." Comp. St. Neb. 1893, c. 16, § 8. Under this statute the brokers in Omaha were the agents of the company. The policy of the Traders' Company was delivered in the state of Nebraska to a resident of the state of Nebraska, who there paid the first premium. It was therefore a Nebraska contract, to be governed and construed by the laws of that state. Matters relating to the validity and execution of a contract are governed by the law of the place in which it is made; those relating to the remedy by the law of the place in which the suit is brought. This contract was made in Nebraska, and the action upon it was brought in Nebraska. Therefore the rate of interest upon the amount due upon it was governed by the law of that state. Insurance Co. v. Russell, 77 Fed. 94, 100, 23 C. C. A. 43, 48, 40 U. S. App. 530, 543; Society v. Winning, 58 Fed. 541, 7 C. C. A. 359, 19 U. S. App. 173.

Finally, counsel for the Traders' Company contend that the action against it was prematurely brought. It was commenced on July 19, 1897. The award was made on June 15, 1897. The contention is that no action could be maintained under the policy until 60 days after the filing of the award. But a careful examination and analysis of the provisions of the policy of this company fails to disclose any provision which extends the time of payment until 60 days after the publication of the award of the appraisers. The Lancashire policy, as we have seen, expressly provides that the loss shall not become payable until 60 days after the proof of loss, including an award by appraisers when appraisal has been required. The Traders' policy has no such provision. The stipulations of its contract are that it shall pay the damages resulting from the loss 60 days after the written notice and proofs shall have been made by the assured, unless the company shall have given notice of its intention to rebuild, repair, or replace the property damaged or destroyed within that time; that it has the option to repair, rebuild, or replace the property damaged within 60 days after receipt of the proofs, and that the proofs shall be delivered within 30 days after the loss has occurred. The proofs of loss were delivered on December 20, 1896. The policy provided that the insured should produce plans and specifications if requested, and that the loss should be payable within 60 days after the receipt of the proofs, unless the company exercised its option to rebuild within that time. No plans or specifications were called for. No notice of intention to rebuild was given within the 60 days. The necessary effect of these provisions of the policy was that the damages would have become due at the expiration of 60 days from the receipt of the preliminary proofs of loss, to which no objection was made, had it not been for the disagreement relative to the amount of the loss and its appraisal under the policy. The result is that immediately upon the completion of the appraisal the Traders' Company's share of the award became due and payable. The 60 days after the production of the proofs mentioned in its policy had expired long before the award was

made, and as soon as that appraisal was complete, and the liability of the company was fixed, its duty to discharge it became instant. The action against the Traders' Company was not prematurely brought, and the judgments below are affirmed.

SANDERS' ADM'X v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1901.)

No. 912.

1. ABATEMENT—STATUTORY ACTION—DEATH OF PLAINTIFF.
   The question whether a cause of action created by a state statute survives the death of the plaintiff, or of the person for whose benefit it is given, is one of right, and not of procedure, and is governed by the statutes of the state giving such right of action.[1]

2. WRONGFUL DEATH — ACTION UNDER TENNESSEE STATUTE — ABATEMENT BY DEATH OF BENEFICIARY.
   In an action for wrongful death brought by an administrator under the Tennessee statute (Shannon's Code, §§ 4025, 4026), which gives the right of action for the benefit of the widow or children or next of kin of the deceased, under the construction placed on such statute by the supreme court of the state it abates and the right of action is extinguished on the death of the statutory beneficiary in whose favor the right accrued, and who was the real party plaintiff, whether such beneficiary was one of those specifically mentioned, as the wife or a child, or the next of kin under the intestacy laws of the state.

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

This action was brought by Kate G. Sanders, administratrix of Martin J. Sanders, deceased, against the Louisville & Nashville Railroad Company, for negligently causing the death of the deceased. The declaration averred that Martin J. Sanders was unmarried and without issue, and left surviving him his father, Martin Sanders, his mother, one brother, and four sisters. Subsequently an amended declaration was filed, which averred that the father, Martin Sanders, for a valuable consideration before this suit was brought, had sold and transferred his right to the recovery in the case to the plaintiff, Kate G. Sanders, individually, and in trust for her mother and brother and sisters. To the amended declaration the defendant pleaded in abatement that the deceased, Martin J. Sanders, died unmarried, without children, leaving surviving him as his next of kin his father, Martin Sanders, who alone was entitled to recover damages for the wrongful death of said Martin J. Sanders, and that since the bringing of this suit said father, Martin Sanders, had died. The plaintiff demurred to this plea in abatement. The demurrer was overruled, and, the plaintiff refusing to plead further, it was adjudged that the plea in abatement was good, and the plaintiff's suit was dismissed. This action of the court in sustaining the plea in abatement and in dismissing the action of the plaintiff is assigned as error.

John F. Allen, for plaintiff in error.

J. W. Judd and Charles N. Burch, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

[1] What law governs actions for death by wrongful act, see note to Burrell v. Fleming, 47 C. C. A. 606.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The right of action in the state of Tennessee for the negligent death of a human being is purely statutory. We must therefore look to the statute to determine when and in whose favor the right of action survives, and by whom such an action may be brought. Railway Co. v. Lilly, 90 Tenn. 564, 18 S. W. 243; Loague v. Railroad Co., 91 Tenn. 458, 19 S. W. 430; Railroad Co. v. Bean, 94 Tenn. 388, 29 S. W. 370; Railway Co. v. Hooper, 35 C. C. A. 24, 92 Fed. 820. This action was brought under sections 4025 and 4026 of Shannon's Revision, which are as follows:

"Sec. 4025. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors.

"Sec. 4026. The action may be instituted by the personal representative of the deceased; but, if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs, unless he sign his name to the prosecution bond."

Section 4025 was construed by the supreme court of Tennessee as preserving only the deceased's right of action for the damage which he might have recovered for the wrong and injury done him in case death had not ensued. Railroad Co. v. Burke, 6 Cold. 45; Trafford v. Express Co., 8 Lea, 96, 105. The pecuniary loss sustained by the widow or children or next of kin in whose favor the action survived was not recoverable in this statutory suit. To enlarge the measure of damages and the scope of the action, the act of 1883, c. 186, was passed, by which it was provided that the plaintiff in such an action should, if entitled to damages, "have the right to recover for the mental and physical suffering, loss of time and necessary expense resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received." Shannon's Code Tenn. § 4029. The next of kin for whose benefit the right of action survives are the real plaintiffs, and the administrator, though made a necessary party plaintiff by the statute, is nevertheless a mere trustee and a nominal party. Webb v. Railway Co., 88 Tenn. 119, 128, 12 S. W. 428; Loague v. Railroad Co., and Railway Co. v. Lilly, cited above; Railway Co. v. Hooper, 35 C. C. A. 24, 26, 92 Fed. 820. The damages sustained by the deceased, as well as those sustained by the statutory beneficiaries, must be recovered in one action, brought by one authorized to maintain the suit by the express terms of sections 4026 and 4027, set out above. Loague v. Railroad Co., 91 Tenn. 458, 460, 461, 19 S. W. 430. Inasmuch as the right of action survives only for the benefit of the beneficiaries designated in the statute, it is essential that the plaintiff's declaration show that the suit is brought for the use and benefit of a statutory beneficiary

in existence when the right of action accrued. Railway Co. v. Lilly, 90 Tenn. 564, 18 S. W. 243; Railroad Co. v. Pitt, 91 Tenn. 86, 18 S. W. 118. In Railway Co. v. Hooper, 35 C. C. A. 24, 92 Fed. 820, we held that, inasmuch as the pecuniary damages recoverable for the loss sustained by the next of kin for whose benefit the action survives would depend much upon the nearness and dependence of the beneficiary, a suit brought by an administrator for the benefit of one averred to be the next of kin entitled to the recovery was a different cause of action from that stated in an amendment substituting a different beneficiary as the person for whose use the action was brought, and that a plea of the statute of limitations was good against the new action, which would not be good against the action as originally brought.

The declaration in the case at bar averred that the deceased left neither a widow nor children, and that he left surviving a father, mother, one brother, and four sisters. Under this state of facts, the action could only be brought by the personal representative of the deceased for the use and benefit of the father of the deceased, Martin Sanders, who, under the Tennessee statute of distribution, was the next of kin entitled to the sole benefit of the recovery. Did the cause of action die with the person of Martin Sanders, for whose sole benefit it had survived? For the plaintiff in error it has been argued that, as Martin Sanders was the next of kin for whose benefit the right of action survived, the right to the recovery in the pending suit was a vested right which he might assign, and that the suit might be prosecuted after his death for the benefit of his assignees; the amended declaration averring such an assignment to have been made. It is obvious that if Martin Sanders had a vested right in the recovery, capable of assignment, the action would not abate by his death, even if no assignment had been made, inasmuch as the benefit of the recovery would inure to the estate of Martin, and be payable to his personal representative. It follows that, if the recovery would inure to the benefit of either the personal representative of Martin Sanders or of his assignees, the plea in abatement was erroneously sustained. The question as to whether a particular cause of action, dependent upon a statute, survives the death of the plaintiff, or of the beneficiary for whose benefit the action is brought, is a question of right, and not procedure, depending upon the substance of the cause of action, and for its solution we must look to the statute of the state giving the right of action. Martin v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311. The defendant in error has cited and relied upon two cases construing the Tennessee statute under which the action was brought. Those cases are Loague v. Railroad Co., 91 Tenn. 458, 19 S. W. 430, and Railroad Co. v. Bean, 94 Tenn. 388, 29 S. W. 370. In the case first cited the action was brought by the widow of the deceased, who died pending the suit. It was sought to revive the action in the name of her personal representative. This was denied upon the ground that no one could be the plaintiff in such an action but one authorized by the terms of the statute. The statute gave the right of action to the widow or children of the deceased, or to the personal representative of the deceased for the benefit of the

widow or children, if there were such and they declined to sue, or to the administrator for the benefit of the next of kin, if for want of widow or children the next of kin were the statutory beneficiaries. It is manifest that the administrator of the widow was not such a plaintiff as was authorized to sue under the statute. If the administrator of the deceased had sought to revive the action for the benefit of the estate of the widow or of her assignees, the question would have been presented which arises here. The case of Railroad Co. v. Bean is more in point, and is decisive of the question. The action was by the administrator of the deceased for the use and benefit of the widow, who was named as the statutory beneficiary. There was a judgment for the plaintiff. The defendant sued out a writ of error, pending which the widow died. A motion was made in the supreme court to abate the suit because of the death of the widow, who was sole beneficiary and the real plaintiff. The court said:

"We think the exclusive statutory beneficiary was that person or class of persons who were entitled to the recovery at the death of deceased, when the cause of action accrued. In this case it was the widow, and, in the language of the statute, the right of action passed to her, or to the administrator for her benefit. The right of recovery having once vested in the widow, it did not pass upon her death to her personal representative; neither did it revest in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished."

The suggestion that the case at bar may be distinguished from Railroad Co. v. Bean, because the statute specifically named the widow as the beneficiary, and that, in default of widow and children, resort must be had to the statute of distribution to ascertain the "next of kin" entitled to the recovery, has no substance in it. That is certain which can be made certain. The statute which preserves the right of action from extinguishment does so for the benefit of the statutory next of kin,—a person or class of persons determined and made certain by the statute of distribution. In Railroad Co. v. Bean the Tennessee supreme court decided that an action brought by the administrator of the deceased for the benefit of the widow of the deceased, who, under the statute, was the sole beneficiary, abated as a consequence of the death of the widow pending a writ of error. There can be no escape from holding that a like result must follow when it happens that the father is the statutory beneficiary for whose benefit the cause of action had survived. The assignment made by the father could not enlarge his rights. An administrator, under our law, takes title by assignment. If the right to the recovery would not pass to the administrator of Martin Sanders because the cause of action died with his person, it is clear that no assignment of the recovery would preserve the cause of action after the death of the beneficiary.

The case is governed by Railroad Co. v. Bean, and the judgment is affirmed.

PATTON v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Fourth Circuit. November 6, 1901.)

No. 366.

1. APPEAL AND ERROR—QUESTIONS REVIEWABLE—GRANTING NEW TRIAL.
The rule of the federal courts that the action of a trial court in granting or refusing a new trial is not reviewable in the appellate court is not changed by the fact that such action was taken by the trial judge on his own motion, or that he refused to give his reasons therefor, in the absence of anything in the record showing an abuse of the judicial discretion vested in him.

2. SAME—EFFECT OF REVERSAL—SECOND TRIAL.
A decision of the circuit court of appeals on the record before it that the case should have been submitted to the jury is not controlling upon the trial court in a second trial, where the evidence is different.

3. TRIAL—DIRECTION OF VERDICT.
The action of a trial court in directing a verdict for defendant in an action against a railroad company for a personal injury sustained, on the evidence in the record, on the ground that such evidence was insufficient to support a verdict for plaintiff.

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

Theodore F. Davidson and F. A. Sondley, for plaintiff in error.
Charles Price, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

GOFF, Circuit Judge. At the November term, 1897, of this court, this case was remanded to the circuit court of the United States for the Western district of North Carolina, with instructions that a new trial be granted. The facts then shown by the record are fully stated in the opinion then filed, and only such matters as are additional will be referred to now. Patton v. Railway Co., 27 C. C. A. 287, 82 Fed. 979. The case, coming on to be further heard in said circuit court, was at the July term thereof, 1898, again submitted to a jury, when a verdict for the sum of $10,000 was returned for the plaintiff. The plaintiff below moved for judgment, but the court, declining to enter the same, ex mero motu set aside the said verdict. The plaintiff asked for permission to be heard on the matter of setting aside the verdict, but this the court declined to grant, and also refused to state the grounds on which the ruling setting aside the verdict was based. To this action of the court the plaintiff excepted. Afterwards, at the November term, 1899, the case was again tried before a jury, when, at the conclusion of the evidence, the court directed a verdict for the defendant below. To this action of the court exception was noted by the plaintiff, and bills of exception, in which were incorporated the evidence and the instructions given and refused, were duly prepared and signed. Judgment was rendered for the defendant, and a writ of error was asked for and granted. The assignments of error are numerous, relating chiefly to the refusal of the court below to give certain instructions as asked for by the

plaintiff in error; but, from the view we take of this case, it will not be necessary to refer to many of them, for the reason that we think the court was clearly right, upon the evidence submitted to the jury, in directing a verdict for the defendant.

The error assigned relating to the setting aside of the verdict rendered at the second trial is without merit; for it is so well settled that in the courts of the United States the granting of a new trial is within the discretion of the court, and not subject to review, that it is even unnecessary to again state the point, or to cite authorities to sustain it. The fact that the court on its own motion set the verdict aside neither adds to nor detracts from the rule applicable to such matters. It is the usual and certainly the better practice for the court to give the reasons moving it to such action, but we are not able in this case to say that it is reversible error not to do so. The court below exercised the right confided to it, and, so far as this writ of error is concerned, we must presume that its discretion was used in a judicial manner. It is true that the plaintiff below excepted to such action by the court, but it is also true that the record does not contain any of the testimony submitted to and considered by the jury; for no bill of exceptions was ever offered by which the same could have been preserved.

We come now to examine the assignments of error necessary to be considered so far as the third trial is concerned. Did the court err in directing a verdict for the defendant? It is insisted that, because this court held when the case was formerly here that the record then disclosed "testimony sufficient to go to the jury," when the case was again tried it was absolutely essential that the jury should pass upon it. We do not think so. This court acted on the record then before it, passed upon the weight of and the inferences to be drawn from the testimony as it was before the jury at the first trial, and could not have intended to control the action of the court below concerning the facts as they should be disclosed by the evidence offered at a future trial. The case as presented to the court and jury at the last trial was quite different from what it was when remanded by this court. The record then shows that no evidence was offered by the defendant, and that on the conclusion of the plaintiff's testimony the court directed a verdict. Now the record shows not only that plaintiff's evidence was heard, but that a number of witnesses, expert and otherwise, were offered and examined by the defendant; their testimony relating particularly to the questions referred to by this court on the hearing of the former writ of error. It must be kept in mind that this court, when the case was last here, found no proof of negligence on the part of the defendant in not providing safe machinery and appliances, and it is plain from the case as it now appears that the court below was warranted in so finding at the last trial. The attention of plaintiff and defendant had been particularly called by the opinion of this court to the character of the track and to the grade at the point at which the accident occurred. Witnesses were examined with special reference to the track, the grade, the curve, and the guard rail; and the court therefore had information on those special points not before in the record,

which, taken in connection with the fact that there was no defect in the machinery and appliances, was clearly decisive of the issues joined. And it is, we think, beyond question that it was the carelessness of the plaintiff, and the disregard by him of the rules that had been issued by defendant for his guidance at the very point where the accident occurred, that caused the running away of the train and the injury complained of. This being so, if a verdict had been rendered for the plaintiff, should it have been permitted to stand? We think not. Then why was it not the duty of the court to direct a verdict for the defendant? We are told by the supreme court of the United States that:

"Before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Commissioners v. Clark, 94 U. S. 278, 284, 24 L. Ed. 59, 61.

We give to the plaintiff below the most favorable view of all the evidence before the jury, and still, from that evidence, and from all the reasonable inferences to be drawn therefrom, we are unable to say that under the law a verdict should have been found in his favor.

Affirmed.

REED v. PENNSYLVANIA CO.

(Circuit Court of Appeals, Sixth Circuit. October 9, 1901.)

No. 1,017.

1. COSTS—APPELLATE PROCEEDINGS—RIGHT TO PROSECUTE IN FORMA PAUPERIS.
   Act July 20, 1892 (27 Stat. 252), which provides that any citizen of the United States entitled to commence any suit or action in any court of the United States "may commence and prosecute to conclusion" any such suit or action without being required to prepay fees or costs, or to give security therefor, upon filing an affidavit of poverty, and which also provides that he may avoid a demand for fees or security pending an action by a like affidavit, applies to proceedings on appeal or writ of error, which are within its equity, and not excluded by its letter.
2. SAME—AFFIDAVIT OF POVERTY—SUFFICIENCY
   An affidavit of poverty made by a plaintiff who sues, as administratrix of her deceased husband, to recover damages for his wrongful death, under a state statute which gives the right of action in favor of the widow and children of the deceased, should show that neither the estate nor the beneficiaries of the action are able to prepay or secure the costs.
3. APPEAL—PRINTING BRIEFS.
   A circuit court of appeals will not suspend the rule requiring printed briefs in favor of an appellant prosecuting the appeal in forma pauperis.

On Motion to Dismiss Writ of Error.

Wellington Stilwell, for the motion.

Before LURTON and SEVERENS, Circuit Judges.

LURTON, Circuit Judge. The plaintiff in error has filed a transcript of the record from the court below, and a petition praying to be allowed to prosecute her writ of error in forma pauperis, as provided by the act of congress of July 20, 1892 (27 Stat. 252), and that she be relieved from making the deposit for costs required

by rule 16 (31 C. C. A. c., 90 Fed. c.), and also the deposit for printing the record required by rule 23 (31 C. C. A. cii., 90 Fed. cii.).

The act of congress is in these words:

"Be it enacted by the senate and house of representatives of the United States of America, in congress assembled, that any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to a conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement, under oath, in writing, that, because of his poverty, he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

"Sec. 2. That after any such suit or action shall have been brought, or that is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit, and willful false swearing in any affidavit provided for in this or the previous section, shall be punishable as perjury as in other cases.

"Sec. 3. That the officers of court shall issue, serve all process and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.

"Sec. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases: provided, that the United States shall not be liable for any of the costs thus incurred."

1. Appellate proceedings are within the equity of this statute, and not excluded by its letter. The language of the first section of the act is, "may commence and prosecute to a conclusion," and by the second section the act is made to apply at any stage of a pending action. Whether a writ of error or appeal be regarded as the commencement of a new action, or as a continuation of the original suit, it is equally plain that the benefits of the act are extended to the appellant or plaintiff in error, who may "avoid a demand" for prepayment of costs, or for a security for their payment, by showing that, owing to his poverty, he is unable to pay such costs or secure same. This construction is the one placed upon this act by this court in a number of unreported instances, and is the construction which the act has generally received in this circuit. Thus, in Fuller v. Montague (C. C.) 53 Fed. 206, Judge Key held that the right to prosecute the suit "to a conclusion" involved the right of appeal, and that upon the filing of the proper affidavit an appeal should be allowed without bond. In Brinkley v. Railroad Co. (C. C.) 95 Fed. 345, Judge Hammond held that the act applied to appellate proceedings, but denied the right of the plaintiff to prosecute an appeal in the particular case in forma pauperis, because the court deemed the plaintiff's suit "unworthy of a trial," and the appeal prayed vexatious and frivolous. The plaintiff applied to this court for a writ of mandamus to compel the allowance of an appeal. An alternative writ was denied, and an order was entered dismissing the petition, which recited that the writ was

denied on the ground that Judge Hammond, "in denying to the relator the right to an appeal as a poor person, without giving the usual bond, was exercising his lawful discretion to prevent the continuance of a proceeding in forma pauperis, of which the court plainly had no jurisdiction, and which was utterly frivolous and vexatious in character." It is further recited in the judgment of this court that "this order is based on the ground set forth in the opinion of Judge Hammond in Brinkley v. Railroad Co. (C. C.) 95 Fed. 345, in the second branch thereof, beginning on page 352." There has been some difference of opinion in other circuits, but the decided weight of opinion is in accord with the view we have indicated. Thus, in Columb v. Manufacturing Co. (C. C.) 76 Fed. 198, it was held that, upon the plaintiff filing an affidavit, he was entitled to his appeal, and to a copy of the transcript for filing in court of appeals. The opinion was on the circuit, and was concurred in by Putnam, circuit judge, and Nelson, district judge. Subsequently the court of appeals for the First circuit held the act to apply to proceedings by appeal or writ of error in the circuit court of appeals. Volk v. B. F. Sturtevant Co., 99 Fed. 532, 39 C. C. A. 646. In Wickelman v. A. B. Dick Co., 85 Fed. 851, 29 C. C. A. 436, the circuit court of appeals for the Second circuit pretermitted the question by ruling that the appellant was not a pauper, because it appeared that he was in receipt of a salary of $20 per week, and paid $200 per year house rent. He was, however, allowed to perfect his appeal by giving the necessary security. In the case of The Presto, 93 Fed. 522, 35 C. C. A. 394, the court of appeals for the Fifth circuit held that the act did not apply to appellate proceedings. We are not advised that there are any other reported cases in accord with the decision last cited.

2. The affidavit in this case is defective in this: The suit is that of the widow and administratrix of Frank Reed, who sues for damages consequent upon the tortious killing of her intestate and husband. Under the Ohio statute authorizing such an action, the damages recoverable are for the benefit of the widow and children of the deceased, and they are the real parties in interest. Bates' Ann. St. Ohio, § 6135. The beneficiaries and real parties in interest are therefore the widow and the children of the deceased. The affidavit shows sufficiently the poverty of the widow, but is defective in not making a like showing in behalf of the children of the deceased. Boyle v. Railroad Co. (C. C.) 63 Fed. 539.

3. It may be that the estate of the deceased is able to prepay the costs of the writ of error, or secure the same. If so, the act would have no application. The affidavit makes no showing as to the value of the estate of which the plaintiff is administratrix. The application is for these reasons denied, but without prejudice to its renewal upon an affidavit showing that the estate of the deceased, as well as the beneficiaries, is unable to pay the costs or give security.

4. The application to suspend the rule in respect to printing briefs must be denied. That is an expense usually borne by counsel primarily, and constitutes an item of expense between counsel

and client. The importance of such briefs to the attainment of a proper understanding of the merits of the case justifies us in expecting that the attorney who has advised the suing out of this writ of error will not desert the cause, or decline to comply with the rule requiring a printed brief. If we are in error about this, we will appoint an attorney to conduct the suit, upon being applied to, under the power conferred by the fourth section of the act. Whelan v. Railroad Co. (C. C.) 86 Fed. 219.

In re GAYLORD et al.

(District Court, E. D. Missouri, E. D. November 29, 1901.)

1. BANKRUPTCY—ASSETS OF ESTATE—MEMBERSHIP IN STOCK EXCHANGE.
A bankrupt's membership in a stock exchange is property, and its money value, subject to the restrictions imposed upon such membership by the laws of the association, constitutes assets of his estate.

2. RULES OF EXCHANGE—EFFECT OF EXPULSION OF MEMBER.
The constitution of the St. Louis Stock Exchange provides for the expulsion of members who are found guilty of fraud by the governing committee, and that their membership "shall be disposed of by the committee on admissions." There is no provision as to what shall be done with the proceeds, but, in case of the death of a member, the proceeds of his membership are to be used to pay any indebtedness due the association or its members, so far as required for that purpose, the remainder, if any, to be paid to his estate, and, in case of a member's suspension for insolvency and his failure to become reinstated under the rules, his membership is to be sold, and the proceeds paid pro rata to his creditors on the exchange. A firm of brokers, who were members of the exchange, became insolvent, and were adjudged bankrupts. They were subsequently found guilty of fraud by the committee, and were expelled, and their seats sold by the exchange. *Held* that, in the absence of any specific provision therefor, the expulsion of a member could not be considered as forfeiting to the exchange his property rights in his seat, and that the proceeds of the bankrupt's membership, after paying any claims of the exchange or its members, were assets of their estates to which their trustee was entitled.

In Bankruptcy. On petition by trustee asking order directing the treasurer of the St. Louis Stock Exchange to deliver to him the net proceeds realized from sale of the seats of the bankrupts in the exchange.

George D. Reynolds, for trustee.

J. Clarence Taussig, for treasurer of stock exchange.

SHIRAS, District Judge. From the record and evidence submitted in this case, it appears that Samuel A. Gaylord and John H. Blessing, prior to March 20, 1901, were engaged in business as stock brokers in the city of St. Louis, under the partnership name of Gaylord, Blessing & Co., and in their individual names they held seats or memberships in the St. Louis Stock Exchange. It further appears that on a petition in bankruptcy duly filed against the firm the partnership and its members were duly adjudged bankrupts in this court on the 17th day of April, 1901, and Charles W. Holtcamp was named and appointed trustee of the estates of the bank-

rupts. It is further shown that, having become insolvent, Samuel A. Gaylord and John H. Blessing were, on or about March 11, 1901, suspended from their rights in the stock exchange, and, charges of fraud having been preferred against them, the same were investigated by the governing committee of the exchange, in accordance with rules of the association, and on the 9th day of October, 1901, the named parties were expelled from the exchange, and thereupon, on the 12th day of November, 1901, the committee on admissions sold the memberships or seats in the exchange held by the bankrupts for the net sum of $4,460, which amount is now held by Benjamin C. Jinkins, the treasurer of the stock exchange.

For the purpose of settling the question whether the trustee is entitled to the money thus realized from the sale of the memberships formerly belonging to the bankrupts, the trustee has filed a petition reciting the facts, and asking an order upon the treasurer of the stock exchange, directing him to pay the money in his hands to the trustee; and to this petition Benjamin C. Jinkins, as treasurer of the stock exchange, answers that the proceeds of the sales of the memberships belong to the stock exchange, and do not form a part of the assets of the bankrupt.

The St. Louis Stock Exchange is not a corporation, but is an association of individuals, having a constitution and by-laws for the government thereof; it being declared in article 11 of the constitution that "the purpose for which the exchange is formed is to establish and maintain a salesroom in which its members may meet and conduct the business of buying and selling bonds, stocks, and other securities, and lending money, and to establish and enforce rules and regulations governing the same, and to encourage among its members in their dealings with each other, and with the public, honorable and uniform business methods in the conduct of such business." It is further provided that the total membership shall be limited to 50 members; that the initiation fee shall be $100; that any member who fails to comply with his contracts or becomes insolvent shall immediately so inform the president, and shall be suspended until after having settled with his creditors, when he may be reinstated by the committee on admissions; that, if any suspended member fails to settle with his creditors and apply for reinstatement within one year from the time of his suspension, his membership shall be disposed of by the committee on admissions, and the proceeds thereof be paid pro rata to his creditors on the exchange, as allowed by the arbitration committee; that the governing committee, by a two-thirds vote, may extend the time for settlement and reinstatement of a suspended member; that a member shall have the right to transfer his membership under certain defined restrictions, including the payment of all debts and obligations due to other members of the exchange out of the proceeds realized from the sale of the memberships; that when a member dies, being in debt to the exchange or any member thereof, his membership may be disposed of by the committee on admissions, and after paying the claims of the exchange, and the members thereof, the balance left shall be paid to the legal representative of the deceased; and that

"should any member be guilty of fraud, of which the governing committee shall be the judge, he shall, upon conviction thereof by a vote of two-thirds of the members of said committee present, be declared by the president to be expelled, and his membership shall be disposed of by the committee on admissions."

Under these provisions of the constitution of the stock exchange, it is claimed by the trustee that the memberships held by the bankrupts formed part of the assets of their estates, and on behalf of the exchange it is claimed that, having been expelled, the bankrupts forfeited all claim to, or right in, the proceeds realized from the sale of the memberships.

In Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264, a case involving the sale of a membership in the San Francisco Stock and Exchange Board, it was held by the supreme court that:

"There can be no doubt that the incorporeal right which Fenn had to this seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy, and that, if there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee."

In Sparhawk v. Yerkes, 142 U. S. 1, 12 Sup. Ct. 104, 35 L. Ed. 915, it is said:

"In Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264, it was ruled that the ownership of a seat in a stock and exchange board is property, not absolute and unqualified, but limited and restricted by the rules of the association; that such rules, in imposing the condition upon the disposition of membership that the proceeds should be first applied to the benefit of creditor members, are not open to objection on the ground of public policy, or because in violation of the bankrupt act; and that, in the case of the bankruptcy of a member, his right to a seat would pass to his assignees, and the balance of the proceeds, upon sale, could be recovered for the benefit of the estate. While the property is peculiar, and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is susceptible of being realized by creditors."

Under these decisions, it must be held that the question whether the memberships held by the bankrupts in the St. Louis Exchange can, in any sense, be treated as assets of the estates represented by the trustee, is dependent upon the provisions of the constitution of the exchange. These memberships are property of such a nature that unless the bankrupts, by reason of their expulsion, had forfeited all right or interest therein, the trustee would become entitled to the net proceeds realized from the sale thereof, and therefore the question to be determined is whether the constitution of the exchange declares that, upon expulsion of a member, his interest in his membership is wholly forfeited to the exchange. In determining this question, it must be borne in mind that the membership represents at least two distinct rights; the one being the personal privilege of conducting business on the floor of the exchange, with the advantages thereto pertaining, and the other is the ownership of a right to the money value of the membership, and both of these rights are subject to the restrictions which are contained in the con-

stitution of the association. In cases of suspension, the right to transact business as a member of the exchange ceases, and, unless the member is reinstated, is wholly terminated. In case of the death of a member, this right to transact business of course ceases, and in cases of expulsion this right is at an end. In cases of suspension, if the party is not reinstated within one year, or such longer time as may be granted him by the governing committee, then his membership is to be disposed of by the committee on admissions, and the proceeds realized therefrom are to be paid pro rata to his creditors on the exchange. This is not a forfeiture of the membership to the exchange as a whole, but is a mode of securing the payment to such members of the exchange as are creditors of the delinquent member of the money realized from the sale of the debtor's property, to wit, his membership in the exchange. In case of the death of a member, the provision is that his membership may be disposed of by the committee on admissions, and, after satisfying the claims of the exchange and members thereof, the balance left is to be paid to the legal representatives of the deceased member. Clearly, therefore, in the cases of permanent suspension or of the death of a member, the property value or right in the membership is not forfeited to the exchange, but provision is made for applying the money realized from a sale thereof to the payment of the debts due the exchange, or any of the members thereof, from the former owner of the membership, and for the payment of any balance left to him or his representative; and these provisions demonstrate that, under the provisions of the constitution, the termination of the personal right to carry on business on the floor of the exchange does not, ipso facto, destroy the right or interest of the former member in the money value of his membership. To sustain the contention that the forfeiture of the personal right to the use of the exchange facilities also works a forfeiture of all claims to the money value of the membership, some express provision to that effect must be found in the constitution of the exchange; for a right to forfeitures of this character cannot be maintained upon mere inferences, or upon a strained construction of the language of the constitution of the association.

It was within the power of the association to make provision for the forfeiture of all rights based upon membership in cases of expulsion, but to secure the right to forfeit the money interest belonging to a member by reason of wrongdoing on his part, or, in other words, to inflict a punishment of this nature on him, the right so to do must be set forth in the constitution or by-laws of the association. So long as one continues a member of the association, his membership therein is a property right, and, to devest him thereof, it must appear that some action has been had which, under the provisions of the laws of the association or of the statutes of the state applicable thereto, has legally deprived him of his property right. Under the express provisions of the constitution of the exchange, suspension so long as it continues, and expulsion permanently, deprives a member of his right to carry on his business on the exchange, but there is no clause to be found therein to the

effect that either suspension or expulsion shall work a forfeiture of the money value of the membership to the exchange.

Counsel for the exchange places reliance upon the provisions of section 1 of article 14, which declares that any member convicted of fraud shall "be declared by the president to be expelled, and his membership shall be disposed of by the committee on admissions." But certainly this is not a declaration that the membership is forfeited to the exchange, or that the proceeds realized shall be disposed of by the committee as it deems best. In cases of suspension, the membership cannot be sold until after the expiration of a year from the date of suspension, this time being allowed to the member to apply for reinstatement; but, in cases of expulsion for fraud, no provision is made for a reinstatement, and by the last clause of section 1, art. 14, provision is made for the immediate sale of the membership by the proper committee. This section does not attempt to define what the disposition shall be of the proceeds realized from the sale, and certainly it does not declare that they shall be forfeited to the exchange. The section directs the committee to dispose of the membership, but is wholly silent touching the disposition of the proceeds of the sale, and therefore the disposition of the proceeds to be made by the committee must be sought for in the other sections of the articles. If the contention of counsel for the exchange be sustained, to wit, that in cases of expulsion the proceeds of the sale of the membership are forfeited to the exchange, then the result would be that in cases of suspensions the proceeds of a sale are to be applied to the payment of the debts due the exchange and any member thereof, but that in cases of expulsion for fraud the proceeds of the sale go to the exchange as a whole, and the creditors wronged by the fraudulent transactions of the expelled member must bear the loss caused thereby. To sustain such a contention, so unfair to the creditors of the expelled member, it must be made clear that the express provisions of the constitution so declare, but no such declaration is to be found in the section relied on. That section authorized the immediate sale of the membership, but is wholly silent as to the disposition to be made of the proceeds of the sale, and certainly the absence of all direction as to the disposition of the proceeds cannot be construed into a forfeiture of the rights, not only of the expelled member, but also of his creditors, to the money realized from the sale of the membership in which the expelled member had a property right. This section does not provide for a forfeiture of the money interest of the expelled member, and therefore we must look to the other provisions of the articles of the association for the rule to be followed in disposing of the proceeds arising from the sale of the membership, and as, in the case of a suspended member, no provision is made for the forfeiture of the proceeds of the sale to the exchange, it must be held that, in cases of suspended members and of expelled members, the constitution of the exchange recognizes the right of the member in the money value of the membership, and therefore after the payment of the debts, if any, due the exchange and to the members thereof,

the balance left remains the property of the former member, and, although there is no express declaration that this balance shall be paid over to him or to his successors in interest, yet such is the necessary legal inference, if it be true that he has not incurred a forfeiture of his right to the money value of the membership. Counsel for the exchange, in support of the claim of forfeiture, cite the case of Belton v. Hatch, 109 N. Y. 593, 17 N. E. 225, 4 Am. St. Rep. 495, wherein the court of appeals of New York, in construing a similar provision in the articles of the New York Stock Exchange, held that the right to dispose of a membership of an expelled member must be construed to mean that the expulsion worked a forfeiture of all the rights and interest of the former member. In the light of the rulings of the supreme court in Hyde v. Woods and Sparhawk v. Yerkes, supra, to the effect that the interest of a member of a stock exchange is property of such a nature that, after the payment of the claims due the exchange and the members thereof, the proceeds thereof will pass to his trustee in bankruptcy, it cannot be held that the termination of the right to remain a member of the exchange ipso facto causes a forfeiture to the exchange of the money value of the membership. It is said by the learned judge giving the opinion in Belton v. Hatch, supra, that "if a member becomes honestly insolvent, and fails to qualify under the rules for readmission, or if he dies after the claims of the association are discharged, the proceeds may be paid to him or his legal representatives, as the case may be. But in the case of a member who, by misconduct cognizable by the laws of the association, forfeits his rights to continue to remain a member, there is reserved by the constitution the right to dispose of his membership," and from this right of disposition the right of forfeiture is inferred. In the instances of a failure to qualify for readmission or of a death of a member, the right to dispose of the membership is vested in the exchange, through the action of the proper committee, yet it is admitted by the court of appeals of New York that in these cases there is no forfeiture to the exchange, so that it does not follow that the right to dispose of the membership necessarily creates a right to forfeit the proceeds. If it be admitted that there is a property right in the membership,—and under the rulings in Hyde v. Wood and Sparhawk v. Yerkes, supra, that is not an open question in this court,—then certainly the owner of this property right cannot be deprived thereof, except through the operation of some rule or law binding upon him. It was open to the stock exchange to have made provision for the forfeiture of all rights in the association, in cases of fraudulent conduct on part of members of the exchange, but, to insure the right to inflict a punishment of this nature, proper provision must be made in the laws of the association. The right to expel a member guilty of fraudulent conduct is clearly provided for in the articles, but no express provision is made for a forfeiture of the money realized from a sale of the membership of an expelled member, and courts are not justified in assuming that the right of forfeiture exists, when no provision to that effect is found in the laws of the association. The

reason why such provisions are not found in the constitution of the exchange is probably due to the fact that the originators of the association realized that the creditors of the expelled member would be the actual sufferers from the adoption of such a provision, and hence it is not included in the constitution.

The conclusion reached is that the trustee in bankruptcy is entitled to the net amount realized from the sale of the memberships held by the bankrupts in the St. Louis Stock Exchange, after deduction made of any debts due the exchange or the members thereof, and is entitled to an order directing the treasurer of the exchange to pay this net amount to the trustee.

In re HOWDEN.

(District Court, N. D. New York. November 27, 1901.)

BANKRUPTCY—DISCHARGE—MAKING FALSE OATH.

A bankrupt, who was 46 years old, had lived with his father on the latter's farm of about 50 acres ever since his majority. Both were widowers, the bankrupt's wife having also lived with him on the farm until her death a few years prior to the filing of the petition in bankruptcy. The bankrupt was his father's only heir, and he had from time to time been given money by his father, and at other times had sold produce and kept the proceeds. The farm produced little more than enough to support the two men. Both testified that there was no agreement to pay the bankrupt for his services, and there was no testimony to the contrary. *Held*, that under the rule requiring objections to a discharge to be sustained by clear and convincing proof, such evidence was insufficient to sustain an objection alleging that the bankrupt had a claim against his father for wages, and that in verifying his schedule, in which he stated that he had no assets, he made a false oath.

In Bankruptcy. On motion to confirm report of referee recommending that the bankrupt's petition for a discharge be denied, and upon exceptions to the report.

The referee finds that the third, fourth, and sixth specifications, filed by the objecting creditor, have been sustained. The third specification charges that the bankrupt made a false oath in verifying his schedule of indebtedness, which contained a statement that he owed Archibald G. Howden, his father, $100, for cash loaned, whereas, in truth and in fact, the said sum was paid to the bankrupt by his father for services rendered. The fourth specification charges that the bankrupt made a false oath in swearing that he had no assets, whereas he was the owner of a chose in action against his father for work, labor and services rendered in the sum of over $1,000. The sixth specification charges false swearing in taking the "pauper oath," the bankrupt well knowing at the time of the existence of the claim of $1,000 and upwards against his father.

James H. Bain, for the bankrupt.
Edgar Hull, for contesting creditor.

COXE, District Judge. The controversy hinges upon the single question whether or not the bankrupt had a claim against his father for work, labor and services which he should have included in his schedules. If such claim did not exist the charge of having made a false oath must fall. At the time the testimony was taken, in the

winter of 1898, the bankrupt was 46 and his father was 87 years of age. They were both widowers and had lived together during almost the entire time in controversy upon a small farm of 53 acres situated in the village of Ft. Edward. The bankrupt's wife lived with him on this farm until 1894, when she died, and since then the men have lived alone. Both the bankrupt and his father testify that there was no agreement to pay the bankrupt for his services on the farm and no one swears to the contrary. In these circumstances the law is well settled and is clearly stated by the court of appeals of New York as follows:

"The parent is not legally entitled to the custody or earnings of his children after they arrive at the age of twenty-one; * * * yet if they live with him as members of his family without any contract or understanding that he shall pay for their services or receive pay for their maintenance, the law will not imply a promise to pay on either side." Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301.

Again the court says:

"It is well settled that where parties sustain the relation of parent and child, either by nature or adoption, the former in the absence of an express promise cannot be required to pay for services rendered by the child, nor the latter be obliged to pay for maintenance." Otis v. Hall, 117 N. Y. 131, 22 N. E. 563.

The learned referee, after a most careful and thorough investigation of the facts and law, reaches the conclusion that at the time the schedule was verified the bankrupt owned a claim against his father for at least $100, for service rendered during the preceding six years. He is of the opinion that although there was no contract there was an "understanding" that wages should be paid. This conclusion is based upon presumptions drawn from discrepancies and contradictions in the testimony and from the inherent improbability that the bankrupt would work during 25 years after coming to man's estate for nothing. On the other hand it must be remembered that in some aspects the case is sui generis. The bankrupt evidently possesses little self-respect and no ambition. He was content during the years when most men are striving to better their condition to hold a menial position on a small, unproductive farm, affording, apparently, little more than a bare subsistence for the two men. The bankrupt was his father's only heir and his conduct was more that of a part owner than a servant. He was given money from time to time, sold produce and kept the proceeds and performed other acts inconsistent with the theory that he was merely a hired servant. In short, is there anything incompatible with the theory that the two men, father and son, were content to live on the farm, getting a little more than their living therefrom, the son furnishing the labor and the father the capital and both expecting that the son would eventually own the entire property? If the question is to be determined by direct testimony it is all in favor of the bankrupt, and if it be a case for inferences and conjectures it must be admitted that they do not all point in one direction. Having read the testimony in the light of the briefs and opinion of the referee the court is unable to say that the bankrupt's right to wages has been established.

Even were this an ordinary action of assumpsit there would still be grave doubt as to the plaintiff's right to recover; but we are here dealing with a charge which must be established not by a mere preponderance of testimony, but by clear and convincing proof. If there be a fair doubt as to the bankrupt's claim against his father the discharge should be granted. That it is doubtful is, apparently, conceded by the referee when he says, "I am aware that this is a very close case." In such circumstances the bankruptcy act requires that the doubt shall be resolved in favor of the bankrupt.

Many of the most careful students of the law are convinced that the act is far too liberal and lenient in permitting discharges. There are, practically, but three grounds for withholding a discharge, namely, fraudulent failure to keep books, fraudulent concealment of property and making a false oath in bankruptcy proceedings. The other offenses mentioned in section 29 are evidently directed at persons other than the bankrupt, and though a bankrupt may be guilty of these offenses they are seldom invoked to prevent discharges. If he has done none of these acts the judge is commanded to discharge him no matter how dishonest he may have been in other respects. Unquestionably many unworthy men have been released, but while the law remains unamended there is no alternative but to enforce it. The authorities are unanimous in holding that the burden is upon the opposing creditor to prove his objections, not necessarily beyond a reasonable doubt, but by clear and convincing testimony. In re Ferris, 5 Am. Bankr. R. 246, 105 Fed. 356; In re Gaylord, 5 Am. Bankr. R. 410; In re Corn, 5 Am. Bankr. R. 478, 106 Fed. 143, and cases there cited. In Re Ferris, supra, the facts were quite similar to those in the case at bar. It was alleged that unfounded claims were allowed to the sister and brother of the bankrupt. The court says:

"There is much in the testimony of the bankrupt that indirectly lends support to this position, yet it is not affirmatively proven that the debts due to the brother and sister were unfounded. * * * The opposing creditor having failed, therefore, to sustain the specification by sufficient evidence the same must be overruled."

In the present case it must be conceded that the claim against the father "is not affirmatively proven," and the court is unable to say, even if resort be had to presumption, what, if anything, was due the bankrupt. This being so it can hardly be said that the omission of so nebulous a claim from the schedules involved the bankrupt in the crime of having made a false oath. In this connection it may be proper to say, as both counsel agree as to the fact, that an action brought by the trustee to recover wages was withdrawn by him after issue joined.

It is thought that the bankrupt is entitled to a discharge.

In re DICKSON et al.

DICKSON et al. v. WYMAN.

(Circuit Court of Appeals, First Circuit. November 15, 1901.)

Nos. 341, 344.

1. BANKRUPTCY—PROVABLE CLAIMS—SURRENDER OF PREFERENCES.
A creditor who received payments made him by a debtor while insolvent is required by Bankr. Act. 1898, § 57g, to surrender the same before he can prove any claim against the estate; and it is immaterial that such payments were made and received in good faith, in the usual course of business, without intention on the part of the debtor to give a preference, or reasonable cause on the part of the creditor to believe the debtor insolvent. It is also immaterial that the payments were made on different debts from those sought to be proved. Pirie v. Trust Co., 21 Sup. Ct. 906, 182 U. S. 428, 45 L. Ed. 1171, applied.

2. SAME—EFFECT OF GIVING NEW CREDITS.
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," will not be so construed as to require a creditor to surrender partial payments received by him on account in the usual course of business, where the transactions covered by the account between them, taken together, resulted in increasing the net indebtedness to the creditor, and correspondingly increasing the bankrupt's estate.

3. SAME—ORDERS ALLOWING OR REJECTING CLAIMS—MODE OF REVIEW.
The proper procedure for the review of an order of a court of bankruptcy allowing or rejecting a claim exceeding $500 is by appeal, and not by petition for review.

4. SAME—COSTS IN APPELLATE COURT.
Where proceedings for the review of an order of a court of bankruptcy are dismissed by the appellate court for want of jurisdiction, without any motion therefor, neither party will be allowed costs.

5. SAME.
On an appeal against a trustee from an order in bankruptcy, where such order is reversed on a ground not assigned or urged by appellant, costs will not be allowed to either party.

Petition for Revision of Proceedings and Appeal from the District Court of the United States for the District of Massachusetts, in Bankruptcy.

Henry D. Hotchkiss and Richard B. Aldcroft, for petitioners and appellant.

Thomas H. Gage, Jr., for respondent and appellee.

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

PUTNAM, Circuit Judge. These cases were argued in October, 1900, and the determination of them has been delayed by reason of the pendency in the supreme court of Pirie v. Trust Co., now reported in 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, involving a question underlying those at issue here. The controversy arose out of the following provision in the act establishing a uniform system of bankruptcy, approved on July 1, 1898 (paragraph "g" of section 57):

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Other provisions of the statute bearing on the construction of this paragraph are given in the decision of the supreme court referred to, and they are conveniently grouped in McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923, 925, to which we will also again refer, so that it is needless to now recite them at large.

These proceedings were instituted by creditors the proof of whose claim was stricken out by the district court, basing its action on the provision of the statute which we have quoted. It appears that the creditors had been dealing with the bankrupt, selling him merchandise from time to time at short intervals, and receiving payments therefor substantially every month, each sale being paid for by itself; that is to say, each bill of merchandise sold one month was separately paid for the succeeding month, or soon after. The sales, however, and the payments, were entered to the same running account, so that, so far as the mere form of ledger entries is concerned, the transactions were continuous. The proof was made up of several items of merchandise sold as stated, on none of which had any payment been made.

It is consequently claimed by the creditors that, so far as the sales in proof are concerned, they received no payment during the four months preceding the bankruptcy; and they also claim that whatever payments they received were in the ordinary course of business, without any intention on the part of the debtor to prefer them, and without reasonable cause on their part to believe him insolvent. All the facts thus set up by the creditors are conceded by the trustee in bankruptcy, who is the party proceeded against in this court. Nevertheless the district court, justly feeling itself bound to follow the decisions of the circuit courts of appeals in other circuits, and finding that the creditors had actually received payments for other merchandise within four months, rejected the proof. Afterwards came the opinion in Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, already referred to, sustaining the action of the district court so far as concerns the lack of any intention on the part of the debtor to prefer, and the lack of any reasonable cause on the part of the creditors to believe that he was insolvent. The supreme court, however, did not pass in terms on the other proposition; that is to say, that arising from the fact that no payment had been made during the period of four months on account of any merchandise the price of which constitutes any particular item offered to be proved; but its line of reasoning and some expressions contained in its opinion sustain the decree appealed from, so far as this is concerned. The construction given by that court to the statute is a literal one. Carrying this method of construction to its legitimate conclusion, it must be observed that paragraph "g" of section 57 classifies according to creditors, and not according to claims; and, so far as creditors who have received preferences are concerned, it makes no limitation with reference to the claims offered by them for proof. So long as the statute is to receive a literal construction in the manner applied by the supreme court, we cannot avoid the conclusion that any cred-

itor who has received a payment, under the circumstances which we have stated, without more appearing, must comply with paragraph "g" before he can prove any claim whatever.

There is one view of the pending cases, however, which is not touched on by the supreme court, and which apparently was not brought to the attention of the district court. Moreover, it has not been brought to our attention by the parties. Yet, if we affirm the decree below, the result would do such gross injustice, and would also establish so unfortunate a precedent, that we cannot overlook the matter.

The account current between the creditors and the bankrupt shows that, month by month, payment was made for the precise amount of merchandise sold the previous month, as we have already said. The petition in bankruptcy was filed on December 13, 1899. Going back four months, the last transaction prior thereto was on August 10th, which was a sale of merchandise amounting to $128.20. There had also been a sale on August 7, 1899, amounting to $676.01. The total of these two sales was $804.21. On the 13th day of August, just four months before the petition was filed, the bankrupt owed the creditors only this amount of $804.21. The prices of all merchandise sold before that day had been paid, the last payment having been made on August 8th. The account shows the subsequent transactions by virtue of which, although payments were made as already stated, the indebtedness was increased during the four months ending December 13th from $804.21 to the amount proved, $2,174.20, —a net increase of indebtedness during that period of $1,369.99.

While the supreme court has adopted a literal construction of the statute in question, and we are bound to follow it, there must nevertheless be a limit to that method of interpretation, and these cases reach it. It is beyond all reason to hold, because a creditor has, in the ordinary course of business, during the four months preceding bankruptcy, received payments which under some circumstances might operate as a preference in some views of the law, that that fact can be held to bar the proof of his claim, when, looking at all the transactions together, they demonstrate not only that they were without any intention to acquire any unjust preference, but also that they have increased the net indebtedness to the creditor, and correspondingly increased the bankrupt's estate. In order to avoid so unreasonable a result, we might say that all the transactions covered by the account current should be regarded as one, so that it could not be held that the effect of the payments was to enable the creditors at bar to obtain a greater percentage of their debt than any other creditor of the same class, within the meaning of paragraph "a" of section 60. A result was reached under similar circumstances by the circuit court of appeals for the Seventh circuit in McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923, already referred to, by giving a construction to paragraph "c" of section 60 beyond what its letter calls for; but we prefer to put the result on the broad ground that in the absence of positive and direct expressions, evidently intended to accomplish a particular purpose, the ordinary

rules of construction require us to avoid interpreting this statute so as to effectuate so unreasonable a purpose. In this view, the decree of the court below should be reversed.

The referee found that the bankrupts were insolvent for more than four months before the petition was filed; but, if the limitation of four months be rejected, and all the transactions between the bankrupts and the appellant creditors shown by the record are taken into account, the result would be even more favorable for the appellants, because the primary indebtedness was even smaller than it was on August 13th.

In order to avoid the possibility of being defeated by mistaking their remedy, the proponents in this court pursued the same course as that in Re Worcester Co., 42 C. C. A. 637, 102 Fed. 808, decided by us on April 20, 1900. They filed a petition for revision, as well as took an appeal. In support of our own convictions that an appeal is the proper remedy, Pirie v. Trust Co. came before the supreme court in that way without question. The observations that we made in Re Worcester Co. to the effect that a petition for revision does not necessarily nullify proceedings on a simultaneous appeal, apply here.

The common rule is that, when a proceeding is dismissed for want of jurisdiction, neither party recovers costs. Ordinarily the only exception to that rule is that on a proceeding in an appellate tribunal the costs incident to a motion to dismiss for want of jurisdiction are allowed when dismissal follows. In this case there has been no motion to dismiss.

With reference to costs on the appeal, the proposition on which the case now turns was brought forward of our own motion; also the party appealed against is a quasi officer of the law. Combining the two facts, there is no equity in favor of the allowance of costs to either party.

In No. 341 (Joseph B. Dickson et al., Petitioners) the petition is dismissed, without costs.

In No. 344 (Dickson et al. v. Wyman, Trustee) the decree of the district court is reversed, and the case is remanded to that court, with directions to allow the proof of the appellants; and neither party will recover any costs of appeal.

MORAN v. KING et al.

(Circuit Court of Appeals, Fourth Circuit. November 5, 1901.)

No. 398.

BANKRUPTCY—EXEMPTIONS—PERMITTING AMENDED CLAIM.

A bankrupt, who, at the time of filing of his schedules, claims certain property as exempt under the constitution and statute of Virginia, which permit, but do not require, him to select property to the value of $2,000 as a homestead exemption, cannot be allowed to amend his schedule, and claim additional property or its proceeds, after title to the same has vested in his trustee; and especially will such additional claim be denied where it is not made for the purpose contemplated by the exemption law, but avowedly for the purpose of preferring certain creditors to whom the bankrupt had given notes in which he waived his exemption privilege.

Petition for Revision of Proceedings of the District Court of the United States for the Western District of Virginia, in Bankruptcy.

On the 2d of March, 1900, certain creditors of W. G. Moran, a citizen of the state of Virginia, duly filed their petition in the court of bankruptcy for the Western district of Virginia, asking that said Moran be declared an involuntary bankrupt by reason of alleged preferences to other creditors, and on the 16th of March, 1900, an order was entered adjudicating said Moran an involuntary bankrupt. Previous to the proceedings in bankruptcy, the said Moran, on the 3d day of February, 1900, executed a deed of trust, which on its face was a general assignment, in which he preferred the People's National Bank of Charlottesville, Va., for a debt of $400, and it was for reason of this preference that the bankruptcy proceedings were instituted, and Moran adjudged a bankrupt. Moran had also, on the 24th of November, 1899, executed a deed of trust upon certain of his property, wherein he preferred one of his creditors, J. D. Smith, for the sum of $900. Within 10 days after the order of adjudication, the bankrupt filed a schedule of his creditors and effects, and in said schedule he made his claim for exemptions under the laws of Virginia as follows (extract from Schedule B 5):

"As a married man and householder and head of a family, undersigned claims benefit of the homestead exemption of $2,000 under the Virginia statute, chapter 178 of Code, as to the articles in house occupied by him, not exempt under poor debtor law, viz.: 1 bureau, 1 table, 1 washstand, 7 chairs, 1 sofa, 1 desk, 1 lounge, 2 clocks, pictures in house, and bric-a-brac and ornaments; in all worth probably about $60.00.

"[Signed] W. G. Moran."

The first meeting of creditors was held on the 8th day of April, 1900, and on the 9th day of April, 1900, bankrupt filed with the referee the following notice:

"The undersigned, W. G. Moran, hereby gives notice of his intention to claim his homestead exemption to the extent of $2,000 out of the property which this proceeding involves, such exemption to be paid in money from the proceeds of such portion of said property as said Moran is entitled to have exempt under the laws, whether such portion be from sales or collections; and the undersigned reserves the right to indicate said property later. Moreover, the referee in bankruptcy will take notice that no assignment is to be made by him to such trustee as may be selected until the claim of homestead is formally made out and filed. And the undersigned will amend his schedule claiming said exemption.

"[Signed] W. G. Moran."

Upon this notice the bankrupt made application to amend his schedule so as to increase his claim for exemption. The hearing of the application to amend the schedule was continued to May 8, 1900, at which time creditors filed exceptions to the amendment, and the referee refused to allow the same; and thereupon the bankrupt filed his petition for a review of the referee's decision to the judge of the district court of the United States for the

Western district of Virginia. On the 28th of December, 1900, the judge of the Western district of Virginia, sitting as a court of bankruptcy, rendered a decision sustaining the referee, and the bankrupt now files a petition to this court asking that the decision of the district court be reversed.

Anterior to the bankruptcy proceedings the bankrupt had given notes to certain of his creditors, aggregating an amount in excess of the full exemption under the law, in which he had waived, in accordance with the Virginia statute, his right to claim homestead exemption, which said notes are still outstanding and unpaid; and in the petition filed by the bankrupt in this court is the following statement: "Petitioner did not make his claim to homestead when he first filed his schedules. He had not then realized the necessity for doing so. But when he considered that certain creditors held notes waiving homestead (which waivers were made according to the state law, and treated as perfectly valid by all courts everywhere) he saw clearly that he was obliged to claim his full homestead in order that his agreement with those creditors (that is to say, the agreement evidenced by the waivers) might be faithfully carried out." And further, in his petition, the bankrupt, after stating that the waivers in the notes gave no specific liens, but created a superiority of right which should be protected in the bankruptcy court, says that "he was obliged to do it [that is, amend his claim to the full amount of $2,000] to maintain good faith with the creditors holding the waiver notes; and he made the claim, not with the least intention of committing a wrong, but solely for the purpose of asserting and securing a right." In pursuance of the constitutional provision, the legislature of Virginia has enacted certain laws relative to the manner in which the claim for homestead and exemptions may be asserted and set apart, and also providing that a person entitled to exemptions may waive the same as to any particular debt by setting forth the waiver in the face of the obligation.

George Perkins, for petitioner.

D. Harman (Wilson & Manson, on the brief), for respondents.

Before SIMONTON, Circuit Judge, and MORRIS and BOYD, District Judges.

BOYD, District Judge (after stating the facts as above). Under the head of "Homestead and Other Exemptions" the constitution of Virginia (article 11, § 1) provides that:

"Every householder, or head of a family, shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, garnisheeing or sale, under any execution, order or other process issued on any demand for any debt heretofore or hereafter contracted, his real and personal property, or either, including money and debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him."

There is a further provision (article 11, § 5) that:

"The general assembly shall at the first session under this constitution prescribe in what manner and on what condition the said householder or head of a family shall thereafter set apart and hold for himself and family, a homestead out of any property hereby exempted, and may in its discretion determine in what manner and on what conditions he may thereafter hold, for the benefit of himself and family, such personal property as he may have, and coming within the exemption hereby made."

The Virginia court of appeals, in construing the homestead and exemption provisions of the Virginia constitution, referring to the debtor, in Reed v. Bank, 29 Grat. 719, holds that:

"The privilege given by the constitution is a personal privilege, to be exercised by him or not, as he may choose. The constitution does not de-

clare, as does the poor debtor law, that certain property shall be exempt from levy, etc., but that the householder or head of a family shall be entitled to hold property to be selected by him to the value of $2,000. In the former case the law executes itself. It is a part of the public policy of the government to exempt that particular property absolutely from forced sale, and its provisions cannot be waived. But there is no such constitutional declaration that property to the amount of $2,000 shall be exempt. On the contrary, the very language used plainly shows that it may be exempt only when the privilege given the householder or head of a family has been exercised, and the property selected and set apart by him."

This doctrine was reaffirmed in Linkenhoker's Heirs v. Deitrick, 81 Va. 44, 59 Am. Rep. 648, and was also declared by Chief Justice Waite in Re Soloman, 2 Hughes, 164, Fed. Cas. No. 13,166. The bankrupt in this case, when opportunity was afforded, exercised the privilege which the exemption laws of the state of Virginia conferred upon him. He filed his schedule before the meeting of creditors had taken place, and before the title to the property had passed, by the operation of the bankrupt law, to the trustees, and he made claim to certain specific articles of property as exempt under the provisions of the Virginia law above quoted. The property specified was that selected by him and claimed as exempt, and was all that he did claim at that time. Subsequently he filed his petition to be allowed to amend his claim for exemption, in which he asks to enlarge said claim, and have other property set apart, on the ground that it is his duty "to claim his full homestead, in order that his agreement with those creditors (that is to say, the agreement evidenced by the waivers) might be faithfully carried out." It is thus seen that the purpose of the bankrupt, in his effort to enlarge his exemption, is not that property may be set apart for the benefit of himself and his family, in pursuance of the humane objects of the exemption law, but that whatever additional property he may withdraw from his estate in bankruptcy may go to the payment of debts due to persons to whom he has executed notes in which he has waived his right to claim exemption. We think the supreme court of Ohio, passing upon the exemption laws of that state, in Sears v. Hanks, 14 Ohio St. 300, 84 Am. Dec. 381, has well defined the purpose of the homestead exemptions generally when it says:

"The humane policy of the homestead act seeks not the protection of the debtor, but its object is to protect his family from the inhumanity which would deprive its dependent members of a home."

And among many other decisions to the same effect we find the following:

"A statute of exemption is properly a remedial statute, evidently intended to prevent families from being stripped of their last means of support, and left to suffer, or cast as a burden upon the public, and to rescue them from the hands of unfeeling creditors." Leavitt v. Metcalf, 2 Vt. 342, 19 Am. Dec. 718.

"The exemption was made for the benefit of the family, rather than its head, the debtor. Its object concerns the question of public policy. It is to keep together the wife and children, that the latter may be trained and educated to become useful members of society, to protect them against dangers to which they would be exposed by being scattered at a tender age, and to secure them the means of instruction and improvement." Griffin v. Sutherland, 14 Barb. (N. Y.) 456.

The bankrupt in this case, upon the facts set forth in his petition, seeks exemption for no such purpose, but avows the object of his petition to be to remove so much of his property as he can from the hands of the trustee in bankruptcy, in order that it may go to the benefit of certain creditors holding what are called "waiver notes." "While the exemption laws are to be construed liberally, so as to carry with them the benevolent policy of the legislature, debtors claiming their benefit must bring themselves at least within the spirit of their provisions." 12 Am. & Eng. Enc. Law (2d Ed.) p. 77. It is evident that the bankrupt, when he filed his schedules and made claim to exemption, had it in mind to set apart only such of his property as would inure to the benefit of himself and family; but later on he conceived the idea of favoring certain of his creditors to the exclusion of others, and it then occurred to him to enlarge his claim for exemption, for the purpose, as stated in his petition, of carrying out his agreement with these creditors. To grant his petition, therefore, would not, in our opinion, be consistent with the objects of the homestead exemption, or in furtherance of the due administration of his estate under the bankrupt laws of the United States. The bankrupt having exercised his privilege and made his selection of exempted property, the title to his entire estate, except the property selected as exempt, passed to the trustee, to be administered for the benefit of creditors under the provisions of the bankruptcy act, and the title thus vested in the trustee cannot now be disturbed by setting apart further exemptions. "As a general rule, if a person who holds a homestead, and is under no disability to assert it, fails to do so at the time and in the manner provided by law in any action or proceeding involving the right, he will be deemed to have waived his exemption." 15 Am. & Eng. Enc. Law, p. 638, cases cited in note 7. We think this doctrine is in entire harmony with the exemption laws of Virginia as construed by the highest court of the state. The claim to exemptions under the constitution and statute law of the state is a privilege which the debtor may exercise or not, as he chooses; and, it being left to his option, he may claim as exempt property to the full amount of $2,000, or for a less amount, if he may see proper. In this case the bankrupt has exercised his privilege, has selected the property which he claimed as exempt, and, with the exception of the property so claimed, the title to the estate has vested in the trustee. We think the bankrupt is concluded, and should not be allowed to amend his schedules as prayed for.

The petition is denied, and the judgment of the district court affirmed.

UNITED STATES v. CONNERS.

(District Court, D. Oregon. November 7, 1901.)

1. COUNTERFEITING—SIMILITUDE—WORTHLESS BANK BILLS.
Bills issued by a bank for circulation are not obligations or securities "engraved and printed after the similitude of an obligation and security issued under the authority of the United States," within the meaning of Rev. St. § 5430, since they do not purport to be obligations or securities of the United States, and an indictment for a violation of said section does not charge an offense where it shows that the instruments referred to are such bank bills.

2. CRIMINAL LAW — REMOVAL OF PRISONER TO ANOTHER DISTRICT FOR TRIAL.
A federal court will not order a person removed to another district for trial on an indictment which does not charge facts constituting an offense, although the prisoner does not resist the removal, or even if he consents thereto.

On Application for Order of Removal.

John H. Hall, U. S. Atty.
Charles J. Schnabel, for defendant.

BELLINGER, District Judge. This is an application by the United States for an order for the removal of Harry Conners, alias Harry Conway, to the Northern district of California, on an indictment charging the defendant with feloniously having in his possession, without authority of the secretary of the treasury or other proper officer of the United States, two obligations and securities, each of which was engraved and printed after the similitude of an obligation and security issued under the authority of the United States, and which were as follows: One obligation and security purporting to be an obligation and security issued by the State Bank at New Brunswick, in the state of New Jersey, of the denomination of $2, and payable to bearer on demand; and one obligation and security purporting to be an obligation and security issued by the State Bank of New Brunswick, in the state of New Jersey, of the denomination of $5, and payable to bearer on demand. It is further charged that the defendant well knew said obligations not to be lawful and genuine, and that he intended to sell or otherwise use the same to defraud some person or persons to the grand jury unknown. A second and third count in the indictment charges the defendant with having sold to a Mrs. Burdick and to a Mrs. Wassman notes of said State Bank of New Brunswick, in the state of New Jersey, for the purpose of defrauding such purchasers. The question as to whether these facts constitute a crime under the laws of the United States was recently considered by me upon a presentment made by the grand jury in the case of F. W. Burk. My conclusion was that these facts do not constitute a crime against the United States, and I so instructed the grand jury. The question is free from doubt. The bills described in this indictment are not in the similitude of any obligation issued by the United States, and the statement in the indictment that they are so does not countervail the facts alleged, which show the contrary. These bills are described as notes and obligations

issued by the State Bank of New Brunswick, in the state of New Jersey. They do not purport on their face to be obligations of the United States, but something altogether different.

The petition for removal is not resisted by the defendant, and the suggestion was made in the application that the order prayed for in the petition was agreeable to his wishes. But this can make no difference. There can be no order of removal upon consent of the party whose removal is sought, where the facts charged in the indictment do not constitute a crime.

The petition is denied.

McKNIGHT v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. November 11, 1901.)

No. 936.

1. NATIONAL BANKS—OFFENSES BY OFFICERS—INTENT AS ELEMENT.
   Under Rev. St. § 5209, which makes it a criminal offense for an officer or agent of a national bank to do either of certain acts therein enumerated, "with intent in either case to injure or defraud the association," etc., such intent is an essential element of every offense therein specified, which must be charged in the indictment and proved.
2. SAME—PROSECUTION FOR EMBEZZLEMENT—INSTRUCTIONS.
   Where the court, in a prosecution under Rev. St. § 5209, for embezzlement by an officer of a national bank, refused to charge, as requested, that the defendant could not be convicted unless the jury found that the acts of embezzlement were committed with intent to injure or defraud the bank, as charged in the indictment, but charged that the averment of such intent was surplusage, such action was reversible error, notwithstanding it defined embezzlement in the charge as the fraudulent appropriation by defendant of the funds of the bank to his own use.

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

A. E. Richards and W. C. P. Breckenridge, for plaintiff in error.
R. D. Hill, for the United States.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This case, upon a former writ of error, was before this court at its October term, 1899, and is reported in 38 C. C. A. 115, 97 Fed. 208. At the second trial of the case the plaintiff in error was convicted upon two counts, numbered 39 in the indictment in case No. 5,782, and 2 in indictment in case No. 5,783. These counts severally charge McKnight with embezzlement of the funds of a bank. Upon the trial the court was requested to charge the jury that the defendant could not be found guilty unless the jury believed that the acts of embezzlement were committed with the fraudulent intent charged in the indictment. In both the counts under consideration the embezzlements were charged to be with the intent to injure and defraud the bank, in this respect using the language of section 5209, Rev. St. U. S., defining the offense. The court, however, refused so to do, being of the

opinion that the language of the statute requiring the criminal acts to be done with intent to injure or defraud the association did not apply to the offense of embezzlement.

This section (5209) undertakes to provide, in the first instance, for the acts of certain officers of the association,—president, director, cashier, teller, clerk, or agent,—whose acts are made criminal by the section. These acts are defined to include embezzlement, abstraction or willful misapplication of the moneys, funds, or credits of the association, or, without authority from the directors, issuing or putting in circulation the notes of the association, or, without such authority, issuing or putting forth any certificate of deposit, or drawing any order or bill of exchange, making any acceptance, assigning any note, bond, draft, bill of exchange, mortgage, judgment, or decree, or making any false entry in any book, report, or statement to the association, with intent, in either case, to injure or defraud the association, etc. "In either case" obviously includes all or any of the acts which have been previously denounced as criminal when done by one of the officers named, and one of them is embezzlement of the moneys, funds, or credits of the association. These acts are criminal only when done with the intent which the statute has made an essential element of the offense. This is the natural interpretation of the language used, and has been the uniform holding of the courts of the United States, in construing this section, so far as we are advised. U. S. v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520, in which case the supreme court said that the intention to injure and defraud is an essential ingredient to every offense specified in the section, and the failure to aver the intent is a fatal defect in the counts in which it occurs. To the same general effect are Evans v. U. S., 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624; U. S. v. Northway, 120 U. S. 327, 7 Sup. Ct. 580, 30 L. Ed. 664; U. S. v. Harper (C. C.) 33 Fed. 471; U. S. v. Youtsey (C. C.) 91 Fed. 864.

It is true that the court defined "embezzlement" as the fraudulent appropriation by an officer of a national bank of the funds of the bank which had been committed to his custody and care, and further told the jury that it must appear that McKnight fraudulently appropriated the money to his own use, in the one instance in order to bribe Britt and Reeder, and in the other to his own use as charged in the two counts of the indictment upon which the accused was being tried. It may be fairly argued that the fraudulent appropriation of the money of the bank intrusted to his charge would include the intent to injure or defraud the bank, to be inferred from such fraudulent appropriation of trust funds. In the same connection the court told the jury that, if the intent charged was necessary to be proved, the jury would be authorized to conclude that it was present from the fraudulent act of misappropriation of the money which constituted embezzlement. But, when the attention of the court was directly called to the necessity of proving the intention to injure or defraud the bank in order to work a conviction, the jury was told that it was merely surplusage to allege in the indictment

that the appropriation of the money was with intent to injure or defraud the association, and more than once the jury was told that it was unnecessary to allege or prove that the misappropriations in question were with intent to injure or defraud the bank. This charge negatives the inference that such intent is included in the fraudulent misappropriations which the court told the jury would constitute the crime. Undoubtedly the intent to injure or defraud may be inferred where such is the natural consequence of doing the prohibited act; for the law properly concludes, in the absence of circumstances negativing the inference, that one intends the natural consequences of his acts knowingly and intentionally done. But this rule, while it may suffice to define the measure of proof required to establish such wrongful intent, does not dispense with the necessity of proving its existence, where, as in the present case, it is made an essential element of the crime. The statute only makes the acts of the officers therein named criminal when done with the specific intent named. In charging the jury that the accused could be convicted without proof of the intent to injure or defraud, the court failed to give a proper construction to the terms of the statute, and permitted a conviction without proof of an element of the offense as defined in the statute. This conclusion renders it unnecessary to examine the other errors assigned.

It follows that the judgment must be reversed, and a new trial awarded.

HOSTETTER CO. v. CONRON.

(Circuit Court, S. D. New York. November 25, 1901.)

UNFAIR COMPETITION—FRAUDULENT IMITATION—SUFFICIENCY OF EVIDENCE.

A preponderance of the testimony showed that defendant manufactured bitters, and sold the same in bulk as Hostetter's Bitters, which were manufactured only by complainant in accordance with a secret formula, and advised purchasers to put the same in empty Hostetter bottles, which evidence was re-enforced by testimony of a statement made by defendant's employé that he manufactured the bitters sold by defendant in imitation of complainant's, and by the fact that defendant failed to produce such employé as a witness, without any adequate excuse. *Held*, that such evidence was sufficient to sustain complainant's charge of fraud and unfair competition.[1]

In Equity. Suit for unfair competition in trade. On final hearing.

A. H. Clarke, for complainant.

Charles F. Kelley, for defendant.

COXE, District Judge. This is an action to restrain unfair trade. The defendant is charged with having sold a cheap imitation article as genuine Hostetter's Bitters. These bitters are prepared only by the complainant. They are made by a secret formula. The law applicable to this situation is well settled and need not again be stated.

[1] Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper, 30 C. C. A. 376.

Hostetter Co. v. Brueggeman-Reinert Distilling Co. (C. C.) 46 Fed. 188; Same v. Sommers (C. C.) 84 Fed. 333; Same v. Bower (C. C.) 74 Fed. 235; Same v. Comerford (C. C.) 97 Fed. 585. The only question is one of fact. The testimony of the complainant's witnesses is to the effect that the defendant was engaged in manufacturing bitters which he sold by the gallon and half gallon as Hostetter's Bitters. The genuine bitters are sold only in square bottles, holding approximately a pint. It also appears from complainant's testimony that in order to mislead the public the defendant was in the habit of advising his customers to fill empty Hostetter bottles with the spurious bitters thus enabling them to sell the cheap substitute in small quantities as the genuine article. That the defendant sold and gave away empty Hostetter bottles to parties who purchased his bitters by the half gallon is not denied, and several of the complainant's witnesses testify that the defendant suggested that they fill the empty bottles with the counterfeit bitters. These acts and declarations of the defendant are sworn to by eight witnesses who appear to be respectable and are unimpeached. The only accusation against them is that they were in the employ of the complainant. The defendant denies the testimony of the complainant tending to establish fraud and unfair dealing, and he is corroborated to some extent by two witnesses. One of these, at least, is in his employ. The weight of testimony would seem, therefore, to be with the complainant. Its witnesses outnumber those of the defendant and they have less interest in the controversy. If, however, the evidence stopped here, the court, recognizing the rule that in such cases the complainant must establish fraud by a clear preponderance of proof, might entertain some doubt as to what its action should be. But it does not stop here. The most persuasive presumption tending to establish the defendant's unfair proceedings is yet to be stated. On the 3d day of December, 1898, two of the complainant's witnesses called at the defendant's place of business. The defendant was absent, but his compounder, one Pfeiffer, waited upon them, and, in reply to a complaint that the goods previously purchased were not up to the required standard, Pfeiffer said:

"I try to make them as near right as I possibly can. I get a bottle from Acker, Merrall & Condit occasionally as a guide so as to make the Hostetter's Bitters right in color and as near the taste as possible."

Pfeiffer was not called as a witness and this statement stands unchallenged, except by a qualified denial from a young woman who was employed by the defendant. No excuse, which the court can consider, is given for the failure to contradict this inculpating evidence, and, of course, the presumption is that had the witness been called he would have been unable to deny its truth. The only excuse suggested is found in the defendant's brief, and is as follows:

"In case the absence of Mr. Pfeiffer should be commented on by plaintiff, we would say that this man Pfeiffer had been in the employ of the defendant more than five years prior to the commencement of this action, but to the surprise of defendant, a couple of days before the first hearing in this matter he suddenly said to defendant: 'Mr. Conron, I am going to leave to-

night,' and when pressed for his reasons for so doing, and at such short notice, said, 'Well, I am getting old and my son in Boston wants me to go there to live with him and I am going to retire.' He did leave and from that day to this has not returned."

Even if the court could regard this statement as proof it would hardly help the defendant. It seems rather to strengthen the presumption against him. Pfeiffer's sudden exodus two days before the hearing is open to a most damaging inference, and no reason is suggested why his testimony was not taken after he went to live with his son at Boston. The presumption arising from the omission to call so important a witness added to the complainant's testimony presents a case which leaves little room for doubt.

It follows that the complainant is entitled to a decree as prayed for in the bill.

AMERICAN ELECTRICAL NOVELTY & MFG. CO. v. ACME ELECTRIC LAMP CO. et al.

(Circuit Court, S. D. New York. November 25, 1901.)

PATENTS—SUIT FOR INFRINGEMENT—SUING WRONG CORPORATION.

Suit for infringement of patents was brought against a corporation alleged and admitted to have been organized under the laws of New York. An interlocutory decree was entered for complainant after an ex parte hearing, and an accounting directed. The evidence before the master showed that the defendant had ceased doing business before the patents were issued, and that the infringements complained of were committed by a New Jersey corporation having the same name, and in part the same officers, which was organized after defendant went out of business, but before the patents sued on were issued. *Held*, that there was no ground upon which a decree could be rendered against defendant for such infringements, and that complainant could be awarded only nominal damages.

In Equity. Suit for infringement of patents.

On exceptions to master's report awarding a decree of $4,023.65 as damages against the defendant corporation and Louis A. Jackson. The corporation alone excepts. The interlocutory decree was granted after an ex parte hearing, no one appearing for the defendants. 98 Fed. 895. Subsequently upon full hearing and argument in another action both of the patents involved were held to be invalid. Manufacturing Co. v. Newgold (C. C.) 108 Fed. 957.

Ewing, Whitman & Ewing and G. H. Gilman, for complainant.

C. H. Duell, George B. Lester, and W. A. Megrath, for defendant corporation.

COXE, District Judge. This action was commenced in January, 1899, for the infringement of two letters patent, the bill alleging and the answer admitting that the defendant, the Acme Electric Lamp Company, "is a corporation organized under the laws of the state of New York and a citizen thereof." The decree was against this corporation and in the nature of things could be against no other corporation. Upon the hearing before the master it appeared that this corporation was organized June 15, 1896, and ceased to

do business in January, 1898. In January, 1898, a New Jersey corporation, having the same name and some of the same directors and officers, was organized. All of the lamps upon which an accounting was ordered, with the exception of two stipulated into the original record upon the question of infringement, were made and sold by this New Jersey corporation. The patents were granted in January, 1899, a year after the New York corporation had ceased to do business, and during all of the period in question it was the New Jersey and not the New York corporation that was infringing the patents. These facts seem to be wholly undisputed. The principal question is whether the master was right in assessing damages against the defendant based upon the sales of the New Jersey corporation. The exceptions clearly present this issue. There seems to be no escape from the conclusion that the complainant has sued the wrong defendant. That the mistake was natural, and, perhaps, inevitable, may be conceded, but the fact remains that the defendant is required to pay $4,000 for the wrong of another party. The damage was done and the profits, if any, were received by the New Jersey company. The New York company, upon the present proof, has made no profits and has done no injury. How, then, can it be made to pay? The fact that the two corporations have the same name, though tending to confuse the issue, does not change its legal aspect. In the eye of the law the two companies are distinct and separate entities. If, for instance, the New Jersey company had been incorporated under the name of the "Hoboken Novelty Company" it would seem obvious that the Acme Electric Lamp Company of New York should not be made to pay for the wrong doing of the Hoboken Company. Or, to push the illustration a step further, assume that a man named Louis A. Jackson was engaged in business at 1659 Broadway until January, 1898, when he moved out and another individual having the same name moved in and a year later began infringing the complainant's patents. Is it not manifest that Jackson No. 1 cannot be made to pay for the damage done by Jackson No. 2? And, yet, how is the legal aspect of the situation changed because the parties happen to be corporations instead of individuals? The organization of the new corporation having the same name as the old certainly has a suspicious look, but the court is unable to find anything in the record tending to show a collusive design. There could hardly have been a fraudulent intent as to the infringement of the patents, because the New Jersey company was organized a year before the patents were granted. For aught that appears the change was a legitimate one and made for an honest purpose, but assuming it to be merely a juggle it is difficult to see how this fact can avail complainant in the present suit. The New Jersey company is not a party to this action, but it can, of course, be made to pay for its infringement if found liable in a proper suit commenced for that purpose. The court has been unable to discover any theory upon which the corporation defendant can be made to pay for infringements for which, upon the undisputed testimony, it is in no way responsible.

The exceptions which present the question decided are sustained. The decree against the defendant corporation should be limited to nominal damages.

WESTINGHOUSE AIR BRAKE CO. v. NEW YORK AIR BRAKE CO.

(Circuit Court, N. D. New York. November 25, 1901.)

No. 6,631.

1. PATENTS—SUIT FOR INFRINGEMENT—DEFENSE OF LACHES.
The defense of laches to a suit for infringement need not be pleaded.

2. SAME.
Where a patent has lain dormant for 15 years, and has been infringed by defendant for 7 years, with the knowledge of complainant, and without a word of protest, a decree for an accounting should not be granted.[1]

In Equity. Suit for infringement of patent. On final hearing.

Frederic H. Betts, George H. Christy, and J. Snowden Bell, for complainant.

Frederick P. Fish and Charles Neave, for defendant.

COXE, District Judge. This is an infringement suit based upon letters patent, No. 270,528, granted to George Westinghouse, Jr., January 9, 1883, for a pressure retaining valve in automatic brake mechanisms. The bill was filed April 4, 1898, and the patent expired January 8, 1900, twenty-one months thereafter. As the patent expired pendente lite no injunction can be granted, and as there is neither proof that the complainant's device was marked "patented," nor proof of actual notice, as required by law (Rev. St. § 4900), it is manifest that there can be no accounting for profits and damages, except, perhaps, from the date of the commencement of the action.

Assuming that the filing of the bill was sufficient notice of infringement under the section referred to, a position which the defendant strenuously denies, the question remains, shall the court retain jurisdiction in order that an account during this brief period may be taken?

The defendant, among other defenses, maintains that the complainant has been guilty of such inexcusable laches as to preclude all relief.

From the date of the patent to the commencement of the suit, a period of 15 years, the complainant did no act and uttered no word indicating that it considered the patent valid and valuable and that it intended to call infringers to account. There is some testimony of a vague and shadowy character that a suit was brought against an infringer in Illinois, but the date when it was commenced and the result of the litigation is left wholly to conjecture. So far as the record discloses the complainant could not have acted with

[1] Laches as a defense in suits for infringement, see notes to Taylor v. Spindle Co., 22 C. C. A. 211; Richardson v. D. M. Osborne & Co., 36 C. C. A. 613.

greater indifference had no patent been issued. Since 1891 the defendant, and every one else who desired to do so, has used the pressure retaining valve with impunity. The complainant has known of this use and has looked on without the least token of dissent.

There is nothing to show that the defendant knew that the device was patented. As stated above the complainant omitted to give even the statutory notice, by failing to mark the valves "patented." In short, the conduct of the complainant from first to last has been such as to encourage the defendant in the belief that the valve was not patented, or, if it were, that the patent was invalid or was one which the complainant did not intend to enforce.

It would be in conflict with the well-known principles of equity to permit the complainant to collect damages for a use which it tolerated and almost invited. The defendant was justified in the belief that the valve was public property. The complainant knew of its use for seven years and never made the slightest objection. This supineness, indifference and silence are wholly without legal excuse. The usual plea of poverty is not available, and the suggestion that the complainant was too busy in conducting other litigation with defendant to spare any time to protect or enforce the patent in suit can hardly be regarded as closing the debate. The commencement of an infringement suit to enforce a patent for a device so simple would not have unduly taxed the powers of the most incompetent clerk in the office of any one of the complainant's solicitors.

The acceptance of the proposition, that the complainant, with all its vast resources, was unable to bring such a suit during the few years following 1891, assumes the existence of an innocent credulity which the court, in justice to all, feels compelled to disclaim. Indeed, if the court may consider other suits between these parties, it would seem that the complainant cannot fairly be charged with inactivity in asserting and protecting its rights wherever they were considered worth protecting.

The defense of laches need not be pleaded. Richards v. Mackall, 124 U. S. 183, 187, 8 Sup. Ct. 437, 31 L. Ed. 396; Sullivan v. Railroad Co., 94 U. S. 806, 811, 24 L. Ed. 324; Manufacturing Co. v. Williams, 15 C. C. A. 520, 68 Fed. 489, 494; Walk. Pat. § 597.

Where a patent has lain dormant for 15 years and has been infringed by the defendant for 7 years with the knowledge of the complainant and without a word of protest a decree for an accounting should not be granted.

The bill is dismissed.

ELECTRIC SMELTING & ALUMINUM CO. v. PITTSBURGH REDUCTION CO.

(Circuit Court, W. D. New York. October 22, 1901.)

PATENTS—INFRINGEMENT—PROCESS FOR REDUCTION OF ALUMINUM ORES.

The Bradley patents, No. 464,933 and No. 468,148, relating to a process for the reduction of highly refractory and nonconductive metallic ores in an unfused state by electrolysis, some of the claims having specific

reference to the application of such process to the separation of aluminum from its ores, are not infringed by the process of the Hall patent, No. 400,766, for the reduction of aluminum ores. The Bradley process consists essentially in passing an electrical current through a mass of ore, such current having a sufficient strength and intensity to fuse the ore, and to effect its continuous and progressive decomposition, while the essential feature of the Hall process, which has given it great commercial value, is the employment of a bath of fused cryolite, in which alumina readily dissolves. Such bath has a greater electrolytic stability than the alumina, and the latter, when in solution, is decomposed by passing through the mass an electrical current not having sufficient intensity to effect the decomposition of the bath, which is kept in a fused condition by the heat incidentally developed in the process of electrolysis, and used with repeated charges of alumina. In such process there is not only a different employment of ingredients from that of Bradley, and an entirely new method of operation, but far better results are attained; and, conceding that Bradley was the first to point out the method by which progressive fusion and electrolysis was made practicable, in view of the prior art and of the doubtful utility of his process, which has never been put into commercial use, his patents cannot be given a broad construction, as embodying a pioneer invention, to cover the process of Hall, which has superseded all others and resulted in a remarkable increase in the production and use of aluminum.

In Equity. Suit for infringement of patents. On final hearing.

C. M. Vorce, Frederick H. Betts, and Timothy E. Ellsworth, for complainant.

Thomas W. Bakewell, George H. Christy, Frederick P. Fish, and Norris Morey, for defendant.

HAZEL, District Judge. This is a suit in equity by the Electric Smelting & Aluminum Company against the Pittsburgh Reduction Company to restrain the infringement of two United States letters patent for a process of separating aluminum and for a process of obtaining metals from their ores or compounds by electrolysis. The patents are owned by the complainant under several mesne assignments. The original application for patent was filed by Charles S. Bradley, February 23, 1883; on December 8, 1891, patent No. 464,933 was issued on a division of the original application; and on February 2, 1892, patent No. 468,148 was granted to him. Both patents relate to a process for the reduction of highly refractory and nonconducting metallic ores or compounds in an unfused state by electrolysis; that is, by subjecting the ores or compounds to the action of an electric current, resulting in a fusion of the entire mass of ore, and, while in a state of fusion, by conjoint and simultaneous action of the electric current to separate, disassociate, or decompose the fluid mass, so that the metal contained therein will be gradually deposited at the cathode, then to be drawn from the bottom of the receptacle or basin in which it is contained. Claims 1, 2, and 3 of patent No. 468,148 cover and control the process broadly, while claims 4, 5, and 6 cover and control the process described as specifically applied to the separation of aluminum from its ores. Patent No. 464,933 relates to the same process, but confines its claims to a particular structure used and a special mode of practicing the process. The answer sets up various defenses, among them want of novelty and noninfringement.

The case is of very great importance. The questions involved are of such magnitude and complexity that a great deal of time has been consumed in becoming familiar with the voluminous testimony, consisting of about 3,000 printed pages, including exhibits. The court has proceeded, however, in the hope that, when a decision is rendered, the propositions involved may have received such careful consideration as their importance requires. The claim of the complainant and the various defenses interposed are of a difficult and technical nature. The testimony of the expert witnesses, men of a high reputation in chemistry and electro-metallurgy, is of widely divergent character as to the application of important scientific and electrical principles. A knowledge of the complicated and intricate subjects of chemistry and electricity, and the application of their laws, would seem necessary to a proper disposition of this case. The evidence consumes great space, and should make the questions at issue clear of comprehension. The arguments of counsel generously amplify the copious and discursive opinions of the expert witnesses. Everything appertaining to the discovery for which the patents were granted has been clearly set forth, so that in the consideration of the facts and the law applicable thereto the task of the court may be as clear as the subject will admit. Some of the facts are obscured in more or less uncertainty, and are difficult of solution; but it is hoped that a sufficient understanding of the questions involved has been reached for a proper determination of the controversy.

The process by which aluminum is extracted from its ores has been completely revolutionized. The patent of Hall, used commercially by the defendant, and claimed by complainant to infringe its patents in suit, is No. 400,766, issued April 2, 1889, for a process of reduction of aluminum by electrolysis. This patent unquestionably resulted in the phenomenal reduction in the price of aluminum. In 1886 its price ranged from $5 to $8 per pound, while in 1897 it was from 25 to 30 cents. The entire consumption of aluminum in the United States is supplied by the defendant. From an extremely rare and only occasional employment of this metal in the commercial world, it has become useful in the manufacture of articles for which theretofore brass, copper, and tin only were known to be serviceable. Its price being reduced to that of copper and brass resulted in the advantageous use of aluminum for many purposes only made possible by the lowered cost of manufacture. It is not seriously disputed that this result was due to the discovery of the Hall process and its subsequent operation. Indeed, immediately after the defendant began its use commercially, manufacturers using other processes ceased to work on account of their inability to profitably make aluminum at the price for which the defendant was able to place its product on sale. What brought about this revolution in the art? Hall's answer is that he was the first to discover a suitable bath material, which, when fused, on account of certain properties contained therein, would at a low temperature freely dissolve alumina; that his bath contained a higher chemical stability than the dissolved alumina itself, so that, by the passage of the electric current, the alumina would be decomposed, and the bath material and its properties left unaffected.

Alumina in the form of an ore or compound is abundant, and therefore cheap. Prior to Hall's invention, it was difficult to melt or fuse, while cryolite, a natural double fluoride of aluminum, was known to be fusible at a high temperature, and its resistance to electrical conduction was regarded so great as to render its use practically prohibitive. Hall's idea was that, inasmuch as it was commercially impracticable to fuse alumina, he might discover a method of dissolving it in a fused bath chemically more stable than alumina, and containing substances not easily volatilized nor subject to decomposition by air. The bath must possess high electrical conductivity and low specific gravity. Moreover, it appeared to him vitally essential that the solvent must be incapable of decomposition by the electric current required to decompose the dissolved alumina; otherwise, the solution would become decomposed by the action of the current, and the alumina remain in the bath unaffected. Therefore the bath material used as a solvent must have a higher electrolytic stability than the alumina. He experimented with fluor spar and the fluorides of sodium, potassium, and magnesium. These fluorides were either insufficiently fusible, or, when in a fused state, failed to satisfactorily operate as solvents for alumina. Cryolite, a double fluoride of aluminum and sodium, when fused, was finally ascertained to meet with highly favorable results. Hall says he "found that cryolite fused easily, and, when fused, dissolved alumina as easily as water dissolved salt, without raising the melting point of cryolite or apparently changing its physical properties." This discovery was quickly followed by repeated successes. Carbon crucibles were used, in which to dissolve the alumina in a double fluoride, or cryolite, bath, and then to decompose the dissolved alumina by passing an electric current through the solution by means of carbon rods used as electrodes. Defendant contends that through this discovery Hall solved the problem of the practical electrolytic production of aluminum, one which had remained unsolved for half a century; that, in comparison with the prior processes, he made a vast improvement, when he planned to fuse a practically nonelectrolyzable ore, and to electrolyze an unfusible one. The extraction of aluminum from its ores by a method of electrical fusion and decomposition, so that the metal regarded as precious could be commercially utilized, had for many years baffled specialists, who had given untiring attention to the subject. In 1888, following the successful experiments conducted by Hall, this defendant corporation was organized. Fifty pounds of aluminum for a time were produced per day at its Pittsburg manufactory. Soon afterwards its plant was enlarged by the erection of two additional establishments at Niagara Falls, using a total of 6,000 electrical horse power and having an output daily of 9,000 pounds of aluminum.

What does Bradley claim? His invention consists in the regulation of the heat generated by current energy to perform three functions. He utilizes the electricity developed between electrodes placed in a mass of refractory ores,—nonconductors in an unfused state. He maintains the necessary current energy communicated from the initial point throughout the entire mass, thus securing fusion and simultaneous electrolysis, and progressively holds a

mass of ore in a continuously fused state, resulting in its reduction. Thus the pure aluminum will be deposited at the bottom of the cavity or basin, whence it may be withdrawn. To produce this result, the electric energy must be applied according to the method specified by the patent, and stated in complainant's brief to be:

"(1) Melt and maintain melted the material in the initial line of flow. (2) To apply the current in such a manner that the melted material will spread its heat, so as to propagate sufficient heat to liquify the surrounding material. (3) Decompose or separate the atoms of the fused mass, made a conductor of electricity by the diffusion of the heat generated."

The main object of the invention, the patentee says, "is to dispense with the external application of heat on the ore in order to keep it fused." This he proposes to accomplish by the employment of "an electric current of greater strength or intensity than would be required to produce electrolytic decomposition alone." The decomposition or disassociation of refractory ores by electrolysis is not claimed to be new in the art. The utilization of a sufficient quantity of heat from a center of fusion throughout a mass of nonconducting and refractory material, of which cryolite is a sample, by means of an electric current concentrated upon a portion of such mass, is claimed to have been unknown, and that Bradley is a pioneer in the art.

Complainant claims that its process is not limited to any particular class of ores. The patent covers the extraction of metals from their compounds, and is not restrictive in its scope. Therefore the Hall process is the same as Bradley's, although more economically performed, because Hall uses a well-known flux or solvent for the alumina, which facilitates fusion and consequent electrolysis. I am quite satisfied that it was not a well-known flux for this purpose. The utility of electricity as a potent agent for the transmission or diffusion of heat was well known for fusing refractory ores. Various anticipatory patents will be hereafter discussed. The mere application of this agent to decompose alumina, after it has passed through an intensely heated cryolite bath, does not necessarily fuse the alumina. Hall does not endeavor to do this. Instead of using a fusing process, he creates a bath by which alumina is dissolved. This is done by charging it into the fused bath, resulting in the process of solution. This distinction, claimed to exist between fusion and solution in the chemical and metallurgical arts, has been the basis for considerable expert testimony, extremely contradictory in its nature. It will not serve any good purpose, with reference to the various definitions of fusing, fluxing, melting, solution, and dissolution, to in detail or at length make any comment upon these definitions.

This very same question, which is regarded with so much importance, was decided in the circuit court for the Northern district of Ohio in the case of Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (predecessor of complainant) 55 Fed. 301. That was a suit brought by the defendant in this case against the Cowles Electric Smelting & Aluminum Company, a corporation then in existence and engaged in the manufacture of aluminum alloys, to restrain infringement of the Hall process on the part of

the Cowles Company. It was contended that the use of cryolite as a flux for alumina was well known in the art prior to the date of the Hall invention; that fluxing and dissolving were synonymous terms, and therefore the Hall process was old and his patent void. The suit was tried before two eminent jurists, Judges Taft and Ricks. The learned and exhaustive opinion given by the court in that case is persuasive of the finding there made on the questions before it. The learned court, after an examination of all the patents claimed in anticipation, and after full consideration of the terms "fluxing," "fusion," and "solution," held that the Hall process consisted simply in solution of the alumina and subsequent electrolysis. The process of De Ville was said to be a process of electrolysis, followed by "electro-chemical solution of the alumina." Judge Taft was of the opinion that by Hall's process the alumina dissolved and became the electrolyte. The court had before it substantially all the evidence and exhibits that are in this case. The questions which arise here with reference to fluxes and solution were exhaustively argued. Many of the expert witnesses in that case are witnesses here, notably Mr. Cowles and Drs. Chandler and Morton. Indeed, the chief contention was that the use of cryolite as a flux for alumina was old in the art, and that "fluxing" and "dissolving" were synonymous terms. Hall maintained, and the conclusion of the court was that the novelty of the process consisted in that the alumina dissolved in a fused double fluoride of sodium and aluminum as freely as sugar dissolves in water; that, until he discovered that alumina would thus freely dissolve in this bath, it had never been known, and that no one had ever before succeeded in disrupting the constituent elements of alumina by an electric current; and therefore the patent was a pioneer patent, entitling it to liberal construction. The court quoted with approval, at page 309, the testimony of Prof. Chandler, who also gave testimony for defendant in this case:

"The alumina dissolves in the fused bath of cryolite, as sugar does in water, quietly, without any of the usual evidences of chemical action, such as production of heat, or the reduction of fusibility, or thickening of the liquid. This seems to show that the alumina in solution remains chemically unchanged."

After the decision in that case a motion was made for a rehearing before Judge Taft, and the meaning and effect of metallurgical fusion and solution again discussed. Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co. (C. C.) 64 Fed. 125. It is true, in that case the Bradley patents were not relied on. The Cowles patents, however, substantially claimed to be the same, were before the court. On the motion for rehearing it was again argued that the use of cryolite as a flux is the same as its use as a dissolvent for alumina. The De Ville patent, claimed in anticipation, was again reviewed and distinguished. The court rested its decision on the degree of fusibility of alumina in cryolite. This De Ville's description of his process shows to a very small per cent., and it does not appear that his process will render fusible a very large per cent., which Hall discovered and which his process performs. The court said:

"It is utterly immaterial, therefore, whether the cryolite be called a 'flux' or a 'dissolvent' of the alumina, because in either case the extent to which De Ville's experiments showed that it could dissolve or flux alumina was very small."

The court further said:

"Neither the Bradley nor the Cowles patents contain the slightest suggestion that cryolite should be used as a flux for the refractory alumina, and no evidence is sought to be introduced that any one ever actually used cryolite in furnaces for that purpose."

From the foregoing extracts, and a careful review of the evidence and authorities cited by counsel in the present case, I am constrained to hold that Hall's invention was not a mere alteration in the Bradley process, or the substitution of one ingredient for another, which was well known at the time. The subsequently conceived process of Hall is substantially different from the former of Bradley, and the addition of the alumina in the cryolite flux tended to perform a different function, not covered by the Bradley process. It tended towards the solution of an ore which, if operated upon by the Bradley process, construing it broadly, and not limiting it to any particular class of ores, would have necessitated its fusion with the contents of the bath, and would, therefore, have required an extremely high electrical voltage to perform the office of disassociating the aluminum.

Complainant's counsel maintain with great force and ability that, inasmuch as the Hall bath is a compound one, consisting of fluorides of aluminum, of sodium, and of calcium, and oxide of aluminum, and the electric current passes through every substance in the bath, therefore the Hall bath is fused in the same manner specifically claimed by the Bradley patents. Nevertheless, Hall's heat is quite differently applied and utilized than Bradley ever contemplated. Hall maintains that he reduces his current to a minimum and obtains his heat from the anodes, the combustion of the anodes, and the lining of the crucible or pot; that these developments of heat result from the use of the electric current for decomposition. He adds pulverized carbon to his bath and throws on additional alumina. After a short space of time, it is intermingled with the bath material. This method also utilized a certain amount of heat by preventing its escape by radiation. In each pot or crucible are fixed 40 carbon rods, made of compressed carbon, each weighing eight pounds. When these rods are immersed in the bath, they are gradually consumed, and as the ends are consumed they are pushed down, to keep them nearly in contact with the lining of the crucible or pot. The oxygen, as it is released from its compounds, combines with the carbon, by which carbonic acid gas is formed, resulting in the production of heat. This heat maintains the fluidity of the bath, and suffices to keep the bath liquid, without any excess of current. Hall claims that to use an excessive current, as described by the Bradley patent, would be unnecessary, and would involve considerable expenditure of money for the production of its current energy. In the Lane-Fox British patent of 1878 it was demonstrated that electric currents could be employed for external heating as a substitute for fires involving combustion; the heat being produced by resistance to the current in or

at the surface of the containing vessel. The greater part of defendant's heat being obtained through the carbon anodes and the crucible lining would suggest a similarity with the Lane-Fox patent. The heat generated is not permitted to be of such intensity as to fuse the bath, and also decompose it, but only of such low intensity as to decompose only the dissolved alumina, and not the bath itself. The alumina is heated to the temperature of the bath before it becomes a part of it, and is then easily dissolved, without participating in any fluxing action. It is quite true that a chemical reaction may be said to take place, producing from substances practically nonelectrolytic a new substance, the electrolyte, which, when acted upon by the amperage, deposits aluminum at the cathode, and that the initial step of the process to create a chemical change of substances to form the electrolyte cannot take place without heat. Hall's claims do not say what heat shall be employed to fuse the bath. The process described by his patent speaks of dissolving alumina in a fused bath, composed of fluorides of aluminum and a metal more electro-positive than aluminum, and then passing an electric current through the fused mass. With reference to obtaining the required temperature to maintain the bath the patent says:

"This crucible is placed in a suitable furnace, B, and subjected to a sufficient heat to fuse the materials placed therein; such materials fusing at approximately the same temperature as common salt."

From this it is deduced that Hall never intended, certainly that he did not conceive, the plan of internal heating by current energy, and that its present use for bath fusion and electrolysis is an infringement of Bradley's process. The latter describes a method for maintaining both fusion and electrolysis by continuous and simultaneous action of the electrical current applied to his bath. The specifications declare:

"The main object of my invention, therefore, is to dispense with the external application of heat to the ore in order to keep it fused. In order to accomplish this object, I employ an electric current of greater strength or intensity than what would be required to produce the electrolytic decomposition alone, and I maintain the ore or other substance in a state of fusion by the heat developed by the passage of the current through the melted mass, so that by my invention the electric current is employed to perform two distinct functions; one of these being to keep the ore melted by having a portion of its electrical energy converted into heat by the electrical resistance offered by the fused ore, and the other being to effect the desired electrolytic decomposition, by which means the heat, being produced in the ore itself, is concentrated at exactly the point where it is required to keep the ore in a state of fusion."

The question presented is not free from difficulty. Counsel for complainant argue with great force that the heat development had first to be conceived, and the advantage of utilizing the Bradley plan of heating as a substitute for intense external heat had first to be realized. Was the conception of the application of electrical heat, in the art as it existed at the date of the application for the Bradley patent, such a discovery as to entitle the patentee to the protection of the patent laws? It is urged that the claims of the Bradley patent must be broadly construed with reference to its limitation to the use of an electric arc for initial fusion, in the light of the decision rendered in Aluminum Co. v. Lowrey, 24 C. C. A. 616, 79 Fed. 331.

The court in that case did not pass upon the validity of Bradley's claims, but it did have before it what had been previously done by Sir Humphrey Davy, Siemens, and others. The court expressly said that the record in that case was not made up for the purpose of enabling it to decide how far the Bradley invention advanced the prior art. It also used the following language:

"But the researches of Sir Humphrey Davy, Siemens, and other scientific men had already made a considerable advance in developing this new art."

The Lowrey suit was brought by Lowrey's executors to clear the title to the Bradley patents, which Cowles claimed to own by virtue of an assignment of May 18, 1885, assigning to Cowles inventions of Bradley which interfered with the patents of Cowles. The complainant claimed title under a subsequent assignment, and contended that the Bradley claims related to a process essentially different from that of the Cowles patents, and therefore that the assignment by Bradley to the defendant, by reason of a restrictive limitation in the assignment, did not include the Bradley patent. The determination of the court in that case with reference to the construction placed upon the claim of the patent in suit can have no bearing upon the questions before me. This suit is not between the same parties or their privies in interest, and the subject of the action is widely different. Moreover, in the view that I have taken, it would serve no useful purpose to determine the question whether the patents of the complainant are limited to initial fusion by an arc. The proof on the part of the complainant—and the patent so indicates—is that the electrode and the carbon slab upon which the ore may be placed shall first form a contact. This contact would offer a resistance resulting in the production of intense heat at the point of contact. The electrode is withdrawn when the heat is generated by reason of the contact between the electrode and carbon slab. This permits a heat-producing action, and aids the development of a larger bath or body of fused material. Complainant's experts described this as an incandescent operation, as distinguished from that of an arc. The proofs show that, when a current of sufficient voltage is applied to metallic compounds, it will fuse, maintain fusion, and decompose them without the aid of external fire. Defendants contend that this was well known to be old in the art.

Prior to 1884 Messrs. Cowles were engaged in the reduction of metals, aluminum alloys. By their process the refractory and nonconducting material was mixed with carbon or other similar conducting, although highly resisting, material. At this time the diffusion of electrical heat throughout the mass of material in the furnace, invented by Cowles, was justly regarded as a remarkable process, marking an era in practical metallurgy. Bradley's application for a patent was then on file. The general adoption of the practice of internally heating the baths by the current, from the failure of external heating unquestionably, is due directly to Messrs. Cowles. Doubtless great credit is due to their enterprise and progressive commercial foresight. Nevertheless it was known that Sir Humphrey Davy, in a lecture delivered before the Royal Society of London in 1807, and published in the Philosophic Transactions for 1808, used this language:

"I tried several experiments in the electrization of potash rendered fluid by heat, with the hopes of being able to collect the combustible matter, but without success, and I only attained my object by employing electricity as a common agent for fusion and decomposition."

This was a mere experiment, possibly, but it was an account of a process that was complete and capable of practical operation. Bradley admitted, in the proceedings at the patent office, in his second brief on appeal to the commissioner, that:

"Sir Humphrey Davy's reduction of potassium and sodium, as described by him, on an infinitesimal scale, was the process described and claimed by Bradley."

I cannot agree with the argument that Sir Humphrey Davy's process revealed nothing to the world. His laboratory operations with reference to a process for reduction have since been carried out on a larger scale. They have been proven practical by successive improvements, and his method has been tested by actual use. Castner's patent, No. 452,030, granted May 12, 1891, is cited as an improvement in the process described by Davy. Siemens invented a mode of initial fusion, using the arc, which made Davy's process applicable to other fusible electrolytes than those upon which he experimented.

It is vigorously contended by complainant that Davy's experiment did not demonstrate that electric heating could be practically applied internally by conduction to surrounding nonconducting and refractory substances; that his experiment consisted of its operation on minute quantities; and that soda and potassa, Davy's material, does not justify a similar operation with materials of different character. Dr. Morton, expert for complainant, says, in speaking of the Davy experiment, after declaring that a battery analogous to that of Davy ought to be used to ascertain the conditions which existed in his case:

"I have no doubt that Davy's experiment may be successfully carried out, even with a battery, as in the experiment that I made, or with a dynamo machine and adjustable resistance properly manipulated."

Dr. Chandler met with fair success in his trial experiments for use in this case by his substantial repetition of Davy's process. In 1881 the Compagnie Generale Belge, in its French patent, spoke of the use of the electric arc for heating substances. Nothing is said of reduction, but it is suggestive of the use of electrical heat for fusion of metals. Prof. Howe in 1882 published a paper in the regular annual volume of Transactions of the Society of Mining Engineers, and copies thereof were distributed as early as May, 1882. In this paper Prof. Howe speaks of fusing his material before decomposing it by electrolysis. Bunsen fused chloride of magnesium, and electrolyzed it with the aid of electrodes, and demonstrated the necessity of a definite voltage. The United States patent of Ball & Guest, No. 236,478, described the application of an electric current for carbonizing arcs of paper or other materials while confined in a case of nonconducting material. Siemens' British patent, No. 2,110 of 1879, to which I have already referred, describes the use of the electric arc for the fusion of metals. It makes no reference to decomposition, but it is clearly stated by the patent that the electric current is ap-

plied to produce intense heat for the fusion of electrolyzable substances. Two carbon rods, fitted to slide towards each other horizontally within water-cased tubes, are employed. The substances to be fused are introduced in the crucible, and the carbon rods are advanced sufficiently near each other to form an arc within the crucible. Dr. Morton says that with modern dynamos, generating large currents, Siemens' apparatus, which was useful only on a small scale, could be enlarged, so as to fuse large masses of material requiring high temperature, provided the Siemens method of cooling his electrode with water is dispensed with. Bell in 1861 had electrolyzed cryolite, and Gauduin in 1869 decomposed aluminum salts, by the electric current in crucibles by means of external heat. As the aluminum was extracted, fresh material was added. This is also done by complainant's process, and by that of the defendant, when necessity requires. Other patents are in evidence from which it appears that the decomposition of metallic compounds was old in the art. In every case external heat was used. No electrolytic heat generated in the crucible was utilized for continuous heating. That seems not to have been practical until the discovery by Hall of a suitable bath, which would, when fused, dissolve alumina. I think that these patents quite clearly show the state of the art with reference to electrolysis and internal heating of ores or compounds. They disclose the state of the art to be such that what Bradley did was to adopt a well-known process for heating to the special purpose of fusing,—a carrying forward or new application of what others had already done or attempted in reducing refractory metals by similar means. His claims must therefore be narrowly construed. Manufacturing Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307.

The complainant's argument is that by the Bradley patents an electrolytic current is employed sufficiently powerful to do two things, to wit, to electrolyze and to develop sufficient heat to keep the ore fused. This may be done, as the patent points out, in the following way:

"For the purpose of perfectly managing and controlling my process, I have my electric generator or source of current so arranged that the strength of the electrolytic current may be properly regulated, and the mass of ore thereby kept at proper temperature. The most convenient way to accomplish this is to raise or lower the electro-motive force of the generator by any of the well-known methods employed,—for example, in incandescent electric lighting. * * * By these means I am able to dispense with the necessity of keeping the ore in a fused state by the application of heat from without through the walls of the refractory vessel, and to concentrate the heat required for this purpose just where it is needed between the two electrodes."

True, Bradley explicitly states that by his invention external heating is dispensed with. To do that, as already stated, simultaneous and progressive fusion and electrolysis are relied upon; but, in the light of the heat which is incidentally generated by the Hall method to perform this work in his process and the prior state of the art, a construction cannot be placed upon the Bradley patent sufficiently broad to permit his claim with regard to simultaneous fusion and electrolysis to inure to his benefit as against the claims of Hall. This construction, however, requires that defendant's operation of its process clearly appear. Its apparatus consists of a crucible, pot,

or tank, about six feet long and from three to four feet wide, wherein the double fluoride of aluminum and some other more electro-positive metal, such as sodium and calcium, are fused. In this fused bath alumina is dissolved and decomposed. The receptacle in which the process takes place is lined with carbon, and, with the aluminum it may contain, constitutes the cathode. The anodes are carbon cylinders, adjustably suspended by copper rods from an overhanging frame, which is connected with the positive side of the dynamo. The anodes are immersed in the bath, and the current passes to the lining of the pot, accomplishing in its passage the electrolytic decomposition of the dissolved mass. At the beginning the flat ends of the carbon anodes are pressed into close contact with the flat bottom lining of the pot, the current is then turned on, and, owing to the resistance offered at the contacts of the anodes and cathode, great heat is developed, rapidly heating up the lower ends of the anodes and the lining of the pot at and near the contacts. The anodes are pressed down from time to time, as the carbon is destroyed by combustion. By defendant's method, molten bath material is ladled into the apparatus from one going out of use or requiring repairs. Other raw material is added to the crucible. Alumina is added and quickly dissolved. The anodes are raised a few inches, and decomposition takes place. This operation continues for months, until the apparatus gives out or repairs are required. From the evidence of Jeff, complainant's witness, it appears that the bath sometimes becomes thick when running under a voltage of less than 5½; that the carbon is then raised to supply more voltage, a volt meter being connected with each apparatus. Efforts are made to keep 5½ volts in each crucible, and about 45 are in operation at the same time. Is the current regulated, and the mass of ore thereby kept at the proper temperature, for the purpose of managing and controlling the process, as claimed by the Bradley patent? It is well understood by those familiar with the art that an electric current, applied to a conducting element, generates heat proportionate with the watts of electrical energy used to overcome the electrical resistance. Joule's law, so called, determines the law of electrical heating in the following words:

"The heat which is evolved by the proper voltaic action of any voltaic current is proportional to the square of intensity of the current multiplied by the resistance to conduction which it experiences."

Prof. Thurston, of the Sibley College of Mechanical Engineering, Cornell University, called as an expert witness for defendant, says:

"Joule's law, as above expressed, holds good, whatever the nature of the substances producing the resistance, and the heat evolved in the passage of the electric current is precisely the same in amount; the same current being passed and the same resistance being met, whether the resisting material be a solid, or liquid, or a solid in a fused state. The quantity of heat is a function of current and resistance alone, and is absolutely independent of the nature of the substance traversed by the current."

To electrolyze a fused bath, a practical voltage is required to overcome the resistance of the carbon electrodes. This voltage is distinguished from theoretical voltage by Prof. Chandler. He says:

"Extra electrical energy is always required in every electrolytic process to overcome conductive resistance of the bath and to go on with reasonable rapidity. It is essentially the case in fused baths where a voltage considerable above the theoretical voltage is always required to produce satisfactory results. * * * It is necessary to use a sufficiently high voltage to cause electrolytic action to proceed with rapidity, and experience has shown that from five to six volts are necessary with the solution of the defendant's process. It is immaterial whether defendant's process is carried on in crucibles or pots heated by the external heat of the fire or by the electrical heat of conduction."

From the experiment of Dr. Morton, made on April 26, 1899, and from other measurements of counter electro-motive force made by Mr. Davis, Prof. Geyer, and Prof. Rogers, it is argued that the defendant uses an electric current of sufficient strength and density to decompose cryolite, and that it uses a greater voltage than would be required for electrolysis alone. Defendant's experts do not agree with this contention. I am constrained to defer to the judgment of defendant's expert witnesses, in view of the vast amount of corroborating evidence found in the case, showing that Hall, in experimenting with his process, never contemplated the use of an electric current of greater voltage than to produce decomposition. He was primarily of the opinion that the heat produced by the electrical energy necessarily used to decompose the metal in the crucible would be entirely sufficient for both fusion and decomposition. Indeed, in a letter written to his sister, as early as August, 1886, he said:

"In some respects this invention is going to be better than I anticipated. Thus, the resistance of the liquid is exceedingly low. Also, it is evident from the experiments that the waste heat of electricity, which must be used anyway, will be nearly, if not quite, enough to keep the solvent melted."

The proofs show that Hall's anticipations in that regard proved true. The current strength sufficient for electrolysis, as applied by the Hall process, is sufficient to fuse and decompose. The development of heat is an adjunct to the process, or, as said on the argument, it is incidental thereto. This fact, of course, aids in minimizing the voltage and amperage required to keep the bath fused and to perform electrolysis. Obviously, this renders it unnecessary that Hall should use an excessive current for fusion of the ore. By Bradley's method, it is distinctly stated that the current must be sufficiently powerful to both keep the ore in a proper state of fusion and to perform the required electrolytic work. It appears that in securing this result by his process a double strength of current is required. Cryolite is the ore cited by Bradley as an illustration in his patent, and doubtless was in his mind when he conceived his invention. Its fusion requires, as has been said, a current of greater strength and intensity than would be required to produce decomposition alone. In the case of Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co., supra, the defendants sought to distinguish their process then employed by denying infringement of the Hall patent, for the reason that they used the electric current internally applied to fuse their bath material. The court said:

"This defense is based on a narrow and highly impossible construction of the Hall patent."

The application of that decision to the case at bar would certainly compel the conclusion that, if the only alleged infringement by Hall is the application of internal heat, then in reality no infringement exists. The theoretical voltage required by Hall to decompose alumina is 2.8 volts. The working voltage required is from 6 to 7 volts. Defendant's contention that this amount of voltage would be required to electrolyze the contents of the pot, even though the mass had been fused by external heat or by the electrical heat of conduction, is disputed. The Heroult process is cited as an instance where the theoretical voltage which is required for this same purpose, using external heat to keep the bath fused, is 3 volts. Inasmuch as the Heroult process is substantially that of the defendant, complainant argues that the defendant, in its use of a current of 6 volts, infringes this feature of the patent, because of its use of an electric current of greater strength or intensity than would be required for decomposition alone, and that a regulation of the current is necessarily so arranged as to keep the ore at proper temperature. A practical voltage, as heretofore defined, is required; but the heat required to maintain fusion is obtained by the heat radiation, and from such sources as are incidental to the use of the process, and not from any independent process of electric heating. The record does not bear out this claim of the complainant with reference to anticipation. The Heroult process fused the alumina by internal electric heat, melting it above a base metal, so that it would alloy with aluminum without the presence of cryolite. These alloys contain 10 or 15 per cent. of aluminum only. This process was used in Europe in 1887 and 1888. Subsequent to the Hall process, it was put in use in the United States. His application for United States patent covering the pure aluminum process was in interference with the application of Hall, and was determined in Hall's favor.

It is quite true that there must be a regulation of the current utilized by the Hall process; but manifestly, from what has already been said, that must be found due to the regulation of the application of electricity for the decomposition of alumina. After the current has passed through the electrolyte, an increase of voltage will not increase the production of metal. That is affected only by increasing the amperes. No statement appears in the Bradley patent as to the number of volts employed either for reduction performed with internally or externally heated crucibles. Complainant's witness Rogers testified that, if Bradley used twice the voltage necessary to effect decomposition, he would not be employing, according to Prof. Chandler's figures of the theoretical voltage, more than 6 to 10 volts, and that his voltage would simply be determined by the amount necessary to decompose and maintain fusion. Obviously, it is essential by the Bradley process to first ascertain the amount of voltage required for electrical decomposition, and then increase the electric current to one about twice as strong as would be employed to perform a given amount of electrolytic work in the ordinary way in externally heated crucibles. By so doing the patentee is enabled to keep the ore fused without the application of any external heat whatever. It is quite plain that this is not Hall's process, who, as we have seen, uses only such heat as is incidental to every

operation of electrolysis, which it is admitted is not covered by the patent and is not patentable. Considering this feature, together with the application of alumina to a cryolite bath, it appears to me that the Hall process is a new mode or operation by means of which a new result is obtained. I do not think, for reasons hereinafter stated, that the Bradley patent, claiming broadly the disassociation of aluminum from its ores or compounds, or of other like highly refractory metallic compounds, can be construed to cover the claims of Hall. It is quite true that when a patentee describes an invention, and then claims it as described, he is protected by law, not only in the precise form which he has described, but all other forms which embody his invention. Winans v. Denmead, 15 How. 329, 14 L. Ed. 717. But here in the Hall process there was a different employment of the ingredients which go to make up the process, and an entirely new mode of operation. The means employed and the method of operation produced a new or better result. It may be said to be equally true "that, when a person has invented some mode of carrying into effect a law of natural science or a rule of practice, it is the application of that law or rule which constitutes the peculiar feature of the invention." Sewall v. Jones, 91 U. S. 184, 23 L. Ed. 277. But Hall's process was not applied in the same way. By his method of solution the work was performed differently.

The question of the utility of the Bradley process must now be considered. Bradley conceived his invention February 23, 1883. The patents were not issued until about eight years afterwards. The delays were due to adverse decisions of the patent office, and amendments made to the original application from time to time to meet those decisions. Hall's patent was granted April 2, 1889, and went into immediate operation. The complainant's proofs show that, although the Bradley process had never been in actual operation, the fundamental invention of Bradley was substantially used by Cowles Bros., in 1890 and previously, in the manufacture of aluminum alloys. Previous to that time it was substantially used for a short time at Boonton, N. J. This plant was started primarily to show the practicability of the Heroult process. The witness Stetson gives testimony to the effect that this process was operated at Neuheusen under the Heroult patent from 1886 to 1890. Under his direction pure aluminum and aluminum bronze were made. It was claimed to be used by Cowles Bros. in a suit for infringement in Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co., supra; it being established in that case that the defendant used Hall's solution process. An injunction was granted, which is still in force. Inasmuch as Bradley's patents were not before the court, it can hardly be claimed that the utility of the process as specifically claimed was established. Although possessing facilities for their operation and practical control of both Bradley patents since the determination of the Lowrey suit in 1897, nothing has been done by complainant to demonstrate their commercial utility. I am not unmindful that the granting of a patent is prima facie evidence of its utility, and that the burden of proof of want of utility is on the defendant. If there is any doubt, it should be resolved in favor of the patentee. I find no evidence at all of the practical use of the Bradley process.

There was no abandonment of it, yet it is still important to consider its practical operation for the purpose of construing its scope. The witness Yates gave testimony in the suit brought for infringement of Pittsburgh Reduction Co. v. Cowles Electric Smelting & Aluminum Co., supra. He said the Cowles syndicate of England used the same process that the Cowles Company used at Lockport for the manufacture of aluminum bronze; that an experimental run of pure cryolite was made in one of their furnaces, but that the "current was not properly proportioned to the bath and no alumina was added; hence no aluminum was produced." By the Gauduin bath experiment, made June 15, 1899, it was undertaken to demonstrate that aluminum was readily made by the Bradley process. It had a bath of cryolite, salt, and aluminum fluoride. It is claimed by the Gauduin process that the low temparature and conditions contributing to generate heat and dissolution observable in the Hall process existed, and that this patent is in anticipation of Hall. Gauduin, in carrying on his process, added aluminum fluoride. The experiment, however, seems not to have been carried out as specified by Gauduin. Aluminum fluoride was added in the beginning to the cryolite. This resulted in electrolyzing and decomposing a solution of aluminum fluoride in cryolite, instead of fusing and electrolyzing cryolite. It is thus quite doubtful whether the Bradley process has ever demonstrated its practical utility. The reasons expressed by the supreme court in the case of Westinghouse v. Power-Brake Co., 170 U. S. 537, 562, 18 Sup. Ct. 707, 718, 42 L. Ed. 1136, 1145, aptly apply:

"In view of the fact that the invention in this case was never put into successful operation, and was to a limited extent anticipated by the Boyden patent of 1883, it is perhaps an unwarrantable extension of the term to speak of it as a pioneer, although the principle involved subsequently, and through improvements upon this invention, became one of great value to the public."

In Deering v. Harvester Works, 155 U. S. 285, 15 Sup. Ct. 118, 39 L. Ed. 153, a case where, in view of the prior art, the invention was held to be of doubtful utility, and never went into practical use, and where the machines manufactured were extensively sold throughout the country for about eight years before any adverse right was asserted, the court narrowly construed the patent in suit. The doctrine of this last case would seem to be applicable to the case at bar.

Counsel for complainant argue that Bradley cannot be limited to the use of a single kind of ore—for example, cryolite—in the operation of his process; that, inasmuch as he was a pioneer in the discovery of simultaneous and progressive fusion of refractory ores, his patent must be broadly construed. Patent No. 464,933 states:

"My invention * * * is specially designed for the extraction of metals from their ores or compounds, and their reduction to the metallic state,—for example, the extraction of aluminum from one of its ores, say, cryolite."

Patent No. 468,148 states:

"My invention relates to the process of effecting by electric current the separation or disassociation of aluminum from its ores or compounds, or the decomposition in a similar manner of other like highly refractory metallic compounds, of which aluminum may be considered a type, and which have been classed together by reason of the great difficulty in their reduction."

The patents, read in their entirety, broadly claim to cover their operation by simultaneous fusion and electrolysis upon all ores or compounds refractory in their nature, and it is claimed that the compounds under discussion are no more fully within the scope of the generic patent than any other metal capable of electrolysis. I am unable to view the patent in this light. The process of Hall was a new mode of accomplishing the same object which Bradley had in mind, and the discovery that alumina would readily dissolve in a cryolite bath, rendering it easy of decomposition, must be considered a new element, and one which not only rendered his process commercially superior, but tended to produce a result in a different way. Although, as has been stated, the Bradley process has never been put to practical use, it does not appear that it was incapable of performing what is claimed for it. No statement is found in the specifications of Bradley's process advising a person skilled in the state of the art at the time of the filing of the Bradley application that alumina might be dissolved and decomposed as set forth by Hall. An inventor must set forth the nature and the extent of his discovery, so that a person skilled in the art as understood at the time of the discovery may be able to successfully apply the process. Pitts v. Wemple, Fed. Cas. No. 11,194. In New York Paper-Bag Mach. & Mfg. Co. v. Hollingsworth & Whitney Co., 5 C. C. A. 490, 56 Fed. 224, the court used the following language:

"An analysis of this patent in the light of the prior art, taken in connection with the circumstances that no practical commercial machine containing this invention has ever been put into use, forbids us from holding that this is a pioneer patent, which marks a great advance in the art or lies at the basis of a new art."

In Westinghouse v. Power-Brake Co., 170 U. S. 568, 18 Sup. Ct. 707, 42 L. Ed. 1136, the supreme court, at page 569, 170 U. S., page 723, 18 Sup. Ct., and page 1148, 42 L. Ed., said:

"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 the 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."

The Incandescent Lamp Patent Case, 159 U. S. 465, 16 Sup. Ct. 75, 40 L. Ed. 221, was a case where two forms of electrical illumination had for many years been the subject of experiments. One was the arc, and the other the incandescent, light. A chief defense to that patent was defect upon its face in attempting to monopolize the use of all fibrous and textile materials for the purpose of electric illumination. The claim of the patentee, among other things, was:

"An incandescing conductor for an electric lamp, of carbonized fibrous or textile material and of an arch or horseshoe shape, substantially as hereinbefore set forth."

It was admitted that the lamp described in the Sawyer & Man patent was never a commercial success, but the contention was that in the conductor used by Edison he made use of the fibrous or textile material covered by the patent in suit. The court said:

"Instead of confining themselves to carbonized paper, as they might properly have done, and in fact did in their third claim, they made a broad claim for every fibrous or textile material, when in fact an examination of over 6,000 vegetable growths showed that none of them possessed the peculiar qualities that fitted them for that purpose. Was everybody, then, precluded by this broad claim from making further investigation?"

American Bell Tel. Co. v. National Tel. Mfg. Co. (C. C.) 109 Fed. 976, is a case where the complainant alleged that the invention must be broadly construed, because the patent in suit covered all "constant-contact telephonic transmitters which it is possible to make." Judge Brown, speaking of this averment of the complaint, said:

"I believe these claims to cover broadly all transmitters having variable contact of opposing electrodes. They certainly are broad enough to cover every variable-contact transmitter that has been presented in this case. The concessions made by the complainant are sufficient to prove that these claims are what are termed in Carlton v. Bokee, 17 Wall. 471, 21 L. Ed. 519, 'ingenious attempts to expand a simple invention of a distinct device into an all-embracing claim, calculated by its wide generalizations and ambiguous language to discourage further invention in the same department of industry, and to cover antecedent inventions.' It is a familiar rule that a generalization or definition that is too broad cannot be made good by making an arbitrary exception of each case that comes within its terms, but which should not have been included."

And further on in his very exhaustive opinion he says:

"I am of the opinion, therefore, as the claims are statutory requirements, prescribed for the purpose of making the patentee define precisely what his invention is, and as these claims are so broad as to include every transmitter of the general class of which Bell was the first inventor, and which is exemplified in his constant-contact transmitter, that they are invalid for excessive breadth, and for a vague generality which makes them a constant menace to all inventors who may seek to improve the art of telephony by applying what Bell has taught as to the practicability of operation by the constant and variable-contact method. By claiming 'variable pressure of electrodes' as an art or method, the complainant seeks to monopolize an indispensable feature of every constant-contact transmitter having varying contact and opposing electrodes, and to suppress all subsequent invention in the same field."

It seems to me that this language and the language of the court in the Incandescent Lamp Patent Case are peculiarly appropriate to this case. I am of opinion that the complainant's claim, with respect to its operation on ores or compounds, must be narrowly construed, and that it does not cover the claims of Hall.

No useful purpose will be served by further consideration of these questions, or any of the remaining points or contentions presented by the very able arguments of counsel. The argument and briefs of complainant's counsel most strenuously insist that Bradley was a pioneer in the art, that he was the first to fuse and electrolyze by simultaneous application of electrical energy, and that by his method progressive fusion and electrolysis are made practicable. Doubtless that is so. It is not disputed that Bradley pointed out a way by which the electric current, when regulated as described by the patent, will perform two essential features of his process. This was new in the art, although Sir Humphrey Davy by his experiments suggested electricity as the common agent for fusion and electrolysis. The conception and practicability of utilizing the electric current for these purposes simultaneously was unlike the prior art. Hall, ambitious,

vigorous, and intellectually strong, competed, experimented, and produced a process in aid of decomposition of refractory ores not contemplated by the complainant's patents. The same purpose that Bradley had in view is accomplished by the joint action of certain compounds when subject to certain chemical and electrical action. The admixture of material and the chemical and electrical action applied thereto by Hall's process are essentially different.

Little attention has been given to the controversy arising by reason of initial fusion by an arc or by incandescence. Nor has it been intended to pass on the validity of the various claims of the Bradley patents. To review all the questions urged upon the attention of the court would extend this opinion beyond useful limits. My purpose has only been to determine the issue of infringement, and give such salient reasons as seemed to me apparent from an examination of the record and arguments presented.

The motion made by defendant for leave to amend its answer, reserved by Judge Coxe until the final hearing, is allowed. Although it has not been considered in the determination of this case, the proposed amendment appears to be material, and may be added to the original answer, as provided by equity rule 60. The motion by complainant to suppress testimony of Romain C. Cole is granted. This testimony was given in another suit between this defendant and complainant's predecessor, a corporation. Such privity or mutuality between the parties to this suit is not found as will justify retaining in the case the testimony of Cole, deceased. It is therefore stricken out.

It must therefore be held that the process used by defendant under the patent issued to Hall, No. 400,766, does not infringe patents granted to Bradley, Nos. 464,933 and 468,148. The bill is dismissed.

WILFLEY v. DENVER ENGINEERING WORKS CO. et al.

(Circuit Court, D. Colorado. November 5, 1901.)

No. 3,927.

1. PATENTS—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
   A combination of old elements, to render them adaptable to a new use, may involve invention, and sustain a patent, where the combination possesses utility, and produces a new and useful result in the art to which it is applied, and was not obvious to one skilled in such art.
2. SAME—INFRINGEMENT—ORE CONCENTRATION TABLES.
   The Wilfley patent, No. 590,675, for an improvement in ore concentrators, discloses invention, and is valid, and entitled to a liberal construction. Claims 1, 2, and 7, covering a concentrating table, construed, and *held* infringed.

In Equity. Suit for infringement of patent. On final hearing.

George L. Hodges, for complainant.
Cranston, Pitkin & Moore, for respondents.

RINER, District Judge. The bill in this case is founded on letters patent granted to the plaintiff on the 28th day of September, 1897, for "certain new and useful improvements in ore concentra-

tion." It is alleged in the bill that the defendants have been and are causing to be manufactured, advertised and offered for sale and use, and have sold for use, and have used, and threaten still further to advertise, to offer for sale, and use, and to sell and use, a concentrating table described in the bill as the "Cammet Concentrating Table" or "Cammet Concentrator," which it is alleged, in its construction and in its intended operation, comes clearly within the terms of claims numbered 1, 2, and 7 of plaintiff's patent, as follows:

"(1) A transversely inclined concentrating table, having a movement whose tendency is to carry the material longitudinally forward towards the tail or foot of the table, said table being provided with a number of riffles extending longitudinally a portion of the distance from its head towards its foot, said riffles varying in length for the purpose specified, the table having a smooth, plain, or unriffled portion extending from the extremities of the riffles towards the tail of the table, whereby the material as it leaves the riffles is subjected to the action of the water on the smooth portion of the table, and the final separation of the mineral from the gangue effected.

"(2) A transversely inclined concentrating table having a number of longitudinal riffles extending a portion of the table's length from the head towards the foot, said riffles being of unequal length, the uppermost being the shortest, while the other riffles increase in length from the upper edge to the lower edge of the table; the table having a plain or unriffled portion lying at the extremities of the riffles, and adapted to receive the material caught by the riffles."

"(7) The combination of a transversely inclined concentrating table having a series of riffles extending longitudinally from the head towards the tail of the table, said riffles being of unequal length, the uppermost being the shortest, and the riffles increasing in length from the upper to the lower edge of the table, the table being provided with a plain or unriffled portion of suitable area located at the extremities of the riffles, means for feeding the material to the upper portion of the table's head, means for discharging water on the upper edge of the table, and suitable means for imparting to the table a longitudinally reciprocating movement of a character adapted to move the material from the head towards the tail of the table."

The defendants deny the patentable novelty of Wilfley's claims, and deny that their acts constitute infringement, as alleged in the bill. As stated in the brief filed by the respondents on July 19, 1901, two main issues arise:

First. "Can the combination claims 1, 2, and 7 of the Wilfley patent in suit be construed and interpreted by the court to cover an invention new and patentable at that time?"

Second. "Supposing that claims 1, 2, and 7 of the Wilfley patent be held to cover patentable subject-matter, then do or do not the respondents' tables, as manufactured by the Denver Engineering Works Company, fairly come within the monopoly of the complainant?"

I think the first question must be answered in the affirmative. Even if it be established that the arrangement of the table is merely the application of an old article to a new use, it does not follow that the patent is necessarily void. If we concede that the riffle was old, and that the smooth surface of the table was old, it by no means follows that the application, in the manner shown in the claims set forth, of the riffles to the smooth surface, substantially as described in the patent, is merely applying the riffles to a new use, in the sense in which, in the law of patents, the mere application of an old article to a new use is held not to be the subject of a patent.

While it may be said, using an old and familiar illustration, that using an umbrella to ward off the rays of the sun, it having been before used to keep off the rain, would be merely the application of an old article to a new use, and therefore not patentable, yet to apply such a principle to avoid the claims of the patent in suit would render void the mass of patents that are now granted. There is scarcely a patent granted that does not involve the application of an old thing to a new use, and does not, in one sense, fail to involve anything more. But the merit consists in being the first to make the application, and the first to show how it can be made, and the first to show that there is utility in making it. While it is difficult in many cases to determine where skill ends and invention begins, I think it perfectly clear, from the evidence, that here a new and useful result was accomplished in the matter of ore concentration, which cannot be said to have been perfectly obvious. The prior art discloses no combination of the elements of the Wilfley patent in the way which he describes. The minds of inventors and those interested in the art had been specifically directed to the question of the separation of the values from the gangue, for many years prior to the Wilfley patent, yet neither the defendants nor any one else conceived the idea that this result could be best accomplished by subjecting the pulp upon the table to the repeated interference of the riffles placed upon the table in the manner described in the patent, and at the same time and in the same manner protect the values lower down on the table from the cross wash of the water laden with the waste from the riffles higher up. This arrangement was new, and, as the testimony clearly establishes, useful and valuable.

He solved a problem in ore concentration that had never before been answered, by adjusting riffles, of unequal length, one in advance of the other, the shorter being at the top, so that they not only protect the mineral deposited at the head end of the table, but offer a succession of riffles to the cross flow of the gangue and values which wash down from the riffles above, and thereby saves the values which, coming from the top of the table, would otherwise be washed across the table. When the discovery was made and explained to the public, it could readily be seen by other inventive and mechanical minds that the means whereby the result was produced were very simple and plain, and it became apparent to him, as it now is to others, that the same results could be brought about by various changes that might be made in the construction of riffles; hence he said in his specifications, "I do not limit the invention to any special construction of riffle."

After a most careful study of the question, I am unable to adopt the suggestion of counsel for the respondents, that the plaintiff should be limited or narrowed down to the rights of a mere improver of an old machine. While the courts have no right to enlarge a patent beyond the scope of its claims as allowed by the patent office, yet patents should be construed liberally, in accordance with the design of the patent laws, to promote the progress of the useful arts, and allow inventors to retain for their own use not anything which is matter of common right, but what they themselves have created.

Considering the result, I think, if any doubts exist as to the fact of invention, they should be resolved in favor of the patent.

In the Wilfley table the raised ribs or riffles at the head end, from which the material is passing suspended in the water, cause a violent disturbance in the current, and, to use the language of some of the witnesses, "in the quiet eddy" caused thereby the material is given an opportunity to settle out of the water upon the table. This material is protected by the riffles, and is stratified and carried forward by the force of the end motion of the table. When the material is carried forward to or near the end of the riffles, most of the heaviest mineral is stratified at the bottom, and the lighter stratum of pure gangue is washed over. The middle strata are then subjected to the side wash of the water, the lower stratum coming across the table in a line, straight or oblique, depending upon adjustment, and, the middle strata going forward and downward, the values are caught by the riffles below, which, because of their arrangement, offer an obstruction to the current, and allow the values to settle in with the other values there stratified, and, protecting them, carry the lower strata to a place of safety. This operation is repeated by each advancing riffle.

The distinctive arrangement of the riffles upon this table has nothing to do with the strata which lies at the bottom of the head end channels, and which find their way across the table to the tailings box. The primary function of the table, as shown by the evidence, is that which concerns the middle strata, which are treated by the interposing of riffles under the surface adapted to receive the mineral, and sufficiently "smooth, plain, or unriffled" for the purpose set forth, in such a way that the values are caught and restratified, and directed again to the tail of the table.

Upon the withdrawal of the protection of the elevated riffles, the relative resistance of the specific gravities of the various strata cause them to take different positions in diagonal bands in the same order as that in which they were superposed. The heavier specific gravities, with the greatest resistance at the top, serve, in a measure, to exaggerate the retarding action which occurs on the linoleum surface, and exercise a protecting influence over the minor or more sensitive particles of the material below, and it is the taking advantage of this diagonal arrangement, by the adjustment of the riffles with reference thereto, that is new and valuable in the plaintiff's patent.

The riffles at the head end of the Cammet table, as in the Wilfley, precipitate the values, and, stratifying them, protect them to the zone of separation. The two tables, in their construction and arrangement, so far as the raised ribs or riffles are concerned, are substantially, if not exactly, the same. About the only difference is that, in the Cammet table, the raised ribs are widened where they taper down to the smoother portion of the table, but, as in the Wilfley table, they are of unequal length, terminating on a diagonal line, the uppermost being the shortest, and increasing in length from the upper to the lower edge of the table. The reason for this arrangement (first disclosed and taken advantage of by the plaintiff) in both

tables is, I think, in view of the prior state of the art, entirely clear. The purpose is to secure the stratification of the material in the channels at the head end of the table, the advancement of the imbedded strata to the ends of the elevated riffles, the subjection to the side wash of the water when the protection of the riffles is withdrawn, whereby the upper and lighter strata, and, with them, particles of greater specific gravity, held temporarily in the mass, are washed down to the extending wall of the next riffle below, where a new stratification of that material, by arrangement in its proper relation as to specific gravity, takes place. At the end of the riffle the material is again subjected to the side wash of the water, and so on down the path of travel along the terminals of the elevated riffles, and from riffle to riffle, until it reaches the lower left-hand corner of the table; the repeated stratification along the ends, and slightly in advance of the elevated riffles or ribs at the head end of the table, being the necessary prearrangement of the material which the repeated washings make effective in concentration by the removal of the superposed stratum of gangue or waste.

The feature of the Wilfley invention covered by his patent is the arrangement of the terminals of the riffles so as to take advantage of a diagonal arrangement of materials on the table's surface in bands, in the order of their specific gravities, and to produce the repeated washings in the passage thereof from riffle to riffle.

Do the shallow grooves in the defendant's table, extending from the ends of the raised ribs or riffles to the end of the table, and through that portion of the table designated in the Wilfley patent as "plain, smooth, or unriffled," perform any other or different function? After a most careful study of this record, I have reached the conclusion that they do not. There is no doubt that the modification of the surface, in the operation of the Cammet table, tends to a great extent to guide the concentrates so as to distribute them across the entire end of the table, while the linoleum surface of the Wilfley table delivers them into the concentrates box lower down the table. But the surface over which the material is washed is the smooth broadened portion of the elevated riffles or ribs, forming the table's surface, and the bottom of the next groove or grooves, or, when the grooves are filled with material, which must necessarily be the case after the first few moments of operation, then over the material running therein, thus giving it ample opportunity to spread and be rewashed. This I think the evidence shows is the function performed by the Wilfley table.

The improvement in the Cammet over the Wilfley table, if it is an improvement, consists in directing and delivering, by means of the grooves in that portion of the table designated as plain, smooth, or unriffled in the Wilfley patent, the concentrates into the receptacle provided therefor. It may be that the Cammet tables are an improvement upon the invention covered by the Wilfley patent in this respect, but it still has all the essential elements of the best form of Wilfley's invention. It performs the same function in substantially the same way, and therefore must be held to infringe it.

Let a decree be entered for complainant in accordance with the prayer of the bill.

VAN ANDA v. NORTHERN NAV. CO. OF ONTARIO, Limited.

(Circuit Court of Appeals, Seventh Circuit. November 6, 1901.)

No. 788.

CARRIERS—INSUFFICIENT ACCOMMODATIONS OF STEAMSHIP—ACTION FOR DEATH OF PASSENGER.

Libelant's intestate purchased tickets for passage, meals, and berths for himself, wife, and daughter on respondent's steamship from a lake port in Canada. On presenting them, he was told that berths could not be furnished, not having been reserved, and the vessel having an extraordinary number of passengers, owing to its being the close of the summer season, when an unusual number of passengers were returning from the lake resorts. He insisted on going, and was then told that if he would accept a cot or mattress for himself, his wife and daughter would be furnished with a berth. He accepted the offer, and the officers procured a number of mattresses from a dealer, one of which he took, and on which he slept. On reaching port the next morning, he was taken with a chill, which developed into pneumonia, from which he died a few days later. Suit was brought under the Canadian statute giving a right of action for wrongful death, it being alleged the death was caused by the dampness of the mattress; no claim being made on the ground of breach of contract. *Held* that, under the facts shown, respondent was not chargeable with negligence, the officers of the vessel having done all that was reasonably possible to meet an extraordinary emergency, but that in accepting the accommodations offered, with knowledge of the conditions existing, deceased assumed whatever risk was involved.

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

R. W. Burns, for appellant.

Charles E. Kremer, for appellee.

Before JENKINS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

GROSSCUP, Circuit Judge. The action below was to recover damages from the appellee,—a company operating a steamship line in the Georgian Bay in the Province of Ontario, and to Sault Ste. Marie and Mackinac,—for the death of Carmi A. Van Anda, said to have been brought about by the appellee's negligence in furnishing him with a wet mattress on board the appellee's steamship "Brittanic" between French River and Killarney. The action is based upon an act of the Provincial Parliament of Ontario,—similar to Lord Campbell's act—Chapter 166 of the Revised Statutes of Ontario 1897.

The facts were substantially the following:

The deceased had purchased, on the twenty-fourth of August, 1897, at Collingwood, Ontario, for himself, his wife and daughter, tickets good for passage, meals and berths on the Steamship "Brittanic" from Parry Sound to Killarney. On presentation of these at Parry Sound, on the following day, he was informed that there were no berths for his party, as none had been reserved; but, on his urging that his party must go, was told that if he would sleep on a cot or mattress, the wife and daughter would be furnished a berth.

At about nine o'clock that evening, when the steamer was in the

port of French River, ten mattresses (said to have been new and borrowed from a store-keeper of that town) were brought upon the steamer and placed upon the floor, one of which was put at the disposal of, and accepted, by Van Anda. On this mattress he lay for the night, arising the next morning at Killarney, and going on shore in company with his wife and daughter.

On this day of arrival, at about ten o'clock, Van Anda had a chill, which developed into pneumonia, from which he died eight days thereafter, on Mackinac Island, having been taken there upon another steamer at the beginning of his illness.

One of the issues of fact on the hearing in the District Court was, whether the mattress thus furnished was damp or dry, and upon this, considerable evidence was offered pro and con. The facts already set forth, however, were not in controversy; and it was admitted, in addition, that the number of passengers traveling upon that occasion, the close of the summer season, was extraordinary; much larger indeed than the ordinary sleeping facilities of the steamer could accommodate. Upon the case thus presented, the District Court entered a decree dismissing the libel.

We have not found it necessary to pass upon some of the interesting questions raised by this appeal, such as, whether the death having occurred on land, the Court of Admiralty would have jurisdiction; or, whether, under the Maritime Law of the United States, a right of action survives to the representative of the deceased. The decree of the District Court is sustainable upon other grounds.

It is not necessary to determine to what extent the company, operating a passenger steamship, is responsible for the condition of its usual sleeping facilities; nor how far it must go in providing such facilities for the usual number of passengers. In the case under consideration, the number of passengers was extraordinary. It was near the close of the vacation season, and cool weather having come on, tourists were hurrying to their homes. Few days in the year probably found so many passengers aboard.

This unusual passenger list created an emergency for the officials of the steamship, and they seem to have met it in the only way available. The proffer of a mattress, under the circumstances indicated, was not the proffer of the steamship's usual sleeping facilities, and, when accepted by Van Anda, was upon the knowledge that it was a mere makeshift for the occasion. Equally with the steward of the ship, Van Anda had opportunity to inspect the condition of the mattress. He chose to take it, rather than to sit up, and in so choosing, under the circumstances, assumed whatever risk its condition may have exposed him to.

Nor is the fact that Van Anda held tickets good for a berth relevant to this character of action. The suit is not to recover for violation of the contract, evidenced by the ticket, but for negligence in furnishing an improper mattress; and, as already indicated, upon the facts presented, no actionable negligence is shown.

The decree of the District Court is accordingly affirmed.

THE SOUTH PORTLAND.

(District Court, D. Washington, N. D. November 18, 1901.)

1. SEAMEN—REFUSAL TO PERFORM CONTRACT FOR SERVICE—COERCION BY IMPRISONMENT.

Since the passage of Act Dec. 21, 1898 (2 Supp. Rev. St. 897), there is no authority for the imprisonment of a seaman for refusing to further perform his contract for service on a ship when at any port; and such imprisonment at the instance of the master, whether through judicial process or otherwise, is a violation of his personal rights which renders the vessel liable in damages.

2. SAME—DAMAGES.

Libelants shipped as seamen for a voyage to Alaskan ports and return. On reaching a port in Alaska they refused to further perform their contract, and announced their intention to leave the vessel on the ground that she was unseaworthy and unsafe. The master procured a warrant from the commissioner, under which libelants were arrested and imprisoned until the vessel left, when they were returned on board. They served during the remainder of the voyage, and were then discharged and paid in full. They were in fact not justified in their attempt to quit the vessel, and the master acted in good faith and under legal advice; neither he nor the attorney having knowledge that the law permitting such procedure had been repealed. *Held* that, under the circumstances, libelants would be awarded $10 each as damages for their illegal imprisonment.

In Admiralty. Libel by seamen to recover damages for illegal imprisonment by the master.

Root, Palmer & Brown, for libelants.

Fred Bausman, for claimant.

HANFORD, District Judge. The libelants in this case signed shipping articles for a voyage on the steamship South Portland to Cape Nome, via Skagway and other places in southeastern Alaska, and return to Seattle. In making the run to the north some hardships and perils were encountered, but nothing of an unusual character. The steamer's boiler was old and required repairing, but there was nothing in the condition of the ship or her machinery to cause apprehension, in addition to what was known by the libelants before signing the shipping articles, and the vessel was in fact seaworthy. The libelants, however, claiming that they were justified in wishing to leave the vessel at Skagway, because they supposed the vessel to be unseaworthy and not fit to proceed farther on her voyage, have brought this suit to recover damages for being coerced into performing their contract. On the day of the vessel's arrival at Skagway they failed to turn to at the usual hour after the noonday meal, and, upon inquiry being made, they informed the first mate that they were going to leave the vessel. The captain persuaded them to continue at work until 5 o'clock, and in the meantime, upon the advice of a lawyer, he complained to the United States commissioner, who issued a warrant under which a deputy marshal went on board the vessel and arrested the libelants, and they were imprisoned until the vessel was ready to proceed on her voyage, when they were forced to return to the ship; a squad of United States soldiers, with fixed

bayonets, being called to the assistance of the deputy marshal for the purpose. I find from the evidence that the libelants had no legal or reasonable cause for wishing to quit the service of the vessel, and that Capt. Hall acted without malice, and adopted only such measures as he believed he was legally justified in resorting to, to compel them to perform the contract. After returning to the vessel, they performed their duties faithfully until the return to Seattle, when they were discharged and paid their wages in full, including payment for overtime, according to their contract.

All laws sanctioning and regulating imprisonment and the use of force to compel involuntary servitude on the part of seamen in the merchant vessels of this country were repealed and abrogated by the act of December 21, 1898 (2 Supp. Rev. St. U. S. 897), except that disobedience at sea may be punished by confinement in irons, with a bread and water diet. In this statute the legislative intent to extend to sailors the benefit of the thirteenth amendment to the constitution of the United States is plainly indicated, and at the present time it is just as unlawful to imprison a sailor who at any port refuses to perform a contract which he has entered into for service on a ship, as to imprison a journeyman mechanic or farm laborer for a similar refusal. No matter how much inconvenience and loss shipowners and merchants and travelers may suffer by the detention of an American ship, caused by refusal of the crew, when the vessel is in port, to proceed on a voyage, it is unlawful to use judicial process or force to coerce the crew. Congress delayed for many years to make the laws relating to merchant seamen conform to the thirteenth amendment to the constitution, but at last, by complete and radical legislation, it has seen fit to subject the interests of shippers and travelers to the hazard to which I have referred, in preference to exposing sailors to the chance of suffering oppression and abuses by being compelled to render unwilling service. The justice or wisdom of the change is not a matter for judicial investigation. The duty of the court is plain,—to protect sailors, as well as others, in their legal rights; and, as the libelants in this case were subjected to unlawful imprisonment at the instance of the captain, they are entitled to recompense for that wrong. The injury which they suffered, however, was not serious, and as the captain acted without malice, under the advice of a lawyer who probably did not have access to the statutes recently enacted by congress, and was not informed that the laws which he supposed authorized the proceedings had been repealed, there is no reason for awarding very heavy damages. Considering all the circumstances, and the expenses incident to the litigation, it is the decision of the court that each of the libelants recover as damages the sum of $10 and costs.

STATE TRUST CO. v. KANSAS CITY, P. & G. R. CO. et al.

FORDYCE et al. v. BRADLEY.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1901.)

No. 1,032.

RAILROADS—INJURY TO PERSON ON TRACK—CONTRIBUTORY NEGLIGENCE.

Plaintiff, an employé of a railroad company, was walking on a track extending over the water on a trestle to a pier where he was working. There were two tracks, which came together before reaching the pier, and about 20 feet beyond the junction there was a switch platform. Plaintiff saw a switch engine backing out from the pier, and knew that at the switch it would take the other track. He reached the junction about the time the engine stopped at the switch, and, in attempting to pass over the single track to reach the platform before the engine started, he fell immediately in front of the engine, and was run over and injured. *Held*, that it was his duty to stay on the other track, which was safe, until the engine passed, and that in attempting to pass over the single track in front of the engine he was guilty of negligence, which precluded his recovery from the railroad company for his injury.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

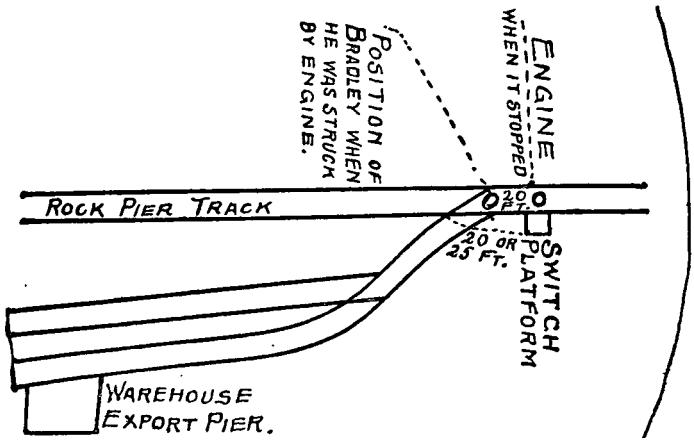
See 110 Fed. 10.

This is a suit by intervention for damages for personal injuries. The original suit was by the State Trust Company against the Kansas City, Pittsburg & Gulf Railroad Company, Missouri, Kansas & Texas Trust Company, Texarkana & Ft. Smith Railway Company, and Kansas City, Shreveport & Gulf Railway Company. The court appointed R. A. Greer receiver of the Texarkana & Ft. Smith Railway Company. He resigned, and S. W. Fordyce and Webster Withers were appointed in his place. The intervener, Wm. E. Bradley, sued for $20,000 damages, alleging that the defendant corporations, in operating a railroad by their agents, wrongfully ran an engine over him, cutting off part of his foot. One of the defenses interposed was that the injury complained of was caused by the contributory negligence of the intervener. The intervention was referred to a master in chancery, who reported in favor of the intervener, and recommended that a judgment be entered in his favor for $4,000. The receivers filed exceptions to the master's report, alleging that the master erred in failing and refusing to find that the intervener was guilty of contributory negligence, and in recommending that judgment be entered for the intervener. The court overruled the exceptions, and entered judgment for $4,000 for the intervener against the Texarkana & Ft. Smith Railway Company and the receivers, who have appealed to this court. The overruling of the exception raising the question of contributory negligence is assigned as error.

The intervener, as a witness for himself, testified in part as follows: "My name is W. E. Bradley. I was 27 years old on the last day of November, this year. Q. This is a suit against the Texarkana & Fort Smith Railway Company for cutting off your foot. Tell the judge how it was and when. A. I was working for, I suppose, the Texarkana & Fort Smith Railway Company. I was employed by Mr. John C. Collins, the agent of the Texarkana & Fort Smith Railway Company at Port Arthur. I was working at the office on the export pier out over the lake. This accident occurred on the 23d of last March, in the evening, about five or half past five. I was walking along the railroad trestle, which was the means that the employés of the Texarkana & Fort Smith Company had in going to and from the export pier over the lake, and the only means. The railroad company had originally put a plank walk along all the way from the shore to the export pier alongside this trestle, but

there was only about one-third of it there at the time I was hurt, the balance of it having been washed away by the waves. At the place where I was walking there was no plank walk, and never had been any that I knew anything about. I saw the switch engine coming. It was backing out on the track to get some empty cars. I knew that they would have to stop at the switch stand, and go on the other track from the one which I was on, in order to get the cars. I was coming down one switch track, and the empty cars were on the other. I was attempting to reach the switch platform before the engine passed it. I was not more than twenty feet from switch platform when the engine stopped, and the switchman jumped off and threw the switch, and signaled for the engineer to come back, and at that time I was not more than twenty feet from the engine. The switch platform was built some eight or ten feet square. When the engine reached the switch the switchman jumped off, and threw the switch, and as soon as he had done so he stepped on the engine footboard at the rear of the tender, and signaled the engineer to come back, and it seemed to me that the engineer had thrown the throttle wide open, and he came back fast, although I could not say how fast, but probably three or four miles an hour, and ran into me. The engine had stopped at the switch platform perfectly still, and then the switchman turned the switch, and signaled the engineer, and he started back on me. The switchman saw me at the time and told me to hurry up, but I do not know what he meant by telling me that. He told me that when he signaled the engineer to start back. In the meantime I was walking fast to reach the platform before they started, when I missed a step, and fell down. All the train men, I thought, were looking at me. I made every effort to keep from getting hurt." And on cross-examination he stated: "My intention was to get to that platform in order to pass. I do not know why I did not stop at the double track, and let the engine pass. I suppose it is like a great many things a person sees after it is too late. Q. State to the court positively if you had stopped on the north track and stayed there until the engine went past would you have gotten hurt. A. No, sir; I would not have gotten hurt. The engine was moving all the time, before it stopped at the switch platform. It was about twenty feet from me when it stopped. I was walking towards the engine all the time. If the switchman had not thrown the switch, it would have gone on down the track I was first on." And on redirect examination he stated: "The trestle was constructed over the water, and the water was probably two or three feet deep." And, being recalled, further said: "Q. Where were you coming from? A. The warehouse on the export pier. There is only one track between the switch platform and the shore, and the engine was coming out on that. The switch was set so that the engine would come out on the export track, and the switchman turned it so that it would go on the other track. If the engine had not stopped, but had come straight on, it would not have come on the track I was on. If I had not left the export track, I would not have been on the track the engine was going on, after the switchman turned the switch. As it was, when the switch was turned I was on the same track the engine had to go on, as I was then on the single track between where the two tracks come together and the switch platform, and about twenty feet from the switch platform when the engine stopped. I was going from the export pier towards the engine, and at the time the switch was so set that the engine would have come on the track that I was on, but, when the switchman stopped and threw the switch, that let the engine go on the other track from the one I came down from the export pier on. I knew that the engine was going out on the other track from the one I was on, when I saw it coming from the shore, as I knew it was going after the empty rock cars. When the switch was thrown, I was on the single track between where the two tracks come together and the switch platform. I knew that the engine had already gone out on the export pier, and that it was now going out on the rock pier to get the empties there. * * * I do not remember exactly where I was when I first saw the engine. When the engine stopped, I was not more than 20 feet from the switch platform; that is, about the length of the tender."

The intervener made the following sketch of the place of the accident:



O'Pyre, the switchman, Bridgman, the engineer, and Newton, the foreman, who were present when the accident occurred, testified that there was a plank walk along the side of the pier opposite the point where the accident occurred, and that there was nothing to prevent Bradley, the intervener, from going on the walk, where he would have been safe from the engine as it passed. There was no evidence tending to show that the men in charge of the engine wantonly or intentionally injured the intervener. It was expected by those in charge of the engine that the intervener, who was seen approaching on the track, would step off the track on the walk as the engine approached him. People were in the habit of walking on the track at the place of the accident, but would step off on the walk as the engine approached.

Hal W. Greer, R. A. Greer, and Lathrop, Morrow, Fox & Moore, for appellants.

J. F. Lanier, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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

The intervener admits that if he had stopped on the north track, and stayed there till the engine passed, he would not have been injured. He knew the movements of the engine that were to be made, and was familiar with the tracks. He attempted, he says, to reach the switch platform, so that the engine might pass him there. He should have remained in a place of safety. In walking thoughtlessly along the track, over which he knew the engine was coming, he was guilty of culpable negligence. He took the chances of getting to the switch platform before he would meet the engine. To quote Mr. Justice Field in Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542: "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." Accepting, therefore, the theory of the intervener, that there was not a walk parallel with and near the railroad track where the accident occurred, it was culpable negligence in him to walk on the

track, meeting the approaching engine, and in plain view of it. Railroad Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014.

If, on the other hand, it be true, as testified to by several witnesses, that there was a plank walk near to, and parallel with, the roadbed, opposite the place where the accident occurred, the intervener should have walked on it, and not on the roadway. Assuming these witnesses to speak the truth,—and they are not positively contradicted by the intervener in his testimony,—it is difficult to understand why the intervener did not walk on the plank way, or why he did not step out on it, so as to leave the road free for the engine to pass. The circumstances strongly indicate that he attempted to get on the moving engine.

The evidence tends to show that he fell so near the engine (if not under it) that it would not have been possible for the engineer, after his fall, to have prevented the injury.

No fair construction, we think, can be given the evidence that would free the intervener from negligence which contributed to his injuries.

The judgment must be reversed, and the cause remanded, with instructions to enter a judgment dismissing the intervening petition. Reversed.

SAN FERNANDO COPPER MINING & REDUCTION CO. v. HUMPHREY.

(Circuit Court, S. D. California, S. D. November 1, 1901.)

No. 980.

DISCOVERY—INSPECTION OF DOCUMENTS UNDER STATUTE—REQUISITES OF APPLICATION FOR ORDER.

To entitle a party to an order for the inspection of entries of accounts in any book or of any document or paper in the possession of the adverse party under Cal. Code Civ. Proc. § 1000, the application therefor must describe the book, paper, or document of which an inspection is desired with such particularity as to advise the adverse party of what is required, and to enable the court to determine the propriety of allowing the inspection sought, and it must also be made to appear that the book, document, or paper is competent evidence, and material to some issue involved in the action.

On Motion for Inspection of Books and Papers.

H. C. Dillon, George A. Corbin, and Henry J. O'Brien, for complainant.

Oscar A. Trippet, for defendant.

WELLBORN, District Judge. Section 1000 of the Code of Civil Procedure of California, on which defendant bases his alleged right to the order applied for, is as follows:

"Sec. 1000. Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court

may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness."

The phraseology of this section contemplates, and decisions of the courts on similar statutes show, two things essential to the order provided for in said section, namely: First, the application for the order must describe the book, paper, or document of which the party desires an inspection with such particularity as to advise the adverse party of what is required, and to enable the court to determine the propriety of allowing the inspection sought (6 Enc. Pl. & Prac. p. 802); second, it must be made to appear that the book, document, or paper is competent evidence, and material to some issue involved in the action (Ex parte Clarke, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 835, 77 Am. St. Rep. 176). The notice in the present case does not purport to describe any book or document wanted, except "the assignment alleged to have been made by the San Fernando Copper Mining & Reduction Company to the plaintiff." There is evidently a mistake in this attempted description, because the company named is itself the plaintiff. That description, therefore, is ineffectual. The references in the notice to the other books, documents, and papers desired are too general to admit of an order for their inspection. Moreover, there is no showing as to the competency or materiality of any of the books, papers, and letters sought to be inspected. The allegations of the complaint in regard to certain assignments and letters would probably, as to them, be a sufficient prima facie showing in the respects mentioned, if such assignments and letters were otherwise properly called for.

The pending motion will be denied, without prejudice, however, to the defendant's right to renew his application, if he shall be advised so to do.

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

(Circuit Court of Appeals, Fifth Circuit. November 19, 1901.)

No. 1,019.

1. LIFE INSURANCE—ACTION ON POLICY—SPECIAL LIMITATION.
Whether the limitation contained in a life insurance policy requiring an action thereon to be commenced within six months after the death of the insured runs from the time of such death, or from the time the right of action accrued under other provisions of the policy, quære.[1]

2. SAME—COMMENCEMENT OF ACTION—MISSISSIPPI STATUTE.
Within the time limited by a policy of life insurance after the death of the insured a declaration was filed in an action thereon against the company. The statute of Mississippi, in which state the action was brought, provides that "an action shall for all purposes be considered to have been commenced and to be pending from the time of filing of the

[1] Conditions in policy as to time for bringing suit, see notes to Steel v. Insurance Co., 2 C. C. A. 473; Rogers v. Insurance Co., 35 C. C. A. 404.

declaration if a summons shall be issued thereon for the defendant." With the declaration was filed a waiver of summons and an entry of appearance for defendant, signed by an agent duly authorized to accept and acknowledge service of process. Subsequently, but after the expiration of the period of limitation, a summons was issued and served upon the same agent, who, so far as appeared, was the only person on whom it could have been served, and to such service defendant appeared. *Held*, that the action was commenced, within the meaning of the statute, on the day the declaration was filed.

3. SAME—ISSUE AS TO SUICIDE—DIRECTION OF VERDICT.
Where, upon the question of fact whether an insured committed suicide, while the evidence was quite conclusive that he shot himself, there was a conflict in the evidence directed to the question whether the shooting was intentional or accidental, the action of the trial court in refusing to direct a verdict for defendant on the issue will not be reversed by an appellate court.

4. SAME—DEFENSE OF SUICIDE—BURDEN OF PROOF.
The burden rests upon a life insurance company to establish a defense of suicide pleaded in an action on the policy.[2]

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

Marcellus Green and Garner Wynn Green, for plaintiff in error.
Dodd & Luckett, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This action was brought by Love, as administrator of D. B. Noah, on an accident policy executed by the Fidelity & Casualty Company of New York, insuring D. B. Noah. Judgment was rendered against the company in the circuit court.

The first contention of the plaintiff in error is that the suit is barred by the contractual limitation of six months. The policy provides that proof of death must be furnished the company "within two months from the time of death," that legal proceedings for recovery under the policy may not be brought "till after three months from the date of filing proofs at the company's home office," and that suit shall not "be brought at all unless begun in six months from the time of death." Noah's death occurred December 1, 1899. Proof of the death was received by the company at its home office "on or about January 8, 1900." The declaration was filed in court May 29, 1900, but no summons was issued on it till June 15, 1900. The contention is that the suit was not brought till the summons was issued, and, more than six months having elapsed from the date of the death (December 1, 1899) and the date of the summons (June 15, 1900), the action was barred. The first answer made to this contention is that the six-months contractual limitation did not begin to run till the right of action accrued. The policy provides that suit may not be brought on it till after three months from the date of filing proofs at the company's home office. If the limitation did not begin to run till three months after the proofs were filed, the six months had not expired when the summons was is-

[2] Suicide as a defense to action on life insurance policy, see notes to Ætna Life Ins. Co. v. Florida, 16 C. C. A. 623; Casualty Co. v. Egbert, 28 C. C. A. 284.

sued, June 15, 1900. The view that the limitation does not begin to run in such cases till the right of action accrues is sustained by many adjudicated cases and text writers. 2 Bac. Ben. Soc. & Life Ins. §§ 446, 448, and cases there cited; 4 Joyce, Ins. § 3188, and cases there cited. The contrary view—that the limitation begins to run from the date of the death—is held by other courts. Griem v. Casualty Co., 99 Wis. 530, 75 N. W. 67; Chambers v. Insurance Co., 51 Conn. 17, 50 Am. Rep. 1; Johnson v. Insurance Co., 91 Ill. 92, 33 Am. Rep. 47. The question was referred to, but not decided, in Thompson v. Insurance Co., 136 U. S. 287, 298, 10 Sup. Ct. 1019, 34 L. Ed. 408. In Steel v. Same, 47 Fed. 863, it was held by the United States circuit court, district of Oregon, that the limitation began to run from the date of the death; but this decision was overruled on error to the United States circuit court of appeals, Ninth circuit, by a divided court, the majority holding that the limitation did not begin to run till the right of action accrued. 2 C. C. A. 463, 51 Fed. 715. And this last decision, on certiorari to the supreme court, was affirmed, without an opinion, by a divided court. 154 U. S. 518, 14 Sup. Ct. 1153, 38 L. Ed. 1064. There is, however, another view of this question, that makes it unnecessary for us to decide between these conflicting authorities. The death occurred December 1, 1899. The declaration was filed May 29, 1900, 5 months and 28 days after the death. The following is the Mississippi statute in reference to the beginning of an action:

"Filing Declaration the Commencement of an Action. Except in cases in which it is otherwise provided, the manner of commencing an action in the circuit court shall be by filing in the office of the clerk of such court a declaration, on which a summons for the defendant shall be immediately issued, and an action shall, for all purposes, be considered to have been commenced and to be pending from the time of filing of the declaration, if a summons shall be issued thereon for the defendant, and if not executed, other like process in succession may be issued, in good faith, for the defendant."

If there had been no delay in the issuance of the summons, the action was clearly to be considered as pending from the time of filing the declaration. John M. Fletcher was the agent of the defendant company, duly authorized to "accept and acknowledge service of process." When the declaration was filed, Fletcher waived the issuance of summons by the following writing:

"I, John M. Fletcher, agent for the Fidelity & Casualty Co. of New York, in Attala Co., Miss., do hereby enter an appearance for said company to this suit, and hereby waive the issuance of service of summons, and hereby agree for said company to appear and plead to said action as fully and for all purposes as though it had been duly summoned to appear as the law directs in such cases.

"This May 29, 1900. John M. Fletcher, Agent.

"Filed May 29, 1900. J. H. Sullivant, Circuit Clerk,
"By M. A. Clark, D. C."

If a summons had been issued May 29, 1900, it does not appear that it could have been served, except on Fletcher as the agent of the company. When, on June 15, 1900, the summons was issued, it was on the same day served on Fletcher. It was sought to avoid the effect of Fletcher's waiver of service by showing that he was the guardian of Noah's children, and occupied a position antagonistic

to the company. It does not appear that there was any other agent or officer of the company on whom service could have been made, or who was authorized to waive issuance of the summons. And when service was made on Fletcher, on June 15th, the company recognized the service as valid, and appeared and filed pleas. There is nothing to indicate that Fletcher intended or did any wrong in waiving the issuance of the summons. If he had made no waiver, and the summons had issued and been served on May 29th, the date of the waiver, the service would have been as legal as the one subsequently made on June 15th, which was recognized by the company as sufficient to cause it to appear and plead. These facts, we think, show that this action was commenced on May 29, 1900, and within less than six months from the date of Noah's death.

The policy on which the action is brought contained this provision:

"In case of injuries, fatal or otherwise, intentionally inflicted on himself by the assured, or inflicted upon himself or received by him while insane, the measure of the company's liability shall be a sum equal to the premium paid; the same being agreed upon as in full liquidation of all claims under this policy."

The important question of fact in the case was whether or not the deceased committed suicide.

It is assigned as error that the trial court refused to give peremptory instructions to find for the defendant. The trial court, under certain conditions, has the right to direct a verdict one way or the other. A case, however, is not to be ordinarily taken from the jury. The jurors are the recognized triors of questions of fact. When the judge, who has the same opportunity that the jurors have for seeing the witnesses and for noting all those occurrences in a trial not capable of record, forms the deliberate opinion that there is no excuse for a verdict save for one party, and so rules by instructions, an appellate court will pay much respect to his conclusions. And, on the other hand, "it is seldom that an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other." Patton v. Railway Co., 179 U. S. 658, 660, 21 Sup. Ct. 275, 276, 45 L. Ed. 361. Whether Noah committed suicide or not was a question of fact. He was found dead on his bed, only partly dressed, with his feet on the floor, with a pistol loosely grasped in his hand. There was some evidence as to the range of the ball that passed through his head, which tended, or at least was offered, to show that he did not fire the fatal shot. But if it be conceded, as the weight of the evidence seemed to show almost, if not quite, conclusively, that the deceased held the pistol that fired the shot, it is not absolutely certain that he committed suicide. No one saw the shooting. Whether it was accidental or intentional is a matter of surmise. There is evidence tending to show that he was despondent and probably tired of life, and evidence tending to the contrary. There is conflict even as to the wound and its location. The evidence is not entirely inconsistent with the theory of accidental killing. Under the circumstances, it cannot be said that beyond dispute he committed suicide. The evidence is presented in detail and at length in the record, and it would serve no

useful purpose to state it. In a case very much like this one in many of its features the supreme court has recently held that the trial court did not err in submitting the question of suicide to the jury. Supreme Lodge v. Beck, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741. We think the court did not err in refusing to instruct the jury to find for the defendant.

After instructing the jury as to what was required to make out a prima facie case, the court charged the jury, in effect, that the burden of proof was on the defendant to sustain its plea that the injury which caused the death of Noah was purposely inflicted upon himself. We think there was no error in the charge. The defendant was bound to establish the defense by evidence outweighing that of the plaintiff. Association v. Sargent, 142 U. S. 691, 12 Sup. Ct. 332, 35 L. Ed. 1160.

The judgment of the circuit court is affirmed.

TEXAS & P. RY. CO. v. CARLIN.

(Circuit Court of Appeals, Fifth Circuit. November 19, 1901.)

No. 1,048.

1. TRIAL—DIRECTING VERDICT—QUESTION OF NEGLIGENCE.
   A question of negligence, dependent on evidence, is one of law for the court, only where there is no material conflict, and the facts are such that all reasonable men must draw the same conclusions from them. It is not the province of the court to weigh the evidence, and decide between conflicting statements of witnesses, or to decide what inference should be drawn from uncontradicted evidence, if different minds could fairly come to different conclusions from it.

2. MASTER AND SERVANT—FELLOW SERVANTS—RAILROAD EMPLOYES UNDER TEXAS STATUTE.
   Under the statutes of Texas (Sayles' Ann. Civ. St. 1897, arts. 4560g, 4560h), which provide that all employés of a railroad company who are intrusted with authority of superintendence, control, or command of other servants or employés, or with authority to direct any other employé in the performance of any duty, are vice principals of the company, and not fellow servants of their co-employés, and that employés shall be considered fellow servants only when they "are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work to a common purpose," the foreman in charge and control of a bridge gang on a railroad is not a fellow servant with a member of such gang, who under his orders is engaged in a separate piece of work, but is a vice principal, for whose negligence in the performance of his duty as foreman, resulting in an injury to his subordinate, the company is responsible.[1]

3. NEGLIGENCE—ACTS CONSTITUTING—UNUSUAL CONSEQUENCES.
   The fact that an act of negligence produced an injury to another in a manner so unusual that it was not to be expected or anticipated does not relieve the party responsible from liability, when such act was one likely to cause injury in a way that might have been foreseen.

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[1] 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; Flippin v. Kimball, 31 C. C. A. 286.

4. SAME—PROXIMATE CAUSE OF INJURY.

One of a gang of workmen engaged in repairing a bridge on defendant's railroad left a heavy iron hammer or sledge with which he was driving spikes lying on the bridge. It was the duty of the foreman to see that all obstructions were removed from the bridge before the passing of any train. When a train approached the foreman was alone on the bridge near the place where the hammer lay, but he failed to see or to remove it, and it was struck by the train, and thrown some distance from the track, where it struck and severely injured plaintiff, who was one of the workmen. *Held* that, conceding the workman who left the hammer to have been negligent in so doing, his negligence was not the proximate cause of the injury, which was the negligence of the foreman in failing to see or remove it on the approach of the train.

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

T. J. Freeman, F. B. Stanley, M. A. Spoonts, and George Thompson, for plaintiff in error.

E. C. Orrick and J. C. Terrell, Jr., for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action for damages for personal injuries, brought by Michael Carlin, plaintiff, against the Texas & Pacific Railway Company, defendant. The petition alleged that the plaintiff was in the employ of the defendant as a member of what is known as the "bridge gang," and, while at work near where a bridge was being repaired, a train approached with great speed, and as it ran over the bridge a spike maul or heavy iron hammer, weighing six or eight pounds, with a handle attached to it, was caught by the train, and thrown against the plaintiff, injuring his leg so that it had to be amputated. The negligence of the company was charged in several ways, one being that the foreman of the bridge gang had failed to see and remove the maul from the bridge. The defendant's answer contained a general denial, and a plea that, if there were negligence, it was that of a fellow servant of the plaintiff, for which the defendant was not liable, and that the plaintiff was guilty of contributory negligence. The case was tried on these issues, and there was a verdict for the plaintiff for $6,000 damages, on which judgment was entered. A bill of exceptions was reserved by the defendant, and the case is brought here on writ of error.

The plaintiff in error contends that the trial court should have directed a verdict for the defendant. Several of the assignments of error are dependent on that contention, and they are discussed t gether in the arguments submitted.

In every jury trial there is a preliminary question for the court. The court must determine whether or not there is sufficient evidence upon which the jury could base a verdict for the plaintiff. If there is no evidence, or if it is such that, on a fair construction, it does not sustain the plaintiff's case, and that no fair inference to be drawn from it sustains it, the court should give the peremptory instruction. There is no good sense in permitting a verdict that it would be the duty of the court to set aside. But it is not the province of the court

to weigh the evidence, and decide between conflicting statements of witnesses, or to decide what inference should be drawn from uncontradicted evidence, if different minds could fairly come to different conclusions from it. A question of negligence, dependent on evidence, should not be taken from the jury, except in cases where there is no material conflict, and where there is no room for different minds to draw different inferences from it. The question of negligence is one of law for the court, only when the facts are such that all reasonable men must draw the same conclusions from them. A case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish.

The plaintiff, Carlin, was one of several members of a bridge gang. Welsh was the foreman in charge and control of the gang. The foreman and gang had gone to the bridge on the defendant's railway to repair it. Ed. Carver, one of the gang, used an iron maul or hammer about ten inches long, weighing six or eight pounds, to drive spikes in the bridge. It had a wooden handle about three feet long. Welsh, the foreman, directed the plaintiff to sharpen a saw. Pursuing their work under the direction of the foreman, all the men left the bridge. Welsh alone remained on the bridge. It was his duty to see that the bridge was kept free from obstructions, so that trains could safely pass. Where Carver laid the maul when he left the bridge is not shown by direct evidence. Ten or fifteen minutes after he was using the maul, a train approached rapidly, and crossed the bridge. Welsh says he looked on the bridge, and saw no obstruction; that he did not see the maul. He stepped out of the way of the passing train. As the train passed, the plaintiff, who was more than 20 feet from the track, was seen to fall. His leg was broken so as to require amputation. Lying near him was the iron maul, with the handle freshly broken. The conclusion is irresistible that the cars in passing had struck the maul, breaking the handle, and hurling it against him.

One of the averments of negligence in the petition is that the company was negligent, in that Welsh, the foreman of the bridge gang, failed to see that the bridge was clear of obstructions, and in failing to detect the maul on the bridge, and in leaving it there to obstruct the bridge.

In the absence of a controlling statute, it may be conceded that Welsh, the foreman, and the plaintiff, a member of the bridge gang, would have been fellow servants, and Carlin would have had no cause of action against the company. McDonald v. Buckley (C. C. A.) 109 Fed. 290; Railroad Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181. But there are statutes in Texas applicable to the case. By these statutes, in a case like this, a servant or employé, who has the authority to direct any other employé in the performance of any duty of such employé, is a vice principal, and not a fellow servant. By the express terms of the statute, employés are not considered fellow servants unless they "are in the same grade of employment, and are doing the same character of work or service, and are working

together at the same time and place and at the same piece of work and to a common purpose." Sayles' Ann. Civ. St. Tex. 1897, arts. 4560f-4560h. The statutes are printed in the margin.[1]

It is clear on the proof that Welsh was in control and command of the plaintiff, and that they were not in the same grade of employment, nor at the time of the accident were they doing the same character of work or service. Under the Texas statute, according to its letter, or as construed by the Texas supreme court, they were not fellow servants. Long v. Railroad Co. (Tex. Sup.) 57 S. W. 802; Nix v. Railway Co. (Tex. Sup.) 18 S. W. 571. We must be controlled by these statutes and their construction by the Texas supreme court. Rev. St. U. S. § 721; Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. It follows that the company would be responsible to the plaintiff if he received the injuries from the negligence of Welsh.

The contention for the peremptory charge must be and is based on the idea that there is no proof of negligence on the part of Welsh. There is no conflict in the evidence that it was Welsh's duty to see that the bridge was not obstructed. He says he looked, and saw no obstruction. It is claimed that there is no evidence as to the location of the maul when the train reached the bridge; that there is no proof that it was in sight; that, if Carver had placed it where Welsh could not have seen it, it was not negligence in Welsh to fail to see and remove it. Negligence, like any other fact, may be proved by circumstantial evidence. The indisputable fact that the cars struck the maul, and hurled it so that it struck the plaintiff, shows that the maul lay where the cars could strike it. Welsh was alone on the bridge as the train approached. It was proved that the surface of the bridge was plain,—made with the cross-ties about 18 inches apart, on which were the rails and the guard rails, with nothing on them or near them

[1] "Art. 4560f. Every person, receiver, or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employé thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employé of such person, receiver or corporation; and the fact that such servants or employés were fellow servants with each other shall not impair or destroy such liability.

"Art. 4560g. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employés of such person, receiver or corporation, or with the authority to direct any other employé in the performance of any duty of such employé, are vice-principals of such person, receiver or corporation, and are not fellow servants with their co-employés.

"Art. 4560h. All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. Employés who do not come within the provisions of this article shall not be considered fellow servants." Sayles' Ann. Civ. St. Tex. 1897, arts. 4560f–4560h.

to cover or hide the maul. When the evidence shows that the cars struck the maul on the bridge so constructed, is not that a fact from which the jury might infer that it was lying in plain view, near the rail? If such inference be not unreasonable, the question was one for the jury.

We cannot adopt the suggestion or intimation that in cases like this, owing to the alleged inclination of juries to find against corporations, we should assume that the jury has been influenced otherwise than by a consideration of the evidence. To adopt the expression of a distinguished judge:

"We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these, as well as others." Jones v. Railroad Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478.

It must be conceded that the injury for which the action is brought occurred in an extraordinary and unusual manner. Just such an occurrence was not to be anticipated. The defendant requested the trial judge to instruct the jury that, although they may find that the foreman failed to discover the maul, "yet, if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then, in such event, the failure of the foreman to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and you must find for the defendant." The court did not err in refusing to adopt this view of the case. It may be true that the accident in its extraordinary form, with its peculiar circumstances, could not have been expected to happen from the maul being left on the bridge near the rail, yet the act of permitting it to remain there was none the less negligent, for it threatened danger in many directions. It was liable to produce familiar results, which would cause serious injury. The fact that it happened to cause the injury in a manner so unusual that it was not to be expected cannot prevent the act from being negligent when it was likely to cause injury in a way that might be foreseen. It may be true that the negligence in this case produced an effect not before observed, the circumstances of which could not have been anticipated. But, if it was negligence likely to produce other and familiar injuries, the peculiarity of the accident does not prevent liability. Doyle v. Railway Co. (Iowa) 42 N. W. 555, 4 L. R. A. 420. The extraordinary circumstances attending the injury cannot serve as a defense. To so hold would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable.

It is contended that, if Ed. Carver left the maul close to the rail or track, this act of Carver's was the direct or proximate cause of the injury. It is true that, if the maul had not been placed near the rail, Carlin would not have been injured. But we do not think that this act of Carver's, conceding it to be proved, constituted the proximate

cause of the injury. When he finished driving the spikes with the maul he would be expected to lay it down. The tools of the workmen, and the material in use to repair the bridge, could only be rightfully on the bridge and on the track when no train was to pass. Sometimes they would necessarily be left for a short time on the bridge. They could be there without negligence on some occasions. It would, of course, be negligence to leave them on the track for a train to run over them. The fact that they were so placed on the track, the men negligently leaving them there, could not make it the less negligent for the foreman to fail to perform his duty to remove them or cause them to be removed. To illustrate: The gang might remove a defective rail on a bridge to put in a new one. If the foreman failed to put out a flag, or to use or cause to be used other means to stop the train coming on the bridge while the rail was off,—that being his duty,—and an accident occurred, it could not be said that the act of the gang in removing the rail was the proximate cause of the accident. The proximate cause of the accident would be the failure of the foreman to stop the train. Placing the maul on the bridge may have been an innocent act connected with its use. It may be conceded that Carver was negligent to leave it there. The fact, not disputed in evidence, that the duty was imposed on the foreman to see that the bridge was kept free from obstructions, shows that it was deemed unsafe by the company to rely alone on the men to voluntarily keep it free. Conceding the negligence of Carver, could that excuse or relieve Welsh from the performance of his duty? He was left alone on the bridge, and, as the proof tends to show, near the maul, when the train was approaching. He had time to remove it. If he negligently failed to see it, or, seeing it, failed to remove it, that was the negligence constituting the proximate cause of the accident. The preceding act of Carver could not relieve the company of its responsibility for Welsh's failure to perform his duty.

We have carefully examined all the assignments of error, and find no reversible error in the case. The judgment of the circuit court is affirmed.

AMERICAN EXCH. NAT. BANK OF NEW YORK CITY v. WARD et al.

(Circuit Court of Appeals, Eighth Circuit. October 21, 1901.)

No. 1,497.

1. CORPORATIONS—EFFECT OF INSOLVENCY—RIGHT TO PREFER CREDITORS.
The insolvency of a corporation does not ipso facto transform its assets into a trust fund for the equal benefit of its creditors, but such trust attaches only in the administration of the assets after possession is taken by a court of equity; hence so long as a corporation continues in possession of its property it may lawfully prefer one creditor over another.

2. SAME—PREFERENCE OF DIRECTORS.
A corporation is not precluded from preferring a bona fide creditor because he is also one of its directors, although in such case the transaction will be subjected to the most rigid scrutiny by a court of equity, and the creditor must assume the burden of proving his absolute good faith and the justice of his demand. In many cases the condition of

the corporation may be such that it cannot borrow money from outside sources when a timely loan will save it from serious loss, and a director or stockholder who under such circumstances advances money to the corporation in good faith and for its benefit is entitled to all the rights of any other creditor in obtaining security for his demand, either at the time or subsequently.

3. SAME—LEGALITY OF PREFERENCE—FACTS CONSIDERED.
A mercantile corporation had four unsecured creditors, three of whom, holding much the larger part of its indebtedness, as well as all of its preferred stock, by agreement with the common stockholders obtained the election of their representatives as directors and manager; the purpose being to secure a change of management because the business of the company had become unprofitable. The fourth creditor was advised of such action, and made no objection. Such creditors remained in control for 2½ years, during which time they paid the fourth creditor one-third of its claim, but increased the indebtedness of the corporation to themselves by advancing money for its use. It did not appear that any new outside indebtedness was created. At the end of that time, the business having remained unprofitable without the fault of the management, the directors had a chattel mortgage and trust deed executed conveying the property of the corporation to secure its creditors; preference being given to the claims of the controlling creditors. There was no evidence of fraud or bad faith, but, on the contrary, the evidence justified the inference that their action in assuming control was for the purpose of benefiting the corporation and all of its creditors. *Held*, that there was neither actual nor constructive fraud in the transaction which rendered the preference voidable by the fourth creditor, who was not injured, but was in fact the only one of the four benefited, by the transaction.

4. SAME—DEEDS—PRESUMPTION OF VALIDITY.
Where the statutes of a state authorize a corporation to convey property by deed executed by its president or vice president when given such powers by its by-laws, a deed signed by the vice president of a corporation under authority given by the board of directors is presumptively valid.

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

Prior to March 29, 1895, the Martin-Perrin Mercantile Company, hereinafter called the "Mercantile Company," was doing an extensive business in Kansas City, Mo. It had issued common stock of the face value of $300,000, and preferred stock of the face value of $150,000. The common stock was held, $150,000 of it by E. L. Martin, its president; $100,000 of it by C. G. Perrin; and $50,000 of it by Thomas E. Gaines; these three men constituting the board of directors. Of the preferred stock, $75,000 in face value was held by the Metropolitan National Bank of Kansas City, hereinafter called "Metropolitan Bank"; $50,000 by the National Bank of Commerce of Providence, R. I., hereinafter called "Providence Bank"; and $25,000 by J. Levy & Bros. of Cincinnati, Ohio, hereinafter called "Levy & Bros." At this time the mercantile company was, and for some time prior thereto had been, indebted to the Metropolitan Bank in the sum of $25,000; to the Providence Bank, $5,843; and Levy & Bros., $10,506,—the payment of none of which was secured. It was also indebted to the American Exchange National Bank of New York City, the plaintiff in error, in the sum of $6,250, likewise unsecured. This constituted all of the unsecured indebtedness on March 29, 1895. Whether the Metropolitan Bank, Providence Bank, and Levy & Bros. were the absolute owners of the preferred stock, or held it as collateral security for the payment of indebtedness due them, is, for the purposes of this case, unimportant. Besides this unsecured indebtedness, the mercantile company then owed to divers persons the sum of $123,521, the payment of all of which was duly secured by collateral. The mercantile company had prior to March, 1895, transacted a large busi-

ness in buying and selling liquor, but, for reasons unnecessary to mention, its business had declined, and was no longer profitable. Representatives of the Metropolitan Bank, Providence Bank, and Levy & Bros. met together in March, 1895, and, after consideration of their interests, decided that a change in management of the mercantile company was desirable. Conferences then followed between them and the officers and directors of the mercantile company, which resulted in the transfer of substantially all of the common stock from their former owners to them, and in the substitution of W. C. Glass and J. H. Wiles as directors in place of E. R. Martin and Thomas E. Gaines, the former of whom having before that time taken the place on the board formerly held by C. G. Perrin. Glass and Wiles were both directors of the Metropolitan Bank. E. L. Martin was continued as president of the mercantile company. Glass was made vice president, and, because of a prior valuable experience in the liquor business, was made general manager, with full control over the business of the company, and immediately entered upon the discharge of his duties as such. The plaintiff in error was forthwith informed by E. L. Martin, the president, of this change in the management; Mr. Martin writing it that "the Metropolitan Bank [whose directors had become the managers of the mercantile company] thought the changes which are made would be beneficial to the common stockholders and creditors." Mr. Martin testifies, in substance, that the plaintiff in error was practically the only other unsecured creditor, besides the two banks already referred to and Levy & Bros., and he thought it should be notified of what was being done. The record shows that Martin was particularly friendly to plaintiff in error, and gave it full information of the transaction already detailed, which occurred on March 29, 1895, and that no objection or complaint was made by plaintiff in error with respect to that transaction. The new management in July, 1895, before appropriating any of the funds of the mercantile company to the payment of the unsecured indebtedness due to the Metropolitan Bank, Providence Bank, or Levy & Bros., remitted to plaintiff in error the sum of $1,250, thereby reducing its claim to $5,000. On December 18, 1895, it was found that additional money was required to properly carry on the business. At that time, with full knowledge and acquiescence by Mr. Martin, the president of the mercantile company, the following agreement was entered into:

"The Metropolitan Bank of Kansas City, Mo., the National Bank of Commerce of Providence, R. I., Jas. Levy & Bros., of Cincinnati, O., and the Martin-Perrin Mercantile Co., of Kansas City, Mo., in consideration of the mutual agreements herein contained, do hereby jointly and severally agree with each other as follows: The sum of fifteen thousand ($15,000) dollars is to be forthwith loaned by the three first parties named to the Martin-Perrin Mercantile Co. on its several promissory notes, all to be of even date, and at four months, less discount at six per cent. per annum, in the following amounts: Metropolitan National Bank, $7,500; National Bank of Commerce, $5,000; Jas. Levy & Bros., $2,500. This agreement is entered into on the express condition and understanding that all of said loans are to stand upon a parity and equality, and are made at the request of the said Martin-Perrin Mercantile Co., and are to be paid prior and preferable to the present unsecured indebtedness of said company, as the same now exists and appears on its books, to the other parties hereto, none of which shall in any manner be secured, paid, or discharged until the entire $15,000 herein agreed to be loaned is fully and entirely secured or paid; but the words 'present unsecured indebtedness' shall not be deemed to mean or include discounted customers' paper, or other paper that may be otherwise secured, but, as long as any part of such $15,000 is unpaid, such present unsecured indebtedness of such company to the other parties herein shall, as between said parties, be treated as a parity, so that, if for any reason security is taken by one, like security shall be taken for all, without preference as between each other. And the said Martin-Perrin Mercantile Co., by its signature hereto, agrees to pay said $15,000 in the manner herein expressly set out, and agrees not to pay, secure, or discharge its said unsecured indebtedness to the other parties hereto as the same now exists or appears on the said books of said company, other than as herein agreed.

And the Martin-Perrin Mercantile Company agrees that William C. Glass shall continue as vice president and manager of said company, but the other parties hereto in no wise assume any supervision, direction, or control of the said business.

"Witness the hands, respectively, of the parties hereto on the 18th day of December, A. D. 1895."

Pursuant to the terms of this agreement, the full amount of $15,000 was loaned to the mercantile company. Soon thereafter, and before appropriating anything to the payment of the claims of the two banks or Levy & Bros., in June, 1896, the new management again remitted to plaintiff in error $1,000, reducing its debt to $4,000. By reason of long and continued depreciation in value of a large stock of whisky on hand when the new management took charge, and also by reason of other unfortunate circumstances and conditions, the expectations of all concerned were disappointed, and on November 26, 1897, it was found advisable to wind up the business of the mercantile company. On that day, pursuant to a resolution of the board of directors, a chattel mortgage and deed of trust were executed, conveying all the property of the mercantile company to Hugh C. Ward and James K. Burnham, as trustees, to secure the payment of the following indebtedness: First. A note due the Metropolitan Bank for $7,500, a note due the Providence Bank for $5,000, and a note due Levy & Bros. for $2,500. These notes represented the loan as made by the payees, respectively, according to the agreement of December 18, 1895, no part of which had ever been paid. Second. Note due the Metropolitan Bank for $30,500, notes due the Providence Bank for $6,000, and notes due Levy & Bros. for $2,121.73. These represented the unsecured indebtedness of the payees, respectively, as it stood on November 26, 1897, and amounted to $6,722 in excess of the indebtedness of the mercantile company to them at the time they, in March, 1895, undertook, through their representatives, the management of the business. In other words, these three creditors in their effort to extricate themselves and the plaintiff in error, who, as already stated, were the only unsecured creditors in March, 1895, succeeded in paying off $2,250 of the debt due to the plaintiff in error, leaving a balance at that time due to it of $4,000, but increasing their own aggregate unsecured indebtedness in the sum of $21,722; the same consisting of loan of $15,000 made on December 18, 1895, and $6,722 in addition thereto. The plaintiff in error being informed by its friend, Mr. Martin, of all the steps taken by the new management from the beginning to the end, found no fault until the chattel mortgage and deed of trust were executed on November 26, 1897. This, Mr. Martin says, it complained of, saying, "It ought to have been secured, along with the balance of them, by mortgage." Plaintiff in error afterwards, and on December 20, 1897, instituted a suit by attachment in the circuit court of the United States for the Western district of Missouri against the mercantile company to recover the balance of $4,000 and interest then remaining due it, and caused Hugh C. Ward and Thomas K. Burnham, the defendants in error, to be summoned as garnishees. Interrogatories having been duly filed, the garnishees made answer in effect denying that they had in their possession any money or property belonging to the mercantile company; admitting the execution and delivery to them of the chattel mortgage and deed of trust of date November 26, 1897; reciting the trust created by the instruments, already referred to; and stating that in the execution of the trust thereby created they sold the major portion of the property conveyed to them, and then had in their possession, of the proceeds of such sale, $8,572.92, besides some notes and accounts, and that they held the same to be paid over to the Metropolitan Bank, Providence Bank, and Levy & Bros., the beneficiaries in the chattel mortgage and deed of trust. Plaintiff in error, after having secured judgment against the mercantile company in the attachment suit for the sum of $4,197.32, pursuant to the practice under the statutes of Missouri, filed its denial of the garnishees' answer, setting forth, in substance, that the chattel mortgage and deed of trust were not executed by the mercantile company; that W. C. Glass, who purported to execute the same as the vice president of the company, had no right or authority by virtue of any action of the board of directors of the company to execute the same,—and after detailing the facts hereinbefore stated, and

freely characterizing each of them as fraudulent in their purpose and effect, alleged that the chattel mortgage and deed of trust under which the garnishees claimed to hold the property of the mercantile company were executed by it with intent to hinder, delay, and defraud the creditors of the mercantile company, and were therefore null and void. The case came on for a hearing on the issue so made, and at the conclusion of the evidence offered by plaintiff in error, who was the plaintiff below, the court, on motion of the garnishees, which, although somewhat doubtful in its character, we will for the purposes of this case treat as a demurrer to the evidence, sustained the same, and rendered a judgment in favor of the garnishees. To reverse this judgment a writ of error was duly prosecuted to this court.

Henry C. Solomon (Benjamin F. Wollman and Armwell L. Cooper, on the brief), for plaintiff in error.

Hugh C. Ward (Herbert S. Hadley and Frank Hagerman, on the brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

The chief question for our determination is whether there was any substantial evidence to support the issue raised by plaintiff in error in the garnishment case. The denial setting forth the facts relied upon to avoid the chattel mortgage and deed of trust, and the brief and argument of counsel for plaintiff in error in treating of the facts of the case, abound in general statements of fraud and fraudulent intent; but a careful and considerate examination of all the evidence discloses substantially the facts recited in the foregoing statement, and those only. It cannot be true that there was any actual fraudulent intent or purpose on the part of the Metropolitan and Providence Banks or Levy & Bros. in the transaction complained of. It is strenuously argued that, securing the control and management of the mercantile company by their representatives, the banks and Levy & Bros. put themselves in position to secure a preference by the execution of the chattel mortgage and deed of trust in question. This result may have followed, but all the testimony and proof in the case satisfy us that no such purpose was originally contemplated by them. Nor was any such purpose contemplated by them at the time they loaned the $15,000, on December 18, 1895. They did not engage in the liquor business as a permanent venture, but, representing all the unsecured creditors except plaintiff in error, and discovering that the condition of the business of the mercantile company was such as required a new management in order to insure the payment of the unsecured debts, they, being at that time owners of all the preferred stock of the mercantile company, secured, by the voluntary action of the owners of the common stock, a controlling interest in the same, and with the full co-operation of the president of the company, and with the full knowledge and acquiescence of plaintiff in error, proceeded to elect directors satisfactory to themselves, and to take charge of the business. They conducted it for a period of about 2½ years, loaned money to the company without security, and, so far as the record discloses, transacted the business openly and fairly, and with

the single end in view of securing the payment of their own debts, and that of the plaintiff in error as well. Without reducing their aggregate demands at all, but increasing them in the sum of $21,722, they actually paid plaintiff in error one-third of its demand. At last, by reason of an unprecedented and unexpected decline in the value of a large stock of whisky on hand, they were forced to abandon their original undertaking. The record discloses no new creditors whose demands were created during the period of their management. Presumptively, none existed at the time they closed the business. In this condition of things the mortgage and deed of trust complained of by plaintiff in error were executed. For the purposes of this case it may be conceded that the directors and vice president of the mercantile company, who authorized and executed the mortgage and deed of trust, were so the representatives of the Metropolitan and Providence Banks and Levy & Bros., the beneficiaries in the mortgage and deed of trust, as to make their acts the acts of the beneficiaries themselves; in other words, that the legal effect of the condition of things as it existed, and of the acts done, was that the beneficiaries in the mortgage and deed of trust were in full charge of the mercantile company, and that they caused the deeds to be executed to secure their own demands against the mercantile company. Are the deeds so executed voidable at the instance of the plaintiff in error? This is the question now to be answered. Notwithstanding a contrariety of opinion on the subject, it is now, we think, established by persuasive and controlling authority that the insolvency of a corporation does not ipso facto transform its assets into a trust fund for the equal benefit of its creditors. This conclusion is reached in a number of decisions by the supreme court of Missouri, in which state the transactions involved in this suit occurred. Alberger v. Bank, 123 Mo. 313, 27 S. W. 657; Slavens v. Drug Co., 128 Mo. 341, 30 S. W. 1025; Schufeldt v. Smith, 131 Mo. 280, 31 S. W. 1039, 29 L. R. A. 830, 52 Am. St. Rep. 628. The same conclusion is reached by the supreme court of Minnesota in the case of Hospes v. Car Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, and by the supreme court of the United States in Fogg v. Blair, 133 U. S. 534, 541, 10 Sup. Ct. 338, 33 L. Ed. 721, and in Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. In the latter case the court, after reviewing the authorities bearing directly and indirectly on the status of the property of corporations after they become insolvent, concludes that the only trust attached to such property is in the administration of the assets after possession is taken by a court of equity, and is not a trust attached to the property, as such, for the direct benefit of either creditor or stockholder. Such being the law, it follows that an insolvent corporation may, in the exercise of its jus disponendi, prefer one creditor to another. The remaining question is whether it may prefer its own directors, if they happen to be creditors.

The relation of directors to their corporation is undoubtedly that of agents to principal. As such, they are charged with the duty of serving their principal faithfully, and with an eye single to its best interests. Their own personal welfare must at all times be sub-

servient to that of their principal. But this obligation ought not to be an insuperable barrier to the performance of their duty. Many cases may arise, and the one now under consideration fairly illustrates them, in which, by reason of the financial condition of their principal, it becomes impossible to borrow money from outsiders, and when a timely loan or forbearance in the enforcement of demands may bridge it over and start it on a successful career. The directors, of all others, best know the conditions and circumstances, and may be the only ones from whom succor can come. To say that they are so bound by a strict rule prohibiting contracting with themselves as to foreclose the possibility of securing aid is, in our opinion, carrying the rule beyond its reason. If they may contract with themselves, obviously they may thereby entitle themselves to all the incidents to such contract, and among them is the right to resort to all legal methods of securing the payment of their demands. This last-mentioned right, as said in Duncomb v. Railroad Co., 84 N. Y. 190, is equally true whether the pledge be taken for a present or precedent debt. The temptations to self-aggrandizement and dishonesty are, of course, great, and require the utmost good faith on the part of directors, and subject them and all their acts to the most rigid scrutiny. Their relations to the corporations are of that intimate and fiduciary character that they are very properly held, whenever their acts are questioned, to assume the burden of proving their absolute good faith and the perfect justice of their demands. The following authorities sustain the principles just announced: Foster v. Planing Mill Co., 92 Mo. 79, 4 S. W. 260; Schufeldt v. Smith, supra; Butler v. Mining Co., 139 Mo. 467, 41 S. W. 234, 61 Am. St. Rep. 464; Garrett v. Plow Co., 70 Iowa, 697, 29 N. W. 395, 59 Am. Rep. 461; Duncomb v. Railroad Co., supra; Harts v. Brown, 77 Ill. 226; Stratton v. Allen, 16 N. J. Eq. 229; Bank of Montreal v. F. E. Potts Salt & Lumber Co., 90 Mich. 345, 51 N. W. 512.

In Brown v. Furniture Co., 7 C. C. A. 225, 231, 58 Fed. 286, 292, 22 L. R. A. 817, 823, Judge Taft, speaking for the court of appeals for the Sixth circuit on this general subject, after reviewing the cases, says:

"Several cases have been cited, some of them decisions of circuit courts of the United States, in which it has been held that, while it is lawful for a corporation to prefer creditors, it is not equitable or permissible for directors of a corporation to prefer themselves, even if they are bona fide creditors, because they are trustees. It may be conceded that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and places the burden upon the preferred director of showing beyond question that he had a bona fide debt against the corporation; but we do not see why, if a corporation may prefer one creditor over others, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor, and as an individual may prefer, among his creditors, his friends and relatives, so a corporation may prefer its friends."

In the case of Gould v. Railway Co. (C. C.) 52 Fed. 680, Judge Caldwell had occasion to review the authorities on this subject, and concludes as follows:

"The corporation is under the same obligation to pay a bona fide debt due to one of its directors and stockholders that it is to pay a debt due to

a stranger, and a security given for a debt due to a stockholder is as valid as a security given to any other creditor. The doctrine established by the best considered cases and by the decisions of the supreme court of the United States is that the mere fact that the creditors of a corporation are directors and stockholders does not prevent their taking security to themselves as individuals to secure a bona fide loan of money previously made to such corporation, and used by it in conducting its legitimate corporate business."

The supreme court of the United States, in Richardson's Ex'r v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516, in treating of the subject in hand, says:

"Undoubtedly his [Richardson's] relation as a director and officer or as a stockholder of the company does not preclude him from entering into contracts with it, making loans to it, and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions, not, perhaps, with distrust, but with a large measure of watchful care, and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."

See, also, Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

The facts of the case now under consideration bring the banks' and Levy & Bros.' demands fully within the most stringent rule announced in the foregoing authorities. Their demands, for which they took security upon the property of the mercantile company, were not only just and legal, but, in our opinion, highly meritorious. They had not only forborne to assert them for a long period of time, but had advanced a large amount of money in the earnest and honest effort to extricate the mercantile company from its difficulties. They had not injured the plaintiff in error, but had materially improved its condition. No others are complaining, and, in our opinion, the plaintiff in error has no ground for so doing.

Counsel for plaintiff in error insist most strenuously that the evidence discloses a secret manipulation of the property of the mercantile company by the banks and Levy & Bros., with the intent and purpose of fraudulently converting it to their own use, while they, under the guise of conducting the business in the name of the mercantile company, lulled the plaintiff in error and other unsuspecting creditors into a sense of security. They assume and assert that in the creation and execution of the scheme inaugurated on March 29, 1895, the deliberate intention was: First, that the scheme should be kept secret; second, that all persons dealing with the mercantile company should continue to believe that the corporation was standing on its own feet, with no change in its corporate management or control; third, that fraudulent credit should thereby be secured. On these assumptions they construct an argument, but the assumptions are not supported by proof. As already disclosed, there is no substantial evidence of secrecy in devising or executing the scheme, or of any attempt to cause any one to believe that there was no change in the management of the company, and certainly no evidence of any attempt to secure fraudulent credit. The fact is conspicuous in this case that in March, 1895, there were no other unsecured creditors

besides the banks, Levy & Bros., and plaintiff in error, and there is no evidence whatsoever that any other credit was after that desired or secured; and there is affirmative, uncontradicted testimony that the plaintiff in error itself was in no manner injured by any of the acts of the banks and Levy & Bros., or their representatives,—on the contrary, that plaintiff in error was substantially benefited thereby. For want of necessary evidence, therefore, the case largely relied upon by counsel for plaintiff in error (American Oak Leather Co. v. United States Rubber Co., 37 C. C. A. 599, 96 Fed. 891, decided by the court of appeals for the Seventh circuit) has no application. Not only is this true, but plaintiff in error has been deprived of this supposed bulwark by the recent reversal of the case by the supreme court of the United States. See United States Rubber Co. v. American Oak Leather Co., 181 U. S. 434, 21 Sup. Ct. 670, 45 L. Ed. 938. It results, therefore, that there was neither actual nor constructive fraud in the transactions complained of.

It was suggested by counsel in their argument that the chattel mortgage and deed of trust were inoperative and void because executed on behalf of the mercantile company by W. C. Glass, the vice president, instead of by the president. All that need be said concerning this is that there is no assignment of error predicated upon any such defective execution of the instruments in question, and, even if there were, it would have no merit, because, under the provisions of section 982 of the Revised Statutes of Missouri of 1899, it is made lawful for any corporation to convey lands by deed sealed with the common seal of the corporation, and signed by the president, vice president, or presiding member or trustee of the corporation. That section fully warranted the execution of the deed of trust in question. Section 954 of the same statutes empowers the directors to elect a president and appoint a treasurer and secretary, and such other officers and agents as shall be prescribed by the by-laws of the company. The by-laws, which are adopted by the stockholders, determine the agents so to be appointed and their powers. The record shows that the vice president was authorized by the board of directors to execute the instruments, including the chattel mortgage in question. Plaintiff in error failed to disclose what powers were vested in the vice president, and certainly failed to show that he was not empowered to execute the instruments. The burden was on it to make this showing, if the facts warranted it. Having failed to do so, it will be presumed that the agent who might have exercised the power in question was duly authorized to do so, and that he properly and lawfully executed the chattel mortgage.

There are several assignments of error relating to the court's action in rejecting testimony. On a careful consideration of them, we find that some of them are not predicated on any proper exceptions taken at the time of the ruling. The others relate to the exclusion of some details of evidence, which, if material, were fully covered by other evidence found in the record.

We are of opinion that there was no substantial evidence to support the issue raised by plaintiff in error in the garnishment case, and no wrong done to plaintiff in error in the course of the trial. The judgment must therefore be affirmed.

In re SEWELL.

(District Court, E. D. Kentucky.)

BANKRUPTCY—VALIDITY OF LIEN—CONDITIONAL SALE UNDER KENTUCKY STATUTE.

According to the settled law of Kentucky, a conditional sale of personal property under a contract by which the seller retains the title until payment of the price is, in effect, an absolute sale, with a mortgage back, and comes within Ky. St. § 496, which provides that no mortgage shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until acknowledged or proved and recorded. As construed by the court of appeals of the state, such section applies, as to creditors, only in favor of those whose debts were subsequently contracted, without notice of the lien, and who have, by legal proceedings or otherwise, acquired some hold or lien upon the property. *Held*, that the lien given by such a conditional contract of sale, unrecorded, was valid, as against a trustee in bankruptcy of the purchaser, where the creditors, although their claims arose subsequent to the sale, were all general creditors, none of whom had acquired any lien upon the property prior to the bankruptcy which would have entitled them to contest such lien.

In Bankruptcy. On question certified by referee.

T. G. Bigstaff, for Cash Register Co.

R. A. Chiles, for trustee.

COCHRAN, District Judge. Upon petition of the National Cash Register Company, the referee has certified to the court for review his decision as to its claim to a lien for unpaid purchase money upon a cash register sold by it to the bankrupt before the institution of these proceedings, and forming a part of his assets, and to have same subjected to the payment thereof in preference to the general creditors. The trustee, on their behalf, resisted the claim, and the referee, by the decision complained of, has disallowed it. It was stipulated in the contract of sale of the register, which was in writing, that the title thereto should remain in the company until fully paid for, and that, in default of payment of any installment of the purchase price, it should be entitled to retake possession thereof, and the payments theretofore made should be considered as paid for its use during the time Sewell had had it in possession. Such a stipulation in a contract of sale of personal property, according to the law of this state, has the effect of passing the title of the property sold back to the seller, as security for the purchase price, and therefore to create a mortgage thereon in his favor therefor. In the case of Baldwin v. Crow, 86 Ky. 679, 7 S. W. 146, Lewis, J., with reference to a contract of sale of personalty containing such a provision, said, "It should therefore be regarded as an absolute sale and mortgage back." And in the case of Welch v. Cash Register Co., 103 Ky. 30, 44 S. W. 124, White, J., as to such a provision in a contract of sale of personalty, said, "That contracts of this kind are only mortgages is equally well settled in this state." This proposition of law is recognized by the referee in his decision. His refusal to enforce the mortgage is based upon two other admitted facts in the case: One is that the contract of sale was never recorded; and the other,

that all the other debts of the bankrupt were created subsequent to the making of that contract, and at a time when Sewell had the title and possession of the register, subject to this unrecorded mortgage. He holds that because of these two facts that mortgage is ineffectual and invalid as against those subsequent creditors, and the proceeds of the register should be distributed ratably amongst all the creditors, and bases his position upon the following statutory provision contained in the Kentucky Statutes, to wit:

"Sec. 496. No deed or deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors, until such deed shall be acknowledged or proved according to law and lodged for record."

In order to determine the applicability of this statute to this case, and whether it necessitates the referee's holding, it is essential to understand the construction which has been placed upon it by the court of appeals of this state. This or a substantially similar provision has been in force in Kentucky from an early date, and quite a number of cases have arisen since then in which that court has been called upon to decide its meaning and applicability in so far as it relates to creditors. The following is a list of such cases, to wit: Helm v. Logan's Heirs, 4 Bibb, 78; Campbell v. Moseby, Litt. Sel. Cas. 358; Graham v. Samuel, 1 Dana, 166; Morton v. Robards, 4 Dana, 258; Righter v. Forrester, 1 Bush, 278; Low v. Blinco, 10 Bush, 331; Baldwin v. Crow, 86 Ky. 679, 7 S. W. 146; Wicks v. McConnell, 102 Ky. 434, 43 S. W. 205. The result to be deduced from them is this: Though in terms the statute refers to creditors generally, it is limited in its application to them. It does not have the effect of invalidating a pocket deed or mortgage as against creditors whose debts were created antecedent to such deed or mortgage. In the early cases there was some oscillation of opinion on this subject, but it is now fixed and settled. The statute has relation solely to creditors whose debts have been created subsequent to the deed or mortgage. And, as to these, it is only such subsequent creditors whose debts were created without notice of the deed or mortgage, and in the belief that the debtors' title to the property was good and unincumbered, that can rely on the statute to invalidate the deed or mortgage. Two limitations have thus been placed upon the general terms of the statute in this particular by judicial construction. Only creditors who are both subsequent to, and without notice of, the deed or mortgage, can claim the benefit of it. In the case of Wicks v. McConnell, the last of the cases cited above, Du Relle, J., thus states the law:

"On the one hand, the unrecorded lien is upheld as against creditors who cannot be presumed to have given credit upon the faith of the property held in lien. On the other hand, creditors who may be presumed on such faith to have given credit are protected, as against the secret lien, in the rights which they secure by their diligence in the levy of their execution or attachment."

The construction thus placed upon so much of the statute as relates to creditors puts them in the same category with the other class of persons to whom it relates, to wit, purchasers. According

to the terms of the statute, they are purchasers for a valuable consideration and without notice, and, of course, subsequent purchasers; and in making this construction the court of appeals is but following the maxim, "Noscitur a sociis." But such are not the only limitations that must be placed upon the very general language of the statute as to creditors. In the very nature of things, it is only subsequent creditors without notice who have in some way got a hold on the property that are in the contemplation of the statute. Without such a hold, they are not in a position to raise an issue with the holder of the unrecorded deed or mortgage. A creditor having nothing more than his claim against the debtor will not and cannot be heard as to the validity of such deed or mortgage. In the extract from the opinion in the case of Wicks v. McConnell, quoted above, the creditors who are said to be entitled to protection against a secret lien are those who have secured rights "by their diligence in the levy of their execution or attachment." In that case the contesting creditor had an attachment lien on the property which was the subject of the litigation. In the case of Graham v. Samuel, supra, he had acquired an equitable lien by a suit in equity to subject the property to the payment of a personal judgment against the debtor upon which an execution had been issued, and returned, "No property found." In all the other cases the creditors had obtained a hold upon the property by the levy of an execution. In the case of Baldwin v. Crow the property had not been sold, and the litigation was between the holder of a secret lien and the sheriff, who had taken the property under the execution. In all the other execution cases the property had been sold under the execution, and the litigation was between the holder of the unrecorded deed or mortgage, on the one hand, and the purchaser, on the other; the purchaser in most of the cases not being the execution creditor, but relying on the rights of such creditor to protect his purchase.

It being essential, then, that the contesting creditor shall have a hold of some sort on the property in order to be in a position to call in the aid of the statute, we are brought up to the question whether creditors who have a hold thereon under and by virtue of a general deed of assignment for benefit of creditors or an assignment in bankruptcy are within the purview of the statute. Antecedent creditors certainly are not, because such creditors are not within the statute at all. Nor are subsequent creditors under such circumstances, because their sole hold upon or right in or to the property is under the assignment which provides that the property passing by it shall be distributed ratably amongst all the creditors, antecedent as well as subsequent. To apply the statute in such a case, therefore, is to let in antecedent creditors, or to do violence to the terms of the assignment, neither of which is allowable. The mere fact that in a particular case all the creditors other than the holder of an unrecorded mortgage are subsequent creditors without notice can make no difference. There is no warrant in the terms of the statute to say that it applies to subsequent creditors without notice, whose rights in the property arise under a general deed of assignment for benefit of

creditors or an assignment in bankruptcy, when there are no antecedent creditors, and that it does not so apply when there are such creditors. So the Kentucky court of appeals has never applied the statute to subsequent creditors without notice, whose rights in or hold upon the property arise under such assignments. On the contrary, it has uniformly held that an assignee under a general deed of assignment for the benefit of creditors or in bankruptcy takes and holds the property assigned to him the same as the assignor held it, —subject to any unrecorded deeds, mortgages, or liens which might have been asserted against the property in the hands of the assignor had the assignment not been made. It was so held as to assignees under general deeds of assignment for the benefit of creditors in the following cases, to wit: Zaring v. Cox's Assignee, 78 Ky. 528; Bridgford v. Barbour, 80 Ky. 529; Kentucky Nat. Bank v. Louisville Bagging Co., 98 Ky. 871, 33 S. W. 101; Warehouse Co. v. Combs (Ky.) 58 S. W. 420,—and as to an assignee in bankruptcy in the case of Bank v. Stone, 80 Ky. 109. In none of these cases was the statutory provision in question sought to be applied, except in the case of Warehouse Co. v. Combs; and in answer to this claim, Hobson, J., said, "But the assignee for the benefit of creditors, being neither a purchaser for valuable consideration nor a creditor, is not protected by this statute." In the case of Clift v. Williams (Ky.) 49 S. W. 328, the debtor had died, and in a suit to settle his estate the general creditors of the decedent relied on this statute to defeat an unrecorded lien asserted by the holder thereof as against a portion of the property left by decedent; but the court of appeals of Kentucky decided that the statute had no application. This it did, however, on the ground that the creditors were all antecedent creditors. No implication can be drawn therefrom as to what it would have decided, had there been any subsequent creditors, as to their rights, for such question was not up for decision in that case. That an assignee in bankruptcy takes the property assigned subject to any liens on it that might have been asserted against it in the hands of the assignor, other than such as are avoided by the bankrupt act itself, has been decided by the supreme court in the case of Stewart v. Platt, 101 U. S. 731, 25 L. Ed. 816.

For these reasons, the court feels constrained to disapprove the decision of the referee. An additional consideration adverse thereto is that nowhere in the facts certified is it stated that the creditors of the bankrupt at the time their debts were created had no notice of the National Cash Register Company's unrecorded mortgage. As we have seen, in any event, in order for subsequent creditors to avail themselves of the statute, they must be such creditors without notice, and the burden is on them to show absence of notice. This is not a matter of inference from the fact that they are subsequent creditors, but is a distinct substantive fact of itself, to be alleged and proven.

The decision of the referee is reversed, and the case is remanded for further proceedings before him consistent with this opinion.

SMITH v. READ, Collector.

(Circuit Court of Appeals, Third Circuit. November 20, 1901.)

No. 42.

CUSTOMS DUTIES—CLASSIFICATION—LACE CURTAINS.

Lace curtains, having cotton as the material of chief value, which were made on the Nottingham lace curtain machine, but which, in addition to having undergone the usual finishing process of bleaching, dressing, and starching, have been ornamented by a cord design sewed thereon by the use of a machine known as the "Cornelli Machine," which largely increases their market value, are dutiable, under paragraph 339 of the tariff act of 1897, as lace curtains not elsewhere provided for, and not under paragraph 340, covering curtains, "finished or unfinished," made on the Nottingham machine.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Howard T. Walden, for appellant.

Wm. M. Stewart, Jr., and James B. Holland, for appellee.

Before ACHESON and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. This matter comes before the court on an appeal from the circuit court for the Eastern district of Pennsylvania affirming a decision of the board of general appraisers, and relates to the duty assessed upon certain lace window curtains imported by the appellant, which were made either wholly of cotton, or having cotton as the material of chief value. The duty was assessed as upon cotton lace curtains, under the act of July 24, 1897 (paragraph 339), which is as follows:

"Laces, lace window curtains, * * * all of the foregoing composed wholly or in chief value of flax, cotton or other vegetable fibre, and not elsewhere provided for in this act, * * * sixty per centum ad valorem."

It appears from the evidence produced before the board of general appraisers, and made a part of the record here, that the curtains were made in part on the Nottingham lace curtain machine, and therefore it is claimed by the importer that they should have been assessed for duty under paragraph 340 of the above-mentioned act, which provides as follows:

"Lace window curtains, pillow shams and bed sets finished or unfinished, made on the Nottingham lace curtain machine or on the Nottingham warp machine and composed of cotton or other vegetable fibre, when counting five points or spaces between the warp threads to the inch, one cent per square yard, when counting more than five points or spaces to the inch one-half of one cent per the square yard, in addition for each such point or space to the inch in excess of five, and in addition thereto, twenty per centum ad valorem, provided that none of the above named articles shall pay a less rate of duty than fifty per centum ad valorem."

The evidence shows that, after this imported curtain had passed through its process of manufacture on the Nottingham lace curtain machine, it was a completed article so far as that machine was

concerned, but known to the trade as an unfinished curtain, because, in order to make it marketable,—fit for use,—it was necessary that it should be bleached, dressed, and starched. Although these operations were conducted upon another machine, the curtains did not lose their identity. They were still designated as curtains made on the Nottingham lace curtain machine, but in a finished state. As the curtains came from the Nottingham lace curtain machine, they were unfinished,—that is to say, there was something more needed to fit them for general use; when they had been bleached, dressed, and starched, they were finished, and adapted to the retail trade. This is the distinction which we think was sought to be drawn in paragraph 339, which provides for the imposition of a duty on lace curtains, finished or unfinished, made on the Nottingham lace curtain machine. The curtains which were presented at the custom house, and which are the subject-matter of this suit, in addition to having undergone the finishing process above mentioned, had had, by the operations of a machine known as the "Cornelli Machine," a cord sewed upon them in a design more or less intricate. The object sought to be accomplished was, not to make the curtain a finished article, for that had been or was to be done by the bleaching, dressing, and starching, but to ornament it,—to make it a curtain different in appearance, and of largely increased value. In our opinion, the curtain, by the operation of the Cornelli machine, became so changed in character, appearance, and value as to be readily distinguishable from the curtain known as one made on the Nottingham lace curtain machine, and was no longer within the description of curtains provided for in paragraph 340, but came within the classification of paragraph 339.

The conclusion reached by the board of general appraisers meets with our approval, and the decree of the circuit court is affirmed.

FORBES et al. v. MERCHANTS' EXP. & TRANSP. CO.

(District Court, E. D. New York. July 27, 1901.)

SHIPPING—LOSS OF CARGO—UNSEAWORTHINESS OF BARGE.

A vessel some 50 years old, which had been used as a steam propeller until she had become unfit for such service, and afterwards converted into a freight barge, sank at a dock with her cargo during the night, after she had been loaded. The evidence showed that the immediate cause of her sinking was a leak due to the springing of a plank in her hull, the spikes which held it having become loosened. The only peril to which she was subjected was that from the swells caused by passing vessels, and that was one which was usual and ordinary, and was withstood by other vessels at the dock without injury. *Held*, that the presumption arising from such facts was that the barge was unseaworthy, and that her sinking was due to that cause, in the absence of evidence establishing some other adequate cause.

In Admiralty. Action for loss of cargo.

Black & Kneeland, for libelants.

James J. Macklin, for respondent.

THOMAS, District Judge. At about 3:15 o'clock on the morning of July 13, 1900, the barge James Mackin sank at Brown's dock, at Newark, N. J., on the Passaic river, and the damage to her cargo, delivered the previous evening, is the subject of this action, wherein the libelants charge that the injury was "due to, and occasioned by, the improper and unfit condition and unseaworthiness of" the barge. The answer denies unseaworthiness, and alleges that the loss "was the result of the barge James Mackin striking some unknown obstruction, or the swells or suction of passing vessels run at a high rate of speed, and dangerously near the said barge, or from some other marine peril." Alongside the face of Brown's dock the bank is very abrupt, and the water is so shallow, at ordinary low tide, that there is not more than six feet of depth. The bottom is uneven, and, as the respondent's superintendent stated, "some places it is muddy,—some mud. They had been unloading paving stones, and some fell overboard; 20 feet from the dock you have got deep water,—what we call deep water,—14 feet or 12 feet." The barge was 108 feet long, 24 feet beam, drew about 7 feet of water, and sank when the tide was about half ebb.

It is necessary to trace the history of the barge, and also to describe her condition after the accident. The vessel was built in 1848 or 1850, and was fitted for and used as a steam propeller, until 1896 or 1897, when she was condemned for such purpose, and was laid up at East Newark for some two years. The respondent purchased her in 1899, and after being overhauled, and her engine, but not her boiler, removed, she was used as a barge. In August of that year her stem was injured by collision with a dock, and she was repaired in that regard. In March, 1899, she was overhauled to some extent by one Deibert, who states that, although he never went inside to look at the timbers, her planking was good; that he "caulked her all over; searched her all over the bottom; done everything that was necessary to do to the boat to make her seaworthy on the bottom." In January, 1900, her boiler was removed, and, the keelson beneath the boiler having been burned, three new keelsons were put in, and her deck repaired. Long, who made these repairs, testified that "she was then in pretty fair condition for an old boat." From this time to the time of the accident nothing was done to her, save as stated by Long, as follows:

"By Mr. Macklin: Q. Did you see the barge after that time? A. Yes, sir. Q. When? A. In July. He had a little of the house broke. She went to the Standard Oil Company, and on the way down she staid to my place, and I put two or three men—I don't remember which—to fix the house, and she went on to work again. Q. Did you examine her condition then? A. Yes; we went over her top, and wherever her butts wanted caulking we put it in. Q. Did you go in the hold? A. Yes, sir. Q. What was her condition? A. Seaworthy condition. Q. What time did she leave your place in July, 1900? A. I think about the 10th. Q. Was she in leaking condition then? A. No; no leaking. That was in July, 1900."

She was not taken from the water at this time. When the barge was examined after the accident, certain defects were found. The respondent's superintendent states that about a week after the accident he saw the barge on the dock at Staten Island; that her seams

were tight on the port side, but more or less open on the starboard side; that her forward deck had been out forward, where it was open and exposed to the weather; that her sheathing had come off, from being sunk; that her planks were all good, except on the starboard side, where there was some oakum out in some places, and in one or two planks there was quite an opening, caused by one of her planks being sprung.

Mutteen, a surveyor and adjuster for purposes of insurance, called by respondent, testified that he examined the barge August 13th, after the accident, at McWilliam's yard, Staten Island; that her seams were opened up a little; that one starboard plank, otherwise perfectly good, length 14 to 20 feet, was sprung outward its whole length, by reason of the spikes having partially dropped; that some oakum was left both in the open seams and at the sprung plank; that the oakum on the port side was fairly good; that the plank, in his opinion, was sprung by collision with the dock, and not from resting on the bottom; that he did not examine the fastenings of the sprung plank; and that he did not go inside the boat. This description of the vessel after the injury is corroborated by Mitchell, her captain, who also stated that after her repairs in January, 1899, she was "in good seaworthy condition,—splendid planking on her,"—and that she did not leak more than is proper for a vessel in good condition, up to the time of the accident; that the plank which sprung out was driven back into its place with new spikes. It is the opinion of this witness that the springing of the plank was caused by her striking the dock, rather than by the subsequent movement of the barge. He states that it was impossible to strike the hull of the boat against the dock, but his theory was that "the guards struck that spile in such a position that when she settled and came back with the rebound of that swell it must have strained the planks; the hull couldn't do it; the hull can't strike the dock; it is protected by the overhang, the same as a ferryboat"; that the plank could not have struck the spiles, and have been thus started, but that the "guard struck the dock, and strained the hull there." He also states that the plank was only sprung off the length of about two timbers of the boat; that it was sprung sufficiently so that he could place his finger along in the seam. The witness also states that all the time that he was on her she was never out of the water, and he was with her as captain from September 5, 1899, down to the time of the accident. Deibert, the shipwright, also saw her in August after the accident, and states that the plank on the bottom, on the starboard side, was sprung off on one end, and that the seams were more or less open on the starboard side, but that they were good on the port side, and that he made the repairs by jacking up and fastening the plank without removing it. He said that her seams were made good by caulking, and that the planking was good. This witness agrees with the captain that the plank did not strike anything, but that from the swells of passing vessels the guards struck up against the dock, and the strain thereby induced caused the planks to spring off.

In behalf of the libelant certain evidence was given by persons who examined the barge after the collision. Ward, the shipwright,

examined her in August at Staten Island, looking her over inside and out. He states that he "would call her an old, worn, and weak vessel"; that he saw "the outside planking loose in spots, and the seams large in places, and, judging from the outside appearance, I believe the fastenings were corroded away"; that he examined the fastenings inside, and saw the ceiling drop right out of its place with the need of fastening, but that he could not see the fastening on the inside of the vessel; that he saw "a large seam about amidships on the starboard side,—a very large seam,—water spouting right out of it." This witness did not think that the injury could have been caused by striking against the dock, from the swells of passing vessels, provided the barge was in good condition. Henry Salter, inspector for marine insurance companies, first saw the barge at the dock in Newark a day or two after she sank, and several times thereafter, and also after she had been raised and taken to Staten Island and put on the dry dock. He states that he examined her inside and out; that her seams were unusually large; that there were quite a number of short pieces in her planking; that he saw the seam on the starboard side to which Mr. Ward testified, and that the seams on that side were rather large to be good caulking seams; that he took the steel point of his umbrella, and poked it into the seams, not only on the starboard side, but on the port side; that there were two butts at the bow on the port side where the point of the umbrella went into the timber. This witness states that the open seams which he saw could not have been caused by the surging and striking against the dock from the swell of a passing steamer. He says that he looked the bottom of the boat over most carefully, and did not find any marks to indicate that it had come in contact with any substance or pile to cause the leak. A memorandum made by him after his inspection states that he saw "two planks on the bluff of the port bow, and one on the starboard bow, which appear to have been broken. They are of oak. There are several butts in four places along the turn of the bilge, especially aft on each side the seams are very open; in fact, there is no oakum to be found in them in half a dozen places." He states that he did not find any rotten planks.

It is claimed on the part of the respondent that some of the injuries noticed by its own witnesses, and also by the witnesses for the libelant, were caused by the action of the water after the boat sank, or from her being drawn from her position on the bottom after she was sunk. Undoubtedly the disturbance of the vessel after she sank tended to increase any defects which she might have, but the evidence shows with sufficient clearness that the sprung plank was disturbed so as to allow the vessel to leak before she sank. This plank sprang out because the spikes drew out under some strain. There is no evidence of the cause, or, if so, it was a cause incident to, and never absent from, ordinary navigation in rivers and harbors. It is claimed on the part of the respondent that the swells of passing steamers threw the barge up against the dock with such force as to cause her to spring a-leak, the river at that point being about 600

feet wide. But she had been lying at that dock on numerous occasions from time to time for some years, and no passing steamer had caused her, or any other vessel lying there, to leak before, although lines had been broken by such swells. Kane, the man who was watching her, testified that the steamers passed that night rapidly, as usual, but no more rapidly than customary, nor is there any evidence that the conditions on that occasion were different from those theretofore existing. It is also suggested that some object may have struck against the side of the steamer, and caused the injury. All these theories are the merest speculations, not based on even the slenderest known fact. The only question, therefore, is whether the respondent has shown the vessel to be in such a seaworthy condition at the time of the accident that it must be necessarily inferred that some excepted cause, without the usual perils of navigation, brought about the injury. The Compta, 4 Sawy. 375, Fed. Cas. No. 3,069; The Emma Johnson, 1 Spr. 528, Fed. Cas. No. 4,465; The Vivid, 4 Ben. 319–323, Fed. Cas. No. 16,978. Vessels ordinarily seaworthy withstand the swells of passing vessels, and this barge did not. The inference is that she was not seaworthy. If upon this occasion she was not equal to the strains successfully withstood by other vessels lying at that dock, the inference would be that she had become weakened and was in need of repairs. What other vessels met without injury caused her to sink. The swells were nightly present; their influence was known; they were the usual, common accompaniments of navigation. The respondent's barge, to be deemed seaworthy, should have been able to withstand them. The Northern Belle, 9 Wall. 526, 19 L. Ed. 748. She was an old boat. She had survived the use for which she had been constructed, and been rehabilitated for purposes of a freight barge, and it was the duty of her owner to give her the attention that vessels of her age and decrepitude require. She had not been thoroughly examined and overhauled since the respondent first repaired her, and her bottom had not been examined for several months before the accident. The presumption is, from her sinking, that she was not seaworthy, and the court is unable to discover sufficient facts overcoming this presumption. Therefore the respondent must be held not to have discharged the burden which rests upon it, of showing that she was seaworthy against ordinary conditions. This conclusion renders unnecessary a consideration of the question of the insurance.

There should be a decree for the libelants for their damages, with costs.

WASHINGTON COUNTY, NEB., v. WILLIAMS.

BLAIR et al. v. WASHINGTON COUNTY, NEB., et al.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1901.)

Nos. 1,533, 1,486.

1. MUNICIPAL BONDS—NEGOTIABILITY—CONDITIONAL PROMISE.
Bonds issued by a county which acknowledge an indebtedness in a certain sum, and promise to pay the same to the payee or bearer from a special fund to be raised by the annual levy of a specified rate of tax on the taxable property of the county,—such fund to be applied pro rata on such bonds, first to the payment of the interest, and then the principal,—are not negotiable instruments, within the law merchant, because there is no certainty as to the fact or time of payment, which depends entirely on the adequacy of the fund; nor are they negotiable instruments under Consol. St. Neb. § 2968.

2. SAME—STATUTORY POWER TO ISSUE—EFFECT OF RECOGNITION OF VALIDITY.
While obligations issued by a municipal corporation cannot acquire validity through the operation of the doctrine of estoppel if the corporation was without statutory power to issue them in the first instance, yet, where the act from which the power is derived is susceptible of different constructions, and the right to issue bonds is doubtful, the fact that they have been recognized by the municipality and its citizens as valid for a long number of years, during which it has paid interest thereon without objection, will entitle the holders to a more liberal construction of the statute under which the power was claimed and exercised than would be given it if their validity had been challenged before their issuance or soon thereafter.

3. COUNTIES—POWER TO AID IN CONSTRUCTION OF RAILROADS—CONSTRUCTION OF NEBRASKA STATUTE.
Rev. St. Neb. c. 9 (Act Neb. T. Jan. 11, 1861, § 24), gave the board of commissioners of any county power to submit to the people of the county the question whether the county should aid in the construction of "any road or bridge," and to extend such aid if a majority voted in favor of the proposition. It also provided that the commissioners might "aid any enterprise designed for the benefit of the county," when authorized by a vote of a majority of the people. Other provisions required the question submitted to include the levy of a tax for the payment of any indebtedness authorized, not to exceed, in case it was to aid in the construction of a road or bridge, the rate of one mill on the dollar of the assessed valuation of the property of the county. Assuming to act under the power conferred by such statute, and by proceedings in accordance therewith, a county voted to issue bonds to aid in the construction of a railroad; the interest and principal to be paid from the proceeds of a one-mill tax, which was authorized to be levied for the purpose. The railroad was constructed, the bonds were issued, and for 28 years the county continued to levy the tax, and to apply the proceeds in payment of the interest thereon. The bonds in the meantime passed into the hands of different holders. *Held* that, under the liberal construction required under such circumstances, the phrase "any road," as used in the statute, must be construed as broad enough to include a railroad, and that the bonds were valid.

4. MUNICIPAL BONDS—EFFECT OF REFUSAL TO PAY—RIGHTS OF HOLDER.
Where bonds issued by a county expressly provided that they should be paid, both principal and interest, from a special fund to be created by the levy of an annual tax at a fixed rate on the taxable property of the county, the refusal of the county to longer levy the tax, or to make any further payments on the bonds, does not entitle the holder to recover a judgment for the full amount of the bonds and accrued interest, but his right is limited to a recovery of the amount due under the terms of the contract.

5. JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.
Where plaintiff sued to recover the principal of bonds and accrued interest, amounting to over $2,000, the fact that he is adjudged to be entitled to a judgment for a part of the sum sued for, and less than $2,000, does not deprive a federal court of jurisdiction to render such judgment, unless it appears that the excessive demand was made in bad faith, for the sole purpose of giving such court jurisdiction.[1]

6. EQUITY JURISDICTION—ADEQUATE REMEDY AT LAW—SUIT BY HOLDERS OF MUNICIPAL BONDS.
A county issued a series of bonds, payable to bearer, in which it promised to pay thereon, pro rata, the proceeds of an annual tax to be levied at a certain rate upon the taxable property of the county, until the principal and interest should be paid. *Held*, that each holder of such bonds had a separate right of action at law to recover his pro rata share of the fund created by such tax, or which was due him under the terms of the contract, and that the several bondholders could not unite and jointly maintain a suit in equity to obtain a decree establishing the validity of the bonds, and recovery of the amount due thereon, on the repudiation of the obligations by the county; the remedy of each at law being adequate, and as effective as that in equity, and the case not being one in which equity had jurisdiction on the ground of avoiding a multiplicity of suits.

Sanborn, Circuit Judge, dissenting from proposition that court of equity is without jurisdiction.

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

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

These are two cases, one at law and the other in equity, which in the main involve the same questions, and have been argued and briefed together. The controversy arises out of the following facts:

On July 1, 1869, Washington county, in the state of Nebraska, executed and delivered to the Sioux City & Pacific Railroad Company 149 obligations, in the following form:

"State of Nebraska. Washington County.

"Five Hundred Dollar R. R. Bond. $500.00.

"Be it known, that the county of Washington, in the state of Nebraska, acknowledges itself to owe and to stand indebted to the Sioux City & Pacific Railroad Company in the sum of five hundred dollars, which sum the board of county commissioners of said county, in the name and on behalf of the said county, hereby promises to pay to said Sioux City & Pacific Railroad Company or bearer, at the office of the county treasurer of said county, with interest at the rate of seven per cent. per annum, which principal and interest are to be raised and paid by an annual levy of a tax of one mill on the dollar on the entire taxable property in said county, and the sum to be raised by taxation is to be applied first in the payment of the interest on this and 149 other bonds of the same date and amount, and next in the payment of the principal sum and annually accruing interest, until the whole of the principal and interest shall have been paid and extinguished, and which payments are to be made on the first day of July next following the date hereof, and annually thereafter on the first day of July. This obligation is one of a series numbered from one (1) to one hundred and fifty (150), each for the sum of $500, and in the aggregate amounting to $75,000, issued by the said county of Washington to aid in the construction of the Sioux City and Pacific Railroad from a point on the Missouri river in Wash-

[1] Jurisdiction of circuit courts as determined by amount in controversy, see notes to Auer v. Lombard, 19 C. C. A. 75; Tennett-Stribling Shoe Co. v. Roper, 86 C. C. A. 459.

ington county aforesaid, and running thence westerly through said county, forming a connection with the Union Pacific Railroad at or near Fremont, in Dodge county, in accordance with a vote of the electors of said county of Washington at an election held on the ninth day of June, 1868, for the purpose of taking a vote on the proposition to aid the said railroad company in the construction of said railroad by the board of county commissioners of said county executing and delivering to said railroad company the bonds of said county calling for the payment of $75,000, with interest at the rate of seven per cent. per annum, and to be paid by an annual levy of a tax of one mill on the dollar of the entire taxable property of said county until such time as the amount thus raised will extinguish the whole amount of the principal and interest and accruing interest, which proposition was submitted and adopted under the provisions of the ninth chapter of the Revised Statutes of the State of Nebraska. The said railroad having been built by the said railroad company after the adoption of said proposition as contemplated therein, and within the time therein mentioned, this bond, with the others of the series above mentioned, is issued in pursuance thereof, as well also as under the provisions of an act of the legislature of the state of Nebraska approved February 15, 1869, entitled 'An act to enable counties, cities and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purposes.'

"In testimony whereof, we, the board of county commissioners of said county of Washington, have hereunto set our hands and caused the seal of said county to be affixed on this first day of July, A. D. 1869.

"[Seal of Washington County Commissioners' Court, Nebraska.]

Alonzo Perkins,
Watson Tyson,
Commissioners.

"P. N. Besmer, County Clerk."

It appears to have been the intention of the county to issue 150 of such obligations, but, as a matter of fact, only 149 were issued, making the aggregate amount of the indebtedness incurred $74,500.

The ninth chapter of the Revised Statutes of Nebraska, which is referred to in said obligations, was an act passed by the legislative assembly of the territory of Nebraska on January 11, 1861. Laws Neb. 1860–61, pp. 146 to 153, inclusive. That act contained, in part, the following provisions:

"Sec. 24. The said commissioners shall have power to submit to the people of the county, at any regular or special election, the question whether the county will borrow money to aid in the construction of public buildings; the question whether the county will aid, or construct any road or bridge, or to submit to the people of the county any question involving an extraordinary outlay of money by the county; and said commissioners may aid any enterprise designed for the benefit of the county as aforesaid, whenever a majority of the people thereof shall be in favor of the proposition as provided in this section."

"Sec. 26. The mode of submitting the questions to the people, contemplated by the last two sections, shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect, or having operation, if it be of a nature to be set forth, and the penalty of its violation, if there be one, is to be published at least four weeks in some newspaper published in the county. If there be no such newspaper the publication is to be made by being posted up in at least one of the most public places in each election precinct in the county, and in all cases the notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election.

"Sec. 27. When the question submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to lay a tax for the payment thereof, in addition to the usual taxes under section sixteen, of this act; and no vote adopting the question

proposed shall be valid, unless it likewise adopt the amount of tax to be levied to meet the liability incurred.

"Sec. 28. The rate of tax levied in pursuance of the last four sections of this act, shall, in no case, exceed more than three mills on the dollar, of the county valuation in one year. When the object is to borrow money to aid in the erection of public buildings, as provided, the rate shall be such as to pay the debt in ten years. When the object is to construct or aid in constructing any road or bridge, the annual rate shall not exceed one mill on a dollar of the valuation; and any special tax or taxes levied in pursuance of this act, becoming delinquent, shall draw the same rate of interest as ordinary taxes levied in pursuance of the revenue law of this territory.

"Sec. 29. The said commissioners being satisfied that the above requirements have been substantially complied with, and that a majority of the votes cast are in favor of the proposition submitted, shall cause the same to be entered at large upon the book containing the record of their proceedings; and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon can not be rescinded by the board of county commissioners.

"Sec. 30. Money raised by the county commissioners in pursuance of the last six sections of this act, is specially appropriated and constituted a fund distinct from all others in the hands of the county treasurer, until the obligation assumed is discharged."

While this law was in force, and on June 9, 1868, an election was held in conformity therewith for the purpose of taking the sense of the people on a proposition to aid the Sioux City & Pacific Railroad Company in the construction of its road from a point on the Missouri river to a junction with the Union Pacific Railroad at or near Fremont, Neb.; and at such election the proposition to aid in the construction of such road in the manner and to the amount indicated in the obligation above quoted was duly approved, and such aid was authorized by the people. While said road was in process of construction, and after it had been for the most part completed, the legislature of the state of Nebraska, on February 15, 1869, passed another act (Laws Neb. 1869, p. 92), entitled "An act to enable counties, cities and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvement in this state, and to legalize bonds already issued for such purpose." This act contained the following provisions:

"Section 1. Be it enacted by the legislature of the state of Nebraska, that any county or city in the state of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten per centum of the assessed valuation of all taxable property in said county or city, provided the county commissioners, or city council, shall first submit the question of the issuing of such bonds, to a vote of the legal voters of said county or city, in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska, for submitting to the people of a county, the question of borrowing money.

"Sec. 2. The proposition of the question must be accompanied by a provision to levy a tax for the payment of the principal and interest of said bonds in addition to the usual taxes, and sufficient to meet the payment of the principal and interest of said bonds, and to continue from year to year until said bonds are paid."

"Sec. 5. It shall be the duty of the proper officers of such city or county, to cause to be annually levied, collected and paid to the holder of such bonds a special tax upon all taxable property within said county or city, sufficient to pay the annual interest, and finally to pay the principal thereof, which tax, when levied, shall be a lien upon all of the taxable property in said county or city, and shall be collected in the same manner as the ordinary tax of such county or city.

"Sec. 6. Any county or city which shall have issued its bonds in pursuance of this act shall be estopped from pleading want of consideration therefor,

and the proper officers of such county or city may be compelled, by mandamus or otherwise, to levy the tax herein provided to pay the same."

The Sioux City & Pacific Railroad Company completed its road, as projected, in the spring of 1869; and the obligations aforesaid were delivered to it on July 1, 1869, without any further vote than that taken on June 9, 1868. These obligations have since passed into the hands of numerous holders. The county levied taxes at the rate specified in the obligations for 28 years, and applied the proceeds of the levies pursuant to the agreement evidenced by said obligations; but the sum realized by a one-mill levy proved insufficient to discharge the interest in full, and nothing has as yet been paid on the principal. On September 14, 1899, the county of Washington, acting by its board of supervisors, refused to pay further interest on said obligations, and denied the liability of the county thereon. Thereupon the above-entitled actions were brought; the first being an action at law which was brought by J. Bertram Williams, who owns five of the obligations, to recover the entire amount due thereon,—both the principal sum and interest,—upon the theory that the action taken by the county in September, 1899, in denying its liability, renders the entire amount due and payable. The second action was brought by De Witt C. Blair, as executor, et al., and is a proceeding in equity, in which substantially all of the holders of the obligations in question have joined as complainants against the county, to obtain a decree declaring the validity of the obligations, and to obtain such further general relief as they may be adjudged to be entitled to. In the law case the plaintiff below recovered a judgment, as prayed, for the amount of the five obligations which he holds, and interest. In the equity case the county prevailed, and the bill was dismissed for want of equity. Both records have been removed to this court by the losing parties, and are before us for review.

John L. Kennedy and F. S. Howell (Herman Aye, on the briefs), for Washington county.

W. J. Courtright and F. Dolezal (B. T. White and J. B. Sheean, on the briefs), for J. Bertram Williams, De Witt C. Blair, and others.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

In behalf of Washington county it is claimed that the obligations executed by it on July 1, 1869, one of which is set forth in full in the foregoing statement, were executed without authority of law, and are invalid in the hands of any holder thereof. It is urged, in substance, that the obligations in question were not authorized by the provisions of the "ninth chapter of the Revised Statutes of the State of Nebraska," which is referred to therein, and under which an election to authorize the issuance of the obligations was held, because that chapter of the Revised Statutes (the same being an act which was approved on January 11, 1861) did not contemplate or authorize the granting of county aid to railroads, and did not authorize the issuance of negotiable bonds, even if such aid was contemplated. And with respect to the act of February 15, 1869, which did contemplate the issuance of railroad aid bonds, it is said that the obligations in suit cannot be supported under that act, because it required a popular vote before bonds could be lawfully issued, and that the obligations in suit show on their face that no such vote was taken under the act of February 15, 1869; the election specified in the recital being one which was held on June 9, 1868, pursuant to the act

of January 11, 1861, long before the act of February 15, 1869, was passed and approved. These contentions present the principal questions to be discussed on appeal.

Conceding it to be true that the twenty-fourth section of the act of January 11, 1861, supra, did not authorize the county to make a donation of negotiable bonds in aid of the construction of railroads, or to issue such bonds for any purpose other than the construction of public buildings, and conceding for present purposes that the power to issue negotiable securities, when claimed by a municipal corporation, must be either expressly conferred, or derived by implication from an express power to borrow money or to purchase stock and pay for the same with bonds (Kelley v. Town of Milan, 127 U. S. 139, 150, 8 Sup. Ct. 1101, 32 L. Ed. 77; Merrill v. Town of Monticello, 138 U. S. 673, 681, 11 Sup. Ct. 441, 34 L. Ed. 1069; Brenham v. Bank, 144 U. S. 173, 12 Sup. Ct. 559, 36 L. Ed. 390), yet we are of opinion that the obligations in suit are not negotiable bonds, within the rules of the law merchant, and that a purchaser of the same for value in the open market cannot invoke for his protection the doctrine of estoppel by recitals, as it is generally applied in actions upon negotiable municipal bonds. To render a written promise to pay money negotiable in the sense of the law merchant, it is essential that it should be an unconditional promise to pay a certain sum of money at some future time, which is sure to arrive, or, as is more frequently said, there must be "certainty as to the fact of payment." If by the terms of the contract the sum promised to be paid, or a portion thereof, may never become payable, as where the sum promised is not to be paid unconditionally and at all events, but only out of a special fund derived from certain sources, which may not prove adequate to meet the demand in full, the instrument, according to the great weight of authority, cannot be deemed negotiable, and entitled, in the hands of a third party, to the immunities which belong to that class of instruments. Husband v. Epling, 81 Ill. 172, 174, 25 Am. Rep. 273; Blackman v. Lehman, Durr & Co., 63 Ala. 547, 550, 35 Am. Rep. 57; Cota v. Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464; Harriman v. Sanborn, 43 N. H. 128, 130; Bank v. Piollet, 126 Pa. 194, 198, 17 Atl. 603, 4 L. R. A. 190, 12 Am. St. Rep. 860; Chicago Ry. Co. v. Merchants' Bank, 136 U. S. 268, 279, 10 Sup. Ct. 999, 34 L. Ed. 349; Daniel, Neg. Inst. §§ 41–43. We have no reason to suppose, and it has never been decided, that section 2968 of the Consolidated Statutes of Nebraska, which defines negotiable instruments, was designed to modify the doctrine aforesaid in any respect, or to declare that an instrument might be negotiable even though it was uncertain as to the fact of payment. The statute, like many other statutes of a similar character, was designed to place bonds and promissory notes on the same plane of negotiability as foreign bills of exchange, provided they possess the requisite words of negotiability, and contain an unconditional promise to pay a certain sum of money at some future time, which is sure to arrive. Now, while the obligations in suit acknowledge an indebtedness on the part of the county of Washington to a certain amount, yet the promise made to pay this indebtedness is not a promise to pay it unconditionally and at all events,

but is a promise to pay it only out of a fund to be raised by a levy of one mill per dollar on the taxable property of the county, which fund is to be apportioned pro rata among all of the obligations, and applied first to the interest, and next to the indebtedness. It is obvious that the special fund out of which the acknowledged indebtedness is to be paid may never be adequate to pay it; and, as the record discloses, 28 years' experience demonstrates that the fund is inadequate, and that the debt is yearly increasing, instead of diminishing. Under these circumstances, the obligations in suit cannot be regarded as negotiable bonds. They are instruments which merely evidence an obligation on the part of the county to levy a tax of one mill annually on all the property situated within the county, and to apply it to the indebtedness until the same has been fully paid off and discharged. The original holders of the obligations, and all subsequent purchasers thereof, took them with full knowledge of the manner in which the county undertook to pay them, because the method of payment is stated in each obligation, and is an essential part of the contract. The several holders must be regarded as having assumed the risk of the fund proving adequate to pay the debt. For the reason, therefore, that the obligations are not negotiable, the suggestion that the act of January 11, 1861, conferred no authority to issue negotiable bonds, becomes immaterial.

Passing to a consideration of the question whether the twenty-fourth section of the act of January 11, 1861, conferred upon the county the power to aid in the construction of a railroad, we observe in the first place that a more liberal construction should be placed upon the act after this lapse of time, and in view of the conduct of the county for the past 28 years, than would have been permissible if the action of the board of county commissioners had been challenged when they took the first steps, under the act of January 11, 1861, to extend such aid, or if the action of the board had been called in question before the obligations were issued, or shortly thereafter. If the power of the county under that act to extend aid to a railroad had been seasonably challenged, as it might have been, by any taxpayer or citizen of the county, it would have been the duty of any judicial tribunal before which such a proceeding was brought to have construed the act strictly, and to have denied the existence of the power in question unless it was clearly conferred. We conceive, however, that the same rule of interpretation ought not to be applied at the present time. It is true that a municipal corporation cannot be estopped by its previous conduct or by acquiescence from denying the validity of obligations which it may have issued, if in point of fact they were issued without any authority. In other words, such corporations cannot acquire a power which has not been conferred upon them by law, by the operation of the doctrine of estoppel. So much may be conceded. It has been held frequently, however, both by the federal and state courts, that such corporations, by acquiescence in what has been done, as by paying interest for a series of years on obligations which they have issued, and thereby giving them currency in the market, may be estopped from challenging their validity on the ground that they were issued irregularly, or that

some preliminary action which should have been taken was omitted, or not taken at the proper time or in the proper manner. Supervisors v. Schenck, 72 U. S. 772, 781, 782, 18 L. Ed. 556; Clay Co. v. Society for Savings, 104 U. S. 579, 591, 26 L. Ed. 856; Shoemaker v. Goshen Tp., 14 Ohio St. 569, 587; Society for Savings v. City of New London, 29 Conn. 174, 193; Leavenworth, L. & G. R. Co. v. Douglas Co. Com'rs, 18 Kan. 169, 185, 186; Mills v. Gleason, 11 Wis. 470, 490, 78 Am. Dec. 721; President, etc., of Town of Keithsburg v. Frick, 34 Ill. 405. For like reasons, we are of opinion that the citizens and taxpayers of Washington county are not at this time entitled to the same strict construction of the power of the county under section 24 of the act of January 11, 1861, which they might have insisted upon had they objected to the issuance of the obligations in suit at any time before they were executed and delivered, or shortly thereafter. Any citizen or taxpayer of the county had the right to have stayed the execution and delivery of these obligations until the power of the county under the act of 1861 to aid in the construction of a railroad was judicially determined, but the power to extend such aid was not called in question, although nearly one-third of the popular vote at the election held on June 9, 1868, appears to have been cast against the proposition when it was submitted. It is obvious, therefore, that at that time the county officials and the public generally construed the act of 1861 as being broad enough in its provisions to authorize the county to aid in the construction of a railroad. Moreover, the road to which the people of the county voted to extend aid was substantially constructed between June 8, 1868, and the spring of 1869, probably in reliance upon such promised aid; and for more than 28 years taxes were regularly levied by the county authorities, without any protest, so far as these records disclose, upon the assumption, no doubt, that the board of county commissioners had acted within the law, and that the obligations were valid. In view of these facts, we think that the present holders of the obligations in suit are entitled to invoke a liberal construction of the power of the county under the act of 1861. If the intent of the legislature, as manifested by that act, is not altogether clear, and if the act is so worded that different views may fairly be taken of its meaning, or concerning the power intended to be conferred, that view should be adopted which will sustain the obligations in suit, rather than destroy them.

Turning to section 24 of the act of January 11, 1861, it will be seen that it authorized the board of county commissioners of Washington county to submit to the people of the county, at any regular or special election, the question whether the county should aid in the construction of "any road or bridge," and to extend such aid if a majority of the people were in favor of the proposition. In view of other provisions of the act, it is also clear that the legislature contemplated that such aid might consist of a tax to be levied on all the property of the county for a period of years, or until a certain sum had been raised, provided the annual rate of taxation for that purpose did not exceed one mill on the dollar of valuation. The word "road," which was used in that act, is a generic term, and is sufficiently com-

prehensive to include all highways, of whatsoever kind, over which people ordinarily travel, whether they are dirt roads, macadam roads, plank roads, or railroads; and, as if to make the language as comprehensive as possible, the phrase "any road" was employed. It must also be borne in mind that in ordinary conversation a railroad is sometimes termed a "road." Indeed, this use of the word is very common when no occasion exists for specifying the particular kind of road to which reference is made. Aside from this view of the case, showing that the language used was broad enough to include railroads, it is to be observed that the section of the act in question bears internal evidence that the legislature intended to authorize the people of the county to extend public aid to "any enterprise designed for the benefit of the county"; and in view of this fact it may be fairly argued that the word "road," as employed in the act, comprehends railroads, and that they fall within the legislative intent, because the construction of such roads within or through the county would be fully as beneficial to the county, and tend as much to its speedy development and to increase its wealth and population, as the construction of other highways, such as plank roads, macadam roads, or dirt roads. The authorities which have been cited as bearing upon the question whether the phrase "any road" includes a railroad are not in harmony, and none of them, in our judgment, should be deemed of controlling weight in the case at bar. In Van Hostrup v. City of Madison, 68 U. S. 291, 17 L. Ed. 538, it was held that authority conferred upon a city to take stock "in any chartered company for making a road or roads to said city" empowered such city to take stock in a railroad company which was organized to build a branch road from a point on another railroad already constructed, which latter road entered the city. In the case of Evansville, I. & C. S. L. R. Co. v. City of Evansville, 15 Ind. 395, and in the case of City of Aurora v. West, 9 Ind. 74, 86, it was likewise decided that a power given to a city "to take stock in any chartered company for making roads to said city" conferred adequate authority to take stock in a railroad. And in the case of Dubuque Co. v. Dubuque & P. R. Co., 4 G. Greene, 1, 4, it was decided that an authority given by statute to counties in the state of Iowa to aid in the construction of "any road or bridge" conferred power to aid in the construction of railroads, these being included in the phrase "any road." This view obtained and was followed by the supreme court of Iowa in several later decisions, but it was eventually overruled by a divided court in the case of Stokes v. Scott Co., 10 Iowa, 166. These adjudications demonstrate very clearly that the language employed by the legislature of the state of Nebraska in the act of January 11, 1861, may be interpreted differently, with much reason to support either view, and that it is fairly susceptible of the interpretation which was placed upon it by the county officials of Washington county and by the public generally when the obligations in suit were voted and contracted; and inasmuch as no voice was raised at that time, nor for 28 years thereafter, against an interpretation of the act which made it include railroads, and inasmuch as the road to which aid was voted was built, and the obligations have been in the market and

circulating from hand to hand, for more than a quarter of a century, in reliance on their validity, no court, in our judgment, should now adopt a different construction of the act, in a controversy between the holders of these obligations and the county. We accordingly conclude that the obligations in suit were authorized by the act of 1861, and in that view of the case it becomes unnecessary to determine whether they were also authorized by the subsequent act of February 15, 1869.

Three other questions are presented by the records, which remain to be considered. The first of these is whether the holders of the obligations in suit at the time the actions were brought could rightfully demand judgment against the county for the full amount of the several obligations and accrued interest. The second is whether the lower court had jurisdiction of the law case, in the event that the last question is answered in the negative. And the third question is whether the holders of the obligations in suit can collectively maintain a bill in equity against Washington county to have the validity of the obligations established, and to obtain a decree against the county for the sum now due thereon and unpaid.

The trial court held, and in the law case rendered its judgment upon the theory, that the refusal of the county on September 14, 1899, to levy further taxes for the purpose of making payments on the obligations in suit, rendered the entire amount of the acknowledged indebtedness immediately payable, notwithstanding the agreement that it should be paid only in annual installments, each installment to be such a sum as might be realized by an annual levy of one mill on the dollar. In so deciding, the trial judge seems to have applied a doctrine which has been applied frequently in actions for the breach of a certain class of contracts, but, in our judgment, is not applicable to a case like the one in hand. The doctrine in question, as stated by the supreme court in Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, is, in substance, that where one party to an agreement which is mutually executory, before the time for performance on his part arrives, gives notice that he will not perform it, the opposite party is at liberty to consider himself absolved from all obligations to perform the agreement, and may sue at once for all damages occasioned by the anticipatory breach, or, if he so elects, may wait for the time of performance to arrive, treating the contract in the meantime as prospectively binding for the exercise of this option. In the case last cited, where the subject was elaborately considered and all of the authorities were reviewed, it was held that the doctrine in question has its limitations; that it is only applicable to contracts that are mutually executory, such as contracts for marriage, for the rendition of services, or for the transportation or the sale and delivery of property; and that it has no application to money contracts, pure and simple, where one party has fully performed his undertaking, and all that remains for the opposite party to do is to pay a certain sum of money at a certain time or times. Roehm v. Horst, 178 U. S. 1, 17–19, 20 Sup. Ct. 780, 44 L. Ed. 953. See, also, Nichols v. Steel Co., 137 N. Y. 471, 487, 33 N. E. 561. It has never been held, so far as we have been able to discover, that the

holder of a promissory note, or other written agreement to pay a sum of money at a designated time, can maintain an action thereon, in advance of its maturity, because the maker thereof has announced his intention not to pay it. Now, the obligations in suit can be regarded in no other light than a contract on the part of the county to pay a given sum of money annually until such time as the amount of its donation to the railroad company, and accrued interest thereon, was fully discharged. It was not stipulated in the agreement evidenced by the obligations that a failure to pay one of the annual installments should render the entire amount of the obligation immediately payable, nor can it be successfully claimed that the notice given by the county that it would make no further payments had that effect. If the plaintiff's view is maintained, that the refusal of the county to pay rendered the entire debt immediately payable, and the obligations are enforced accordingly, the county would be compelled to do that which it never promised to do. Such conduct on the part of the county merely rendered it amenable to an action for such part of the indebtedness as was then due according to the terms of the donation. It results from this view that the trial court erred in the law case in rendering a judgment for the full amount of the five obligations, and the accrued interest, which were sued upon in that case. The recovery should have been limited to such annual installments as were then due.

Passing to the second question above stated, we observe that it does not follow from the views last expressed that the trial court was without jurisdiction of the law case because the sum recoverable therein was less than $2,000, exclusive of interest and costs. The amount claimed in the declaration or complaint, not the amount of the recovery, is the test of jurisdiction; and the fact that a sum in excess of $2,000, exclusive of interest and costs, was claimed, gave the trial court jurisdiction to render a judgment for a less amount, unless this court is able to find that a demand for a sum in excess of $2,000 was interposed in bad faith, for no other purpose than to give the federal court jurisdiction. Bank of Arapahoe v. David Bradley & Co., 19 C. C. A. 206, 72 Fed. 867, 36 U. S. App. 519. After a careful examination of the records, we fail to discover any evidence which would warrant this court in holding that the plaintiff in the law case demanded a judgment for the full amount of the five obligations by him held, either knowing or believing that he was not entitled to recover the sum claimed, and for the sole purpose of investing the federal court with jurisdiction. Besides, the fact that the learned judge of the trial court sustained the plaintiff's view, and rendered a judgment for the full amount of his claim, should be regarded as sufficient evidence that the claim as made was preferred in good faith, under an honest belief that it was tenable. It follows, therefore, that the contention on the part of the county that the trial court had no jurisdiction of the law case must be overruled.

The third question above mentioned concerns the right of the complainants in the equity case to sue in equity, and with respect to that question it is to be first observed that the causes of action sued upon are clearly of legal cognizance. The actions are founded upon

a promise by the county to pay a certain sum annually out of a fund to be raised by the levy of a tax of one mill on the dollar on all property situated within the county which is subject to taxation. This promise, however, does not run to the holders of the obligations jointly, so as to compel them to unite in a suit to enforce it; for by issuing 149 obligations, each payable to bearer, and by reciting therein, in substance, that the sum raised annually would be apportioned pro rata among all the obligations, the county, in effect, promised to pay to each holder such a portion of the fund as he was entitled to receive. No reason is perceived why each holder of one or more of the obligations in suit may not sue at law, as one of them has already done, and obtain a judgment for the sum due to himself, by proving at the trial what sum would have been raised, and what part thereof would have been payable to him, had the tax been levied. Nor do we perceive that the remedy in equity is any more efficacious than at law. All that a court of equity can do is to determine the validity of the obligations, and render a money decree for the amount of the annual installments then due and unpaid. As much can be done by a court of law, and with equal facility. Moreover, after the validity of the obligations has been established, and a judgment obtained, resort must then be had to a legal remedy, to wit, a writ of mandamus, to compel the levy of a tax to pay the judgment, whether it be recovered at law or in equity, since it is a well-settled doctrine in the federal courts that a court of equity cannot command the levy of a tax; that being a duty which the legislature must impose; the sole function of the courts being to enforce its performance by mandamus when it has been imposed. Heine v. Levee Com'rs, 86 U. S. 655, 22 L. Ed. 223; Rees v. City of Watertown, 86 U. S. 107, 22 L. Ed. 72; Stryker v. Board, 23 C. C. A. 286, 292, 77 Fed. 567. The argument in support of the right of the bondholders to unite and sue in equity on all of the obligations, in its last analysis, results in this proposition: That whenever several persons have distinct or several demands against the same person or corporation, growing out of contract, they may, for the purpose of avoiding a multiplicity of suits, unite and sue in equity to enforce the payment thereof, provided their several demands were incurred by the defendant at the same time and in the same manner, and provided that the defendant interposes or threatens to interpose the same defense thereto. This proposition, in our judgment, is not sustained by any well-considered decision. In the case of Osborne v. Railroad Co. (C. C.) 43 Fed. 824, it appeared that the title of numerous owners of land, who held the same in severalty, and who were also in possession of their respective tracts, was clouded by a claim to all the land which was preferred by a railway company under its land grant; and it was held by Mr. Justice Harlan, on the circuit, that the several landowners might unite in a bill against the railroad company to remove the common cloud, and have the claim adjudged to be invalid. It will be noted that in this case equity had jurisdiction for other reasons than to avoid a multiplicity of actions; this latter ground having been adverted to not as the sole reason for affording relief in equity, but merely to uphold the right of the complainants to file a joint bill, and to avoid

the charge that the bill was multifarious. On the other hand, in the case of Heine v. Levee Com'rs, 86 U. S. 655, 22 L. Ed. 223, several bondholders, whose bonds had been issued at the same time and under the same circumstances by a board of levee commissioners, united in filing a bill in chancery to obtain a decree for the amount of the bonds, and to compel a levy of taxes to satisfy the decree. It was held that a court of chancery had no jurisdiction of the case unless there was some obstruction in the way of the common-law remedy, and it was not even suggested by court or counsel that, because a suit in chancery would lessen the number of actions, such a proceeding could for that reason alone be maintained, although the bonds sued upon did originate in the same transaction, and although the defenses thereto were the same, and the same questions of law and fact would be involved in the trial. It was said, in substance, that the appropriate remedy was in a court of law, the causes of action being of legal cognizance. It is obvious that, if the proposition contended for by the complainants in the equity case is tenable, then the holders of municipal bonds may always unite and sue in equity if the municipality repudiates its obligations, on the pretense that by so doing a multiplicity of suits will be avoided. Such a practice, however, has never obtained or been attempted, although actions upon such bonds have been very numerous, except in the instance above cited, where the jurisdiction in equity was emphatically denied. As bearing incidentally on the point now under consideration, it may be further observed that in several cases before the supreme court where the question of jurisdiction, in view of the amount in controversy was involved, that court has inferentially recognized the right of several persons having distinct interests to unite in an appeal on grounds of convenience, provided their rights or liabilities grow out of the same transaction and give rise to the same questions. But in such cases litigants have never been permitted to aggregate their claims for the purpose of making up the amount necessary to confer jurisdiction unless they were able to show a common and undivided interest in the subject-matter of the litigation. Clay v. Field, 138 U. S. 464, 11 Sup. Ct. 419, 34 L. Ed. 1044; Hawley v. Fairbanks, 108 U. S. 543, 548, 2 Sup. Ct. 846, 27 L. Ed. 820; Ex parte Baltimore & O. R. Co., 106 U. S. 5, 1 Sup. Ct. 35, 27 L. Ed. 78. See, also, a late case, Wheless v. City of St. Louis, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583, affirming the carefully considered decision of the circuit court in the same case. Vide 96 Fed. 865. Persons holding distinct claims arising out of contract, which may be reduced to judgment at law without difficulty, should not be allowed to aggregate them and sue in equity, even if they do grow out of the same transaction and involve the same questions, and even though a multiplicity of actions would thereby be avoided. If such a practice was tolerated, the boundaries of the jurisdiction of courts of law and equity would soon become confused or obliterated.

The result is that the bill in the equity case was properly dismissed for want of jurisdiction in equity, but such dismissal should have been without prejudice to the complainants' right to sue at law.

For the reasons already stated, the judgment in the law case, although it was for the right party, cannot be sustained, because the recovery was excessive. It is accordingly ordered that the judgment in the law case be reversed, and the cause remanded for a new trial, and that the decree in the equity case be modified by adding thereto a clause that the dismissal is without prejudice to the complainants' right to sue at law, and that as thus modified, the decree be affirmed.

SANBORN, Circuit Judge (dissenting). I concur in the views expressed in the foregoing opinion, upon every question except that relating to the right of the complainants to maintain a suit in equity. It seems to me that they have that right, and for the following reasons:

This bill in equity is brought by 26 different parties, each of whom is the separate owner of certain specific bonds. They allege in their bill the terms of the bonds, the vote to issue them, the construction of the railroad, the subsequent delivery of the bonds, and their purchase of their respective holdings. They aver that the indebtedness of the county upon each bond is $1,210; that the county has collected and now has in its treasury $3,059.16, which it has obtained by the levy and collection of taxes to pay these bonds, and that it has refused to pay over this fund, or to make any further levies of taxes to satisfy the indebtedness evidenced by their obligations; and that they have sustained damages in the amount of $1,210 upon each bond by the acts of the defendant. They pray that the fund in the county treasury derived from the levy and collection of the taxes to pay their securities be paid over to them as their respective interests may appear; that the proper officers of the county be directed to make a levy annually of one mill on the dollar on the taxable property of the county to pay the bonds; and they ask for general relief. A glance at the bond discloses the fact that it contains no promise to pay any sum certain at any certain time, and that the only agreement in it is, in effect, that it will pay to each bondholder his pro rata share of such an amount as shall be raised annually by the levy of one mill upon a dollar upon the taxable property of the county. It is a promise to raise and pay over a share of a fund,—nothing more and nothing less. Bearing in mind the nature of this obligation, let us consider the objections to the maintenance of this suit in equity. The contention that distinct demands or liabilities cannot be aggregated for the purpose of giving the circuit court jurisdiction (Clay v. Field, 138 U. S. 464, 480, 11 Sup. Ct. 419, 34 L. Ed. 1044; Hawley v. Fairbanks, 108 U. S. 543, 548, 2 Sup. Ct. 846, 27 L. Ed. 820; Ex parte Baltimore & O. R. Co., 106 U. S. 5, 1 Sup. Ct. 35, 27 L. Ed. 78; Wheless v. City of St. Louis, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583) has no relevancy to this case, because the complainant first named in the bill owns 18 bonds, evidencing an indebtedness of $21,780; and there is no more reason to suppose that his claim to recover this amount in this suit in equity was made in bad faith, than there is to suppose that the claim of Williams in the action

at law to recover the entire debt evidenced by his bonds was made in bad faith. Moreover, the amount in controversy in the equity suit is not the aggregate amount which the levy of one mill on a dollar for the years 1898 and 1899 would produce and render applicable to the payment of these bonds. On the other hand, it is the entire debt which they evidence, because a decree in this suit that the issue of the bonds was unauthorized, and that the complainants are entitled to no levy to pay them, will necessarily render every part of them void, and will constitute a perpetual bar to any subsequent suit to collect any unpaid portion of them. The amount in controversy, therefore, between the complainant Blair alone and the defendant, was far more than sufficient to confer jurisdiction upon the court below.

Turning to the general question whether or not a court of equity has jurisdiction of the case made by this bill, there are three grounds which warrant the maintenance of this suit:

1. The owners of separate claims and rights of action against the same party may maintain a single suit against him "where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as coplaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone." 1 Pom. Eq. Jur. §§ 245, 255, 257, 268, 269, 273; Crews v. Burcham, 66 U. S. 352, 357, 17 L. Ed. 91; Osborne v. Railroad Co. (C. C.) 43 Fed. 824, 828. There is no fatal misjoinder of causes of action in equity in any bill which presents a common point of litigation, the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit. Kelley v. Boettcher, 29 C. C. A. 14, 23, 85 Fed. 55, 64, 56 U. S. App. 363, 378; Hayden v. Thompson, 17 C. C. A. 592, 598, 71 Fed. 60, 67, 36 U. S. App. 361, 369; Chaffin v. Hull (C. C.) 39 Fed. 887; Brinkerhoff v. Brown, 6 Johns. Ch. 139; Fellows v. Fellows, 4 Cow. 682, 700; Prentice v. Forwarding Co., 7 C. C. A. 293, 296, 58 Fed. 437, 441, 19 U. S. App. 100, 108; Brown v. Safe Deposit Co., 128 U. S. 403, 412, 9 Sup. Ct. 127, 32 L. Ed. 468. There is a common point of litigation between the complainants and the defendant in this suit. Indeed, the only point of litigation is a common one. It involves the question whether or not the sole defense to these bonds is good,—whether or not their issue was authorized by the statutes of Nebraska. If this defense is good against one, it is good against all the complainants; and, if it is bad against one, it is bad against all. The complainants' rights and causes of action arise from a common source,—from the act of the county in issuing the bonds. They involve similar facts. They are governed by the same legal rules, and a single decision in this single suit between them and the county will determine all the rights of the parties in interest, and will settle the entire matter in litigation. A decree in this suit that the issue of these bonds was unauthorized will bar all farther actions or suits upon them, and a decree that

they were lawfully issued will perpetually estop the defendant from defeating them. The case falls far within the familiar rule which has been quoted from Pomeroy.

2. Equity has jurisdiction of suits to execute trusts and to administer and distribute trust funds. This is a suit for that purpose. The $3,059.16 which the defendant has collected and placed in the hands of its treasurer by means of the levy of the tax to pay these bonds required by the statute is charged by the law with a trust for the benefit of the complainants. Neither the county nor the taxpayers nor any other party has any right to this money. The treasurer holds it in trust for the complainants, and any one or more of them has the right to institute and maintain a suit in equity, against this trustee and all the other holders of bonds who claim a share in it, to ascertain the respective rights of the claimants therein, to compel the execution of the trust and the distribution of the money. Insurance Co. v. Mead (S. D.) 82 N. W. 78, 82. This is one of the objects of this suit, and this alone is sufficient to sustain the jurisdiction of the court, and, having thus obtained jurisdiction, to warrant it in proceeding to determine the rights of these parties in the entire subject of this litigation.

3. The complainants are without any adequate remedy at law. The remedy at law which will preclude the maintenance of a suit in equity must be "plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." Boyce v. Grundy, 28 U. S. 210, 215, 7 L. Ed. 655; Oelricks v. Spain, 82 U. S. 211, 221, 223, 21 L. Ed. 43; Preteca v. Land Grant Co., 1 C. C. A. 607, 50 Fed. 674, 4 U. S. App. 326; Foltz v. Railroad Co., 8 C. C. A. 635, 641, 60 Fed. 316, 322, 19 U. S. App. 576, 587; Hayden v. Thompson, 17 C. C. A. 592, 594, 71 Fed. 61, 63, 36 U. S. App. 361, 367. There are 26 complainants in this suit. Would 26 actions at law be as efficient, as practical, and as prompt to attain the ends of justice, as this suit in equity? These bonds, as we have seen, contain no promise to pay any sum certain at any certain time. They are mere acknowledgments of indebtedness, and agreements to levy a tax and to distribute the proceeds pro rata among the bondholders. All the bondholders are necessary parties to the distribution by any court of the proceeds of any tax that may be levied, because no court can so determine the pro rata share of any bondholder that its decision will bind the other bondholders, and protect the county from excessive payments, unless the other bondholders are parties to the suit. They cannot be made parties to an action at law. Nor is there any way in which the amount for which a judgment at law in favor of any bondholder should be rendered can be definitely ascertained. The sum he is entitled to recover in an action at law is his pro rata share of the amount which a tax of one mill on a dollar on all the taxable property of the county would have produced in the years 1898 and 1899 if it had been levied and collected. It may be possible to determine what amount should have been levied, but how can the amount that would have been collected if the levy had been made in 1899 be found in an action

at law? And how can the pro rata share of a plaintiff be so adjudged that the decision will bind the other bondholders, and protect the county from excessive payments? These questions may present themselves for answer in 26 actions at law, followed by 26 proceedings by mandamus, before the complainants will secure any relief, if they are forbidden access to a court of equity. Proceedings of that character will fall far short of this simple suit in equity in efficiency, practicability, and promptitude. All the bondholders are or may be made parties to this suit. A single decree here may adjudge the validity of the bonds, the number of bonds held by each claimant, the amount owing to each claimant thereon, and his percentage of the trust fund now in the hands of the treasurer of the county, and of the proceeds of any tax levies that may hereafter be made. Such a decree would bind all the parties interested in this litigation, and put an end to the controversy. The defendant would then undoubtedly proceed to levy the tax and pay the bonds according to their terms, and, if it did not, such a decree would be as ample a warrant for the necessary proceedings by mandamus as any judgment at law can be. This suit in equity is a far more simple and effective way to attain the ends of justice in this matter than any actions at law can be The bill is an application for the administration and distribution of a trust fund, and it presents a case where a number of persons have separate and individual claims and rights of action against the same party, which arise from a common source, which involve a common point of litigation, and which can all be settled by a single decision in a single suit.

For these reasons, it appears to me that a court of equity has jurisdiction of this suit, that the judgment sustaining the demurrer to the bill ought to be reversed, and that the suit should be sustained.

PEABODY GOLD MIN. CO. v. GOLD HILL MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. October 21, 1901.)

No. 685.

1. MINERAL LANDS—VALIDITY OF PATENT.

A patent for mineral lands, which has been in existence for 16 years, and which protects rights that have been continuously exercised by the patentee and his predecessors in interest for nearly 50 years, will not be declared void as to any portion of the granted premises solely for the reason that upon its face it purports to be based on a single mining location, and conveys more than may lawfully be included in one location, when in fact the claims were several, and might have been united in a single patent upon a proper presentation of the facts.

2. SAME—PRESUMPTION.

Where there might have been circumstances which, under existing laws, would have authorized the land department to include in a patent for mining ground all the ground therein described, it will be presumed in support of the patent, when collaterally attacked, that such circumstances existed.

3. SAME—RIGHT TO ATTACK PATENT FOR FRAUD—SUBSEQUENT LOCATION.

A suit to set aside a patent for mineral lands on the ground of fraud practiced on the land department cannot be maintained by a private

individual, who had at the time no claim upon any of the lands, but made a location thereon subsequently, such ground of invalidity being available only to the United States.

4. SAME—GROUNDS FOR CANCELLATION OF PATENT—FRAUD.
Allegations in a bill for the cancellation of a patent for mineral lands that the several claims embraced therein were falsely and fraudulently represented by defendant to the land department to be quartz claims, when they were, in fact, placer claims, afford no ground for the cancellation of the patent, where the fact that they were placer claims would not have precluded the owner from obtaining a single patent therefor, and it is not shown that the government was in any way injured by the false representation.[1]

5. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—ALLEGATIONS IN PLEADINGS.
A complainant cannot invoke the jurisdiction of a federal court by setting forth the contention which will be made by defendant in answering the bill upon which a federal question will arise.[2]

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

The appellant, the Peabody Gold Mining Company, brought a suit against the appellee, the Gold Hill Mining Company, to quiet its title to certain mining property situate in Nevada county, Cal., consisting of three claims known as the "Peabody," the "Suum Quique," and the "Croesus." The bill alleges that these three claims constitute one mining property. The facts upon which relief is sought as set forth in the bill present two distinct causes of suit. So far as the Peabody claim is concerned, the bill alleges no more than title in the complainant and wrongful trespass thereon by the defendant. As to the other claims, the Suum Quique and the Croesus, it is alleged that both were located on September 7, 1898, and that the whole of the former and a portion of the latter are included within the surface area of the Gold Hill Quartz Lode Mining Claim, which was patented to the appellee on August 9, 1883; that the appellee's patent was obtained upon an affidavit showing that the Gold Hill Quartz Lode Mining Claim had been located about the year 1852, after the discovery of a vein or lode within its limits, which affidavit the bill alleges was false and fraudulent; that in fact the claim was not located as a quartz claim, but comprised a consolidation of numerous separate and distinct placer claims, none of which were valid as quartz claims under the mining laws or mining rules and regulations of the time; and that the said patent was fraudulently obtained. The bill also alleges that the patent was issued in violation of the act of congress of May 10, 1872, limiting 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; that the whole of the Suum Quique and a portion of the Croesus are located upon land included within the surface boundaries of the Gold Hill claim, but which lie east of a line drawn parallel with and 300 feet east of the center of the lode. It is alleged that as to the land so included in the patent exterior to a line parallel with and 300 feet from the said lode or vein the patent is void. The bill further alleges that in violation of the rights of the appellant the appellee has trespassed upon the appellant's said claims beyond the 300-feet line from the center of the lode, asserting its right so to do under its patent. To this bill the appellee demurred for want of equity, and for the reason that it appeared from the bill that the Suum Quique and a portion of the Croesus lodes are within the patented surface boundaries of the Gold Hill claim; and further demurred to so much of the bill as concerns the Peabody claim for the reason that the court has no jurisdiction thereof.

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[1] Cancellation of patents to public lands, see note to Hartman v. Warren, 22 C. C. A. 38, pars. 7–12.

[2] Federal questions as conferring jurisdiction on United States courts, see notes to Bailey v. Masher, 11 C. C. A. 308; Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co., 35 C. C. A. 7.

since no federal question is involved. The circuit court sustained the demurrer, and from that ruling the present appeal is taken. 97 Fed. 657, 106 Fed. 241.

A. H. Ricketts, for appellant.
E. W. McGraw, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

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

The bill directs an attack against the patent upon two grounds: First, that it covers surface ground in excess of 300 feet in width from the center line of the lode, and is as to such excess void; second, that it was procured by false representations to the officers of the land department, and therefore should be set aside and annulled. As to the first ground, it is alleged in the bill that up to the time of the issuance of the patent, August 9, 1883, and for some time thereafter, there had been discovered upon the premises covered by the patent but one vein or lode, and that lode or vein, as shown upon the map and the field notes accompanying the patent, ran in a straight line along the western boundary of the patented premises. Does it follow from these facts that the patent is void as to the surface therein contained which lies beyond and eastward of the line 300 feet from the center of the lode? If, upon any theory of the facts, the patent may be sustained, it is the duty of the court to indulge the presumption that the facts existed, and were properly brought to the attention of the officers of the land department, before the patent was issued. All intendments are in favor of the validity of the patent. Before it was issued, the officers of the land department were required to ascertain whether the necessary antecedent steps had been taken which justified its issue. They acted upon the papers and proofs which were presented, and thereupon based their conclusion. It was their duty to investigate the facts, and it must be presumed that such investigation was had. The issuance of the patent was a judicial determination of the patentee's rights. It cannot be disputed that facts might have existed which would have authorized the issuance of the patent for all the surface ground described therein as a quartz lode claim. We think the bill itself suggests such a state of facts. It sets forth the survey of the mining claim and the affidavits which accompanied it. It appears therefrom that the survey was made in August, 1881. In the report of the deputy mineral surveyor and in the affidavit of the oldest discoverer of the Gold Hill ledge and the first locator of a claim thereon it was stated that the first discovery of quartz rock on the lode was made in the year 1850, and that thereupon numerous other claims were made, all of which were 30 by 40 feet by local mining rules; that from the time of the discovery the said mining claims had been continuously mined, and that at the time of the survey $3,000,000 had been taken therefrom; that in 1877 the appellee became the owner of the mining premises which were included in the

patent, having acquired the same by purchase from the original locators. If it be true, as shown by these exhibits to the bill, that the claim thus patented consisted of an aggregation of small quartz mining claims located under the local mining rules and regulations, which claims were subsequently conveyed to the appellee, there was no reason why they might not all have been combined and included in one patent. The right to so combine them and to obtain the patent therefor is not impaired by the fact that the proceedings on which the patent was issued purport to have been instituted and carried out for the acquisition of a single quartz mining claim under the provisions of the act of congress of May 10, 1872. A patent which has been in existence for 16 years, and which protects rights that have been continuously exercised by the patentee and his predecessors in interest for nearly 50 years, will not be declared void as to any portion of its granted premises solely for the reason that upon its face it purports to be based upon a single mining location, and conveys more than may lawfully be included in one location, when in fact the claims were several, and might have been united in a single patent upon a proper presentation of the facts. In Polk's Lessee v. Wendal, 9 Cranch, 87, 3 L. Ed. 665, it was held that a patent of the state of North Carolina for 25,000 acres of land was not void upon its face for the reason that it covered more than 5,000 acres, which was the limit prescribed for a single entry by the laws of that state; and that there was nothing to prevent a person from making several entries, or from purchasing the rights acquired by other entrymen, and uniting several entries in one survey and patent. So, in Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875, where the patent described by metes and bounds premises containing 164.64 acres, more or less, it was held that a patent issued subsequently to the passage of the act of July 9, 1870, may embrace a placer claim consisting of more than 160 acres, and including as many adjoining locations as the patentee had purchased. Said the court in that case:

"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. * * * On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed."

In Tucker v. Masser, 113 U. S. 203, 5 Sup. Ct. 420, 28 L. Ed. 979, the doctrine of Refining Co. v. Kemp was carefully considered and affirmed.

The appellant relies upon the decision of this court in Lakin v. Roberts, 4 C. C. A. 438, 54 Fed. 461, and particularly upon the language of the opinion where it was said:

"The land department, therefore, had no power to issue a patent for a greater width of land than 300 feet, and the patent in this case in excess of 300 feet is void."

The judgment in that case was rendered upon an agreed statement of facts, in which it was made to appear that the land in controversy, which was occupied as a town site, was included within the area of the patented mining claim, but that there had never been any actual possession of that portion of the surface ground by the mining company, and that the right of the miners in that locality to a mining claim was not determined by rule or custom, but depended upon actual occupation of the surface. Under this admission of the facts, the land in controversy in that case was held to be excluded from the operation of the patent. The admitted facts effectually rebutted the presumption which otherwise would have attended the patent, the presumption that the locator was lawfully entitled to all the premises described in his grant, and that all the previous requisites of the law had been complied with.

But the bill, after setting forth the patent, and the representa tions made to the surveyor general upon which it was issued, proceeds to allege that the representations were false, and were fraudulently made, with the intention to deceive the surveyor general; and it seeks upon that ground to impeach and set aside the patent. It is charged that in the affidavit accompanying the survey it was falsely stated that the original mining claims which were contained in the survey were quartz lode mining claims, whereas in fact they were placer claims located and held in accordance with the laws of miners on Gold Hill, and that none thereof was valid under the mining laws of any district, or rules, regulations, or customs for the acquisition and holding of quartz claims. In brief, the allegation is that the surveyor general was led to believe that the claims were quartz claims, when the fact was that they were placer claims. We discover in these facts no ground upon which to set aside the patent. It is not alleged that fraud was practiced against the rights of the appellant. On the contrary, it appears from the bill that the location of the appellant's claims dates no further back than 1898. The present suit was commenced almost immediately after the locations were made. Under such circumstances a suit to set aside the existing patent on the ground of frauds alleged in the bill can only be instituted in the name of the United States. Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226. But, conceding it to be true that the nature of the mining claims was falsely represented as alleged in the bill, it does not follow that fraud was practiced upon the government, or that title was thereby acquired which could not lawfully have been acquired by the patentee. The fact that the claims were placer mining claims instead of quartz mining claims would not have precluded the owner thereof from obtaining a single patent therefor. The bill does not advise us that the government

has been in any way injured by the deception or by the false representation. The price per acre paid for the land patented as a quartz mining claim was greater than would have been the price per acre for placer claims. In short, the averments of the bill, viewed in any possible light, would be wholly insufficient to justify a court of equity, even at the suit of the United States, in setting aside the patent on the ground that fraud was practiced in obtaining it.

The foregoing discussion refers only to the averments of the bill concerning trespass upon those portions of the mining ground claimed by the appellant which lie within the surface ground patented to the appellee. So far as the remaining premises are concerned, and upon which the bill charges that the appellee has trespassed, no ground for the jurisdiction of the circuit court is presented. The bill attempts to show the existence of a federal question by setting forth the contention which will be made by the appellee when it comes to answer the bill. This is insufficient. Metcalf v. City of Watertown, 128 U. S. 586, 9 Sup. Ct. 173, 32 L. Ed. 543; Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; Mining Co. v. Turck, 150 U. S. 138, 14 Sup. Ct. 35, 37 L. Ed. 1030; Railroad Co. v. Lewis, 173 U. S. 457, 19 Sup. Ct. 451, 43 L. Ed. 766.

The decree of the circuit court will be affirmed.

HOME LAND & CATTLE CO. et al. v. McNAMARA et al.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1901.)

No. 683.

1. CONTRACTS—STIPULATED DAMAGES FOR BREACH—PENALTY.
   Defendant contracted to sell to complainants its herd of cattle on the range in Montana, estimated at 30,000 head, at a uniform price per head. The herd consisted of beef and stock cattle, and there was a provision that not less than 9,000 should be beef cattle, and that for any number short of that defendant should pay to complainants $20 per head. *Held*, that the stipulation for such payment could not be considered as in the nature of a rebate in price on account of the difference in value of the two classes of cattle, since the contract contained no provision for the relative number of each class to be delivered, nor as fixing any actual or equitable measure of damages, but that it was a stipulation for a penalty which a court of equity would not enforce.

2. SAME—MONTANA STATUTE.
   Under Code Mont. §§ 2242, 2243, which provide that a contract by which the amount of damages to be paid for the breach of an obligation is determined shall be void except that "the parties to a contract may agree upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage," a stipulation in a contract for the sale of cattle that the seller shall pay to the purchaser a certain sum per head for any shortage in the number of a certain class contracted to be delivered is void, the actual damages in such case being capable of ready ascertainment.

3. SPECIFIC PERFORMANCE—BREACH OF CONTRACT BY COMPLAINANT.
   Defendant contracted to sell complainants its herd of cattle, estimated at 30,000 head, 9,000 of which were to be beef cattle, and stipulated to pay $20 per head for any shortage of beef cattle below that number.

The cattle were on the range, and were to be delivered at different times and places during the season, as should be designated. A few days before the expiration of the time for the completion of the delivery, defendant was making a delivery under the contract, and, after delivering a part of the number on hand, demanded payment therefor before delivering the remainder. This complainants refused, except on allowance of the stipulated $20 per head for the shortage of beef cattle, and defendant thereupon refused to deliver more. At that time it had delivered in all about 16,000 head, of which about 7,200 head were beef cattle, and had but a few hundred head remaining, none of which were beef cattle. *Held* that, the stipulation for the payment of the $20 per head being in the nature of a penalty, and unenforceable, as well as void under the statute, complainants were not justified in refusing the payment demanded, and their doing so constituted a breach of the contract, which precluded them from maintaining a suit in equity to compel specific performance by the delivery of the remainder of the cattle.

4. REFERENCE—REVIEW OF MASTER'S REPORT—CONCLUSIONS OF LAW.
Where a cause has by consent been referred to a master to make findings on all the issues, both of fact and law, a party may file exceptions to the master's conclusions of law after the report has been filed in court, under equity rule 83, notwithstanding his failure to file any exceptions before the master.

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

This was a suit in equity, brought by the appellees, citizens of Montana, to enforce the specific performance of a contract which they had made with one of the appellants, the Home Land & Cattle Company, a corporation, of the state of Missouri, which will be called herein the "Cattle Company." The contract was made at Chicago on May 27, 1897. It provided for the sale and delivery of a herd of cattle belonging to the Cattle Company, which, by the terms of the contract were said to consist of 30,000 head, more or less, of stock cattle and beef cattle, ranging in Valley, Dawson, and Custer counties, Mont. The contract provided that the cattle should be gathered by the Cattle Company and delivered to the appellees at certain designated stock yards in Montana during the regular round-up season of 1897, no cattle to be tendered or accepted later than November 1, 1897. All stock cattle were to be accepted by the appellees whenever tendered prior to November 1, 1897, in not less than train load lots. All beef cattle were to be delivered and counted when marketable for beef in the opinion of the appellees. The contract price to be paid was $25 per head for every head delivered, payable upon the delivery. There was a special guaranty in the ninth clause of the contract that not less than 9,000 head of the cattle delivered during the season should be beef cattle of certain designated grades, and that in case of the failure of the Cattle Company to deliver that number of beef cattle it would pay to the appellees "the sum of $20 in cash for each and every head less than 9,000 head of such cattle so delivered." There was a further provision that the appellees upon their part agreed to purchase of the Cattle Company 500 head of saddle and work horses, to be selected out of its band of horses, at $20 per head, at the end of the round-up season of 1897; but there was no covenant upon the part of the company to sell the said horses. The interest of the Cattle Company in the contract was assigned to the National Bank of Commerce of St. Louis, and that corporation was made a party defendant to the bill. The bill alleged the execution of the contract and the performance thereof on the part of the appellees, and but a partial performance on the part of the appellants. Upon issue joined, by consent of the parties, the cause was referred to the master in chancery to hear the testimony and report the same, together with his conclusions of fact and law, to the court. His findings, which were adopted by the court in rendering a final decree, embodied substantially the following facts: That during the round-up season of 1897 there were delivered and accepted by the appellees from the Cattle Company in all about 16,000 head of cattle, comprising

both stock and beef cattle, and, in addition thereto, the appellees received from the board of stock commissioners of the state of Montana the proceeds of the sales of 148 stray cattle belonging to the Home Land & Cattle Company. That of the cattle so delivered, 7,135 were beef cattle, such as were stipulated for in the guaranty of the ninth clause of the contract, and 1,865 of the 9,000 head of beef cattle so contracted for were not delivered. That upon October 18, 1897, the Cattle Company notified the appellees that it would deliver to them on October 21, 820 head of beef cattle, 631 head of stock cattle, and 500 head of horses; and upon October 21 and 22, 1897, the Cattle Company did deliver to the appellees 820 head of beef cattle and 113 head of stock cattle, the price of which, under the contract, was $23,325. That the Cattle Company was then prepared to make further delivery to the appellees of the 457 stock cattle and 500 head of horses, but refused to deliver the same, or to make any further delivery, unless the appellees would pay the $23,325 due upon the delivery just made. The appellees refused to pay said sum, but offered to pay for said 457 head of cattle and said horses upon their delivery, provided that the appellants, or either of them, would pay the appellees the amount due for shortage in the number of beef cattle called for under the guaranty of the contract at the specified price of $20 per head, and the appellees thereupon presented to the appellants a statement and tendered payment of $9,675, which they claimed would be the balance due the appellants for all the cattle delivered and cattle and horses to be delivered after deducting $37,900 for the shortage upon the beef cattle. This offer the appellants refused to accept, and refused to deliver the 457 head of stock cattle or the horses. That on October 22, 1897, the Cattle Company had finished its round-up for that season, and had made no preparations for, and did not intend to make, further delivery under said contract, and did not have on its range to exceed 300 head of beef cattle, and the appellants then knew that the Cattle Company could not deliver the remainder of the 9,000 head of beef cattle. It was further found that there was an increase in the value of cattle during the season of 1897 of $5 per head. It was found by the court that the appellees depended upon the delivery of the cattle mentioned in the contract to furnish cattle under contracts which they had to the government Indian reservations, and that they had prepared for and made provision to winter at their ranches in Montana cattle to fill such contracts, and depended upon the cattle contracted for to fill the same. The court thereupon decreed the specific performance of the contract, so far as it related to the 457 head of stock cattle, and ordered that the same be turned over to the appellees without further payment to the appellants. 105 Fed. 202.

W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., for appellants.
H. G. McIntire and S. H. McIntire, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

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

One of the contentions upon the part of the appellants is that the appellees cannot demand the specific performance of the contract, for the reason that they themselves failed to carry out its provisions by refusing to pay the $23,325, which, under the contract, became due upon the delivery of the cattle which were turned over to and received by the appellees upon October 21st and 22d. The contracting parties, at the time of entering into the contract, had estimated the herd of cattle at 30,000 head. It was known that it consisted of two grades,—beef cattle and stock cattle. It was believed that of the former there were 9,000 head, and the Cattle Company so guarantied. The price of $25 per head for the whole herd was

agreed upon on that basis. The beef cattle were more valuable than the stock cattle. The testimony on behalf of the appellees is that, but for the guaranty that there were 9,000 head of the beef cattle, they would have paid no more than $23 per head for the herd. It must be borne in mind that this provision for the forfeiture of $20 per head for shortage in the stipulated number of beef cattle does not provide for general damages for breach of the contract. It does not relate to the stock cattle, nor does it contemplate damages for failure to deliver the full 30,000 head. If, for instance, there had been a delivery of 9,000 head of beef cattle under the contract, and no other cattle whatever had been delivered, the provision in the contract for forfeiture would not have applied to such a breach. There is no ground for the contention that the provision requiring the Cattle Company to pay the appellees $20 per head for all the beef cattle that fell short of the 9,000 head so guarantied is equivalent to a rebate from the purchase price upon the theory that the stock cattle were less valuable than the beef cattle. The facts fully contradict this theory. It is proven that at the stipulated price of $25 per head the appellees, although they received less than the stipulated number of cattle, received better cattle than their contract called for. The number of cattle actually found to be in the herd, instead of 30,000, was about 16,000 head, but the proportion of beef cattle to the stock cattle in the herd as delivered was much greater than the proportion contemplated in the contract. By the terms of the contract considerably less than one-third of the herd were to be beef cattle. As the cattle were actually delivered, nearly one-half were beef cattle. It is apparent, therefore, that there was no damage to the appellees by reason of the disparity in value between the stock cattle and the beef cattle which they had received; on the contrary, that disparity was to their advantage. The bill alleges, it is true, that the cattle under the contract possessed "a special and peculiar value" to the appellees, "which could not be adequately compensated for in money damages." This averment is evidently inserted for the purpose of showing that the case is one for specific performance. It does not relate to the beef cattle especially, but to the whole number of cattle contracted for. There is no averment in the bill that the beef cattle possessed special value to the appellees, and there is no allegation upon which it may be predicated that the appellees sustained special damages for the failure to deliver the beef cattle, or any damages other than those which resulted from the increase in value of the cattle. Not only is there no such averment, but there is no evidence whatever of such damage. It appears from the testimony that more than one-half of the beef cattle which were received by the appellees under the contract were, immediately upon delivery to them, at different times, consigned to the market at Chicago; and one of the appellees testified that no more than 1,000 head of them were used in filling their contracts with the Indian agencies, and that the appellees were not damaged, so far as their beef contracts were concerned, by the failure of the appellants to deliver the remainder of the 9,000 head. The provision for the payment of $20 per head for each head short of

the 9,000 did not provide, therefore, for actual damages, or for an equitable compensation to the appellees in case of a breach of the guaranty, in any view of a possible deficiency in the guarantied number of the beef cattle. It can readily be seen, for instance, that, if one-half of the 16,000 head delivered had been beef cattle, there would have been a shortage of 1,000 beef cattle under the contract, involving a forfeiture of $20,000 for a breach which would have occasioned no damage whatever to the appellees; or, if the 16,000 head delivered had been all stock cattle, and there had been a total failure to furnish any beef cattle whatever, the forfeiture would have been $180,000, a sum vastly in excess of any possible damages. In short, it is evident, under the facts of the case, that the appellees could sustain no injury from the breach of the guaranty, except that which resulted from the increase in the value of the beef cattle during the season of 1897,—a contingency that was not foreseen, the amount of which increase could not be pre-estimated, and which the referee has found was in fact $5 per head, a sum grossly disproportionate to the stipulated forfeiture. The agreement can be regarded in no other light, therefore, than as a stipulation for a penalty. It calls for the payment of a sum of money greatly in excess of the actual damages, and it is a case where the damages could have been easily ascertained by proof of the market value of the cattle at the time of the breach of the contract. Such agreements the courts uniformly refuse to sustain, leaving the party injured by the breach to his remedy at law for the recovery of his actual damages. 1 Suth. Dam. 490.

But whether the agreement in this instance is strictly one for a penalty or for liquidated damages is not material. In either case it is made void by the Code of Montana (sections 2243, 2244), which enacts that a contract by which the amount of damages to be paid or other compensation to be made for breach of obligation is determined is to that extent void, except that "the parties to a contract may agree upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." There is nothing in the record to show that the damage to the appellees by reason of the breach of the guaranty in this case could not have been ascertained without difficulty. The only element of damages from the shortage in the number of the beef cattle was the difference between the contract price and the market price at the time of delivery. The appellees had no legal excuse, therefore, for refusing to pay the $23,325 which was due under the contract upon the delivery of cattle on October 22d. They had no right to withhold the money, or to apply it on their claim for damages. Their damages, if any they sustained under the contract, had not been liquidated. By refusing to make the payment, they violated a material provision of their agreement. Their refusal to pay justified the appellants in declining to make further delivery of cattle, and it effectually bars them now from suing in equity for the specific performance of the contract.

It is said, however, that the appellants failed to avail themselves

of the right to question the ruling of the court below by their omission to take proper exception to the findings of the master in chancery. The case of Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 32 L. Ed. 764, is cited in support of the doctrine that, where parties have consented to a reference to a master to hear and decide all the issues of the case, and report his findings, both of fact and of law, "his determinations are not subject to be set aside or disregarded at the mere discretion of the court." It is true that the court in that case remarked that such findings, "like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence or in the application of the law, but not otherwise." It is not necessary, however, in the case at bar, to determine what would have been the effect of a failure to take exception to the findings of the master upon a question of fact, or his omission to make material findings of fact. It is sufficient to point to the fact that the exception to the construction given by the court to the ninth clause of the contract was taken in apt time within the rule indicated in Kimberly v. Arms. After the report of the master was filed, the appellants filed in the circuit court proper and specific exception to the master's conclusions of law upon the very ground which is involved in the foregoing discussion, and upon the contention that the only damages which the appellees could be allowed were to be computed upon the difference between the market value of the cattle at the time of the delivery and the price which was agreed to be paid. Eq. Rule 83; Hatch v. Railroad Co. (C. C.) 9 Fed. 856; Jennings v. Dolan (C. C.) 29 Fed. 861; Fidelity Insurance & Safety Deposit Co. v. Shenandoah Iron Co. (C. C.) 42 Fed. 372.

The decree will be reversed, and the cause remanded, with instruction to dismiss the bill.

BLYTHE CO. v. HINCKLEY et al.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1901.)

No. 661.

1. APPEAL—QUESTIONS REVIEWABLE.

An appeal in equity brings up the whole case, and any matter of law apparent on the face of the record is open to the consideration of the court. The appellee may insist on a ground of demurrer to sustain a decree dismissing the bill, although such ground was overruled by the court below.

2. BILL OF REVIEW—TIME FOR FILING.

Under the settled rule of courts of equity of the United States that a bill of review must be filed within the time allowed by statute for an appeal, an attempted appeal to the supreme court in a case in which no appeal to that court is allowed by law does not operate to suspend the running of the time within which a bill of review may be filed, and such bill must be filed within the six months allowed for taking an appeal to the circuit court of appeals.

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

This is an appeal from the judgment of the circuit court (84 Fed. 228) dismissing a bill filed therein to review a pro confesso decree of the same court entered December 22, 1897, for alleged errors appearing upon the face of the record. The suit which was the foundation of the proceedings in the court below was one branch of the long-pending contest over the large estate left by the late Thomas H. Blythe, and was initiated in the circuit court by the filing on the 3d day of December, 1895, by John W. Blythe, alleging himself to be a citizen of the state of Kentucky, and Henry T. Blythe, alleging himself to be a citizen of the state of Arkansas, against Florence Blythe Hinckley, Frederick W. Hinckley, her husband, and the Blythe Company, therein alleged to be citizens of California, of a complaint entitled, "Complaint to Quiet Title," in which it is alleged that the plaintiffs are the owners, as tenants in common with each other, of that certain piece of land situated in the city and county of San Francisco known as the "Blythe Block," "and also all those various tracts and parcels of land in the county of San Diego, state of California, amounting in all to forty thousand acres of land, more or less, and standing of record in the county recorder's office of said San Diego county in the name of Thomas H. Blythe, now deceased"; that the defendants to the suit claim that they have or own adversely to the plaintiffs some interest in the property, which claims the plaintiffs allege are false and groundless, and constitute a cloud upon the plaintiffs' title. The prayer of the complaint is that the defendants be required to set forth and produce their claims, and that it be adjudged by the court that the defendants to the suit have no right or title to any part of the property described, and the plaintiffs' alleged title be adjudged good and valid as against the defendants, and each of them. Seven days thereafter the complainants in that suit filed an amended complaint containing, in addition to the allegations of the original complaint, the averments that the Blythe Company is a corporation organized and existing under the laws of the state of California, and having its office and principal place of business in the city and county of San Francisco, and that each of the defendants is a resident of the Northern district of California, and that at the time of the commencement of the suit neither one of the parties was in possession of any part of the lands involved therein. Upon this amended complaint a summons was issued, and on December 21, 1895, served upon George W. Towle, Jr., attorney for the Blythe Company, and personally served upon the defendants Florence Blythe Hinckley and Frederick W. Hinckley, her husband. The Blythe Company answered the amended bill on the 28th day of December, 1895, in which answer, after denying, among other things, that the plaintiffs, or either of them, are the owners or tenants in common with each other, or otherwise, of any part of the lands in controversy, "as and for a cross complaint of defendant the Blythe Company against said plaintiffs, John Wesley Blythe and Henry Thomas Blythe, and each of them," alleges, among other things, that the Blythe Company is the owner of the lands in controversy; that no part of them was in the possession or control of any party to the suit at the time of the commencement of the action; that the plaintiffs, John Wesley Blythe and Henry Thomas Blythe, claim some interest therein adverse to the alleged ownership of the Blythe Company, which claims the cross complainant alleges to be false and groundless, and prays judgment accordingly against the plaintiffs, and also "that it be adjudged herein that defendants Florence Blythe Hinckley and Frederick W. Hinckley, her husband, are not, and that neither of said defendants is, the owner of or the holder of any interest in the lands in said complaint described, or any thereof; that the defendant the Blythe Company have judgment that it is the owner of said lands in said complaint described, and all thereof." On the 30th day of December, 1895, Florence Blythe Hinckley and Frederick W. Hinckley appeared specially, by leave of the court, and moved to quash the service of summons issued upon the amended complaint, on the ground that the suit was one that is only cognizable in a court of equity, and that the proper process to be issued in such a suit is that of subpœna. That motion was granted February 10,

1896. Thereafter a subpœna was issued upon the amended complaint and served upon the defendants Hinckley, who on November 2, 1896, entered a general appearance to the suit, and on December 14, 1896, filed a plea in bar thereto, alleging that the statement in the amended bill of complaint that the complainants are the owners, as tenants in common with each other, of the lands therein described, is based solely upon the claim that they are the lawful heirs and next of kin of Thomas H. Blythe, deceased, and that upon his death they inherited and acquired by succession the title to the real property described in the bill of complaint. The plea alleged that Thomas H. Blythe died intestate in San Francisco on the 4th day of April, 1883, and that at and before his death he was a citizen of the United States, and the owner of the real estate in controversy. It then proceeds to set forth in detail the probate proceedings in the superior court of San Francisco in the matter of the estate of Blythe, and the proceedings of that court upon the petition of Florence Blythe under the provisions of section 1664 of the Code of Civil Procedure of California, in which proceedings it was on October 22, 1890, adjudged and decreed that Florence Blythe (subsequently Florence Blythe Hinckley) was the child of Thomas H. Blythe, deceased, and that he legally adopted her as his lawful child and heir, and that as such she was the owner of all the estate of Thomas H. Blythe, deceased, wherever situated, and the only person entitled to have and receive distribution of his estate. The plea also recited proceedings on appeal to the supreme court of the state from that judgment, and its affirmance by the supreme court, and also the subsequent proceedings in the probate court, resulting in a decree distributing the estate of Thomas H. Blythe to Florence Blythe Hinckley; an appeal from that decree to the supreme court of the state, and its affirmance. The plea further alleged that on December 4, 1894, and prior to the commencement of the suit in which it was interposed, the possession of the whole of the property in controversy had, under that decree of distribution, been delivered to Florence Blythe Hinckley, since which time she has continued in its actual possession; and the plea prayed the judgment of the court in the premises. It was not by the complainants set down for argument, nor was issue joined thereon by them; but on January 14, 1897, they filed in the suit, by leave of the court, a "second amended and supplemental bill in equity," in which they omitted all reference to any of the property except the Blythe Block, and in which they alleged that Boswell M. Blythe, a citizen of California, and resident at Downey, in that state, was one of the heirs at law of Thomas H. Blythe, and was entitled to have some share in his estate, but by reason of his citizenship he could not be joined as complainant in the bill, and he was therefore made a defendant, in order that his rights might be protected; and this second amended and supplemental bill proceeded to set forth the substance of the proceedings in the state courts with respect to the estate of Thomas H. Blythe, substantially as contained in the plea of Florence Blythe Hinckley and Frederick W. Hinckley, and alleged further that the defendant Florence was born in England, the bastard child of an unmarried woman; that at the time of her birth her mother was a resident of England, and a subject of Victoria, queen of Great Britain and Ireland; that she remained in England at all times until after the death of Thomas H. Blythe; that she came to California for the first time in 1883; that she was then an infant, about 10 years of age, ineligible to become a citizen of the United States, and when she arrived in California was a nonresident alien. The second amended and supplemental bill then refers to the treaty of 1794 between Great Britain and the United States, sections 17 and 22 of article 1 of the constitution of the State of California, and sections 671, 672, and 1404 of the Civil Code of California, relating to the rights of foreigners and aliens to take real estate by succession as heirs at law of deceased citizens of the state, and then alleges, in various forms, that the superior court of San Francisco was without jurisdiction to adjudge or decree that Florence Blythe was capable of inheriting the real estate as heir at law of Thomas H. Blythe; that at the time of the commencement of the suit neither party thereto was in possession of the land situated in San Francisco, but that the same was in the possession of the public administrator of that city and county; that on October 26, 1894, the

superior court of the city and county of San Francisco entered a decree of distribution, wherein all the real property belonging to the estate of Thomas H. Blythe, deceased, was distributed to Florence Blythe Hinckley, and that on December 4, 1894, possession thereof was delivered to her; that the property situated in San Francisco is covered with stores and tenements, which are much used and in great demand as places of business, yielding a monthly rental of about $12,000, which the defendant Florence receives each month; that on January 18, 1896, the superior court of the city and county of San Francisco granted a final decree of distribution, wherein the residue of the estate remaining in the hands of the public administrator, amounting to $89,842.94 (being the rents accrued from the real property), was distributed to the defendant Florence. The prayer of the second amended and supplemental bill is that the title of the complainants to the real estate be quieted, and that they be let into the possession thereof; that as to the defendants Florence Blythe Hinckley and Frederick W. Hinckley, her husband, an account of the rents and profits which had been received, or which might thereafter be received up to the final hearing, by the defendant Florence, or any one claiming under her, be taken, and, upon the coming in of the report and the confirmation thereof, the amount be adjudged and decreed to the complainants. On the 1st day of February, 1897, the Blythe Company filed an answer to this second amended and supplemental bill, in which the material allegations thereof were put in issue, and the alleged heirship of the grantors of the Blythe Company to the estate of Thomas H. Blythe set forth.

On the 15th day of February, 1897, the defendant Florence Blythe Hinckley (her husband, Frederick W., having died on the 6th day of that month) appeared specially, by leave of the court, and made two motions: (1) A motion to strike from the files the last-mentioned pleading of the Blythe Company, on the ground, among others, that it could not be determined therefrom whether it was intended as an answer or a cross bill, or both an answer and a cross bill; that, if it was intended as a cross bill, no defendants were named; that it contained no prayer for a subpœna or for any process; and that it was not signed by counsel or by the Blythe Company. (2) A motion to strike out certain portions of the pleadings (in the event the first motion should be denied) on the ground, among others, that in the matter alleged it was attempted to introduce a new controversy into the suit, and one wholly distinct and separate from that mentioned and set forth in the bill and a controversy between the defendant the Blythe Company and the defendant Florence Blythe Hinckley, who were citizens of the same state. The order of the court granting the defendant Florence Blythe Hinckley leave to appear and make these two motions contained the further order "that no further appearance in respect to said pleading so filed by said Blythe Company need be entered by said defendant Florence Blythe Hinckley until 10 days after her solicitor herein is served with written notice of the decision of the court on her said motion, and then only if said motion should not be sustained in whole or in part; and, for like cause, said defendant is hereby granted ten days after her solicitor herein is served with written notice of the decision of her said motion in which to enter a general and further appearance to said pleading, and to file any further motion, plea, demurrer, or answer in said suit in relation thereto, and then only if said motion should not be sustained." On the same day that the foregoing proceedings were had with respect to the pleadings of the Blythe Company, the defendant Florence Blythe Hinckley made a motion to dismiss the complainants' suit on the ground that the court had no jurisdiction of the cause of action stated in the bill of complaint, and because the defendant Boswell M. Blythe and the defendant Florence Blythe Hinckley were citizens of the same state; that Boswell M. Blythe was interested wholly on the same side of the controversy in the suit with the complainants, and was therefore to be regarded as one of the complainants. On the 16th day of February, 1897, the Blythe Company, by leave of the court, filed in the suit a cross bill, making John W. Blythe, Henry T. Blythe, Boswell M. Blythe, and Florence Blythe Hinckley defendants thereto, therein alleging the same facts that it had theretofore alleged in its answer to the second amended

and supplemental bill as the basis of its alleged title to the lands in controversy and to the rents thereof, and therein also alleging the death since February 1, 1897, of Frederick W. Hinckley, and praying that the process of subpœna be issued thereon and directed to the defendants named, and for a decree in favor of the Blythe Company for the possession of the lands described in the cross bill, together with the rents, issues, and profits thereof, and that the complainants John W. Blythe and Henry T. Blythe and the defendants Boswell M. Blythe and Florence Blythe Hinckley, and all persons claiming by or through them, or any of them, be forever enjoined from asserting any title to or interest in any part of the property in controversy adverse to the cross complainant. On the 26th day of February, 1897, the complainants John W. and Henry T. Blythe obtained from the court an order dismissing the suit against the Blythe Company; but on the following day, on the application of the solicitor for that company, that order was vacated, without prejudice, however, to a renewal of the motion by the complainants at any time, should they be so advised. Subpœnas were issued on the cross bill of the Blythe Company, the return day of which was April 5, 1897, one of which was returned to the court with the following indorsement:

"United States Marshal's Office, Northern District of California.

"I hereby certify that I received the within writ on the first day of March, 1897, and personally served the same on the first day of March, 1897, on Florence Blythe Hinckley, by delivering to and leaving with Mrs. Harry Hinckley, an adult person, who is a resident of the place of abode of Florence Blythe Hinckley, said defendant named therein, at the county of Alameda, in said district, an attested copy thereof, at usual place of abode of said Florence Blythe Hinckley, one of said defendants herein.

"San Francisco, March 2d, 1897.

"Barry Baldwin, U. S. Marshal,
"By H. M. Moffatt, Office Deputy."

The other subpœnas were returned by the marshal unserved as to the defendants John W. and Henry T. Blythe; the marshal certifying thereon that, after due and diligent search, he was unable to find either of them in his district. On the 4th day of March, 1897, the solicitor for the Blythe Company stipulated that the complainants in the suit need not file their replication to the answer the company had interposed to the second amended and supplemental bill until the expiration of 10 days after notice had been given by the Blythe Company that the replication was required. He also stipulated that the complainants need not plead or move to the cross bill filed by the Blythe Company until further notice from that company. On the 8th day of April, 1897, the Blythe Company procured an order that an alias subpœna issue upon its cross bill, directed to the defendants Blythe therein, and that service of the subpœna be made upon them by delivering a copy thereof to the solicitors who appeared for them in the bills filed by them; and pursuant to that order such alias subpœna was issued, the return day of which was May 3, 1897, and was by the marshal served, in the Northern district of California, upon such solicitors, on the 9th day of April, 1897, and was by him returned on the 22d day of April, 1897, with his indorsement of such service thereon. The service of the subpœna on the complainants, John W. and Henry T. Blythe, to appear and answer the cross bill of the Blythe Company, was accompanied by a notice from its solicitor to the effect provided for by the terms of his stipulation of March 4, 1897. No appearance having been entered by or for Florence Blythe Hinckley, in response to the subpœnas so issued and served, on or before the return day thereof, the solicitor for the Blythe Company caused to be entered on the 6th day of April, 1897, in the order book of the court, a rule taking the cross bill pro confesso as to Florence Blythe Hinckley; and on May 4, 1897, a similar order was entered in the rule book, taking the cross bill as confessed against John W. and Henry T. Blythe. Seven days prior to the entry of the last-mentioned order, however, to wit, on the 28th day of April, 1897, the solicitors for the complainants, John W. and Henry T. Blythe, served a notice on the solicitor for the Blythe Company that on May 3, 1897, they would move the court to set aside and rescind the order entered on February

27, 1897, which vacated and set aside the previous order of February 26, 1897, dismissing the suit as to the Blythe Company, and would move the court to reinstate and give force and effect to the said prior order of dismissal, and that the suit stand dismissed as to the Blythe Company, and would also move the court to set aside the order of April 8, 1897, directing that the subpœna issued upon the cross bill of the Blythe Company be served upon the complainants, John W. and Henry T. Blythe, by delivering a copy to their solicitor. On the 3d day of May, 1897, the complainants, John W. and Henry T. Blythe, petitioned the court for leave to appear specially for the purpose of making these motions, which petition was granted by an order which further directed "that no further appearance in respect to said pleading so filed by said Blythe Company need be entered by said complainants, John W. Blythe et al., until 10 days after the solicitors of said complainants are served with written notice of the decision of the court upon said motion, and then only if said motion should not be sustained in whole or in part. And, for the like cause, said complainants are hereby granted 10 days after their solicitors are served with written notice of the decision upon their said motion in which to enter a general and further appearance to said pleading, and to file any further motion, plea, demurrer, or answer in said suit in relation thereto, and then only if said motion should not be sustained; and it is further ordered that a copy of this order be served upon the solicitor for said the Blythe Company herein." When these motions were called for hearing on May 3, 1897, they were, upon the application of the solicitor for the Blythe Company, continued to May 10, 1897, on which day they were again called, and the motion to dismiss the suit as to the Blythe Company was heard; the solicitors for the complainants appearing and submitting arguments in its support, and the solicitor for the Blythe Company appearing and submitting argument in opposition thereto; and thereupon leave was granted to both sides to file briefs. The motion to quash the substituted service was continued. On the same day, to wit, May 10, 1897, the solicitor for the Blythe Company filed amendments to its cross bill, and obtained an order from the court that the cross bill should stand amended in the manner specified, and the several parts specified be stricken therefrom and withdrawn. The changes made by these amendments in the cross bill consisted of the abandonment and withdrawal of all reference to the property situated in San Diego county, and the dismissal of the cross bill as to the defendant Boswell M. Blythe. On June 1, 1897, the complainants, John W. and Henry T. Blythe, by leave of the court, amended their second amended and supplemental bill by striking out the name of Boswell M. Blythe as a party defendant, but leaving therein the allegation as to his being an heir of Thomas H. Blythe, deceased, with this explanation: "But, as the said Boswell M. Blythe resides out of and beyond the jurisdiction of the court, your orators state the facts concerning him." No new rule taking the cross bill as amended pro confesso was entered in the rule book; but on July 1, 1897, the solicitor for the Blythe Company filed his own affidavit, showing that the subpœna issued on the cross bill was served on Florence Blythe Hinckley, in the Northern district of California, on the 1st day of March, 1897; that no appearance had been entered by or for her, and the time for her appearance had not been enlarged; that a decree pro confesso had been entered in the rule book; that the alias subpœna issued upon the cross bill was served pursuant to the order of the court upon John W. and Henry T. Blythe, returnable on the first Monday of May, 1897; that no appearance had been entered by or for them, and the time of their appearance had not been enlarged; and that a decree pro confesso had been entered in the rule book. Thereupon an order was entered by the court that the cross bill of the Blythe Company be taken pro confesso, and that the judgment and decree of the court be entered accordingly.

On July 3, 1897, a decree in conformity with this order was entered in favor of the Blythe Company, and the court soon thereafter, and on the same day, adjourned for the term. The decree so rendered and entered adjudged, among other things, that the Blythe Company was at the time of the filing of its cross bill of complaint, and still is, the sole owner of, and entitled to the immediate possession of, the Blythe Block (specifically de-

scribing it), together with the rents, issues, and profits thereof, and that it be let into the immediate possession of the property; that at the time the suit was commenced by John W. and Henry T. Blythe none of the parties to the suit was in possession of any part of the property; that since the suit was commenced Florence Blythe Hinckley wrongfully obtained possession of the Blythe Block, and now holds wrongful possession of the whole of it; that the property is of the value of more than $3,000,000, and is occupied by more than 100 tenants, who pay monthly a stipulated sum to Florence as rent therefor, and that the total amount of such rentals has been and is the sum of $12,000 a month; that all debts and claims against the deceased, Thomas H. Blythe, have been fully paid from the rents, issues, and profits of the property; that the respondents to the cross bill, Florence Blythe Hinckley, John W. Blythe, and Henry T. Blythe, and all persons claiming by or through them, or either of them, be, and they are, and each of them is, forever enjoined from asserting any interest in the property adverse to the ownership of the Blythe Company; that Thomas H. Blythe was from the year 1855 to and including the 4th day of April, 1883, a citizen of the United States, and of the state of California, and that during all of that time he was a resident of that state, and was during all of that time the owner and in possession of the Blythe Block, and was such owner and so possessed at the time of his death; that he died intestate, and leaving surviving neither father nor mother nor brother nor sister nor wife nor child nor issue nor offspring; that he never entered into, made, or executed any contract, marriage or otherwise, or did any act, wherein or whereby his title to the property was in any wise limited; that he was never married, and never adopted or legitimated any child; that he never, by any writing or writings signed in the presence of any witness or witnesses, or otherwise, or at all, acknowledged himself to be the father of any child; that he never made or signed or executed or subscribed any writing for the purpose of making, or with the intent to thereby or otherwise or at all make, any child his heir, or for the purpose of making any child, or with intent to thereby or otherwise or at all cause any child to be, or to be considered as, his heir, and that he never signed any paper whereby any child was made his heir; that from the year 1873 to and including the day of his death he had and maintained in the city and county of San Francisco, but not elsewhere, a household and home and a family, consisting of himself and his servants, and that no child was ever received into such household or home or family, and that he never publicly acknowledged himself to be the father of any child, never received any child into his family, and never treated any child as if it was his legitimate child; that he never did, in the state of California or elsewhere, appear before the judge of any superior or other court with or at the same time as any child; that Florence Blythe Hinckley was born in or about the year 1873, the illegitimate child of an unmarried woman; that at the time of the begetting and of her birth her progenitors were, and for generations prior thereto had been, each and all subject to and subjects of Victoria, queen of the United Kingdom of Great Britain and Ireland, and then were, and for many generations prior to her birth had been, continuously residents of the United Kingdom; that, prior to the death of Thomas H. Blythe, Florence Blythe Hinckley had not been, and no one of her progenitors had ever been, outside of the territorial limits of that kingdom; that the law of the state of California, as embodied in sections 230 and 1387 of its Civil Code, is not, and never has been, the law in the United Kingdom of Great Britain, nor has there ever been in the United Kingdom any law of adoption, nor any law by which an illegitimate child could, by an acknowledgment in writing or otherwise, be instituted as or become the heir of a person, or any law by which an illegitimate child could be adopted as the child or heir of its putative father; that certain named persons were at the time of the death of Thomas H. Blythe his next of kin and his only heirs at law, and that they, as such heirs at law, were entitled to inherit and succeed to, and did inherit and succeed to, the Blythe Block, and that all their right, title, interest, succession, and estate therein was prior to the 1st day of November, 1887, sold and conveyed to the Blythe Company in fee, which is now the sole owner thereof, and entitled to its immediate pos-

session, together with the rents, issues, and profits thereof; and that each and all of the claims of John W. Blythe, Henry T. Blythe, and Florence Blythe Hinckley are false and groundless. At the time this default decree was entered there were pending before the court, undetermined, the following of the motions hereinbefore mentioned: (1) The motion of the defendant Florence Blythe Hinckley to strike from the files the answer of the Blythe Company to the complainants' second amended and supplemental bill; (2) the motion of the same defendant to strike out certain portions of the answer of the Blythe Company; (3) the motion of the same defendant to dismiss the complainants' suit; (4) the motion of the complainants to dismiss the suit as to the Blythe Company; (5) the motion of the complainants to quash the substituted service of the subpœna issued upon the cross bill. The first, second, third, and fourth motions had been argued and submitted; the last briefs having been filed on the first and second motions on April 30, 1897, on the third motion on May 22, 1897, and on the fourth motion on June 25, 1897.

The bill of review, from the judgment dismissing which the present appeal is taken, challenges the validity of the subsequent proceedings in the cause, now to be mentioned:

On the 7th day of July, 1897, Florence Blythe Hinckley presented to the circuit judge, in chambers, her verified petition for the vacation of the judgment of July 3, 1897, on the ground that she had never been served with any process, or received a copy of any process, issued upon the cross bill of the Blythe Company; that she had never seen nor received the cross bill, or a copy thereof; that no cross bill, or any copy thereof, or any process, or any copy of any process, had ever been delivered to her, or left at her dwelling house or usual place of abode, with any adult person who was ever a member of or resident in her family. The prayer of her petition was that the court "make an order to set aside and vacate the order made by it on the 3d day of July, 1897, adjourning said court for the term sine die, to the end that this petitioner may have an opportunity to be heard upon her application to set aside the judgment hereinbefore stated to have been entered against her; that this court set aside and vacate the judgment so entered against your petitioner on the 3d day of July, 1897; and that all proceedings upon and under such judgment be stayed." The petition was supported by affidavits of her solicitors to the effect that prior to July 6, 1897, they had no knowledge that a subpœna or any other process had ever been issued upon the cross bill filed by the Blythe Company; that they had no knowledge or information that a default had been entered against Florence Blythe Hinckley, or that an order had been made that the cross bill should be taken pro confesso. At the same time and place, to wit, July 7, 1897, John W. and Henry T. Blythe presented to the judge their motion "to vacate the decree of July 3, 1897, against the complainants and in favor of the Blythe Company, and ask that the order of adjournment of July 3, 1897, be set aside, and that it can be opened, and complainant be granted leave to present affidavits in support of its motion." Upon these proceedings the judge thereupon caused the court to be opened, and to be entered in the minutes of the court the following:

"Wednesday, July 7, 1897.

"Good and sufficient reasons appearing therefor, the order of adjournment of this court sine die entered July 3, 1897, was this day, by the Honorable William W. Morrow, Circuit Judge, ordered vacated and set aside. Court was thereupon opened for the transaction of business. Present: Honorable William W. Morrow, Circuit Judge; Southard Hoffman, Clerk; and Barry Baldwin, Marshal.

"John W. Blythe et al. vs. Florence Blythe Hinckley et al. (No. 12,144.)

"Order Staying Proceedings Under Decree of July 3, 1897, Etc.

"In the above-entitled cause, application for relief having been made on behalf of the defendant Florence Blythe Hinckley, and a petition and affidavits having been filed on her behalf, and counsel for all the parties hereto being present, and having been heard, and Mr. Towle, counsel for the Blythe Company, having objected to the setting aside of the order of July 3, 1897,

adjourning this court sine die, and to the opening of the court this day, and to any proceedings whatsoever, for want of jurisdiction, and having reserved all objections, and it appearing that the decree entered July 3, 1897, herein, against the defendant Florence Blythe Hinckley, was inadvertently made and entered, and upon a misunderstanding as to the facts as to service of process upon her, which would not have been done but for such misunderstanding: Now, therefore, it is hereby ordered that said order adjourning this court for the term be, and the same is hereby, set aside, and the defendant Florence Blythe Hinckley is permitted to file her said petition and affidavits, and the hearing of the same is continued until the first day of the next term of this court, and all proceedings upon the decree of July 3d, 1897, are hereby stayed until the further order of the court, and all matters relating to said decree are hereby reserved until the further order of the court. Mr. L. D. McKisick and Mr. E. B. Holladay, counsel for the complainants herein, moved the court for leave to file affidavits and motion on behalf of complainants to set aside said decree of July 3, 1897, herein, which motion was granted; and, said affidavits and motion having been filed, it was ordered that the hearing of said motion be, and hereby is, postponed to the first day of the next term of this court."

The first day of the succeeding term of the court was July 12, 1897, at which time the hearing of the petition of Florence Blythe Hinckley and the motion of John W. and Henry T. Blythe was continued to August 3, 1897. On the 22d of July, 1897, the Blythe Company filed a petition asking that the minutes of July 7, 1897, be corrected by expunging therefrom all of the entries made therein on that date; and on July 28, 1897, Florence Blythe Hinckley filed a notice of motion to vacate the pro confesso decree, together with the rule taking the same pro confesso, as also the order of the court directing the entry of the decree, upon various grounds, a copy of which was served upon the solicitor for the Blythe Company; and on the same day she filed a notice of motion for leave to amend her petition of July 7, 1897, together with a statement of the proposed amendments, and an affidavit that a copy thereof had been served upon the solicitor for the Blythe Company. On July 30, 1897, the Blythe Company procured an order granting it leave to appear specially to object to any proceedings being had upon the petition and motion of July 7, 1897, and on the 31st of July, 1897, filed its objections thereto. On the 2d day of August, 1897, John W. and Henry T. Blythe filed a notice of motion to vacate the pro confesso decree, supported by affidavit. On August 3, 1897, the petition of Florence Blythe Hinckley to file amendments to her petition of July 7, 1897, was granted, and at the same time the objection of the Blythe Company that neither the complainants nor the defendant Florence Blythe Hinckley was properly before the court was reserved by the court for future consideration and determination. The court thereupon set the hearing of the petition and motions for August 12, 1897, and on the 6th day of August granted the Blythe Company leave to appear specially to the amended motion of John W. and Henry T. Blythe, and to the motion and amended petition of Florence Blythe Hinckley. On August 9, 1897, the company filed its objections, and on August 12th, reserving all of its objections, filed its answers to the petition and motions of Florence Blythe Hinckley and John W. and Henry T. Blythe. On the 6th day of December, 1897, the court made and caused to be entered orders granting the petition and motions of Florence Blythe Hinckley and John W. and Henry T. Blythe; denying the motion of the Blythe Company to correct the minutes of July 7, 1897; and granting the motion of Florence Blythe Hinckley to dismiss the original suit as to her. The opinions of the circuit court in support of these rulings will be found reported in 84 Fed. 228, 245, 246. After the court so ordered the dismissal of the suit, it gave leave to the complainants, John W. and Henry T. Blythe, "to amend their bill, upon the understanding that it would not necessitate any further argument, but should be subject to the prior motion to dismiss the second amended and supplemental bill, and to the order for a final decree entered thereon." Accordingly, on December 22, 1897, the complainants filed their "third amended and supplemental bill in equity." This bill was substantially the same as that immediately preceding, though it set up reasons why an action at

law would not be an adequate remedy, and amplified certain matters alleged to bear on the jurisdiction of the state courts. Between December 6 and December 22, 1897, to wit, on the 16th day of that month, the court made and caused to be entered an order denying the motion of Florence Blythe Hinckley to strike from the files the answer of the Blythe Company to the second amended and supplemental bill of John W. and Henry T. Blythe, and on the same day, to wit, December 16, 1897, made and caused to be entered an order denying the motion of the complainants to dismiss their suit as to the Blythe Company, and vacating its order granting John W. and Henry T. Blythe leave to appear specially to the cross bill. On the 22d day of December, 1897, the court gave judgment, amended January 20, 1898, by which the court annulled the pro confesso decree of July 3, 1897, as well as the orders entered in the rule book of the court on April 6th and May 4th, respectively, that the cross bill be taken pro confesso, as also the orders of the court of July 1, 1897, to the same effect, and dismissing the original and amended complaint of the complainants, as well as their amended and supplemental bills, "for want of either federal or equity jurisdiction, and without prejudice to complainants' right to bring or maintain an action at law," and decreeing that "the pleading of the Blythe Company filed on December 28, 1895, and styled, 'Answer of the Blythe Company to the Amended Complaint,' praying, among other things, for relief against the defendant Florence Blythe Hinckley, and also the pleading of the Blythe Company filed on February 1, 1897, styled, 'Answer of the Blythe Company, a Corporation, to the Second Amended and Supplemental Bill of Complaint of John W. Blythe and Henry T. Blythe, Complainants,' praying, among other matters, for relief against the defendant Florence Blythe Hinckley, be, and the same are, finally dismissed, so far as they, or either of them, constitute a cross bill or cross complaint against any party to the cause, and that the pleading of the Blythe Company filed on the 16th day of February, 1897, styled, 'Cross Bill of Complaint in Equity of the Blythe Company,' together with the amendments made thereto, be, and the same is hereby, finally dismissed as against each and all of the parties named therein as defendants, and in all respects and in every particular," and further decreeing that "the said Florence Blythe Hinckley has paid into court for the Blythe Company the costs imposed upon her as a condition of setting aside said decree in favor of the Blythe Company, and has complied in all respects with the orders of the court in relation to the terms of the setting aside of said decree," and directing that such decree be entered and enrolled as and for a final decree. From the decree so entered, the Blythe Company, as well as John W. and Henry T. Blythe, appealed to the supreme court, both of which appeals were by that court dismissed,—that of the Blythe Company on the 9th day of January, 1899. The mandate following the disposal of that appeal was filed in the court below on the 17th day of May, 1899. On the 5th day of September, 1899, the present bill to review the decree of December 22, 1897, for errors of law appearing therein, was filed by the Blythe Company in the court below, to which bill the defendant Florence Blythe Hinckley demurred, as did also the defendants John W. and Henry T. Blythe, which demurrers, except in so far as the demurrer of the defendant Florence Blythe Hinckley was based upon the complainants' laches, were sustained, and a decree accordingly entered on the 9th day of November, 1900, dismissing the bill of review, from which the present appeal was taken.

George W. Towle, Jr., and Lorenzo S. B. Sawyer, for appellant.

Robert Y. Haynes, W. H. H. Hart, and S. W. & E. B. Holladay, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

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

It is contended on the part of the appellee Hinckley that the bill of review was filed too late. That objection was stated in several

different forms in her amended demurrer. Various other grounds of demurrer were also taken by her, all of which, in the opinion of the court sustaining the amended demurrer and directing the dismissal of the bill, were sustained, except that of laches, which, in the opinion, was overruled; and for this reason it is claimed on the part of the appellant that this court cannot consider the objection that the bill of review was filed too late, inasmuch as there is no appeal by Florence Blythe Hinckley. The answer to this is that there was no occasion for any appeal by her, for the reason that the decree was altogether in her favor; it having dismissed the bill of review, with costs in favor of the demurrant. In equity an appeal brings up the whole case, and any matter of law apparent upon the face of the bill of review is upon such an appeal open to the consideration of the court. If the decree dismissing the bill of review was right, it should be affirmed, regardless of the reasons assigned by the court for its judgment. Many a right judgment is given for a wrong reason. The rule is well settled in courts of equity of the United States that a bill of review must ordinarily be filed within the time limited by statute for taking an appeal from the decree sought to be reviewed, where, as here, the review sought is not founded on matters discovered since the decree. Thomas v. Brockenbrough, 10 Wheat. 146, 6 L. Ed. 287; Whiting v. Bank, 13 Pet. 6, 10 L. Ed. 33; Kennedy v. Bank, 8 How. 586, 12 L. Ed. 1209; Clark v. Killian, 103 U. S. 766, 26 L. Ed. 607. It was recently ruled by this court in the case of Reed v. Stanley, 38 C. C. A. 331, 97 Fed. 521, that 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. In the present instance the decree sought to be reviewed was entered on the 22d day of December, 1897. From that decree the present complainant, the Blythe Company, sought and was allowed an appeal to the supreme court on the 10th day of February, 1898, and from that decree the complainants in the original bill, John W. and Henry T. Blythe, also appealed to the supreme court. The appeal of the Blythe Company was dismissed by the supreme court January 9, 1899 (172 U. S. 644, 43 L. Ed. 1183), whose mandate was filed in the lower court on the 17th day of the following May. The appeal of John W. and Henry T. Blythe was dismissed by the supreme court on the 3d day of April, 1899. 173 U. S. 501, 43 L. Ed. 783. The bill of review was not filed until the 5th day of September, 1899,—more than six months after the entry of the decree of December 22, 1897, and more than six months after the dismissal of the appeal of the Blythe Company by the supreme court, but less than six months after the filing of the supreme court's mandate in the circuit court. Each of the appeals mentioned was dismissed for want of jurisdiction of the subject-matter by the supreme court. The

appeal from the decree of December 22, 1897, given by law to the aggrieved parties, was that provided for by the act of March 3, 1891, creating the circuit courts of appeals, entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of courts of the United States, and for other purposes," and was limited by that act to six months from the entry of the decree. If it be conceded that the time during which the attempted appeal of the Blythe Company from the decree to the supreme court was pending cannot be counted, still the fact remains that the judgment of the supreme court dismissing the appeal to it was entered more than six months prior to the filing in the court below of the bill of review. That judgment ended the appeal, whatever its character. Upon its rendition the appeal from the judgment of December 22, 1897, was no longer pending. "It was," as was said by the supreme court in the Case of Shiboys Jugiro, 140 U. S. 291, 295, 11 Sup. Ct. 770, 35 L. Ed. 510, "none the less a final disposition of the case because at a subsequent date, under the rules and practice of this court, a mandate would be sent down to the circuit court, showing the fact of the affirmance of its judgment." But we are also of the opinion that as the law did not give any appeal from the decree of December 22, 1897, to the supreme court, as was held by that court in the cases above cited, the attempted appeal therefrom by the Blythe Company was ineffectual for any purpose. It was a nullity, and therefore could not stop or suspend the running of the time within which that company was entitled to file a bill of review. Neither its action, nor that of the court of equity whose aid it was entitled to thus seek, was at all hindered or embarrassed during the pendency of an attempted appeal which was wholly unauthorized by law. It was, in effect, so decided by this court in Reed v. Stanley, supra. The final decree there sought to be reviewed was entered by the circuit court in favor of the complainants in the suit on June 18, 1896, 22 days after which, to wit, July 10, 1896, the term of the court expired. From that decree an appeal was taken on the 16th day of December, 1896, by the defendants to the supreme court, upon the sole ground that the circuit court had no jurisdiction of the suit, which appeal was dismissed by the supreme court 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, 42 L. Ed. 1209. The mandate of dismissal was received by the circuit court June 16, 1897. On the next day a second appeal was taken to the supreme court by the defendants upon the ground that the cause 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, 42 L. Ed. 850), and the mandate certifying that dismissal was received by the circuit court March 28, 1898. Four days thereafter, to wit, on the 1st day of April, 1898, a bill of review was filed, seeking the review and reversal of 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 circuit court; and on June 2, 1898, another amendment to the bill of review was filed therein, in which was stated the time occupied by the two appeals to the supreme court from the decree sought to be reviewed. In holding that the bill of review there in question was filed too late, this court said:

"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."

In that case this court took no account of the time occupied by the two appeals to the supreme court from the decree there sought to be reviewed, for the reason, as appears from the opinion, that under the law no right of appeal to the supreme court ever existed, and therefore this court treated the attempted appeals there as wholly ineffectual for any purpose. The same thing must be true here, where by the law no right of appeal to the supreme court was given from the judgment sought to be reviewed.

Such cases as the present and that of Reed v. Stanley, supra, are essentially different from Ensminger v. Powers, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732; Kimberly v. Arms (C. C.) 40 Fed. 548; and others cited by the appellant. In Ensminger v. Powers the decree of the circuit court was entered against the plaintiffs in the suit on the 27th day of December, 1873, from which they, in the

exercise of a right given them by the law, appealed to the supreme court in January, 1874. On the 13th of December, 1875, the appeal was dismissed by the supreme court for the failure of the appellants to file and docket the cause in that court in conformity with its rules. The bill of review considered in Ensminger v. Powers was not brought in the circuit court until the 9th day of September, 1876,—more than two years after the decree of December 27, 1873, thereby sought to be reviewed, was rendered. In overruling the objection there made, that the bill of review was not brought in time, the supreme court said:

"But the appeal to this court was perfected by the giving of a bond for costs in January, 1874, and although this court in December, 1865 [1875], dismissed the appeal for the failure of the appellants to file and docket the cause in this court, yet the cause was out of the court below and in this court until within two years before the bill in this suit was filed. The pendency of the appeal by Bridget Powers would have been a valid objection to the filing of a bill of review by her for the errors in law now alleged, and inasmuch as the appeal was not heard on its merits, but the prosecution of it was abandoned, we are of opinion that the bill of review was filed in time. While the appeal was pending here, although there was no supersedeas, the circuit court had no jurisdiction to vacate the decree in pursuance of the prayer of a bill of review, because such an action was beyond its control. The time during which the control was suspended to await the orderly conduct of business in this court in regard to hearing the appeal is not to be reckoned against Bridget Powers in this case, although she joined in the appeal. She was exercising a right in doing so, and as the city of Memphis was the principal plaintiff and appellant, and was endeavoring to protect its title in fee, and thus her right as a lessee, it may very well have been, as is alleged in the bill, that the appeal fell because the city refused to pay the necessary money for filing the transcript of the record. Being thus left to the protection of her own rights, she may well have concluded that a bill of review was preferable to the further prosecution of the appeal, when she had such good cause for that course, as now appears, although the same error might have been corrected if the appeal had been heard on the merits." 108 U. S. 302, 303, 2 Sup. Ct. 652, 27 L. Ed. 736.

The broad distinction between a case where the control of the circuit court over its decree by means of a bill of review is taken away by means of an appeal authorized by law, and a case such as that now before us, where the appeal attempted was wholly unauthorized by law, and therefore nothing existed to take away the control of the court over its judgment by means of a bill of review, is sufficiently manifest, without elaboration. In the case of Kimberly v. Arms, supra, it was held that the circuit court would not entertain a bill of review to vacate a decree from which the petitioners had prayed and been allowed an appeal to the supreme court, even though they averred in their petition for leave to file the bill that they did not intend to perfect their appeal in the supreme court. The decree which was there sought to be reviewed and set aside was one entered in the circuit court pursuant to a mandate of the supreme court. The defendants to the suit against whom the decree was thus rendered thereupon, and during the term of court at which the decree was given, prayed an appeal therefrom to the supreme court, which was allowed upon their giving bond with sureties to be approved by the court. Such appeal bond was duly executed and approved, after which the defendants peti-

tioned the court for leave to file a bill of review, in which they stated, among other things, "that it is not the purpose of defendants, as at present advised, to perfect their said appeal by filing the record and docketing this cause in the supreme court, as required by the rules of practice of that court." In respect to that averment the court, in its opinion refusing leave to file the bill of review, said:

"This averment does not, of course, amount to an abandonment of said appeal, nor to a definite purpose or intention to do so, but leaves the question of its further prosecution to the option of appellants. No new proceedings having been had in this court between the mandate of the supreme court and the decree based thereon, said appeal by defendants was, no doubt, improvidently taken and allowed. Still it has the effect of transferring the cause, and the decree sought to be reviewed, into the supreme court, where it will remain until heard and disposed of on the merits, or dismissed, under the provisions of the ninth rule of said court, for appellants' failure to file the record and docket the case."

The appeal in that case was not a nullity, for it was taken from a final decree from which the statute allowed an appeal to the supreme court. But, the decree from which the appeal was taken having been entered under and by virtue of a mandate of the supreme court issued in pursuance of the judgment of that court disposing of a former appeal in the cause, it was an appeal which the supreme court would entertain only to the extent of ascertaining whether it was in accordance with its mandate. Thus, in Stewart v. Salamon, 97 U. S. 361, 24 L. Ed. 1045, it is said that:

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is, in effect, our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the decree entered, and, if it conforms to the mandate, dismiss the case, with costs. If it does not, the case will be remanded, with appropriate directions for the correction of the error."

Not one of the cases cited by the appellant holds that an attempted appeal in a case in which no appeal is by law allowed operates to suspend the running of the time during which a bill of review may be filed.

Being of the opinion that the bill in the present case was filed too late, we must affirm the judgment without regard to other questions argued by counsel. The judgment is affirmed.

SEATTLE NAT. BANK v. PRATT.

(Circuit Court of Appeals, Second Circuit. November 18, 1901.)

No. 15.

CORPORATIONS—ACTION AGAINST STOCKHOLDERS—LIMITATION.

Code Civ. Proc. N. Y. § 394, providing that an action against a stockholder of a moneyed corporation, to charge him with a statutory liability, must be brought within three years, applies to an action brought in New York against a stockholder of a mortgage trust company of another state

to enforce a liability imposed by the constitution and statutes of such state, where the defendant has been during the entire period a resident of New York.

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

This cause comes here upon a writ of error by plaintiffs below to review a judgment of the circuit court, Northern district of New York, in favor of defendant below, after trial before the court without a jury. 103 Fed. 62. The action was brought to recover the additional liability of a stockholder of a defunct Western farm mortgage trust company under the laws of Kansas, and was disposed of by the court below on the ground that suit was not begun against defendant, who had been at all times a resident of this state, until more than three years after cause of action accrued.

Buchanan & Lawyer, for plaintiff in error.

Patterson, Bulkeley & Van Kirk, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The facts, as the judge below found, bring this case within the decision of this court in Hobbs v. Bank, 37 C. C. A. 513, 96 Fed. 396; Id., 41 C. C. A. 205, 101 Fed. 75. A three-years statute was applied in that case, and, since certiorari was refused by the supreme court, the rule laid down in the Hobbs Case will be followed here, viz. that such an action cannot be maintained against such stockholder in this state when action was not begun until more than three years after the cause of action accrued, and during that entire period defendant was a resident of this state.

Judgment affirmed, with costs.

OREGON SHORT LINE R. CO. v. POSTAL TEL. CABLE CO. OF IDAHO.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1901.)

No. 680.

1. EMINENT DOMAIN—RIGHT TO MAINTAIN CONDEMNATION PROCEEDINGS—LOCAL TELEGRAPH COMPANY.

The fact that a corporation, duly organized under the laws of the state to construct and maintain a telegraph line, is subordinate or auxiliary to a corporation of another state which owns the greater part of its stock and controls its management, or that its stock has not been paid up, does not affect its right to maintain proceedings to condemn right of way for its line, under the statutes of Idaho. Where the plaintiff shows that it is a corporation de facto of the state, the further right to contest its authority to condemn land or to prosecute the objects of its organization belongs to the state alone.

2. SAME—IDAHO STATUTES—USE OF RAILROAD RIGHT OF WAY FOR TELEGRAPH LINE.

The general rule of law that a corporation having general statutory authority to condemn property for a public use may condemn for such use property which is already devoted to another public use, where the second use will not materially interfere with the first, is not changed as to telegraph companies by Rev. St. Idaho, §§ 5210, 5213, the first of

which gives such companies the right to exercise the power of eminent domain, and the second of which provides that before property can be taken for a public use it must be shown that the taking is necessary to such use, and, if already appropriated to some public use, that the second use "is a more necessary public use." Such statute by implication authorizes a second condemnation, and under it a telegraph company may condemn right of way for its line over the right of way of a railroad, where the court finds that it is necessary, that it will not interfere with the use of the property for the purposes of the railroad, and that the second use is more necessary than the first.

3. SAME—JUDGMENT OF CONDEMNATION—SUFFICIENCY.

A judgment awarding to a telegraph company right of way for its line over the right of way of a railroad, which designates the height of the poles, the manner of their erection, and the minimum distance they shall be placed from the railroad track, and requires the telegraph company on notice to remove, at its own expense, the poles from any portion of the right of way which may be needed by the railroad company, is not so indefinite as to require revision by an appellate court, and especially where there is no assignment of error directing attention to any particular defect therein.

4. SAME—ADEQUACY OF DAMAGES AWARDED.

An award of $500 damages to a railroad company as compensation for right of way for the construction of a telegraph line over its own right of way for a distance of 200 miles, where the court found that such line would not interfere with the operation of its road, and required the telegraph company to remove any of its poles which should at any time so interfere, is not so inadequate that it will be disturbed by an appellate court on a writ of error.

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

For opinion below, see 104 Fed. 623.

The defendant in error instituted condemnation proceedings to condemn to its use, as a right of way for the purpose of constructing and maintaining a telegraph line, a portion of the right of way of the plaintiff in error used and occupied by it for its railroad, extending longitudinally along the line of the railroad through Idaho from the boundary line of Montana, a distance of about 200 miles. In its complaint the defendant in error alleges that the land which it seeks to occupy will be one circular foot five feet deep for each pole to be erected; that it will not attach its wires or fixtures to any of the bridges or structures of the railroad company, and will not erect any of its poles upon any embankment of the company, but will occupy only such portion of the right of way as is not necessary for the use of the railroad company; and promises that, if at any time the railroad company shall need any portion of its right of way where the poles and lines of the telegraph company are situated, the latter will, upon notice, at its own expense remove its poles and wires from such part of the right of way. Upon issue joined and the testimony adduced, the court rendered judgment in favor of the defendant in error, finding that the use to which it proposed to put the property is a public use, authorized by law, and necessary for its use, and a more necessary public use than that to which it was already appropriated, and that the construction and operation of said telegraph line would not diminish the value of the right of way of the railroad company for railroad purposes. Damages were awarded the plaintiff in error in the sum of $500.

Parley L. Williams and Snow & McCamant, for plaintiff in error.

J. R. McIntosh and O. W. Powers, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

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

It is urged that the court erred as to fact and law in finding that the defendant in error was a corporation duly and regularly incorporated under the laws of Idaho, and in ruling that the contention that it was organized to enable a foreign corporation to condemn a right of way "cannot be considered in this case." In the answer it was denied that the defendant in error was a corporation incorporated under the laws of Idaho, or that it had the power to exercise the right of eminent domain, and it was alleged that the Postal Telegraph Cable Company, a corporation of New York, in order to circumvent the policy of the state of Idaho which denied the right of foreign corporations to condemn such right of way, caused certain of its employés to organize a nominal and pretended corporation under the laws of Idaho, and that thereupon the defendant in error was incorporated; that it has no separate existence from said New York corporation; that all its expenses are paid and its business policy dictated by the latter; and that the sole purpose of its organization is to enable the New York corporation to exercise in the state of Idaho the right of eminent domain. The evidence is that the defendant in error was incorporated, and a meeting of its incorporators was held, on July 22, 1899, and that on the same day its incorporators became directors and held a meeting; that the directors consisted of four citizens of Idaho, and E. J. Nally, who was a resident of Illinois and an employé of the New York corporation; that a resolution was duly adopted authorizing the construction of a telegraph line substantially as described in the complaint, and authorizing the institution of the present suit; that the capital stock of said corporation is $250,000, divided into 100 shares, of which E. J. Nally subscribed 96 shares, and the other directors 1 share each. It was shown that no money on account of any of these subscriptions had been paid to the treasurer of the defendant in error, and that the business of the corporation had been conducted under the direction of the New York company. There is nothing in these facts to indicate that the defendant in error was not a corporation de facto. It was duly incorporated according to the laws of Idaho. Four of its five incorporators and directors were citizens and residents of that state. Its right to maintain the present suit is not abridged by the fact that the stock subscribed had not been paid for, and that the majority of the stock was owned by another corporation, which conducted its business and controlled its movements. Day v. Telegraph Co., 66 Md. 354, 7 Atl. 608; Lower v. Railroad Co., 59 Iowa, 563, 13 N. W. 718; Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co. (Mo.) 61 S. W. 684, 51 L. R. A. 936; Exchange Bank of Macon v. Macon Const. Co., 97 Ga. 1, 25 S. E. 326, 33 L. R. A. 800. In the case last cited it was held that the fact that "one corporation owns the entire capital stock of another does not vest in the former the legal title to the property of the latter, nor render the two corporations identical; on the contrary, they are separate and distinct legal entities." The plaintiff corporation, in a suit to condemn land to public use, must show its authority to exercise the right of eminent do-

main, and prove that it has strictly complied with the law. The defendant in such a suit may deny that the plaintiff is duly incorporated, and may cast upon it the burden of proving its corporate existence, but, if the latter show that it is a corporation de facto, it is sufficient. The right to further contest its authority to condemn land or to prosecute the objects of its organization belongs only to the state. McAuley v. Railway Co., 83 Ill. 348; National Docks Ry. Co. v. Central R. Co. of New Jersey, 32 N. J. Eq. 755; Railroad Co. v. Miller, 56 Ind. 88; Wellington & P. R. Co. v. Cashie & C. R. Lumber Co., 114 N. C. 690, 19 S. E. 646; Kansas & T. Coal Ry. Co. v. Northwestern Coal & Mining Co. (Mo.) 61 S. W. 684, 51 L. R. A. 936; Peoria & P. Union Ry. Co. v. Peoria & F. Ry. Co., 105 Ill. 110; Chicago & N. W. Ry. Co. v. Chicago & E. R. Co., 112 Ill. 589; Reisner v. Strong, 24 Kan. 410; Turnpike Co. v. Bobb, 88 Ky. 226, 10 S. W. 794; Day v. Telegraph Co., 66 Md. 354, 7 Atl. 608. In the case last cited it was held that foreign corporations, and especially telegraph companies, may do business within the state, and acquire and hold necessary property therein, to enable them to prosecute and conduct their business, and to hold such property in their own names, or in the name of an auxiliary local corporation organized for that purpose. In the case at bar no question is made that the defendant in error holds the title to whatever right has been acquired in the condemnation suit. Although it may be a corporation auxiliary to the New York company, formed for the purpose of acquiring and holding a right of way in Idaho under the laws of that state, to be used as part of a telegraph line which traverses many states, it is nevertheless a distinct corporation. It may at any time assert its right to conduct and manage its own business affairs, and the payment of the subscriptions to its capital stock may be enforced whenever it shall become necessary for the protection of its creditors or for other purposes. The plaintiff in error cites certain cases which it is said lead to a conclusion the reverse of that which we have reached. A case much relied on is Koenig v. Railroad Co., 27 Neb. 699, 43 N. W. 423. The constitution of Nebraska having provided that no foreign corporation shall be entitled to exercise the right of eminent domain, or "to acquire the right of way," etc., unless certain conditions be complied with, it was held in that case that the prohibition to acquire a right of way prevented such a corporation from doing indirectly what it was prevented from doing directly, or, in other words, prevented it from availing itself of the services of another corporation to accomplish the desired result. The suit was brought to obtain an injunction against the foreign corporation. The latter in its answer pleaded and relied upon a right of way acquired in condemnation proceedings "in its behalf," instituted by a certain other railway corporation of the state of Nebraska, and a transfer of such right from the domestic corporation. It was with reference to these facts and to the constitutional prohibition that the language of the opinion was adopted. There is no prohibition in the laws of Idaho against a foreign telegraph company acquiring a right of way in that state, nor has the New York corporation acquired the right of way in the present case. There has been no

transfer of the right of way from the defendant in error. The title remains in that corporation. Other cases are cited which sustain the general propositions which are not here disputed, that in a condemnation proceeding corporate organization is an issuable fact, that the condemnor must show that the condemnation sought is for public purposes, and that the court may go behind the allegations of the complaint, and try the question whether the real purpose of the condemnation is private or public.

It is said that the court erred in ruling that property already condemned to a public use under the right of eminent domain cannot, in the absence of express legislative authority, be condemned to a second public use; that the judgment in the first condemnation proceeding is an adjudication of the question of the necessity of that use, and that no second judgment can be had subversive of the judgment so rendered. Attention is directed to the fact that, while in some states special provision is made by statute for the condemnation of a right of way for a telegraph line over and along the line of the right of way of a railway company, no such special provision has been enacted in Idaho, and it is urged that there is no provision of law by which the present proceedings may be sustained. So far as the question of special statutory authority is involved, the contention is well founded. The only special statute conferring upon telegraph and telephone companies the right to occupy property already devoted to public use is found in section 2700 of the Revised Statutes of Idaho, which gives permission to construct telegraph and telephone lines along and upon public roads and highways which cross the lands and waters of the state. But, by section 5210, telegraph companies are given the authority to exercise the right of eminent domain. This provision, standing alone, unaffected by other statutory enactments, would confer upon a telegraph company the authority to condemn a right of way along and upon the right of way of a railway company, provided that it did not in any way interfere with the use to which the right of way was already dedicated. The rule is supported by abundant authority, and may be thus expressed: Property dedicated to a public use cannot be taken for another public use under the general laws conferring the right of eminent domain, where the second use will destroy or injure the use to which the property is already devoted. To authorize a second condemnation of such properties to a second use which is subversive of the first, there must be express legislative authority. Mills, Em. Dom. §§ 45–47; Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co., 17 W. Va. 812–852; Lewis, Em. Dom. § 269; Steele v. Empsom, 142 Ind. 397–406, 41 N. E. 822; Winona & St. P. R. Co. v. City of Watertown (S. D.) 56 N. W. 1077; Baltimore & O. S. W. R. Co. v. Board of Com'rs of Jackson Co. (Ind. Sup.) 58 N. E. 837; Sabine & E. T. R. Co. v. Gulf & I. R. Co. (Tex. Sup.) 46 S. W. 784; Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. R. Co. (Minn.) 79 N. W. 315–317. In the case last cited, the court said:

"The general rule is that express legislative authority is generally requisite except where the proposed appropriation would not destroy or greatly injure the franchise, or render it difficult to prosecute the object of the franchise,

when a general grant would be sufficient. Land already devoted to another public use cannot be taken under general laws, when the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained."

The question in the present case is complicated, however, by the provisions of section 5213 of the Revised Statutes of Idaho, which declares that before property can be taken for a public use it must be shown (1) that the taking is necessary to such use; (2) if already appropriated to some public use, that the public use to which it is so applied "is a more necessary public use." Do these provisions import into the law of the case conditions precedent to the second taking, in addition to those which are imposed by the general rule of law which has been above quoted? We think they do not. Taking the language of the statute, we think it may be fairly construed as a statutory declaration of the general rule of law which would have obtained in the absence of such an enactment. Considering the words used, and the general tenor of the law controlling the devotion of private property to public use, we think the statute was intended to provide that property already devoted to a public use might, whenever deemed necessary for the use of a corporation having the authority to exercise the right of eminent domain, be devoted to a second use, which would not interfere with the first. It was not intended to require that absolute necessity should exist for the devotion of the property to the second use. It was only required that the second use be more necessary than the first use. A corporation, in instituting condemnation proceedings, has the general right to select such property as it shall find necessary for its public use. This right is recognized by the courts. No one can defend against such an appropriation by showing that some other property would serve the use of the corporation equally well. Such property is "necessary" when the corporation asserts that it has placed its line over it and needs it. Property already dedicated to a public use stands upon the same footing as other property, and is subject to condemnation as is other property, provided that the second use shall not interfere with the first. The defendant in error in this case has alleged that this property is necessary for its use, and that it is not necessary for the use of the plaintiff in error. The court has found that these allegations are true, and has found that the second use is more necessary than the first. As we construe the statutes of Idaho, we find no error in that conclusion.

It is contended that the judgment is too indefinite, both as to the right condemned and the property to be taken, to authorize the defendant in error to proceed with the construction of its line. There is no assignment of error which brings this precise point before us for our consideration. The assignment is that the court erred in rendering the judgment for the reason that it is erroneous and contrary to law. This is not sufficient to direct attention to a defect in the judgment consisting in its indefiniteness. Nor do we find that the judgment is so indefinite that to render it was plain error which we should notice in the absence of a specific assignment. The judgment, in general terms, locates the telegraph line with reference to

the roadbed of the road, which may be considered a fixed monument. It declares that the poles for the telegraph line shall be erected upon the right of way; that they shall be 30 feet in length, planted firmly in the ground at a depth of not less than 5 feet, and not nearer the roadbed than 30 feet from the outer edge of the railroad track, or at such points as may be agreed upon, and that where it becomes necessary to cross the track of the railroad the poles shall be of such height as to prevent interference with the operation of the road; and that, if at any time the plaintiff in error shall need any portion of its right of way where the poles are placed, the defendant in error shall, upon reasonable notice, at its own expense, remove the same to such other points as shall be designated by the plaintiff in error. If there were in the record an assignment of error directly challenging the sufficiency of this judgment, we are not prepared to say that it is so indefinite as to require revision at our hands. In the nature of the case, it was impracticable to designate the precise spot where each telegraph pole should be placed. The judgment advises the railroad company, in a general way, of the position of the proposed telegraph line, and conserves its remedy against invasion of any portion thereof which it may need for the operation of its road.

It is further contended that the court erred in assessing damages. The damages awarded were $500. When we consider the cost and trouble to the railroad company in obtaining its right of way in the first instance, and the advantage to the telegraph company of locating its line on that right of way rather than on adjacent lands parallel thereto, where it would be required to deal with numerous landowners, and perhaps to prosecute numerous condemnation suits, the amount awarded may appear inadequate; but when it is considered that the property taken for the telegraph line is of no actual value to the railroad company, and, as the court has found, is not needed by it for the operation of its road, the damages found by the court may not be said to be inappropriate. The principal element of damage to the railroad company consists, perhaps, in the trouble and expense to be hereafter incurred by it in causing changes of the position of the telegraph line in case the company shall require more of its roadbed or make changes in the location of portions of its road. We cannot say that the trial court overlooked any of these considerations in awarding damages, or was guided by any erroneous view of the law in arriving at his conclusion. Such being the case, the finding of the court upon the amount of damages cannot be disturbed upon the writ of error. We find no error for which the judgment should be reversed.

The judgment is affirmed.

SOUTHERN PAC. CO. v. ARNETT et al.

(Circuit Court of Appeals, Eighth Circuit. November 4, 1901.)

No. 1,481.

1. CARRIERS—ACTION FOR INJURY TO PROPERTY IN SHIPMENT—PLEADING.
A special contract exacted by a carrier is a defensive weapon to be used by the carrier when sued by the shipper for an alleged violation of duty against which it was designed to afford protection, and a shipper suing to recover damages for negligence, on account of which the carrier is liable notwithstanding the contract, is not required to declare upon such contract.

2. SAME—ACTION FOR INJURY TO LIVE STOCK—EVIDENCE.
On the trial of an action against a railroad company to recover damages for injuries to cattle in shipment, alleged to have been due to the fact that they were kept too long in the cars without rest or feed or water, caused in part by the slow speed of the train, testimony tending to show that the time made was unusually slow for a stock train, and that the bad condition of the cattle on arrival at their destination was due to neglect and bad treatment during the journey, is germane to the issues, and its admission not error, where, so far as it consisted of opinion, the witnesses were shown to be qualified by experience to express such opinions, either by having been in the railroad service or by dealing in cattle.[1]

3. EVIDENCE—STATEMENTS OF THIRD PERSON—RES GESTÆ.
Unsworn statements made by a third person, who acted as agent fo plaintiffs in loading the cattle on the cars, as to their condition at th time, were not admissible as part of the res gestæ in support of a defense that the cattle were in an unfit condition for shipment when loaded. where there was no evidence to show that such person was authorized to bind plaintiffs by such statements.

4. SAME—OPINIONS—QUALIFICATION OF WITNESS.
As a defense to an action against a railroad company for injury to cattle alleged to have been due to their negligent handling in shipment, defendant pleaded that the cattle were in unfit condition when shipped, and that their injury was due to such fact. In support of such defense, defendant offered the testimony of witnesses shown to have had experience in raising and caring for cattle, and to have seen the cattle in controversy at the time of their shipment, to the effect that they were not in fit condition to stand transportation by rail from the point of shipment to the point of destination at the time of year when the shipment was made, owing to the fact that the shipment was from a warm climate to a much colder one, and over high ranges of mountains, and the effect of the cold would be injurious, and would cause them to become numb, and lie down in the cars, and be unable to get up. *Held*, that such testimony was pertinent to the issue, and its exclusion was error, although it did not appear that such witnesses had shipped cattle by rail, or had actual experience of the effect of such change of climate; their qualifications being sufficient to render their opinions admissible, and the weight to be given them being a matter for the jury to determine.
Caldwell, Circuit Judge, dissenting.

5. CARRIERS—ACTION FOR INJURY TO STOCK IN SHIPMENT—INSTRUCTIONS.
Instructions, in an action against a railroad company to recover damages for injury to cattle in shipment, considered and approved.

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

A. H. Arnett and J. C. Easton, the defendants in error, brought this action against the Southern Pacific Company, the plaintiff in error, to recover dam-

[1] Admissibility of evidence in actions for injuries to live stock, see note to Railway Co. v. Hall, 32 C. C. A. 146.

ages for injuries said to have been sustained by certain cattle belonging to them, while they were being transported by the defendant company over its railroad from Caliente, in southern California, to Ogden, in the state of Utah. The plaintiffs below averred, in substance, that they delivered to the defendant company at Caliente 517 head of mixed cattle and 103 head of calves, to be safely carried to Ogden, and that while in transit they were injured through the negligence of the carrier, and depreciated in value to the extent of $15 per head. They averred that the negligence of the defendant company consisted in its refusal to permit the plaintiffs to unload, feed, or rest the cattle while in transit between Caliente and Reno, in the state of Nevada; in the careless handling of the train of cars containing the cattle, by reason whereof the journey was unnecessarily delayed; in failing to start the train promptly after the cattle had been reloaded on the cars at Reno, Nev.; and in neglecting to transport the cattle within a reasonable time from Reno to Ogden, by reason whereof the cattle were kept confined in the cars while in transit between those points, without food, water, or rest, for a period of 42 hours, which delay led to great suffering and damage, and resulted in the loss by death of 15 of the herd.

To the foregoing complaint the defendant interposed an answer, wherein it averred the following facts: That the cattle in question were received on November 3, 1898, to be transported from Caliente, Cal., to Ogden, Utah, under the provisions of a special contract between the carrier and the shipper; that prior to the loading of the cattle on its train it had no opportunity for properly inspecting them, and ascertaining whether they were in a suitable condition for transportation; that the plaintiffs' agents who were at the time, and for a long time previously had been, in charge of the cattle, well knew when the cattle were loaded that they had suffered for a long time for want of sufficient food, and were poor and weak, and not in a suitable condition to endure the journey to Ogden, which fact was unknown to the carrier; that if said cattle had been in a proper condition for shipment when they were received and shipped they would not have been injured; that the plaintiffs negligently and recklessly caused the cattle to be shipped when they were aware that they were in an unfit condition for transportation; and that the alleged loss and damage incident to the journey was occasioned by the plaintiffs' own fault and negligence. As a defense to the charge contained in the complaint that the plaintiffs were not allowed to unload the cattle between Caliente, Cal., and Reno, Nev., the defendant interposed the following plea: That, by virtue of the special contract under which the cattle were carried, they were, while en route, under the special charge of three persons who were in the plaintiffs' employ, whose special duty it was to care for the cattle, and see that they had proper attention at the proper time, and whose duty it was to advise the defendant when the stock needed food and water; that when the cattle reached Sacramento, Cal., they had then been en route about 16 or 18 hours; that the plaintiffs' agents who were in charge of the stock, although advised that the cattle could only be unloaded at Reno, Nev., nevertheless insisted on going forward without unloading at Sacramento, by reason of which conduct the cattle were kept on the cars about 35 hours continuously between Caliente and Reno; and that, if the cattle sustained injury in consequence of not being unloaded and fed at Sacramento, such injury was due to the couduct of the plaintiffs' own agents, and to the bad condition of the cattle at the time they were received for shipment. With respect to the alleged delay in transporting the cattle from Reno to Ogden, the defendant averred that the run between those points was made in 34 hours and 55 minutes; that there was one hour's delay in starting after the cattle were reloaded; that, although the plaintiffs' agents who were in charge of the stock were advised of several intervening stations where the cattle could be unloaded and fed, they nevertheless insisted on going through from Reno to Ogden without unloading the stock, and that by reason of such negligent conduct on the part of the plaintiffs' agents the cattle were damaged, and not by reason of any fault or neglect on the part of the defendant company. The trial below resulted in a verdict and a judgment against the defendant company in the sum of $5,081.25, to reverse which the defendant company has removed the record to this court by a writ of error.

Thomas T. Fauntleroy (Alphonso Howe and Cornelius H. Fauntleroy, on the brief), for plaintiff in error.

S. D. Catherwood (R. E. Shepherd and E. B. Critchlow, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

From the foregoing analysis of the pleadings, it appears that it stood confessed at the trial that the cattle in question were kept loaded on the cars in making the journey from Caliente, Cal., to Reno, Nev., considerably more than 28 hours, the limit prescribed by an act of congress for keeping stock confined in cars while in transit (Rev. St. § 4386); that there was considerable delay in starting the train from Reno after the cattle had been reloaded and made ready to start from that station; that they were kept on the cars continuously at least 36 hours while being transported from Reno to Ogden, Utah; and that as a result of the trip some of the cattle died, all were more or less injured, and that the owners of the herd sustained a considerable loss. The principal defenses which the defendant company seems to have relied upon to shield itself from liability were these: That the cattle were in such a poor physical condition at the time of the shipment, which fact was unknown to the carrier, but was known to the shipper, that they could not have been transported for such a long distance without serious injury; and that whatever additional injury was sustained by their being kept in the cars beyond the period prescribed by law could not be recovered by the plaintiffs, because their being so kept was due to the plaintiffs' own fault, or to the fault of their agents who had the stock in charge. Much testimony was introduced at the trial tending to show the physical condition of the herd when the shipment took place, the various incidents of the journey, the causes which induced delay, the reasons why the cattle were not unloaded, watered, and fed more frequently, and who was responsible for the delay and the undue confinement of the cattle in the cars during the journey. The evidence on these points was somewhat conflicting, but the issues thus raised have been settled by the verdict of the jury. The principal questions discussed in the briefs and at the bar, which we are required to consider, relate to the admission and exclusion of evidence, and to the refusal of certain instructions which were asked by the defendant.

One of the first contentions on the part of the defendant company is that the trial court should have directed a verdict in its favor because the complaint which was filed by the plaintiffs counted upon a violation of the common law duties of the carrier, while the answer and the proofs disclosed that the cattle were transported under a special contract which relieved the carrier from some of its stringent common-law obligations. We do not find that any question of this sort was raised or discussed in the trial court, and, not having been

raised below, it is not open to discussion here. The action was brought by the plaintiffs in the ordinary form, the complaint alleging certain specific violations of duty on the part of the carrier, by reason whereof the plaintiffs had sustained damage. The defendant answered, pleading the existence of a special contract, and such immunity from its common-law obligations as it had thereby secured. It did not insist that the special contract relieved it from liability for the wrongful acts alleged in the complaint, if they had been done in the manner and form alleged, nor did it insist that the plaintiffs could only recover for such injury as they had sustained by declaring upon the special contract, and on that alone. While the defendant set forth the special agreement in its answer, the substance of its defense was that such damage as the plaintiffs had sustained they had themselves occasioned by offering unfit cattle for shipment, and by refusing to unload, feed, and water them at proper intervals, although they were afforded the requisite facilities for so doing. The point under consideration was not only not made below, but if it had been we are aware of no rule of law which requires a shipper who has made a special contract to declare upon it, when he contends that the carrier has been guilty of some neglect of duty on account of which he is liable notwithstanding the provisions of the contract. A special contract, when exacted by a carrier, is a defensive weapon, to be made use of by the carrier when sued by the shipper for any alleged dereliction of duty against which it was designed to afford protection.

The next proposition is that error was committed in permitting a witness by the name of Black, who was one of the men who had charge of the cattle on the trip from Caliente to Ogden, and who had followed the butchering business for many years, and in that capacity had had very much to do with cattle, to say that it took "a great deal longer to take this train" from Sacramento to Reno than any train "he had ever come over on the same road," and to say, further, that "26 to 28 hours is long enough to keep cattle on the cars without feed or water." The first of these statements was neither very important nor improper, while the witness' acquaintance with cattle and knowledge of their habits and powers of endurance was much greater than that of the average person, and qualified him to say, as he did in substance, that 26 or 28 hours' confinement of cattle on cars was long enough, because confinement for a longer period would wear them out, cause them to fall or lie down, and have a general bad effect. It can scarcely be claimed that the admission of this testimony constituted a reversible error.

The same view must be taken concerning several other exceptions to the admission of evidence. One witness who had been a railroad conductor was allowed to say that the run from Caliente to Ogden "was a very poor run"; and with relation to the blowing out of the cylinder head of an engine, which occurred during the trip, and occasioned considerable delay, to say further that such accidents sometimes happen on railroads, but are more apt to happen "with a poor class of engines."

Another witness (one of the plaintiffs), who was a cattle dealer of large experience, and who met and inspected the herd at Ogden on

its arrival, was allowed to testify, in substance, that the cattle had been on the cars and confined therein for such a length of time during the trip, and had been carried across such a country, that it would cause them to be in the bad condition in which he found them on their arrival at Ogden. He was also allowed to answer the question whether it was customary on other roads, like that of the defendant company over which he had shipped cattle, to run stock trains at as low a rate of speed as 15½ miles per hour; there being testimony which tended to show that the train in question did not average a greater speed. The same witness was allowed to state that his experience with railroads had been that it was customary to give stock trains a right of way over all trains except passenger trains. He was not allowed, however, to answer a question propounded on his cross-examination as to whether he had made an estimate of his entire loss on the cattle in controversy, in a letter written to the defendant company. This latter question was excluded, apparently, because it called for the contents of a written document which was not at the time produced and exhibited to the witness.

Another witness, who was a cattle dealer of considerable experience, and who also saw the herd on its arrival at Ogden, was allowed to testify, in substance, that the bad condition of the cattle on their arrival was due to the fact that they "had been very badly handled, and perhaps misused on the cars."

To the action of the trial judge in all of the foregoing instances, and in some others of a similar character which we may have overlooked, exceptions were reserved, and have been argued on appeal. But we are unable to say that the action of the lower court was materially erroneous. The testimony was all germane to the various issues in the case, and, in so far as it consisted of opinions, it seems to have been elicited from persons who were well qualified by experience to express the same. It is manifest, we think, that the judgment below cannot be reversed because of the errors last enumerated, unless we are overtechnical in the application of the rules of evidence.

The special contract under which the cattle in question were transported provided, in substance that any compensation for injuries claimed to have been sustained by the cattle while in transit should be adjusted between the parties on the basis of the declared or represented value of the stock at the time and place of shipment,—that is, at Caliente, Cal.,—and that the damages should not exceed the declared value. With a view of showing, in accordance with the provisions of the special contract, what would have been the market value of the cattle at Caliente, taking into account the alleged injuries which they had sustained during the trip on account of the defendant's negligence, a long hypothetical question, covering more than a page of the record, was propounded to one of the plaintiffs' witnesses, who was allowed to answer it notwithstanding an objection which was interposed by the defendant company. The objection was that the supposed facts as recited in the question were not fairly in accordance with the evidence which had been introduced by the plaintiffs. The question was not criticised in any other respect, nor did

counsel point out with any degree of clearness wherein the assumed incidents of the journey, the condition of the cattle, and the hardships which they had undergone were not in conformity with the proof on those points, as it had been elicited from the plaintiffs' witnesses. In framing the hypothetical question, the plaintiffs had the right, of course, to assume that their own witnesses had told the truth, rather than the defendant's witnesses, whenever there was any conflict; and while the question was long and involved, and while we may be permitted to doubt the expediency of allowing such complex questions to be propounded in a case of this character, yet we are not able to hold that the objection actually interposed was tenable. The question, in our judgment, contained a reasonably fair summary of all the material facts as they had at the time been testified to by the plaintiffs' witnesses.

The defendant company proposed to prove that while the cattle in controversy were being loaded on the cars at Caliente on November 3, 1898, one of the plaintiffs' agents, who was supervising the loading, declared "that he had been buncoed"; also that he said, in substance, that the cattle were not the cattle that had been bought in the field; and that he suspended the loading for a short time, and threatened to unload those that were already on the cars. These statements of the agent were excluded, and an exception was saved. The evidence consisted of unsworn declarations by a third party, who was not shown to have had any authority to bind the plaintiffs by making such statements concerning the condition of the cattle. Nor were they made under such circumstances that they can be regarded as admissible on the ground that they were the res gestæ of an act which the agent was then performing in behalf of his principal, nor was any foundation laid for introducing them in evidence for the purpose of impeaching the person by whom the statements are said to have been made. The proposed testimony was properly excluded, and the same may be said of the action of the trial court in excluding similar statements which the defendant sought to prove by another witness by the name of Byers, who claims to have been present when the cattle were loaded, and to have heard certain disparaging remarks concerning the condition of the cattle, which were made by persons who were at the time in charge of the herd, and were assising in the loading of the same.

Complaint is further made by the defendant because its chief train-dispatcher was not permitted to answer the question, "What care and diligence did the defendant exercise to prevent delay on the road in going forward and in overcoming any delay when it occurred?" But as the answer which the witness gave to that question was "that everything was done that could be done to prevent delay of this train in going forward and in overcoming any delay when it occurred," and as this was a mere conclusion of law on the part of the witness which embodied no statement of the facts on which the conclusion was based, it is manifest that no error was committed in excluding the question and the answer thereto.

The defendant company offered to read from the deposition of a witness by the name of S. J. Root, who testified that he helped to

load the cattle on the cars at Caliente; that he had had experience in raising, feeding, and transporting cattle all his life; and was then 58 years old, and had made cattle raising his principal business,—a statement to the effect that, in his judgment, the cattle in question had not been well enough fed, and were not in a fit condition when shipped, to stand transportation from Caliente to a cold climate; that the change of climate would be injurious to them, and cause them to become numb, and to lie down and be unable to get up. This statement was made in response to the question whether the change of climate in the month of November from Caliente to Ogden, Utah, or to Omaha, where the herd was eventually carried, would have any effect on the cattle in the condition that they were in, and, if so, what effect. The trial court excluded the answer to the question, and an exception was taken. It also refused to permit another witness, George E. Root, who was 30 years old, and had had much experience in raising, feeding, and in taking care of cattle, and who saw the herd loaded on the cars at Caliente, and was well acquainted with it for some time prior to the shipment, to testify, in effect, and in response to an interrogatory, that shortly before the shipment one of the cattle in the herd, a full-grown animal, had died in the pasture where the herd was kept, because, in his opinion, "he didn't get enough feed." It excluded another statement of the same witness, that shortly before the shipment the herd had been moved from one pasture to another because the feed in the former pasture had "given out entirely," and could "keep them no longer." It also refused to permit this witness to answer the question whether the cattle in controversy, when shipped, "were in a fit and safe condition to be transported for three or four days upon railroad cars." The trial court refused to allow another witness, W. H. Cuddy, who testified that he was acquainted with the herd, and had the care and management of cattle all his life, and was 33 years old, to answer a similar question as to whether, in his opinion, the cattle at the time of the shipment were in a condition to be safely transported by rail for such a long distance as they were actually carried. And it also declined to permit another witness, Henry Dubbers, who had had large experience in handling cattle, and who had seen and inspected the herd in question prior to the shipment, and found them, as he said, to be "weak and thin," to say, in response to the inquiry what effect a change of climate in November from Caliente to Ogden would have upon cattle which were poor and weak, that such a change of climate would be disastrous; that the herd, as he saw it, were so poor and ill fed that they could not resist the shock, and "would be numbed, even by frost." Proper exceptions were duly taken to the action of the court in each of the foregoing instances, and the exceptions have been urged in this court.

We are of opinion that each of the foregoing exceptions was well taken. The condition that the cattle were in when they were shipped was one of the principal issues in the case, inasmuch as the defendant contended that, through want of sufficient nourishment for some time prior to the shipment, the cattle were poor and weak, and incapable of withstanding the fatigue incident to a long journey by rail,

and the cold that was encountered in transporting them over the high mountain ranges between Caliente, in southern California, and Ogden, Utah. It contended, further, that the injuries complained of were not the result of any negligence on its part, but were due to the enfeebled condition of the cattle, and that they could not have been avoided by the exercise of that degree of care which the carrier was required to exercise. It is obvious that the excluded evidence tended to support these contentions, and we are unable to say that any of the witnesses from whom the testimony was elicited lacked the experience which was necessary to qualify them to testify as experts concerning the condition of the cattle, and the probable effect of transporting them in their alleged enfeebled condition for a long distance and over high altitudes. In view of their testimony showing the experience which they had severally had in handling cattle, we think that the trial court could not rightfully declare as a matter of law that they were incompetent to testify as experts, but are of the opinion that it was the province of the jury to determine, in the light of the experience which they professed to have had, what weight should be accorded to their testimony. The witnesses were certainly competent to express an opinion as to the condition of the herd, and we think that they were more competent than ordinary persons to judge of the probable effects of fatigue, and how they would be affected by a sudden change from a warm to a colder climate. The excluded evidence was fully as relevant and competent as some expert testimony which the plaintiffs were allowed to introduce, and we are unable to discover in the record any sufficient reasons for its exclusion. Nor are we able to say that the action of the court in excluding it was an immaterial error, which may be disregarded, in view of all the circumstances attending the trial, and the effect which the testimony might have had, if it had been admitted, on the assessment of the damages.

Counsel for the defendant have indulged in some criticism of the instructions which were given by the trial court, but no exceptions were taken to the instructions so given, except to the one which dealt with the measure of damages, and the exception in that behalf was very general, being merely, "We except * * * to the instruction given as to the measure of damages." Counsel, as it seems, did not attempt to point out to the court in what respect the instruction concerning the measure of damage was erroneous or misleading. In view of the provision in the special contract which required the damages, if any were claimed, to be adjusted on the basis of the value of the cattle at the place of shipment, and not to exceed the declared value at the time and place of shipment, the court in its charge gave the following directions, in substance, on the subject of damages: That in no event could the defendant be held responsible for any loss incident to the journey which resulted from the low vitality of the cattle, and was not induced by the carrier's negligence; that, if such negligence on the part of the defendant had been shown as entitled the plaintiffs to recover, the measure of damage would be the difference in value of the cattle at Caliente, Cal., on November 3, 1898, in the condition in which they were in fact delivered at Ogden, and

the condition in which they should have been delivered had the defendant used due care; that it was not any difference in the value of the cattle at Caliente as they were shipped and when they arrived at Ogden which was recoverable, but a difference due to the defendant's negligence, because some depreciation in value would necessarily result from the transportation of the cattle in a proper manner; that the value of the cattle in the condition in which they ought to have been delivered at Ogden and their value in the condition in which they were actually delivered should each be ascertained, the value in each instance being the market value at Caliente on November 3, 1898, and that in no event could the value of the cattle in the condition in which they should have been delivered exceed $20 per head for grown animals and $5 per head for calves, because that was the maximum of value which was fixed by the special contract when the herd was received for shipment.

This part of the charge is criticised by counsel with a refinement of reasoning which is not usual, and, as we think, would not have been appreciated by the jury; for the reason, as counsel say, that in fixing the market value of the cattle at Caliente when they were delivered for shipment the jury may have supposed from the language employed in one clause of the instruction that they were at liberty to place a higher value on the cattle than that fixed by the plaintiffs in the special contract, and that in this way the difference between the two values which was made the measure of damage might have been exaggerated. We do not think that the paragraph of the charge in question is fairly susceptible of such an interpretation; and we have no reason to suppose that it was interpreted by the jury as counsel assert that it might have been. The damages awarded certainly did not exceed the declared value of the cattle, for the sum allowed did not exceed $9 per head for grown animals. In view of all that was said by the court, we are satisfied that the rule for the admeasurement of damages was properly declared, and in language that was well understood.

The defendant's attorneys preferred numerous requests for instructions, and excepted to the refusal of 11 of such special requests. But the instructions actually given embodied, as we think, the substance of these requests, in so far as they enunciated correct propositions of law. The issues whether there was unreasonable delay in transporting the cattle, in view of all the circumstances attending their transportation; whether the defendant furnished reasonable facilities for unloading the cattle, so that they need not have been kept on the cars longer than the statutory period; and whether the plaintiffs exercised proper care and diligence in availing themselves of such facilities or were remiss in the discharge of that duty, and by such neglect contributed to the injuries complained of,—were each clearly defined and fairly submitted to the jury; and these, in connection with the issue respecting the physical condition of the cattle when delivered to the carrier, were the most vital issues in the case. Notwithstanding the complaint made by counsel that the court's charge was too general, we do not conceive it to be probable that the defendant was prejudiced by the refusal to give any of the special

requests, otherwise than as they were given in the general charge, since the jury were instructed, in substance, and in accordance with the view maintained by the defendant, that if the plaintiffs failed to exercise ordinary care in availing themselves of reasonable facilities which were afforded by the carrier for feeding, watering, and resting the stock at proper intervals, then they could not be heard to complain on that account. The defendant company was thus given the benefit of its plea of contributory negligence, in so far as that plea was supported by the proof.

Upon the whole, we conclude that the record discloses no material error other than the one heretofore pointed out, on account of which we deem it necessary to reverse the judgment, and direct a new trial. It is so ordered.

CALDWELL, Circuit Judge (dissenting). I concur in the opinion of the court on all points except the one upon which the judgment of the lower court is reversed. The competency of a witness to give opinion testimony depends upon either the actual experience of the witness with respect to the very subject-matter under investigation, or his previous study and research concerning the same, and sometimes on both. It is not claimed that the witnesses whose opinion testimony was excluded had made the subject of the effect upon cattle of a change of climate, or the effect upon them of transporting them by rail in any climate, a matter of special study or research. It is not shown that any one of them had any actual experience on the subject, or had personally observed the effect on cattle of a change from a warm to a cold climate, or that he had ever accompanied a shipment of cattle by rail at any time in any country. The general rule as to the admissibility of opinion testimony is well settled. In Railway Co. v. Edwards, 49 U. S. App. 52, 24 C. C. A. 300, 78 Fed. 745, this court said:

"The general rule undoubtedly is that witnesses are to testify to facts, and not to give their opinions; but this rule has its exceptions as familiar and well settled as the rule itself. The exceptions rest upon the common ground of necessity. Among these exceptions is this one: That a witness, having special knowledge and experience as to the value of property, animate or inanimate, and as to how the value of such property is affected by certain conditions or treatment, may give his opinion as to how much the property was damaged or benefited by such conditions or treatment. In many cases witnesses are allowed to testify to their opinions, not because they are 'experts,' in the technical sense of that term, but because they have special knowledge of the particular facts in the case, which the jurors have not. It is manifest that one who has never handled or shipped cattle by rail, and has never looked after and attended them while in the cars en route to their destination, can have no accurate conception of the effect upon cattle of confining them in cars standing still on the track for 10 or more hours, at the end of a long journey."

Not one of the witnesses testified that he knew from personal observation and experience the effect of cold weather on cattle in or out of the cars. The only experience they ever had with cattle was driving and herding them in southern California, a semitropical climate. They had no special knowledge derived from personal experience and observation, or otherwise, of the effect of cold upon cattle.

Their knowledge upon this subject was no greater than that of the average man and of every juror in the box. If their opinions were competent testimony, then the opinions of one who drives the cows from the pasture to the pen to be milked, and of the milkmaid who milks them, would be equally competent. The witness S. J. Root carried on a cattle business "in the state of California." He never shipped cattle to Nebraska, and is not shown to have accompanied a shipment of cattle over the mountains or elsewhere at any time, or ever to have crossed the mountains by rail. The experience of the witness George E. Root is limited to raising, feeding, and caring for cattle in four counties in southern California. He states expressly, "I never did travel with a train load of cattle." The witness Cuddy says he is a vaquero in three counties in southern California. He does not testify that he ever shipped any cattle by rail over the mountains, or that he ever accompanied any such shipment, or that he ever crossed the mountains by rail. The witness Dubbers testifies that he is familiar with the transportation of cattle in San Joaquin valley and in southern California. He does not testify to having shipped any cattle by rail over the mountains, or ever to have accompanied such a shipment, or ever himself to have crossed the mountains by rail. It is perfectly obvious that these witnesses had no special knowledge on the subject of the effect on cattle of shipping them by rail over the route traveled by the cattle in controversy in this case or any similar route. In a good many jurisdictions the ruling of the trial court on the competency of a witness to give opinion testimony is not subject to review (Rodg. Exp. Test, § 22), and in the jurisdictions where such ruling is reviewable it is only done where the court has committed a plain and palpable error in matter of law. This is the rule of the supreme court. In Manufacturing Co. v. Phelps, 130 U. S. 520, 527, 9 Sup. Ct. 601, 32 L. Ed. 1035, the supreme court say:

"Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law."

This rule has been affirmed many times. In Iron Co. v. Blake, 144 U. S. 476, 484, 12 Sup. Ct. 731, 36 L. Ed. 510, the court said:

"How much knowledge a witness must possess before a party is entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous."

The reports of that court will be searched in vain for a case where the ruling of a lower court holding that the witness was incompetent to give opinion testimony has been reversed upon the state of facts disclosed by this record. Applying the rule of the supreme court to the testimony in this case, it is clear the lower court did not err. Its ruling was not founded on any error in matter of law. The lower court held that these witnesses were not shown to possess any special knowledge on the subject, or any knowledge above that of the average citizen. This was purely a question of fact to be de-

termined by the lower court, not only from the words of the witness, but from his presence, manner, and demeanor on the stand as well.

There is another view of the case which disposes of this alleged error. Facts within the knowledge of every man of common intelligence cannot be made the subject of opinion testimony. Jurors, as well as all men of common intelligence, know that cattle deprived of food for a long time will suffer from hunger, and that cattle taken suddenly from a warm to a rigorous climate will suffer from the cold, and it was only proposed to confirm these obvious and common truths by the opinions of these witnesses. As the observation and experience of these witnesses had been no greater than that of every farmer, ranchman, and dairyman in the land, they could rightfully testify to facts within their knowledge only, and not to their opinions. Moreover, there was a great mass of direct testimony on both sides showing the exact condition of the cattle at and before their shipment, and their treatment, condition, and action from the time they were placed in the cars until they were taken out at Ogden. The direct testimony on both sides covered every foot of ground and every hour of time from the time the cattle were placed in the cars until they were taken out at Ogden. The opinion, therefore, of these vaqueros, if competent, could not possibly throw any new light on the case or influence the verdict of the jury in the slightest degree. Their opinions, as disclosed by the record, were nothing more than the jury of their common knowledge, as well as from the direct testimony of the witnesses for both sides, already knew. At most, it was weakly cumulative of the direct and positive testimony of witnesses who accompanied the cattle on the train, and of the common knowledge of all men. The rejection of such opinion testimony, if error, was error without prejudice. The rule is well settled that, where a ruling either in admitting or rejecting evidence could not have influenced the verdict, the error is always to be regarded as harmless.

The judgment of the circuit court should be affirmed.

KING v. McANDREWS et al.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1901.)

No. 1,569.

1. LAND DEPARTMENT—QUASI JUDICIAL TRIBUNAL—POWER.

The land department of the United States, including in that term the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands, subject to its disposition, and with power to execute its judgments by issuing patents to the parties entitled to them.

2. PATENT TO LAND WITHIN JURISDICTION OF DEPARTMENT IMPERVIOUS TO COLLATERAL ATTACK.

A patent of land within its jurisdiction evidences the judgment of the land department, and constitutes a conveyance of the legal title of

the nation to the patentee in execution of the judgment. It is, like the judgments of other judicial tribunals, impervious to collateral attack.[1]

8. PATENT NOT ASSAILABLE COLLATERALLY FOR ERRORS OF LAW.
The test of jurisdiction is not a right decision, but the right to investigate, to make some decision, and to dispose of the land accordingly. Hence, in a case within its jurisdiction, the patent is as impervious to collateral attack for errors of law committed by the department as for mistakes of fact.

4. PATENTS TO LAND—REMEDY FOR MISTAKEN OR ERRONEOUS ISSUE.
The remedy for errors of law, as well as for mistakes of fact, in the issue of a patent to land within the jurisdiction of the department, is a direct proceeding by bill in equity to correct them.

5. PATENT TO LAND WITHOUT JURISDICTION OF DEPARTMENT MAY BE COLLATERALLY ASSAILED.
Land the title to which has passed from the United States before the claim on which the patent was based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice, and land for the disposition of which congress has made no provision, is not intrusted to the disposition of the land department, and its patents to such land are void on their face, and may be collaterally attacked in an action at law.

6. LAND DEPARTMENT—PRESUMPTION OF JURISDICTION AND OF VALIDITY OF PATENT.
The general rule is that public lands are subject to the disposition of the land department. A patent of the United States, therefore, is presumptive evidence that the department had jurisdiction, and that it rightfully exercised it, and if there could have been any state of facts which, under the laws, would have given the department jurisdiction to dispose of the land described in the patent, the presumption is that this state of facts existed, and the patent is not open to collateral attack.

7. LAND IN INDIAN RESERVATION NOT SUBJECT TO PUBLIC LAND LAWS.
Land reserved by a treaty or act of congress for the exclusive occupancy of Indian tribes is not a part of the public lands, and until the Indian title is extinguished no one but congress can initiate any preferential right upon or restrict the nation's power to dispose of it.

8. SAME.
The act of the legislature of Dakota Territory of March 7, 1885, including a portion of an Indian reservation in the city of Chamberlain, did not withdraw this land from homestead or pre-emption entry, because it was not a part of the public lands, and was not subject to the public land laws.

9. PUBLIC LANDS—CONGRESS MAY DESTROY PREFERENTIAL RIGHTS TO ENTER.
The congress of the United States has the right and the power at any time before all the preliminary acts prescribed for the acquisition of title to the public lands, including the payment of the fees, have been performed, to deprive any one who has a preferred right to acquire the title of this privilege, and to confer it upon another.

10. PUBLIC LANDS—EFFECT OF ACT OF MARCH 2, 1889.
The act of congress of March 2, 1889 (25 Stat. 894, § 16; Id. 892, § 12; Id. 899, § 28), opened the lands therein described to homestead entry upon the extinction of the Indian title thereto.

11. LAND DEPARTMENT—JURISDICTION.
The land department had jurisdiction to hear and determine the claims of homesteaders and town site claimants to the land described in the act of the Dakota legislature of March 7, 1885, under the act of congress

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1 Conclusiveness of decisions of land department, see notes to Hartman v. Warren, 22 C. C. A. 38; Carson City Gold & Silver Min. Co. v. North Star Min. Co., 28 C. C. A. 344.

of March 2, 1889, and the public land laws of the United States, and to issue patents therefor in accordance with its decisions. Such patents evidence the legal title to the lands, and are impervious to collateral attack.

(Syllabus by the Court.)

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

George H. King brought an action of ejectment in the circuit court of the United States for the district of South Dakota against M. McAndrews, Charles H. Pease, L. C. Rush, and William Lawson to recover possession of lots 3 and 4 and the S. E. ¼ of the S. W. ¼ of section 10, in township 104, of range 71 W., of the fifth principal meridian. He alleged in his complaint that he was the owner and entitled to the possession of the land, and that the defendants wrongfully withheld it from him. The defendants denied the title of the plaintiff, admitted their possession, and alleged that the land was a part of the selected site of a town or city when it first became subject to entry, and that the plaintiff's title consisted of a void patent issued to Henry J. King on July 6, 1899. The plaintiff filed a replication, in which he denied the averments of the answer. At the trial he offered his patent in evidence, and the court sustained the objection to it that it was void because the land it described was within the corporate limits of the city of Chamberlain when the patentee entered it. This ruling defeated the claim of the plaintiff, and a verdict and judgment in favor of the defendants were rendered by direction of the court. These rulings of the trial court are challenged by this writ of error. The learned judge who made them delivered an opinion upon a motion for a new trial of this action, in which he stated the reasons which led him to his conclusions, and this opinion is published in 104 Fed. 430.

John H. King (S. H. Wright and George H. King, on the brief), for plaintiff in error.

John D. Rivers, for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and ADAMS, District Judge.

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

The only complaint of the trial of this case is that, in the absence of any bill in equity or direct proceeding to avoid the plaintiff's patent or to charge the legal title under it with a trust in favor of the defendants, the circuit court held it void on a collateral attack in an action at law. It presents the old question, so often discussed and decided by the supreme court, when is a patent of the United States open to indirect attack? When is it void on its face? In U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 954, 959, 15 C. C. A. 96, 102, 107, 32 U. S. App. 272, 281, 289, in U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296, and in James v. Iron Co., 46 C. C. A. 476, 107 Fed. 597, 600, this court had occasion to consider this question in cases of grave moment, to review, digest, and analyze the decisions of the supreme court upon it, and to deduce from them and announce the principles which, in our opinion, those decisions have established. The discussion of the question, and the review and analysis of those decisions, will be found in the opinion in the case first cited, and it would be a work of supererogation to repeat them here. Our decisions in that case

and in the case of U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296, were reviewed and affirmed by the supreme court without any criticism of the views expressed or of the rules announced in those cases, so that the assumption may safely be indulged that they have received the approval of that court. U. S. v. Winona & St. P. R. Co., 165 U. S. 463, 17 Sup. Ct. 368, 41 L. Ed. 789; U. S. v. Northern Pac. R. Co., 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836. These are the rules and principles which this court deduced from the decisions of the supreme court upon this issue:

The land department of the United States, including in that term the secretary of the interior, the commissioner of the general land office, and their subordinate officers, constitutes a special tribunal, vested with judicial power to hear and determine the claims of all parties to the public lands which it is authorized to dispose of, and with power to execute its judgments by conveyances to the parties entitled to them. 9 Stat. 395, c. 108, § 3 (Rev. St. § 441); 5 Stat. c. 352, § 1 (Rev. St. § 453).

A patent of land within its jurisdiction, issued by the land department, is the judgment of that tribunal, and a conveyance of the legal title to the land to the patentee in execution of the judgment.

When such a patent to land within the jurisdiction of the department is issued, it is, like the judgments of other judicial tribunals, impervious to collateral attack.

The test of the jurisdiction of this tribunal is the true answer to the question, had the department the power to hear and determine the claims of the applicants of the land and to dispose of it in accordance with its decision? If that question can be answered in the affirmative, the land department had jurisdiction of the case, and the patent which evidences its decision conveys the legal title, and is impervious to collateral attack. If it must be answered in the negative, then its conveyance is void, and is as vulnerable in a collateral action at law as in a direct proceeding in equity to avoid it.

Land the title to which has passed from the United States before the claim on which the patent is based was initiated, land reserved from sale and disposition for military or other like purposes, land reserved by a claim under a Mexican or Spanish grant sub judice, and land for the disposition of which congress has made no provision, is not intrusted to the disposition of the land department, is not within its jurisdiction, and hence its patents for such land are void on their face, and may be collaterally attacked in an action at law. Polk v. Wendal, 9 Cranch, 87, 3 L. Ed. 665; Stoddard v. Chambers, 2 How. 284, 318, 11 L. Ed. 269; Easton v. Salisbury, 21 How. 426, 432, 16 L. Ed. 426; Reichart v. Felps, 6 Wall. 160, 18 L. Ed. 849; Best v. Polk, 18 Wall. 112, 117, 118, 21 L. Ed. 805; Sherman v. Buick, 93 U. S. 209, 23 L. Ed. 849; Iron Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103, 39 L. Ed. 183; Railroad Co. v. Forsythe, 159 U. S. 46, 53, 15 Sup. Ct. 1020, 40 L. Ed. 71; Wright v. Roseberry, 121 U. S. 488, 519, 7 Sup. Ct. 985, 30 L. Ed 1039; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Doolan v. Carr, 125 U. S. 618, 624, 632, 8 Sup. Ct. 1228,

31 L. Ed. 844; Wilcox v. Jackson, 13 Pet. 499, 511, 10 L. Ed. 264; Morton v. Nebraska, 21 Wall. 660, 674, 22 L. Ed. 639.

But land which the department is vested with the power and charged with the duty to hear and decide the claims of applicants for, and to dispose of in accordance with its decision, is within its jurisdiction, and its patent of such land conveys the legal title to it, and is impervious to collateral attack, whether its decision is right or wrong. Minter v. Crommelin, 18 How. 87, 89, 15 L. Ed. 279; U. S. v. Schurz, 102 U. S. 378, 401, 26 L. Ed. 167; Moore v. Robbins, 96 U. S. 530, 533, 24 L. Ed. 848; French v. Fyan, 93 U. S. 169, 172, 23 L. Ed. 812; Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Refining Co. v. Kemp, 104 U. S. 636, 645–647, 26 L. Ed. 875; Steel v. Refining Co., 106 U. S. 447, 450, 452, 1 Sup. Ct. 389, 27 L. Ed. 226; Lee v. Johnson, 116 U. S. 48, 49, 6 Sup. Ct. 249, 29 L. Ed. 570; Heath v. Wallace, 138 U. S. 573, 585, 11 Sup. Ct. 380, 34 L. Ed. 1063; Knight v. Association, 142 U. S. 161, 212, 12 Sup. Ct. 258, 35 L. Ed. 974; Noble v. Railroad Co., 147 U. S. 174, 13 Sup. Ct. 271, 37 L. Ed. 123; Barden v. Railroad Co., 154 U. S. 288, 327, 14 Sup. Ct. 1030, 1038, 38 L. Ed. 992, 1001. In the case last cited the supreme court said:

"It is the established doctrine, expressed in numerous decisions of this court, that wherever congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the land department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

The test of jurisdiction is not right decision, but the right to enter upon the inquiry and to make some decision. Foltz v. Railroad Co., 60 Fed. 316, 318, 8 C. C. A. 635, 637, 19 U. S. App. 576, 581; U. S. v. Winona & St. P. R. Co., 67 Fed. 959, 15 C. C. A. 107, 32 U. S. App. 289. Hence a patent evidencing an erroneous decision of a question of law or a mistaken determination of an issue of fact, which the department was vested with the power, and charged with the duty, to decide, is as impervious to collateral attack as one which is the result of correct conclusions.

The remedy for an error of law in the action of the department regarding the title to land intrusted to its disposition is by a direct proceeding by a bill in equity to correct it. James v. Iron Co., 46 C. C. A. 476, 107 Fed. 597, 600; Bogan v. Mortgage Co., 63 Fed. 192, 195, 11 C. C. A. 128, 130, 27 U. S. App. 346, 350; U. S. v. Winona & St. P. R. Co., 67 Fed. 948, 958, 15 C. C. A. 96, 106, 32 U. S. App. 272, 288; U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 37 C. C. A. 290, 296; Cunningham v. Ashley, 14 How. 377, 14 L. Ed. 462; Barnard v. Ashley, 18 How. 43, 15 L. Ed. 285; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Lytle v. Arkansas, 22 How. 193, 16 L. Ed. 306; Lindsey v. Hawes, 2 Black, 554, 562, 17 L. Ed. 265; Johnson v. Towsley, 13 Wall. 72, 85, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 530, 538, 24 L. Ed. 848; Bernier v. Bernier, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152.

The aggrieved party has a like remedy for the wrongful issue of a

patent upon a misapprehension of the facts, which is induced by fraud or gross mistake. Gonzales v. French, 164 U. S. 338, 342, 17 Sup. Ct. 102, 41 L. Ed. 458; Root v. Shields, 1 Woolw. 340, 359, Fed. Cas. No. 12,038; U. S. v. Coos Bay Wagon-Road Co. (C. C.) 89 Fed. 151; U. S. v. Northern Pac. R. Co., 95 Fed. 864, 870, 882, 37 C. C. A. 290, 296, 308; U. S. v. Atherton, 102 U. S. 372, 374, 26 L. Ed. 213; U. S. v. Budd, 144 U. S. 154, 167, 168, 12 Sup. Ct. 375, 36 L. Ed. 384; U. S. v. Mackintosh, 85 Fed. 333, 336, 29 C. C. A. 176, 179, 56 U. S. App. 483, 490; U. S. v. Throckmorton, 98 U. S. 61, 66, 68, 25 L. Ed. 93; Marquez v. Frisbie, 101 U. S. 473, 476, 25 L. Ed. 800; Steel v. Refining Co., 106 U. S. 447, 451, 27 L. Ed. 226; French v. Fyan, 93 U. S. 169, 172, 23 L. Ed. 812; Ehrhardt v. Hogaboom, 115 U. S. 67, 69, 5 Sup. Ct. 1157, 29 L. Ed. 346; Heath v. Wallace, 138 U. S. 573, 575, 11 Sup. Ct. 380, 34 L. Ed. 1063; Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992.

These established principles have been restated and these authorities have been again cited because they control the disposition of the case in hand, and because counsel for the defendants seem to be impressed with the view that every decision by the land department of the many grave and complicated issues which condition the rightful issue of a patent is a mere ministerial act, open to collateral attack for every error of law into which the officers of that department may fall, in every action at law in which the title under the patent is involved. 104 Fed. 432. Such is not the law. The decisions of that department are judicial acts. The patents it issues are judgments of a quasi judicial tribunal. In cases within its jurisdiction they are presumptively right, and as impervious to collateral attack for errors of law or for mistakes of fact as the judgments of the courts, and all cases are within the jurisdiction of this department in which congress has intrusted to it the determination of the rights of the claimants, and the disposition of the land in accordance with its decision.

The real question in this case, therefore, is, was the determination of the rights of the claimants to the land here in controversy, and the issue of a patent to it in consonance with that decision, intrusted to this department? The contention of the counsel for the defendants is that it was not, because the land was within the limits of an incorporated city when it was first entered as a homestead by the patentee. The record of the trial of the case does not disclose the facts which conditioned the decision and judgment of the department, which the patent evidences, that King was entitled to the land. But the general rule is that the disposition of the public lands of the United States is intrusted to this department, and the patent itself is presumptive evidence both that the department had the jurisdiction to decide whether or not the patentee was entitled to it, and that its decision of that question was right. It follows that, if there might have been any state of facts which would have given the department jurisdiction of this case and the power to issue a patent to this land under the acts of congress, the presumption is that such a state of facts existed, and that the

department had jurisdiction of the case. Upon this subject the supreme court said in Refining Co. v. Kemp, 104 U. S., at page 646, 26 L. Ed., at page 878, that "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." And at page 645, 104 U. S., and page 878, 26 L. Ed., it said, in speaking of the authority of the department to hear claims for and to dispose of public land, that "when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the land department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision." The patent in this case then comes buttressed with the presumption that the state of facts most favorable to the jurisdiction of the department existed and was found to exist by that tribunal when it awarded the land and issued the patent to King, and the question in the case becomes: Could there have been any state of facts which would have given the department jurisdiction to dispose of this land under the law? For the purpose of answering this question, the presumption will be indulged that the state of facts existed which the opinions of the various officers of the land department indicated in the course of the protracted litigation in that tribunal which resulted in the award of the land and the issue of the patent to King, and on that assumption this case will be stated. King v. Railway Co., 14 Land Dec. Dep. Int. 167; City of Chamberlain v. King, 24 Land Dec. Dep. Int. 526; City of Chamberlain v. King, 25 Land Dec. Dep. Int. 249.

The land in controversy is a part of a tract of 188 acres situated on the east bank of the Missouri river, in the state of South Dakota. In the year 1880 this tract was a part of the Crow Creek and Winnebago Indian reservation, "set apart for the absolute and undisturbed use and occupation of the Indians." Treaty with Sioux Tribes, April 29, 1868 (15 Stat. 635, 636). In that year the Chicago, Milwaukee & St. Paul Railway Company made an agreement with these Indians to purchase from them this 188 acres and other lands, and this contract was approved by the secretary of the interior on January 3, 1881. On February 27, 1885, President Arthur issued an executive order to the effect that this land was withdrawn from the Indian reservation, was restored to the public domain, and was open to settlement under the land laws. Thereupon the patentee, Henry J. King, immediately made a settlement on the land described in his patent, and has occupied it ever since. On March 2, 1885, he applied to the local land officers to enter the land as a homestead, and tendered payment of the fees, but his application was refused

because the officers had not received official notice that the land had been restored to the public domain. On March 7, 1885, the legislature of South Dakota passed an act including this land in the city of Chamberlain, a municipality which had been previously incorporated. On April 17, 1885, President Cleveland issued a proclamation that the executive order of February 27, 1885, was void, as it was in fact, because it was in violation of the treaty with the Sioux Indians. On March 2, 1889, congress passed an act to divide a portion of the reservation of the Sioux Indians in Dakota into separate reservations, and to extinguish the Indian title to the remainder. 25 Stat. 888, c. 405. By section 16 of that act it declared that the right of the St. Paul Railway Company to acquire and hold this land under its contract with the Indians was confirmed upon condition that it constructed its railroad and complied with certain other requirements of that act in the time and manner there specified; that none of the lands covered by this agreement of the railway company should ever be used for town site purposes; and that, in case that company failed to comply with the requirements of the act, the land should be forfeited to the United States, and that "whenever such forfeiture occurs the secretary of the interior shall ascertain the fact and give due notice thereof to the local land officers, and thereupon the lands so forfeited shall be open to homestead entry under the provisions of this act." 25 Stat. 894, § 16. By section 12 of the act it provided that all the lands within the Indian reservation adapted to agriculture, which should be sold or released to the United States by any Indian tribe, under the act should be held by the United States for the sole purpose of securing homes to actual settlers, and should be disposed of to them in tracts not exceeding 160 acres to any one person, and that no patents should issue therefor except to persons taking the same as homesteads, or to their heirs, after the expiration of five years' occupancy thereof as such homesteads. Page 892. And by section 23 it provided that all persons who between the 27th day of February, 1885, and the 17th day of April, 1885, had entered upon any part of the Crow Creek and Winnebago reservation, and made settlements and improvements thereon, with intent to enter the same under the homestead or pre-emption laws of the United States, should have a preferred right, for a period of 90 days after the lands within that reservation were restored to the public domain, to re-enter upon their claims, and procure title thereto under the homestead or pre-emption laws of the United States. 25 Stat. 898. King had settled upon and improved this land within the time specified in this last section, with intent to enter it as a homestead, so that he fell within its provisions; but no one had settled upon or improved the land described in his patent, or done any other acts upon this land in support of the claim of the town site, between February 27 and April 17, 1885. The Indian tribes accepted the terms of the act of March 2, 1889, and under it their title to the land here in dispute was extinguished. On February 10, 1890, the president announced the fact that the Indians had accepted the terms of the act of 1889, and declared that this release did not

affect the reserved rights of the St. Paul Railway Company to the lands that are here in dispute. The railway company subsequently failed to comply with the terms of the act of 1889, and on December 5, 1894, President Cleveland issued a proclamation wherein he declared "that the said lands granted for right of way and station purposes, to wit, that tract of land known as lots 2, 3, and 4, and the S. E. ¼ of the S. W. ¼, of Sec. 10, and lots 1 and 2 in sec. 5, Tp. 104 N., R. 71 [a tract which includes the lands covered by this patent and a certain other tract], * * * are forfeited to the United States, and will be subject to entry under the homestead laws, as provided by said act of March 2, 1889, whenever the secretary of the interior shall give due notice to the local officers of this declaration of forfeiture." 19 Land Dec. 431. The secretary thereupon gave notice of the forfeiture, so that the lands first became open to entry under the provisions of the act of 1889, on April 15, 1895. On that day King applied to enter the land described in his patent as his homestead, and immediately thereafter, and on the same day, J. W. Orcutt, as mayor of the city of Chamberlain, applied to enter it as a town site in behalf of the defendants and others who were then occupying it. The litigation thus instituted in the land department went to a hearing on its merits before the local land officers, before the commissioner of the general land office, and before the secretary of the interior. All these officers decided against the claimants of the town site. City of Chamberlain v. King, 24 Land Dec. Dep. Int. 526. Upon an application for review, these decisions were again considered by the secretary, and affirmed, and finally, on July 16, 1899, the patent was issued to King in accordance with the uniform decisions of all the officers of the land department upon the questions of law and of fact which the contest between King and the claimants of the town site had presented. City of Chamberlain v. King, 25 Land Dec. Dep. Int. 249.

In this state of the case, counsel for the defendants insist that all this litigation was fruitless, that the department had no power to decide that King was entitled to the land, that its action in rendering that decision was without jurisdiction, and that its patent is not evidence of title, and is void, in the face of a collateral attack, in an action at law. This is his argument: First, under the general homestead act as it stood prior to March 3, 1891, lands within the limits of an incorporated town were not subject to homestead entry, unless otherwise provided by law. Act Sept. 4, 1841 (5 Stat. 455; Rev. St. §§ 2258, 2289). While the act of March 3, 1891 (26 Stat. 1095), repealed the pre-emption law, including section 2258, Rev. St., and struck out the restriction of homestead entries to lands subject to pre-emption, found in section 2289, it is insisted that it was not the purpose or effect of that act to open lands within the limits of an incorporated city to homestead entry. Second, the act of the legislature of the territory of Dakota of March 7, 1885, included the land described in this patent within the incorporated limits of the city of Chamberlain. Third, therefore, this land was not subject to entry as a homestead on April 15, 1895, the land

department had no jurisdiction to hear or decide the issues between the homesteader and the town site claimants, and its decision and patent are void. The major premise of this syllogism is vigorously assailed by counsel for the plaintiff. He stoutly maintains that since the act of March 3, 1891, which expressly struck out of the homestead law the restriction of entries under it to lands subject to pre-emption, and which repealed the pre-emption law, lands within the limits of an incorporated city are open to homestead entries to the same extent as other public lands. It is certain that the right of homestead entry was not farther restricted or limited by the act of 1891. Whether or not it was extended is a question which it is unnecessary to determine in this case, and upon which no opinion is expressed. Before its amendment by the act of 1891, the homestead law restricted the right to enter under it to public lands subject to pre-emption (section 2289), and the pre-emption law provided that "the following classes of lands, unless otherwise provided by law, shall not be subject to the right of pre-emption. * * * Second. Lands included within the limits of an incorporated town or selected as the site of a city or town." Section 2258. For the purposes of this decision, the proposition will be conceded that the restriction upon homestead entries, within the limits of an incorporated town, remained the same after the passage of the act of 1891 that it was before its enactment. But neither the minor premise of the syllogism of counsel for the defendants, nor its conclusion, can be admitted, and that for many reasons, some of which will now be stated.

1. This land was reserved for the Sioux tribes of Indians under the treaty of 1868, on March 7, 1885, when the act of the territorial legislature, including it within the limits of the city of Chamberlain, was passed. It was not a part of "the public lands." It was not subject to the acts of congress relating to town sites, pre-emptions, homesteads, or other claims upon public lands, and until the Indian title was extinguished, and the land was restored to the public domain, no act of any state or territorial legislature, or of any municipal or other corporation, or of any private party, could restrict the nation's power to dispose of it, or initiate any preferential right or claim to it, in the absence of an act of congress expressly authorizing such action. Rev. St. §§ 2380, 2394; Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 733, 742, 745, 23 L. Ed. 634; Buttz v. Railroad Co., 119 U. S. 55, 66, 70, 7 Sup. Ct. 100, 30 L. Ed. 330; Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264; Bardon v. Railroad Co., 145 U. S. 535, 539, 542, 12 Sup. Ct. 856, 36 L. Ed. 806; Keith v. Town Site of Grand Junction, 3 Land Dec. Dep. Int. 356, 358. This proposition has been the conceded law of the land ever since the present system of disposing of the public lands was adopted. No authorities in conflict with it have been cited. A diligent search through the decisions of the courts has disclosed none. In Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 733, 742, 745, 23 L. Ed. 634, in the year 1875, and again in Bardon v. Railroad Co., 145 U. S. 542, 12 Sup. Ct. 856, 36 L. Ed. 806 (1892), the supreme court announced the rule, to which it has uniformly adhered, that

lands within the limits of an Indian reservation are excluded "from disposal as the public lands are usually disposed of," and are exempt from all congressional legislation, unless there is an express declaration therein to the contrary. The entire beneficial ownership of such lands was in the Indians. Nothing but the naked legal title in trust for them was in the United States. Of the Indians' interest in such land, the supreme court has repeatedly said: "For all practical purposes they owned it; as the actual right of possession, the only thing they deemed of value was secured to them by treaty until they should elect to surrender it to the United States." Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 742, 23 L. Ed. 634; Bardon v. Railroad Co., 145 U. S. 535, 543, 12 Sup. Ct. 856, 36 L. Ed. 806.

The contention of counsel for the defendants, that a state or territorial legislature may extend the limits of a town or city over a part of "the public lands" so as to segregate that part from the public domain, and to reserve it from pre-emption and homestead entries, is not disputed. The cases of Root v. Shields, 1 Woolw. 358, 359, Fed. Cas. No. 12,038; Burfenning v. Railway Co., 46 Minn. 20, 48 N. W. 444; Id., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Alger v. Hill (Wash.) 27 Pac. 922, 923; Lewis v. Town of Seattle, 8 Copp. Landowner, 143; City of Grantsville v. McBride, 2 Copp. Pub. Land Laws (1882) 1302; City of Seattle v. McAleer, 2 Copp. Pub. Land Laws (1882) 1306, 1309, 1311; and Town Site of Concordia v. Linney, 2 Copp, Pub. Land Laws (1882) 1313,—which are cited for the defendants, go no farther. None of them hold that the act of any legislature can initiate a claim to, or affect the future disposition of, any land which has been theretofore reserved and appropriated to the occupancy of the Indians, of the army, of the navy, or of any other party, and which has thereby ceased to be a part of the public domain. For this reason, these authorities are neither decisive nor persuasive upon the question which the act of the Dakota legislature presents.

The claim of counsel for defendants, that state and territorial legislatures may extend their civil and criminal laws over the occupants of portions of Indian reservations by including them within incorporated towns or cities or by other legislation, so that crimes committed there may be punished, taxes collected, and rights of property protected by the courts, is not material to the issue in this case, and it is accordingly conceded. Nothing more is held in Langford v. Monteith, 102 U. S. 145, 147, 26 L. Ed. 43; Railway Co. v. Fisher, 116 U. S. 28, 6 Sup. Ct. 246, 29 L. Ed. 542; Draper v. U. S., 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419; State v. Doxtater, 47 Wis. 278, 291, 2 N. W. 439; and Schriber v. Town of Langdale, 66 Wis. 616, 29 N. W. 547, 554,—which have been cited for the defendants. Under this admission, the act of the legislature of Dakota was not void. It extended over the occupants of this land the municipal laws of the city of Chamberlain, and empowered that city to protect the rights of persons and of property there. But it had no more effect upon the present or prospective claims of parties to the title of the land than it would

have had if the title to it had been held by private citizens. An act of the legislature which includes public land in the limits of a town does not segregate it from the public domain, and withdraw it from homestead entry by its own force. It does so, as Mr. Justice Miller has well said in the leading case of Root v. Shields, 1 Woolw. 340, 359, Fed. Cas. No. 12,038, by virtue of the congressional provision only. Remove the cause, and the effect is not produced. The congressional provision had no application to, or effect upon, the title or claims to lands appropriated to Indians or military reservations, because they were not a part of "the public lands." Hence an act of the legislature of a territory which derived all its powers to affect such claims and titles from such a provision was devoid of all effect upon them.

2. If the position just stated were untenable, and if the act of the Dakota legislature segregated this land from the Indian reservation, and withdrew it from homestead entry, the act of congress of March 2, 1889, restored it. If it was withdrawn, it was by virtue of and subject to the terms and limitations of the acts of congress. Rev. St. §§ 2258, 2289. Those terms were that by its incorporation into a town or city it was withdrawn from homestead entry, "unless otherwise provided by law." It was otherwise provided by law. The act of 1889 provided (1) that these specific lands which were then subject to the contract between the Indians and the St. Paul Railway Company should not "be used, directly or indirectly, for town site purposes," and that whenever they were forfeited by the railway company "the lands so forfeited shall be open to homestead entry under the provisions of this act" (25 Stat. 894, § 16); (2) that all the lands sold or released by the Indians under that act which were adapted for agriculture should be disposed of to actual and bona fide settlers in tracts not exceeding 160 acres each, and that no patent should issue for any tract, except to the person taking the same as a homestead (25 Stat. 892, § 12); and (3) that the persons who made settlements and actual improvements, and located or attempted to locate homesteads, pre-emptions, and town site claims on any of these lands, between February 27 and April 17, 1885, with intent to enter them under the homestead or pre-emption laws, should have a preference right to acquire the lands so located for 90 days after the land should be restored to the public domain (25 Stat. 898, § 23). Here were repeated enactments of congress subsequent to the act of the Dakota legislature to the effect that this land should be subject to homestead entry.

3. If the withdrawal of the land from homestead entry was effected by the territorial act including it within the corporate limits of the city of Chamberlain, that act gave the claimants of the town site no vested rights against the United States, and the nation was still free to dispose of the land to others notwithstanding that withdrawal. Congress has the right and the power at any time before all the preliminary acts prescribed by the laws for the acquisition of the title to its lands, including the payment of the fees, have been performed, to deprive any one who has a preferred right to acquire the title of this privilege, and to confer it upon another. Railroad

Co. v. Smith, 171 U. S. 260, 269, 18 Sup. Ct. 794, 43 L. Ed. 157; Frisbie v. Whitney, 9 Wall. 187, 189, 193, 196, 19 L. Ed. 668; Hutchings v. Low, 15 Wall. 77, 87, 88, 93, 21 L. Ed. 82; Buxton v. Traver, 130 U. S. 232, 236, 9 Sup. Ct. 509, 32 L. Ed. 920; U. S. v. Holmes (C. C.) 105 Fed. 41, 44; Campbell v. Wade, 132 U. S. 34, 38, 10 Sup. Ct. 9, 33 L. Ed. 240; Wagstaff v. Collins, 97 Fed. 3, 9, 38 C. C. A. 19, 24, 25; Emblen v. Land Co., 102 Fed. 559, 561, 563, 42 C. C. A. 499, 501, 503; Norton v. Evans, 82 Fed. 804, 27 C. C. A. 168, 49 U. S. App. 669. The claimants to the town site had performed none of the requisite preliminary acts to entitle them to enter it when congress passed the act of March 2, 1889. By that act, as has been seen, it exercised its power to give the preferred right to acquire this land to those who sought to enter it as their homesteads, and there is nothing in the prior act of the Dakota legislature which can limit the terms or destroy the effect of this later act of congress upon a subject which was within its exclusive jurisdiction,—the disposition of the lands of the nation.

The indisputable rules and principles which have now been adverted to compel the conclusion that the act of the legislature of Dakota did not irrevocably withdraw the land which was subsequently patented to King from the jurisdiction and disposition of the land department. When on April 15, 1895, it was restored to "the public lands," under the provisions of the act of March 2, 1889, and the patentee and the claimants of the town site applied to the land department for permission to enter it and for a conveyance of it, the acts of congress had vested in that department the power, and had imposed upon it the duty, to hear and decide the issues whether or not this land was withdrawn from homestead entry by the territorial act of March 7, 1885, at a time when it was a part of an Indian reservation, and not a part of "the public lands"; whether or not the act of congress of March 2, 1889, prohibited its entry as a town site; whether or not that act authorized its entry as a homestead; whether or not either of the claimants made an actual settlement upon, and improvement of, the land with intent to enter it as a pre-emption or homestead or town site between February 27, 1885, and April 17, 1885, so that he acquired a preferred right to enter the land for 90 days after April 15, 1895; whether or not the homestead claimant had complied with the requisite preliminaries regarding settlement, occupation, and improvement to entitle him to enter it; whether or not the property and its occupants were such that the claimants of the town site could lawfully enter the land as such (Rev. St. §§ 2382, 2384, 2387–2389, 2393); and every other issue of law and of fact which conditioned the determination of the ultimate question whether the homesteader or the claimants of the town site were entitled to enter and to receive the patent for this land. The decision of these questions was not a ministerial act. It was the exercise of judgment,—of judicial power,—and the decision by that tribunal, evidenced by its patent to King, of the issues thus presented to it, whether right or wrong, was presumptively right, conveyed the legal title to the land, was impervious to collateral attack, and could be

successfully assailed only by a direct proceeding in equity for that purpose.

The land department was the only tribunal intrusted by congress with the power to decide these questions or with authority to dispose of this land. The claimants of the town site could have obtained title to it from no other source. They recognized this fact when they applied to this tribunal for a decision in their favor and for its patent. If the department had jurisdiction to hear and decide these questions in their favor, if it had jurisdiction to decide them at all, it had jurisdiction to decide them either way,—to determine them wrong as well as right. The test of jurisdiction is not a right decision, but the right to investigate and decide. This right was vested in the department by the public land laws of the United States. Its patent conveyed the legal title held by the government, and evidenced its judgment upon the questions presented to it, and it should have been received in evidence at the trial below and should have prevailed until it was avoided by a direct proceeding in equity for that purpose.

This conclusion has not been reached without a thoughtful reading and consideration of the opinions of the various courts in Burfenning v. Railway Co., 46 Minn. 20, 48 N. W. 444; Id., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; Railroad Co. v. Forsythe, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71; Root v. Shields, 1 Woolw. 359, Fed. Cas. No. 12,038; Wright v. Roseberry, 121 U. S. 519, 7 Sup. Ct. 985, 30 L. Ed. 1039; Deweese v. Reinhard, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757; Morton v. Nebraska, 21 Wall. 660, 674, 22 L. Ed. 639; Riley v. Welles 154 U. S. 578, 14 Sup. Ct. 1166, 19 L. Ed. 648; U. S. v. Carpenter, 111 U. S. 347, 4 Sup. Ct. 435, 28 L. Ed. 451; U. S. v. Coos Bay Wagon Road Co. (C. C.) 89 Fed. 151; and in every other case cited by counsel for the defendants. But there is nothing in any of these authorities that is sufficient to strike down the established rule which was announced in Refining Co. v. Kemp, 104 U. S. 646, 26 L. Ed. 875, and which has been sustained by the decisions of the supreme court for nearly a century, that "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." In Burfenning v. Railway Co., 46 Minn. 20, 48 N. W. 444, and Id., 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175, in which a patent was held void in an action of ejectment because the land which it described was within the limits of an incorporated city when the claim upon which it was founded was initiated, the action was brought and tried in a court of the state of Minnesota. In that court the distinction between actions at law and suits in equity had been abolished, and an equitable defense had been made as available in an action at law as in a proceeding in equity by the statutes of that state. St. Minn. 1894, §§ 5131, 5236. Hence the defense in that action, that the patent had been issued through an error of law of the land department, was as direct a proceeding to avoid the patent as an independent suit in equity would have been in a federal court. That defense was interposed, and it was sustained. But it would not

have been available in the federal courts, because the distinction between actions at law and suits in equity is still maintained in those tribunals. In the courts of Minnesota the defense interposed to that action at law was a direct, and not a collateral, attack upon the patent. In the federal courts it would have been a collateral, and not a direct, attack, and it could not have been sustained. In Railroad Co. v. Forsythe, 159 U. S. 46, 15 Sup. Ct. 1020, 40 L. Ed. 71; Wright v. Roseberry, 121 U. S. 519, 7 Sup. Ct. 985, 30 L. Ed. 1039; Deweese v. Reinhard, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757; Morton v. Nebraska, 21 Wall. 660, 674, 22 L. Ed. 639; and Riley v. Welles, 154 U. S. 578, 14 Sup. Ct. 1166, 19 L. Ed. 648,—the lands in question had either been granted or reserved when the claims of the patentees were initiated so that they were not subject to the disposition of the land department. Root v. Shields, 1 Woolw. 359, Fed. Cas. No. 12,038, U. S. v. Coos Bay Wagon Road Co. (C. C.) 89 Fed. 151, and U. S. v. Carpenter, 111 U. S. 347, 4 Sup. Ct. 435, 28 L. Ed. 451, were direct attacks upon patents by bills in equity for errors of law of the land department. The attack upon the patent in the case in hand was indirect and collateral, and it cannot prevail. It was an attempt to interpose an equitable defense to a legal cause of action, which is not permissible in the national courts. In this action at law the patent was conclusive evidence of title in the patentee, and that effect should have been given to it upon the trial below.

The judgment is reversed, and the case is remanded to the court below, with directions to grant a new trial.

RALLI et al. v. ROCKMORE.

(Circuit Court, N. D. Georgia. June 19, 1901.)

No. 1,479.

DAMAGES—BREACH OF CONTRACT FOR DELIVERY OF COTTON—TIME OF BREACH.

At various times during about two months, ending in December, plaintiffs made contracts for the purchase of cotton from defendant. Of some of the purchases, all was delivered and paid for; of others, part only; and still others, none was delivered. Plaintiffs kept urging delivery of the remainder, and not until January 4th did defendant refuse to make such delivery. Plaintiffs then purchased the amount of the deficiency at the market price, which was an advance over the prices to be paid under the contracts. *Held*, that the breach of the contracts, for the purpose of fixing the measure of damages, occurred on January 4th, and plaintiffs were entitled to recover the amount then paid in excess of the contract price.

Action at Law for Damages for Breach of Contract for the Sale of Cotton.

Slaton & Phillips, for plaintiffs.
W. E. Simmons, for defendant.

NEWMAN, District Judge. This case was submitted; the court to determine the same on the law and facts, without the in-

tervention of a jury. I find that on October 3, 1898, correspondence was opened between Ralli Bros. and M. L. Rockmore, for the purchase of cotton by Ralli Bros. from Rockmore. On October 29, 1898, the first agreement to sell appears to have been made. Thereafter, during the months of October, November, and December, sales were made as follows: October 29th, 100 bales, at 5 cents per pound, which were all delivered and paid for; October 31st, 300 bales, at $4^{15}/_{16}$ cents per pound, which were delivered and paid for; November 2d, 200 bales, at $4^{15}/_{16}$ cents per pound, of which 90 bales were not delivered; November 8th, 200 bales, at $4^{15}/_{16}$ cents per pound, none of which were delivered; November 10th, 300 bales, at 5 cents per pound, of which 166 bales were not delivered; November 16th, 200 bales, at 5⅜ cents per pound, of which 178 bales were not delivered; November 16th, 200 bales, at 5¼ cents per pound, of which none were delivered; November 21st, 50 bales, at 5⅜ cents per pound, of which 37 bales were not delivered; December 12th, 100 bales, at 5½ cents per pound, of which 14 bales were not delivered. I further find that the plaintiffs continually urged the defendant to deliver this cotton, and that defendant failed to do so, but not until January 4, 1899, did the defendant finally refuse to deliver the cotton, and thereby breached his contract with the plaintiffs for the sale and delivery of the same. I further find that it became necessary for the plaintiffs, in order to supply the cotton which the defendant failed to deliver them, to purchase the same from other parties, at an increased cost, amounting to $2,427.41. This is the testimony of the plaintiffs' agent, Mr. Agelasto (and is undisputed), which shows the total cost to the plaintiffs of the amount of cotton which the defendant failed to deliver in each instance. I find that the relation between the plaintiffs and defendant during the time this transaction was going on was that of buyer and seller, and not of principal and agent, as contended by counsel for the defendant in his argument. I find further that the claim of the defendant that he was justified in not delivering the cotton according to contract, by reason of the failure of the plaintiffs to pay exchange, is not sustained by the evidence, and is not meritorious.

Questions of Law.

The only question of law in the case, as I understand it, is whether the plaintiffs' right to recover should be tested and determined by the price of cotton at the time it should have been delivered by Rockmore, in October, November, and December, or at the time that the defendant finally notified the plaintiffs that he would not comply with the contract, in January, 1899. Cotton had risen in price during this period, and up to January 4, 1899. I find, as has been indicated, that the breach of the contract was in January, 1899. During the period between the time the various sales were made and January 4th, Rockmore all the time justified the plaintiffs in believing that he would deliver all the cotton sold. While he did make some suggestions and some complaint about exchange, it was not such, as above stated, to make it meritorious as a defense to

this suit, nor was it sufficient to put the plaintiffs on notice that the cotton would not be delivered, so that they could have supplied the same at an earlier date.

My conclusion is, under the facts, that the breach of the contract was on January 4, 1899, and that the difference in the price at which the different lots of cotton were sold and the price which Ralli Bros. were required to pay, as shown by the testimony of Mr. Agelasto, from January 4th to 7th, is the proper basis for recovery in this case, and that that is the amount which the plaintiffs were damaged, and for which they are entitled to recover. This amount is, as I have stated, $2,427.41. This is upon the assumption that there is an agreement of counsel that there is a deficit, in any event, of 883 bales. There is one trouble about the matter, and that is that the plaintiffs in their declaration appear only to claim a contract for the delivery of 1,650 bales, and such is the statement in the plea of the defendant. If I am under a misapprehension as to the agreement of counsel that the contest was in reality over the nondelivery of 883 bales, without reference to the statement in the pleadings, then there should be written off of the above amount $272.88, which would reduce the amount of recovery to $2,155.53.

The plaintiffs' suit was only brought, however, for $2,175, and necessarily their recovery must be confined to this amount. If I am correct in the assumption that there was a failure to deliver 883 bales, the plaintiffs are entitled to recover this sum of $2,175, with interest thereon from January 7, 1899, and judgment should be entered in favor of the plaintiffs against the defendant for said sums. Counsel may indicate to me before the court adjourns what the agreement was in reference to the number of bales of cotton not delivered.

The claim of plaintiffs for counsel fees for stubborn litigiousness is disallowed.

The claim of the defendant that the character of the contract was such as to be against public policy, and void, being a contract for future delivery, is not insisted upon at all, as I understand it.

The claim of the defendant that the jurisdictional amount is not involved is controlled by the amount of the finding, as above indicated.

LOUISVILLE & N. R. CO. v. TRUETT.

(Circuit Court of Appeals, Sixth Circuit. November 6, 1901.)

No. 949.

RAILROADS—ACCIDENT AT CROSSING—TENNESSEE STATUTE.

Shannon's Code Tenn. §§ 1574–1576, require every railroad company to keep some person on the lookout upon all locomotives, and when any person, animal, or other obstruction appears on the road to give the alarm, put down the brakes, and use every possible means to stop the train and prevent an accident. They further provide that if it fails to take such precautions it shall be responsible for all damages resulting from any accident or collision that may occur, but that if the precautions are taken it shall not be liable, and place the burden of proof upon the

company. As construed by the supreme court of the state, such statute makes a company absolutely liable unless it shows a compliance therewith, and contributory negligence is not a defense, but goes only in mitigation of damages. The court also holds, however, that if a person seen on the track gets off, and out of reach of the train, while under observation, the company is not bound to exercise the precautions mentioned, although such person may afterward get back to the track and be injured. *Held*, that the latter rule only applied where such person had got far enough from the track, and under such circumstances, as to reasonably indicate his safety; and that where a person about to cross a track on horseback, on seeing an approaching train, attempted to turn his horse back, but the horse became frightened and unmanageable, the question whether the failure of the engineer to make any attempt to stop the train rendered the company liable for the death of such person was one of fact for the jury, there being evidence tending to show that such death was caused by the horse crowding so close to the train that deceased was struck by a passing car, and that when he was upon the track, and first seen by the engineer, the train was at such a distance that the speed might have been slackened, if not entirely stopped, before reaching the crossing.[1]

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

Charles N. Burch and John W. Judd, for plaintiff in error.

John T. Allen and W. H. Washington, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. This is a suit brought by Mattie Truett, as widow of her deceased husband, Joseph H. Truett, against the Louisville & Nashville Railroad Company, to recover damages for injuries to her husband resulting in his death. The suit is brought under the statutes of Tennessee, which provide for such recovery at the suit of the persons therein designated. No question is presented involving the propriety of the widow being plaintiff in the action. The case was brought in the circuit court of the United States for the Middle district of Tennessee, and tried before the court and a jury. The trial resulted in a verdict and judgment for the plaintiff for the sum of $2,000. At the close of the evidence in the case the defendant moved for peremptory instructions to the jury to render a verdict for that party. The court declined to give that instruction, and defendant excepted. The case was thereupon submitted to the jury under instructions not now complained of. The only assignment of error relied upon is the one complaining that the court erred in refusing to grant the request for a peremptory instruction to the jury to find for the defendant. We have therefore to deal only with the question whether the evidence in the case relating to the circumstances of the accident in which the husband of the plaintiff was killed were such that the court ought to have instructed the jury to find for the defendant.

The circumstances of the case were as follows: The Louisville & Nashville Railroad, at the place where the accident occurred, runs nearly north and south. Truett resided on the east side of the track,

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

about 100 yards distant. The pike running from Franklin to Nashville runs north and south about 100 yards west of the railroad. There is a crossroad running over the railroad to Truett's residence from a point on the pike nearly opposite. About noon Truett, the deceased, was returning home on horseback. He left the pike at the crossroad, and rode to the east, passing through an open gateway on the west side of the track, and was about to cross the track, his horse's fore feet being just at the edge of the track, when, looking up, he saw a freight train rapidly approaching, not far distant. He undertook to turn his horse back and off the track. The horse became frightened and unmanageable. The train passed swiftly by, without any signal of any kind, or any attempt to stop it being made. According to the contention of the plaintiff, while the horse was whirling about, greatly frightened, Truett was thrown against the rear end of the second car in the train, or the front end of the third car, and received a heavy blow upon his right temple, which resulted in his death shortly after.

The defendant's contention was that Truett did not receive his injury by being brought into collision with the train, but that the horse ran away with him, back on to the crossroad, where it stumbled and fell, carrying its rider to the ground, his head striking a rock or stone by the side of or in the road, and that this was the cause of his injury. The statute of Tennessee which defines the duty of a railroad company in such cases is contained in Shannon's Code of Tennessee, and its provisions are as follows:

Subsection 4 of section 1574:

"Every railroad company shall keep the engineer, fireman or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

Section 1575:

"Every railroad company that fails to observe these precautions or cause them to be observed by its agents and servants shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur."

Section 1576:

"No railroad company that observes or causes to be observed, these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed these precautions shall be upon the company."

The construction given to subsection 1574 is that the duty thereby imposed is, in the conditions there stated, absolute, and that, taken in connection with section 1575, the liability is not left open to speculation or question in case the observances required are not taken when a person appears upon the road and a collision results. The railroad company is held for the consequences.

And it is also held by the supreme court of Tennessee that the statute applies in every case of a person appearing upon the track or so near to it as to be within striking distance of the train. It is further held that if the person has appeared upon the track, but has

afterwards gotten away from it while still under observation, the company is not bound to exercise the precautions mentioned in the statute, although the person might afterwards get back into such proximity to the train as to be injured thereby. Contributory negligence is not a defense, but goes in mitigation of damages. In a recent case (Transit Co. v. Walton, 105 Tenn. 415, 420, 58 S. W. 737) the supreme court of Tennessee thus expounded the statute:

"In construing these provisions, it has been heretofore held by this court, in an unbroken line of decisions, that the railroad company is liable unless it can show that these provisions and precautions have been observed, and the fact that the accident or collision would have occurred had the requirements been performed will not relieve the company from their performance nor from liability for damages. It has been said that cases of hardship, or even absurdity, may occur under such construction, but the language is explicit and certain, and capable of being given no other meaning. Railroad Co. v. Burke, 6 Cold. 45, 50; Railroad Co. v. Connor, 9 Heisk. 26; Hill v. Railroad Co., 9 Heisk. 827; Railroad Co. v. Smith, 9 Heisk. 863, 864; Railroad Co. v. Thomas, 5 Heisk. 266; Railway Co. v. Foster, 88 Tenn. 678, 13 S. W. 694, 14 S. W. 428. So strict is the rule that contributory negligence will not excuse their observance, be it ever so gross, but will only go in mitigation of damages. Railroad Co. v. Burke, 6 Cold. 45, 51; Railroad Co. v. Smith, 6 Heisk. 177; Railroad Co. v. Walker, 11 Heisk. 385; Simpson v. Railroad Co., 5 Lea, 456; Railway Co. v. Foster, 88 Tenn. 675, 680, 13 S. W. 694, 14 S. W. 428; Railroad Co. v. Conner, 2 Baxt. 382. It is true that impossibilities are not required, and if all is done that should have been done, and the accident was unavoidable, the road will not be liable. Railroad Co. v. Scales, 2 Lea, 688, 691, 694; Railroad Co. v. Swaney, 5 Lea, 119; Railway Co. v. Foster, 88 Tenn. 680, 13 S. W. 694, 14 S. W. 428. But when the impossibility and unavoidableness arise out of the default of the road the road will still be liable. Railroad Co. v. Anthony, 1 Lea, 516; Railroad Co. v. Selcer, 7 Lea, 559. The plea or defense that all efforts would have been ineffectual will not protect the road. The injunction of the law is peremptory, and the consequence of a failure is unconditional liability for damage done in cases coming within the statute. Railroad Co. v. St. John, 5 Sneed, 524, 530, 73 Am. Dec. 149. And speculation as to the effect will not be indulged by the court nor permitted by the road, but the statute demands absolute obedience, whether the precautions seem necessary or not. Hill v. Railroad Co., 9 Heisk. 827; Railway Co. v. Foster, 88 Tenn. 679, 13 S. W. 694, 14 S. W. 428. This court has said, in substance, that it is the duty of all who are engaged in running the train, in whatever department they may be employed, to give the entire energies of their bodies and minds, and to bring into requisition all means at their command, to stop the train as soon as possible, and prevent the accident. Railroad Co. v. Connor, 9 Heisk. 22. And that the road must be able to show, not only that the specific precautions were observed, but, in addition, that all possible means were employed to stop the train and prevent the accident; but the company will not be required to perform impossibilities. Railroad Co. v. Smith, 9 Heisk. 863; Railroad Co. v. Scales, 2 Lea, 688. It is incumbent on the road to show that all the brakes were put down by the express terms of the statute. Railroad Co. v. Smith, 9 Heisk. 864."

The question at the trial, therefore, was whether, although Truett and his horse had appeared upon the track, he had yet gotten far enough away from the running room of the train as to be passed safely by. The settled rule in the United States courts is that, if there is no aspect of the evidence in the case which could reasonably justify a verdict by the jury for the plaintiff, it is the duty of the court to instruct the jury that he is not entitled to recover, but that if there is evidence which, if believed by the jury, would

justify the finding of facts necessary to a recovery, the question of liability becomes one of fact, and falls within the province of the jury, and not of the court. In applying this rule, it is not material from what source the evidence comes,—whether from one side or the other. Nor is it necessary that all of the testimony of any witness in the case should be credited by the jury. They may believe that the testimony of a witness is in part true and in part mistaken. We are therefore required to look into the evidence to see whether there was in the whole body of it such proof as that the jury, if crediting it, might have found the facts which it was necessary to make out.

The train was coming from the south. It was a freight train, moving at the rate of about 15 miles an hour. There was a deep cut through which it passed, 150 to 200 yards south of the crossing. The road curved somewhat to the right where the train came out of the cut, and thence continued northerly more nearly in a straight line. It was down grade, and the train moved by its own momentum, steam being turned off.

One important element in the case was a question at what distance the approaching train was from the crossing when Truett attempted to pass over and appeared upon the track. According to the testimony of one Helm, a witness for the plaintiff, who was an eyewitness to the occurrence, the train was very near at that moment,—"almost upon him," as the witness said. He further stated that Truett, looking up, saw the train coming, and attempted to rein his horse around to the right; but the horse was unmanageable, and turned instead to the left, getting far enough away, however, to clear the engine and part of the train as they passed, when, the horse "careening" to the left, Truett fell over to the right, striking the rear end of the second car or the fore end of the third car, the horse being struck also upon its right side; and that thereupon the horse ran, with its rider, out through an opening in the fence to the crossroad, when it fell down, and Truett was thrown to the ground, where he was soon afterwards found, with his temple crushed in. The engineer on the train was called by the defendant, and testified that he was on the right-hand side of the engine, and on the inside of the curve of the track, keeping a lookout ahead, when, just before reaching the crossing, Truett and his horse appeared upon the track ahead, the horse being about to step over the rail on the west side of the track; that he, the engineer, moved to sound the whistle, but before he could do so the horse and its rider seemed to fall back and disappear; that he therefore took no further precaution, and did not know that any injury had happened until he reached the end of his trip. Another eyewitness was called by the defendant, one Parman, who gave a somewhat different account. He testified that Truett was not hit by the train at all; that the horse went up to the track, and that upon the approach of the train became frightened and unmanageable, and ran back from the railroad 25 or 30 yards, and fell down in the crossroad, throwing Truett upon the ground, where the witness found him, wounded in the head and bleeding; that there was a fixed rock in the edge

of the road near where he fell, and there were small stones around him in the roadway. The witness also testified that he did not see the engine at the time when Truett and his horse turned away from the track, and that he did not notice the train then, and did not think it had then come into his (the witness') view.

It is not impossible that the jury may have thought this witness mistaken in some part of his testimony, and yet have believed that the engine was far enough away from the crossing at the time when Truett appeared thereon, and his horse became frightened and unmanageable, for the engineer, if he was maintaining a proper lookout, to see the predicament that Truett was in. And, upon any view of the evidence, the jury might have thought the engineer, if he was maintaining a proper lookout, might have seen that Truett was in trouble, while yet he was in striking distance, and while the uncontrollable movements of the horse were such that there was danger of his coming in collision with the train before it could pass.

Accepting as correct the construction of the statute to be that where one who has appeared upon the track, and then gets away from it under circumstances which indicate that he is able to keep out of the way, but afterward gets back into collision with the train, there can be no recovery, we do not think that that consequence would follow if the man appears upon the track in such circumstances as that it is seen he may be carried by a force beyond his control out of and into the danger line, only momentarily disappearing from off the track. In such case we do not think the railroad company would be relieved from the duty of taking the prescribed caution. It may be that in the present instance it was not possible to have completely stopped the train, and still possible that by promptly applying the brakes and reversing the engine and turning on steam the movement of the train could have been slackened, and the violence of the collision have been eased to the extent of avoiding a fatal injury. We are unable to accept the proposition which seems to be contended for in the brief for plaintiff in error, that if, at the time when the engine passed, Truett was out of striking distance, that would relieve the company from the obligations imposed by the statute, but think that, as before indicated, the circumstances might be such as to justly induce the expectation that before the train could pass it might come into collision with the party who had been seen upon the track, but seen to be unable to control his own movements. Such a case seems to us to come within the intention and purpose of the statute.

We are of opinion that the court did not err in submitting the case to the jury, and the judgment must therefore be affirmed.

BALTIMORE & O. R. CO. v. BURRIS.

(Circuit Court of Appeals, Sixth Circuit. November 11, 1901.)

No. 895.

1. RAILROADS—DEBTS OF RECEIVERSHIP—ORDER REQUIRING ASSUMPTION BY COMPANY.
A railroad company allowed to resume possession of its property, which has been in the hands of receivers in a foreclosure suit, by an order of the court which reserved jurisdiction to adjudicate and settle all claims against the receivers, and required the company to pay all debts and claims which should be adjudged valid, by the acceptance of such condition becomes bound to pay such claims, and may properly be made defendant in a petition of intervention subsequently filed in the cause by a person injured through the alleged negligence of the receivers, and in such case the court will take judicial notice of the terms of its former order.

2. MASTER AND SERVANT—DEFECTIVE RAILROAD CAR—PROOF OF NEGLIGENCE UNDER OHIO STATUTE.
By Bates' Rev. St. Ohio, § 3365–21, the burden of proof of want of knowledge of a defect in any car or locomotive, and of due diligence to ascertain it, rests upon a railroad company, where it is shown that such defect existed, and that by reason thereof an employé was injured.

3. SAME—RULES OF RAILROAD COMPANY—REQUIRING CONDUCTORS TO INSPECT CARS.
By a rule of a railroad company conductors of freight trains were required to be at the starting points of their trains at least 40 minutes before leaving time, and, among other things, to see that their cars were in proper running order before starting. It was shown that the other duties imposed upon the conductors during such time were such as to require the greater portion of it. *Held* that, under a reasonable construction, the rule did not require a conductor to critically examine the several cars in his train, and the attachments thereto, with the particularity which measured the duty of the company iself, but only that he should take a general survey of the train, and take notice whether, to all appearances, the cars were in proper order, and remedy any defect discovered; and that the fact that the end of a brake beam on a car was down, dragging on the track, before the train had cleared the yards at a considerable distance from the starting station, was not sufficient to charge the conductor with negligence as matter of law.

4. SAME—INJURY OF CONDUCTOR—CONTRIBUTORY NEGLIGENCE.
As a freight train was passing out of the yard at a station some one on the ground called to a brakeman that something was out of order. The brakeman did not understand, but reported to the conductor, who was in the caboose, and was directed to go forward on the train, and ascertain, if possible, what was wrong. He discovered that the end of a brake beam on a car had dropped down, and was dragging on the track. The conductor then went forward, and attempted to signal the engineer to stop, but before he could do so, while the train was crossing a bridge, the car was thrown from the track, breaking the bridge, and falling through, and the conductor, falling with it, was seriously injured. *Held*, that he could not be charged with contributory negligence as matter of law, because he sent the brakeman ahead in the first instance, instead of going himself, but that the question was properly submitted to the jury.

5. SAME—BURDEN OF PROOF.
It is the well-settled rule in the courts of the United States that the burden of proving contributory negligence, in an action by a servant for a personal injury, rests upon the defendant.

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

J. H. Collins, for plaintiff in error.
Ulric Sloane and Thomas E. Steele, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

SEVERENS, Circuit Judge. This suit was brought by way of an intervening petition, by Burris, who, while he was the conductor of a freight train in the service of receivers of the railroad company appointed by the court in a case hereinafter mentioned, was severely injured in an accident which happened on the railroad in consequence, as he alleged, of the negligence of the receivers. There was a verdict and judgment for the plaintiff in the sum of $5,000.

When the accident occurred there was pending in the equity side of the court below a suit for the foreclosure of a mortgage, the title of which was the Mercantile Trust Company against the Baltimore & Ohio Railroad Company. Shortly thereafter the court made an order in that case directing the receivers to turn over the railroad property to the company, and to render a report of their receipts and disbursements, etc., reserving, among other things, the adjudication and settlement of all claims against the receivers; and it was expressly provided in the order that the company should take the property upon the condition that it should pay off and satisfy all debts and obligations incurred by the receivers, and which might be adjudged by the court to be valid charges against the receivers. Subsequently, by permission of the court, Burris filed this, his intervening petition, against the railroad company to recover the damages sustained by him from the injury above mentioned.

By its answer, by a motion for judgment upon the pleadings, and by motion in arrest of judgment, the defendant urged as a defense that the liability, if there was any, rested upon the receivers, and not upon the company, for the reason that the company did not have either the possession or control of the railroad when the injury occurred. The court, referring to the condition which it had imposed by its order putting the company in possession, that the latter should become chargeable with the obligations of the receivers, overruled the objection.

Upon the trial testimony was given tending to show the following facts: The freight train of which the plaintiff was conductor left Newark, Ohio, for the East about 7:30 o'clock in the morning, and consisted of an engine and 32 cars, the rear one of which was the caboose. While the train was passing the outer limits of the yard at that station an employé of the company called out to those on board, signifying that there was something wrong about the train. A brakeman heard him, but did not understand what the trouble was. He informed the conductor, who was reading over his waybills in the caboose, of what he had heard from the man in the yard about some trouble with the train. The conductor directed him to go forward, and find out what was the cause of the warning. On going over the cars to about the middle of the train, the brake-

man discovered that one end of a brake beam upon a car in the train belonging to another company had dropped down, and was dragging upon the track. He returned, and informed the conductor, who thereupon went forward himself, and tried to signal the engineer to stop the train. But he failed to catch the engineer's attention until the train reached and was passing over a bridge, when the car having the dragging brake beam was by it thrown from the tracks upon the trestlework of the bridge, breaking it down, and falling, with it, into the ravine below. The conductor fell with the car, and was badly hurt.

The principal grounds of the defense upon the merits were that—First, it was, by a rule of the company, made the duty of the conductor to inspect his train before starting, and find out whether it was in order, which duty, it was claimed, he must have neglected, and hence was not entitled to recover; second, that he was guilty of negligence in not going forward himself when he was notified by the brakeman that something was wrong with the train, instead of sending the brakeman. And at the close of the evidence the defendant, upon these grounds, asked for an instruction to the jury that they find a verdict in its favor. This the court refused, and the cause was submitted to the jury under instructions pertinent to the case.

Four objections to the recovery are mainly relied on by counsel for the plaintiff in error:

1. It is objected that the court erred in holding that the action was properly brought against the railroad company, notwithstanding the injury happened while the receivers were in possession of and operating the road, and authority is cited in support of the proposition that in such case the receivers, and not the company, are responsible. The general rule thus stated is not doubted, and has been recognized and applied by this court. Railroad Co. v. Hoechner, 14 C. C. A. 469, 67 Fed. 456. But here was the further and controlling fact that by the order under which the company had been allowed to resume possession of the road it was charged with, and by its acceptance of the privilege given it by the court had assumed and agreed to satisfy, all the obligations of the receivers, this among them. This is not an infrequent course in such cases, and it effectually removed the ground for the objection. But it is said the court had no authority to go out of the record of this proceeding, and inform itself, without proof that such an order had been made. But this proceeding was a parcel of the foreclosure case,—a mere intervention therein,—and it was competent for the court to take judicial notice of the orders which it had made in the principal case relating to claims arising during its pendency. Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296.

2. Respecting the contention that the conductor was to be held conclusively negligent in not discovering by inspection of his train that the brake beam was down, it is to be observed, in the first place, that by a statute in Ohio, where the injury happened, a prima facie presumption is raised that any such defect as this existed and

was continued by the negligence of the company. The statute is this (Bates' Rev. St. § 3365–21):

"It shall be unlawful for any such corporation to knowingly or negligently use or operate any car or locomotive that is defective or any car or locomotive upon which the machinery or attachments thereto belonging are in any manner defective. If the employé of any such corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachments thereto belonging, owned and operated or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employé, or his legal representatives, against any railroad corporation for damages, on account of such injuries so received, the same shall be prima facie evidence of negligence on the part of such corporation."

The burden of proof of want of knowledge of an existing defect and of due diligence in ascertaining it is thus cast upon the company. Railroad Co. v. Erick, 51 Ohio St. 146, 37 N. E. 128; Felton v. Bullard, 37 C. C. A. 8, 94 Fed. 781, the latter being a case determined in this court.

By the company's rule No. 471, it was provided that:

"Freight conductors and brakemen are required to be at the starting points of their trains at least forty minutes before leaving time, to see that their trains are ready for departure on time; they are required to see that their cars are in proper running order before starting, and examine them at water stations, stopping places, and wherever opportunity offers, to see if the running gear, brakes, etc., are in proper order."

And it is contended that, if Burris had performed the duty enjoined by this rule, he would have seen that the brake beam was out of place, and saved himself from suffering the injury. But it is obvious that it is not intended by this rule that the conductor should critically examine the several cars in his train, and the attachments thereto, with that degree of particularity which measures the duty of the company itself. Other employés (the car inspectors) are charged with that special duty, and, besides, the time prescribed for his preparations for leaving would frequently, if not ordinarily, be insufficient for him to make such thorough examination in addition to the other duties imposed upon him for execution within the time mentioned.

The rule must be given a reasonable construction so as to render its observance practicable. According to the testimony, he was required first to report to the yard office, and there learn where the train was which he was to take. Then he must go to the caboose for the train book with which to check up the train. From there he must go the whole length of the train, taking the number of each car, its description, and ownership. He must see if the seals of each car are unbroken, take the number of the seals, and the name of the company to whom the seals belong. Then he must return to the yard office, and get his waybills. From there he must go to the train dispatcher's office for his running orders, and remain there while these orders, which are in triplicate, are compared. Then he returns to his train, and, having compared his watch time with that of the engineer, gives the signal to start, standing by as the cars

pass, and getting on the caboose as that goes by. And the train might be at a part of the yard distant from the offices. He is undoubtedly required by this rule to take a general survey of his train, and take notice whether to all appearances everything is in proper order, and, further, if he discovers any defect, to see that it is removed before starting. The court charged the jury substantially in accordance with the views we have expressed in regard to the proper construction of the statute respecting the duty of the company and the burden of proof of due diligence and of the rule relating to the duty of the conductor, and it follows that the assignments of error in the instructions upon those subjects are not sustained.

The plaintiff testified that he looked at the brake beams on the cars as he passed along them, and saw nothing out of order, but that he did not get down and examine all of them. We cannot say, in view of the evidence, that the jury were not justified in finding, as they did, that the plaintiff was not at fault in respect to his observance of the duty imposed by the rule referred to. The distance from the place of starting to the yard limits, where the defect was first noticed, was considerable. From the evidence the jury might have not unreasonably concluded that the brake beam had not fallen down when the train started; for, if it had, the indication would have been so manifest that the conductor could hardly have failed to notice it. And yet the jury might have been satisfied that its hangings were weak or insecure, and that, if thorough inspection had been given, the fact would have been discovered, but that the defect was not so apparent that the plaintiff ought to be charged with fault in not seeing it.

3. Another assignment of error raises the question whether there was such proof of negligence on the part of the conductor in sending forward the brakeman to find out whether there was any defect in the train which needed attention. There was testimony that some one standing near by, just as it was leaving the yard, called out that there was something wrong with the train. This was heard by a brakeman on board, who, when testifying, said:

"I went and told the conductor that this fellow halloed at me about something,—something about 'brakeman.' I could not understand what he said. I could not understand his words at all. Something,—'brakeman,' or something of that kind. He halloed, and pointed toward the train, and I told the conductor, and he told me to go over and see if I could find out what was wrong."

He went accordingly, and came back with the report that a brake beam was down. Thereupon the conductor at once proceeded to take measures to stop his train, but was unable to do so in time to avert the disaster. The conductor testified that when the brakeman spoke to him of hearing the man calling out he was busy in the caboose reading his train orders, and for that reason sent the brakeman to examine. It was a question for the jury to determine whether the probability of danger in what the brakeman told him he had heard was such that the conductor was guilty of negligence in sending the brakeman to find out what the matter was instead of going himself. We cannot hold that the court was wrong in refusing to say

that the only reasonable conclusion was that the conductor was at fault. The rule which defines the province and duty of the court in such cases has been so often declared by the supreme court and by this court that it is needless to repeat it. The last case upon that subject in this court was that of Railroad Co. v. Truett (decided only a few days ago) 111 Fed. 876.

4. The court charged the jury that the burden of proof of contributory negligence on the part of the plaintiff was upon the defendant, and this is assigned as error. But the rule as stated by the court is well settled in the courts of the United States. What we have said covers all the assignments of error which seem to be worthy of discussion.

No error being found in the record, the judgment must be affirmed, with costs.

SANSOM v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. November 11, 1901.)

No. 952.

CARRIERS—DEATH OF PASSENGER—EVIDENCE OF NEGLIGENCE.

Plaintiff's intestate purchased tickets over defendant's railroad, and took a train which was advertised as a "solid vestibule train." Having occasion to obtain a ticket at a station for a member of his party, he requested the conductor to purchase it; but the conductor refused, and advised him that the train made but a short stop, and he had best go to the front end, which stopped nearest the station. On reaching the platform of the front car, which was a day coach, used for local business, and not vestibuled, a sudden lurch of the train threw him off, and he was killed. The accident occurred in the daytime, and at a place where the country was hilly and there were many curves in the road. Action was brought to recover for his death on the ground of defendant's negligence. Plaintiff introduced expert testimony which tended to show that the lurching of the train might have been caused by a low joint in the rail or by excessive speed, but there was no proof of either. On the contrary, defendant's evidence that the track was in good condition and the speed not excessive was uncontradicted. *Held*, that the placing of a car without vestibules in the train could not be considered negligence, and the fact that it was advertised as a solid vestibuled train was not material, since the action was not grounded on a breach of contract, and the condition of the car was apparent; that there was no evidence upon which negligence on the part of defendant could be predicated, and a verdict for defendant was properly directed.

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

This case was brought to recover for the alleged negligence of the railroad company in causing the death of the plaintiff's intestate, James J. Cowan. The testimony, taking the view thereof most favorable to the plaintiff, tended to establish the following facts: Mr. Cowan, having occasion to travel on the railroad of the defendant company, wrote to a friend for a schedule of the company's trains, and received in answer a time-table, which, among others, gave the time of train No. 5, upon which he subsequently took passage. This folder or schedule contained the following statement as to this train: "Through Car Service. No. 5 carries Pullman drawing room buffet sleeping car New York to New Orleans without change, also from Chattanooga to Shreveport. This is a solid vestibuled train Washington to

Memphis, carrying Pullman drawing room, sleeping car and day coaches without change." The deceased took passage at Johnson City. Accompanying him were his wife and son and a young lady. The train contained four passenger cars, besides express and baggage cars. The vestibuled cars were three in number,—two sleepers in the rear of the train, then a vestibuled day coach,—and following an ordinary passenger coach, without vestibules. The young lady had no ticket beyond Morristown, and it became necessary to purchase a ticket for her. Mr. Cowan, for this purpose, asked either the regular conductor or the Pullman conductor to purchase the ticket at Morristown. This the conductor declined to do, and advised Mr. Cowan that it would be necessary for him to purchase the ticket, that the train stopped but a few minutes at Morristown, that the forward part of the train would be nearest the office, and that he would have to get off promptly; and thereupon the deceased started forward through the train, having obtained from the young lady the money with which to purchase her ticket. He passed through the vestibuled cars, and reached the vestibule on the car just back of the day coach, which had no vestibule, when a lurch of the train threw him against the accordion part of the vestibule. Gathering himself, he passed upon the platform of the car without a vestibule, when another lurch threw him backward from the train, resulting in injuries which caused his death. These lurches are described by some of the witnesses as being severe and unusual. Had this coach been provided with a vestibule, the injury could not have happened. At the time the deceased was thrown from the train it was rounding one of the curves, which are quite numerous in the company's road, owing to the contour of the country. Expert testimony was also introduced by the plaintiff tending to show that the violent, recurring lurches should not occur on a properly constructed road; that such lurches indicated either a low joint, or that the train was running with too great velocity; the expert stating in this connection that a train might safely run at a rate of from 50 to 60 miles an hour if the track was properly constructed. The defendant introduced testimony tending to show that the train was not running to exceed 45 miles an hour; that the track was in good condition and properly constructed, the appliances safe, and the management proper. The plaintiff relied for recovery upon negligence of the company in four respects: "(1) In failing to provide a solid vestibuled train after it had been advertised, and failing to warn Mr. Cowan of the danger resulting from the absence of vestibules; (2) in instructing him to go forward without warning him of the danger; and either (3) in allowing a low joint in the rail in the curve, causing the lurches that threw Mr. Cowan from the train; or (4) in the negligent handling of the train which caused these lurches." At the conclusion of the testimony the trial judge instructed the jury to return a verdict upon the testimony in favor of the defendant.

Edward T. Sanford, for plaintiff in error.

Leon Jourolmon, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

In cases where the propriety of the court's action in instructing a verdict for the defendant is in review, certain general principles are to be borne in mind. The view of the case most favorable to the plaintiff is to be taken in determining whether the case is to be submitted to a jury. In cases of alleged negligence where the facts are undisputed the question of liability is often one of fact, not of law. Except in those cases where the law has clearly defined a specific duty, the omission of which may constitute negligence, the solution of the problem depends upon whether the conduct in question is deemed to be that of one of ordinary prudence under the

same or similar circumstances. Who shall determine this matter? Is it one of fact or law? A court may not set up its own standard of ordinary care, and require the party to conform to that, and permit a recovery or otherwise as it may determine the facts to show ordinary prudence, or the lack of it, in the conduct under investigation, except in cases where fair-minded men would be agreed that the facts did or did not show a want of due care. Judge Cooley concludes an elaborate discussion of the question in this way:

"If the case is such that reasonable men, unaffected by bias or prejudice, would be agreed concerning the presence or absence of due care, the judge would be quite justified in saying that the law deduced the conclusion accordingly. If the facts are not ambiguous, and there is no room for two honest and apparently reasonable conclusions, then the judge should not be compelled to submit the question to the jury as one in dispute. On the contrary, he should say to them, 'In the judgment of the law, this conduct was negligent,' or, as the case might be, 'There is nothing in the evidence here which tends to show a want of due care.' In either case he draws the conclusion of negligence, or the want of it, as one of law." Cooley, Torts, 670.

This rule is in conformity with Railroad Co. v. Ives, 144 U. S. 417, 12 Sup. Ct. 679, 36 L. Ed. 485, and Railroad Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274.

Another principle is to be borne in mind in this connection, which requires the party charging negligence to prove it, and show not only the negligent act complained of, but as well the resulting injury to the plaintiff. Applying these general rules, did the plaintiff make out a case which required the submission of the right of recovery to a jury?

There is no statute or rule of law of which we are advised requiring the defendant to use vestibuled cars. It is true that it has been held, and we think properly so, that, where a company has undertaken to provide a vestibuled train, it is negligence to permit the appliances to be out of order, or to leave the doors carelessly open, so that passengers who rely and have a right to rely upon the safety and proper management of the train are injured thereby. It was so held in the case cited by counsel from the Eighth circuit court of appeals (Bronson v. Oakes, 22 C. C. A. 520, 76 Fed. 734), where the court held it was negligence to leave open an outside vestibule door through which a passenger fell at night; the testimony showing that the train was moving rapidly, the vestibule poorly lighted, and the passenger mistaking the open door for the car door, through which he intended to pass on his way through the train. In the present case the through cars were properly vestibuled. There was no defect in their construction or management. The fault, if any, was in putting an ordinary car, for the accommodation of local traffic, into the vestibuled train. For such purposes an ordinary car, without vestibules, would be more convenient, if not so safe as vestibuled cars. In the absence of any rule of law requiring all cars to be vestibuled, the negligence in this respect must consist in having, by the advertisement, held out to prospective passengers the assurance that this was a "solid vestibuled train," whereas it was broken, without notice, by the introduction of the car for local traffic, thereby inducing the passenger

to act upon the supposition that he was upon a solid train, and be less guarded in passing from car to car. Assuming, without deciding, that the deceased had a right to rely and did rely upon the statement in the folder, it must be remembered that this car was upon a train to be run in daylight. The want of a vestibule was plainly visible. This is not an action upon contract. There is no claim that the defendant agreed to carry the passenger upon a train of vestibuled cars. Was the railroad guilty of a want of care likely to produce injury in thus introducing a car where it must have been evident to those having occasion to use it that it was not provided with a vestibule? We think this question must be answered in the negative, and that there was no failure to observe that degree of care, precaution, and vigilance justly demanded by the circumstances, the absence of which constitutes negligence. Nor do we perceive any negligence in the statement of the conductor to the deceased that he could not purchase a ticket for him at Morristown, and that it would be necessary for him to go forward for that purpose. This was rather advice as to how the deceased could procure a ticket, than an order upon which he acted to his injury.

The expert testimony introduced by the plaintiff as to the cause of the lurch of the train might attribute it either to a low joint, or undue speed in rounding the curve. The same witness stated that a train might be properly run on such a curve at the rate of 50 to 60 miles an hour. The construction and the condition of the track was a matter susceptible of proof by the plaintiff as well as the defendant. The only testimony upon these subjects was that introduced by the defendant, which tended to show a properly constructed track, in good condition. There was no testimony tending to show excessive speed. This railroad, running through a hilly country, necessarily having frequent curves in its track, while bound to use the highest care in its construction and the management of its trains, cannot avoid the lurching incidental to such conditions.

Upon the whole case, we reach the conclusion that, deplorable as the consequences were, there was no substantial evidence tending to show a want of the care required in the transportation of passengers, and the trial court was warranted in so instructing the jury. The judgment will be affirmed.

HALE v. CONANT.

(Circuit Court, D. Rhode Island. November 14, 1901.)

No. 2,607.

PLEADING — MOTION TO STRIKE OUT PLEAS — INSUFFICIENCY OF DECLARATION.

A writ which states merely that the action is "an action of the case to recover and collect the liability of the defendant as a stockholder" of a corporation is defective in form, in leaving it uncertain whether plaintiff sues in assumpsit on an implied promise, or ex delicto for damages for breach of a legal obligation; and where the declaration is no more specific, and alleges no promise, pleas, the propriety of which depends upon which form of action is intended, will not be stricken out on motion,

but the proper method of raising the question is by demurrer to such pleas, upon which the form of the declaration, as well as the sufficiency of the plea, can be considered.

On Plaintiff's Motion to Strike Out Defendant's Pleas.

M. H. Boutelle, Robert W. Burbank, and Eben Winthrop Freeman, for plaintiff.

Van Slyck & Mumford, for defendant.

BROWN, District Judge. The plaintiff moves that the second, third, fifth, sixth, and seventh pleas be stricken out. The first plea is non assumpsit; the second plea is not guilty. The declaration must be regarded either as in contract or in tort, and cannot be both. It is obvious that one of these pleas is improper. Bull v. Mathews, 20 R. I. 100, 37 Atl. 536. The difficulty that arises, however, is in determining whether it is the second plea (which the plaintiff moves to strike out), or the first plea, which is improper. The writ states that the action is "an action of the case to recover and collect the liability of the defendant as a stockholder of said Northwestern Guaranty Loan Company, as will more particularly appear by declaration to be filed in court." This writ does not state in due form the nature of the action. In Slocomb v. Powers, 10 R. I. 255, 257, it was said of the description in a writ:

"Merely describing it as an action of the case might, perhaps, not be considered as giving notice enough, as there are several subdivisions of actions of the case."

The proper form of description in the writ, where the plaintiff sues ex contractu, is "an action of the case 'upon promises,'" or "'in assumpsit.'" If an action is described merely as an action of the case, it would ordinarily be understood to be an action ex delicto. 2 Chit. Pl. (11th Am. Ed.) *12, *17; 1 Chit. Pl. (11th Am. Ed.) *96, *132.

The declaration describes the action as an action of the case, which would ordinarily be understood to be an action ex delicto. It sets forth that certain sums became due and owing from and by the defendant unto the plaintiff; but it does not allege a promise by the defendant to pay to the receiver, according to the mode which would be proper in case the plaintiff relies upon an implied promise. Whether the promise is express or implied, it must be alleged formally, if the action be in assumpsit. From these formal defects in the declaration, it seems uncertain whether the plaintiff is suing in assumpsit, relying upon an implied promise to the receiver as the gist of the action, or whether he is suing ex delicto for damages for breach of a legal obligation imposed upon the defendant by statute or otherwise. See 1 Chit. Pl. *135, *143.

The defendant states that he was left in doubt as to the proper form of general issue, and, to guard against the ambiguity of the declaration, has pleaded in the alternative. This confuses the record. Were the matter now before the court upon a demurrer to the defendant's pleas, we should go back to the first fault in the pleading (Railton v. Taylor, 20 R. I. 279, 284, 38 Atl. 980, 39 L. R. A. 246);

and this might require us to consider matters of form which were not called to our attention upon the original demurrer. The defendant's demurrer to the declaration raised simply the point that the declaration should have been in debt, and not in case. The question as to whether the declaration is in form ex delicto or ex contractu is not properly before us on the motion to strike out, and has not been argued. The proper method, therefore, of determining the propriety of the second plea, is by demurrer to the plea, upon which will be considered the form of the declaration, as well as the sufficiency of the plea.

The third plea is that the defendant did not, at any time within six years, undertake or promise in manner and form, etc. If the plaintiff's declaration is to be regarded as a declaration in indebitatus assumpsit, upon an implied promise to the receiver resulting from a legal obligation, the plea is probably good. Story, Pl. p. 76. But the motion to strike out this plea also involves a consideration of the form of the declaration, and the matter would be more properly raised by demurrer to the plea than by a motion to strike out.

The fifth, sixth, and seventh pleas involve questions of set-off, are evidently not frivolous, and involve matters of law which should be argued upon demurrer to the pleas. Moreover, the question whether the plaintiff's declaration is in assumpsit or sounds in tort has a material bearing upon the right of the defendant to plead a set-off.

The motion to dismiss is denied.

In re SAN GABRIEL SANATORIUM CO.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1901.)

No. 573.

BANKRUPTCY—JURISDICTION OF DISTRICT COURT—SUITS BY OR AGAINST TRUSTEE.

The bankrupt act does not confer upon a district court of the United States, as a court of bankruptcy, jurisdiction of a controversy between a trustee and a mortgagee of the bankrupt to determine the validity of the mortgage, unless with the consent of such mortgagee.

On Rehearing. For former opinion, see 102 Fed. 310. See 95 Fed. 271.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. In this case the district court for the Southern district of California granted leave to a mortgagee to make a trustee in bankruptcy a party defendant to foreclosure proceedings in the state court. The court also denied the petition of the trustee for an injunction to restrain the foreclosure proceedings in the state court. On a petition to this court for a review of the proceedings in the district court, the orders were reversed. In re San Gabriel Sanatorium Co., 42 C. C. A. 369, 102 Fed. 310. Before further proceedings were taken in the district court the supreme court of the United States decided the case of Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. A rehearing was thereupon granted in this case.

Under the construction placed upon the bankrupt act by the supreme court, the district court was right in granting leave to the mortgagee to make the trustee in bankruptcy a party defendant to the foreclosure proceedings in the state court. It was also right in denying the petition of the trustee for an injunction to restrain the foreclosure proceedings in the state court.

The orders of the district court are therefore affirmed.

In re CLARK.

(District Court, D. Washington, E. D. November 27, 1901.)

1. BANKRUPTCY—EVIDENCE TO ESTABLISH PARTNERSHIP.
   To charge a person as a silent partner in the business of a bankrupt, so as to debar him of the rights of a creditor of the estate, where there has been no holding out as such an actual and definite agreement must be proved, binding on all the parties thereto.
2. SAME—EVIDENCE CONSIDERED.
   Evidence considered, and *held* insufficient to sustain a finding that one claiming to be a creditor of the estate of a bankrupt was a silent partner in his business.

On exceptions to decision of referee, rejecting claim of E. W. H. Lake as a creditor, and finding him to be a partner of the bankrupt. Decision reversed, and claim allowed.

Samuel R. Stern, for contesting creditors.
Graves & Graves, for Lake.

HANFORD, District Judge. The referee to whom this case was referred has certified to the court for its consideration a disputed question as to the validity of a claim against the bankrupt's estate, filed by E. W. H. Lake, a merchant of Atchison, Kan. For a clear statement of the question, and the circumstances under which it arose, I cannot do better than quote from the certificate of the referee as follows:

"E. Clark filed his voluntary petition and schedules in bankruptcy on January 28, 1901, showing assets of $20,197.56 and liabilities of $27,005.78. The petition, in the absence of the judge, Hon. C. H. Hanford, from the division of the district, was referred to Frederick W. Dewart, one of the referees in bankruptcy; and on the same day Mr. Clark was adjudicated a bankrupt. Among the liabilities scheduled was that to E. W. H. Lake, of Atchison, Kansas, for $7.244.10 in money and $4,219.86 in merchandise. The bankrupt was examined by the trustee and the creditors on February 14th, 19th, 23d, and 26th, and March 12th, and he testified that he came to Spokane in July, 1899, and with one George J. Reiter formed the partnership of Clark & Reiter, which continued until June, 1900, when Mr. Reiter retired, and the business had since been carried on by Mr. Clark alone. The bankrupt was examined at length regarding the business of the concern, and the examination was then closed. On March 12th a dividend of 40 per cent. was declared on the claims approved and allowed. Mr. Lake having returned $750.00 in money and goods, which he had received from the bankrupt within the preceding four months, his claim was allowed for $1,900.00, and he received his dividend thereon. The remainder of his claim was suspended awaiting further investigation and proof. On April 9th Mr. Reiter, the former partner, was summoned as a witness and examined. He testified that E. W. H. Lake was a partner in the business from its inception.

Mr. Reiter produced letters from Mr. Clark, the bankrupt, written during the year 1899, which corroborated Reiter's statement on this point. The bankrupt was then ordered for examination, and on April 24th and 25th E. W. H. Lake, having voluntarily appeared, was examined at length, and on April 26th and 27th Mr. Clark was examined. Depositions were taken in San Francisco, Portland, and Atchison, and the various examinations of the bankrupt and other witnesses at Spokane were taken by stenographer in full, and are all included in the record, with the many exhibits. The sole question in this matter is one of fact: Was E. W. H. Lake a partner? * * * I find that E. W. H. Lake was a partner in the firm of Clark & Reiter, and after the dissolution of that firm a partner with E. Clark. And on that finding the following order was made: 'At Spokane, in said district, on the 21st day of August, A. D. 1901. Upon the evidence submitted to the court upon the claim of E. W. H. Lake, heretofore allowed, against said estate, in the sum of $1,900.00, and upon hearing counsel thereon, it is ordered that said claim be disallowed, and expunged from the list of claims upon the trustee's record in said case. It is further ordered that the said E. W. H. Lake shall repay to the trustee herein the sum of $760.00, dividend received by him on said claim. It is further ordered that the further claim of said E. W. H. Lake against said estate for the sum of $11,174.41 be disallowed, and the said E. W. H. Lake shall pay the cost of this proceeding, taxed at $289.77.' Counsel for Lake having filed his petition asking that the question be certified to the United States district court, the said question is certified to the judge for his opinion thereon.

"Dated at Spokane, Washington, this 3d day of October, 1901.

"Frederick W. Dewart, Referee in Bankruptcy."

There is no basis for a presumption that Mr. Lake was a silent partner of the late firm of Clark & Reiter, nor that his claim as the principal creditor of the bankrupt is fraudulent. Therefore, to justify a decision adverse to him, it must be proved by a fair preponderance of the evidence that he was such partner, and there must be convincing proof of an attempt on his part to commit a fraud upon other creditors and deceive the court.

As to the principal question,—whether Lake was a partner,—the referee very truly says that:

"There are three persons who should be able to answer this question,—Mr. Clark, Mr. Reiter, and Mr. Lake himself. We should consider the statements of these parties, and the numerous acts and facts which tend to corroborate or refute their testimony."

With respect to the testimony of Clark and Lake, there is no room for any misunderstanding. They both deny positively and circumstantially that there was ever any agreement to form a partnership with Mr. Lake as a partner, and, without proof that there was an actual agreement to which the minds of all three assented, it is not possible to fix upon Mr. Lake the legal responsibility, or entitle him to the rights of a silent partner. The rule which fastens upon one the responsibility of a partner because he has held himself out to persons dealing with the firm, or knowingly permitted others to make representations that he was a partner, has no application in a case where the question at issue is whether the person charged was in fact a silent partner. The mere statement of the question excludes every supposition that the parties may be bound as partners by estoppel, and, besides, in this case all the testimony and circumstances tend in one direction only, and that is to prove that Mr. Lake was never an active member of the firm,

that he never by word or act represented himself to be a member of the firm, that neither Clark nor Reiter ever represented to the public or to their creditors or customers that Lake was their partner. In his opinion the referee asserts that "Mr. Reiter testified positively that Mr. Lake was a secret partner in the concern from the beginning." From reading the testimony of Mr. Reiter, I am convinced that he is a candid witness, and an honest man. Positive testimony coming from a truthful witness having his opportunity to know the facts, corroborated by circumstances and the bad bookkeeping exhibited, would be very hard to overcome; but I feel constrained to disagree with the referee as to the effect of Mr. Reiter's testimony. If there was an agreement between Clark and Reiter and Lake to enter into copartnership, there must have been some particular time and place when and where all three, or the last of the three, assented to the agreement; and the agreement to which the assent of the three minds was given must have contained terms and conditions to which all were bound. Mr. Reiter, however, does not pretend to fix any time or place when or where the agreement was assented to, nor does he state the terms or conditions which bound the copartners; on the contrary, he testified and repeated and reiterated many times that the subject of a partnership was never mentioned when he was present and when Mr. Lake was present. It appears from his evidence that after some preliminary correspondence between himself and Mr. Clark, while he was employed at Anaconda, Mont., and Clark was employed in Pittsburg, Kan., he received a letter from Clark containing a statement that Lake desired to take an interest with them in a business to be started in some place to be chosen in the West, and that it would be much to their advantage to have Lake interested; that with his assistance they would have no difficulty in obtaining credit; and proposing that Reiter should put into the concern $500, and that Lake and Clark would together contribute $1,000 to the capital, and the three should be equal partners. At the time of receiving this letter Mr. Reiter was not acquainted with Lake, but he acted in the belief that the proposition contained in Clark's letter was bona fide, and authorized by Lake. He proceeded in search of a location, and, having a preference for Spokane, went to Pittsburg to have a conference with Clark, and the two together visited Mr. Lake at his home, where the subject of commencing business at Spokane was talked over. Mr. Lake made inquiry with respect to the city, and expressed his views with regard to the manner of conducting a retail mercantile business, and in their conference Mr. Reiter seems to have taken it for granted that the proposition in the letter which he received from Clark was known to and understood by Lake, and he appears to have assumed that a partnership was already formed, although, as I have already stated, the testimony shows that the subject of a partnership was not mentioned at that time by either one of the three, nor at any time afterwards when Mr. Lake was present. After the business had been commenced, Mr. Lake visited Spokane, and remained about one week, during which time he slept in the same room with Mr.

Reiter, so that there was no lack of an opportunity for them to become well acquainted; and the circumstances were such as to encourage the development of confidential relations, and a clear understanding of the interest which each had in the business. At that time Mr. Reiter had invested in the business $900, Mr. Clark had contributed $1,400, and Mr. Lake had advanced $2,400 in cash, besides furnishing a large part of the stock of merchandise which the firm of Clark & Reiter had commenced business with; so that Mr. Reiter must have known that, instead of acting upon the proposition contained in Clark's letter to form a copartnership with a capital of $1,500, the actual contributions of himself and Clark exceeded the entire capital originally proposed, and that it was not contributed in equal amounts by the two, and that Mr. Lake's contribution amounted to nearly three times as much as the aggregate of the amount put in by the other two; and yet, according to Mr. Reiter's testimony, there was never a suggestion made to Mr. Lake nor by Mr. Lake that there should be an adjustment of this inequality. Silence, under the conditions indicated, is most significant; and, instead of finding in Mr. Reiter's evidence any positive statement that Mr. Lake was a partner, I regard his testimony as strong corroboration of the testimony given by the other two, and the three are not contradicted in any important matter by any other witness. The whole force of Mr. Reiter's testimony bearing upon the issue may be fairly measured by the two most important statements therein, which are substantially as follows:

"I never talked with Mr. Lake concerning partnership. * * * Well, I will make another statement: When I was about to get on the train to leave Atchison, Kansas, to come out here with Mr. Clark, Mr. Lake says to me, 'If we decide to not go to Spokane,—not to open up the business there,—you send me an account of your expenses that you have been to in looking up a location, and I will remit you a draft for the amount.'"

This proves to a certainty that up to that time Mr. Lake had not entered into a partnership with the other two, but an inference has been drawn from Mr. Lake's use of the pronoun "we" in making his offer that he understood himself to be interested in the business venture on which the others were then starting, and that by the contributions of money and merchandise which he subsequently made to aid in starting the business he joined himself to the enterprise and became a partner. In the light of all the evidence, however, it is not difficult to find a reasonable explanation of the offer and of the words in which it was made entirely consistent with Mr. Lake's position as a creditor, and sufficient to rebut the inference. It appears that, after writing the letter to Mr. Reiter above mentioned, and before the meeting of the three at Atchison, Mr. Clark did propose a partnership to Mr. Lake, which the latter very promptly declined to consider; but at the same time he offered to assist Clark, who was then, and had been for several years, his intimate friend, by extending him credit to the amount of $4,000 or $5,000. Lake was then building up a wholesale merchandising business. He had strong faith in Clark as a capable manager, and had good reason to believe that liberality on his

part in assisting his friend would insure him a new customer, and enable him to extend the trade of his own house into new territory. It was good business policy for him to encourage Reiter by voluntarily offering to pay his traveling expenses if he should for any reason become unwilling to furnish the backing which he had promised to Clark. It appears that Clark did not inform Reiter candidly that Lake had declined to become a partner, but in a letter written several days before the first money had been obtained from Lake he did say to Reiter that:

"The firm name will be Clark & Reiter. Our capital will be $8,000.00. Lake is carrying me for the balance of the stock. I am pledging him my credit. * * * I think you will be satisfied with the deal when I talk it over with you."

This was at least a plain notice to Mr. Reiter that the plan of a partnership first proposed had not been carried into effect, and that Lake had become a creditor of Clark. It is true that there are circumstances which harmonize with the theory of the referee's decision; but these circumstances are not conclusive, nor sufficient to overcome the positive testimony of Lake and Clark, corroborated, as I have indicated, by Reiter. The fact which I consider most prejudicial to Mr. Lake's case is his failure to respond to an inquiry by a wholesale establishment with which he was dealing as to whether he was a silent partner in the business with Mr. Clark. The same circumstance, however, would be equally strong against Mr. Lake if he were now claiming the rights of a partner and such claim was being contested.

The evidence is insufficient to justify a finding that Mr. Lake was a partner with Clark at or previous to the time of his becoming bankrupt, and, on the other hand, it is sufficient to prove clearly that the claim which Mr. Lake makes as a creditor in its entirety, and every item, is valid and just. The court directs that an order be entered reversing the decision of the referee and allowing the claim. The costs of the proceedings will be paid out of the funds in the hands of the trustee.

In re WEIL.

(District Court, S. D. New York. November 30, 1901.)

BANKRUPTCY—GOODS OBTAINED BY FALSE REPRESENTATIONS—RIGHT OF SELLER TO RECLAIM.

A merchant ordered goods from Paris, which were shipped to him on credit, in reliance on the report of a mercantile agency, based on a statement made by the purchaser which was false and misleading. The goods were received shortly before the purchaser's bankruptcy, and he refused to receive the same, and attempted to return them. *Held*, that the sellers were entitled to rescind the sale for fraud, and recover the goods or their proceeds from the trustee of the bankrupt, and that such right, under the circumstances shown, was not lost by the fact that they had not consented to the return of the goods when offered.

In Bankruptcy. On motion to confirm report of referee.

Myers, Goldsmith & Bronner, for trustee.

Horwitz & Samuels, for petitioners.

ADAMS, District Judge. An involuntary petition was filed against David Weil on the 14th day of September, 1900, and on the 23d day of October, 1900, he was adjudicated a bankrupt. Pending the adjudication, a receiver was appointed, who, among other things, took possession of certain raw silk and taffeta silk, which were sold by order of the court, and the proceeds are now in the possession of the trustee. Before these goods were sold, Schuster Fils et Cie., of Paris, France, filed petitions claiming the goods upon the allegations that they had been sold to the bankrupt upon false representations made by him; also that the bankrupt had refused to receive them, and the title still remained in the vendors. The claims were denied by the trustee and the issues arising out of the claims were referred to the referee in the case to take testimony and report the same, with his opinion. Such report is now before me on a motion on behalf of the trustee for confirmation. The learned referee was of the opinion that upon the testimony before him the title was in the bankrupt, and that the claims of the petitioners should be denied. There is no conflict in the evidence, none having been offered on behalf of the trustee. As I read it, the following facts appear: The bankrupt was never in direct communication with the petitioners, but in 1899 his son, who was then in his employ, and authorized to purchase goods for him, visited Paris, and bought some goods from them, after making representations which, if believed, would justify a considerable credit. At this time inquiries concerning the bankrupt were also made by the petitioners of Dun's Mercantile Agency, and satisfactory reports were received. These goods, amounting to about $2,000, were paid for, but the line of credit was not exhausted. In May, 1900, the goods in controversy were sold to Weil through the agency of the son, then upon another visit to Paris, partly upon the credit already established, and partly upon new reports from Dun's Agency, which they received from their New York agent in March, 1900. These goods were shipped in July and August, 1900. The March reports were based upon a statement made by Weil on the 7th of March, 1900. In this statement he showed assets amounting to $221,141.13 and liabilities amounting to $72,195.50. Taking the subsequent bankruptcy into consideration, the statement must have been grossly untrue, or there must have been a rapid disappearance of assets. An examination of his books showed its untruth in some particulars, and I am satisfied that it was false and misleading. If the vendors relied upon the statements,—and there is sufficient evidence to establish such fact,—it would seem that the misrepresentations were sufficient to entitle them to rescind the sale and claim a return of the goods. Turner v. Ward, 154 U. S. 618, 14 Sup. Ct. 1179, 23 L. Ed. 391; In re Gany (D. C.) 103 Fed. 930; In re Epstein (D. C.) 109 Fed. 874, 876; Humphrey v. Smith, 7 App. Div. 442, 39 N. Y. Supp. 1055; Bradley v. Bank, 46 App. Div. 550, 62 N. Y. Supp. 51.

Other features of the case are that Weil refused to receive a portion of the goods in question on the ground that they were not according to order, and endeavored to return the other portion,

recognizing that he was not entitled to retain them in view of his condition. This refusal to receive and attempt to return were shortly before an assignment which he had made for the benefit of his creditors, prior to the bankruptcy proceedings. It is claimed by the trustee that the refusal and return were ineffective, because not consented to by the petitioners; but I do not think, in view of the nature of the transactions, that such consent was necessary to establish their present rights.

It follows that the motion to confirm must be denied, and a reference had to determine the amount of the petitioners' recovery.

UNITED STATES v. CHUN HOY.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1901.)

No. 687.

1. CHINESE EXCLUSION—PROCEEDINGS FOR DEPORTATION—BURDEN OF PROOF.
The provision of section 3 of the Chinese exclusion act of May 5, 1892 (27 Stat. 25), placing the burden of proof upon a Chinese person or person of Chinese descent, arrested under the provisions of the act, to establish his right to remain in the United States, is within the power of congress, and valid, and, unless such right affirmatively appears from the evidence, it is the duty of the court to order the defendant deported.

2. SAME—CLAIM OF NATIVITY—EVIDENCE CONSIDERED.
Evidence *held* insufficient to sustain the claim of a person of the Chinese race, arrested for being unlawfully within the territory of Hawaii, that he was a native of such islands.[1]

Appeal from the District Court of the United States for the Territory of Hawaii.

Lorrin Andrews, F. H. Gould, and Samuel F. Chillingworth, for appellant.

Marshall B. Woodworth, for the United States.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This is an appeal from a judgment of the district court of the United States for the territory of Hawaii, directing the deportation of the appellant, Chun Hoy, back to China, from which country he was permitted to land in Hawaii in August, 1900, by the collector of customs for that territory. Shortly thereafter a criminal information, duly verified, was filed against Hoy, charging him with being unlawfully in the United States, upon which the judge of the court below directed that he be apprehended and brought before him, pursuant to the provisions of an act of congress entitled "An act to prohibit the coming of Chinese persons into the United States," approved May 5, 1892 (27 Stat. [1891, 1892] 25). The defendant appeared with counsel, and the trial resulted in the judgment from which the appeal is taken. The contention on his

[1] Citizenship of Chinese, see notes to Gee Fook Sing v. U. S., 1 C. C. A. 212; Lee Sing Far v. U. S., 5 C. C. A. 332.

behalf is that he was born in the Hawaiian Islands, and when 1 year old was taken by his mother to China, where he remained for 17 years, and then came back. The only evidence introduced on the trial was introduced on behalf of the United States by its attorney. The defendant to the proceeding introduced no proof, but contended in the court below, as he does here, that the proof introduced on the part of the government shows him to be entitled to his discharge. That proof consisted of the testimony of a Chinese witness named Yee Fook, and of that of E. R. Stackable, the collector of customs for the territory of Hawaii; a photograph of the defendant; and the following certificate:

"I, Chun Fook, a resident of Honolulu, H. I., hereby state that my son, Chun Hoy, now 18 years of age, residing in China with his mother, Kam She, was born in Honolulu, Hawaiian Islands. He was taken to China by his mother, 17 years ago, and it is my wish that he now return to Honolulu. This statement is therefore made for the purpose of facilitating his landing on his return to Honolulu, H. I.

"[Chinese Signature.] [i. e. Chun Fook.]

"Subscribed and sworn to before me this 28th day of May, A. D. 1900.

"[Seal.] N. Fernandez, Notary Public, Hawaiian Islands.

"We, Lam Wah Lin and Kam Shai, residents of Honolulu, H. I., hereby state that we are well acquainted with Chun Fook and his family, and of our own knowledge know that his son, Chun Hoy, was born in Honolulu, Hawaiian Islands.

"[Chinese Signature.] [i. e. Lam Wah Lin.]

"[Chinese Signature.] [i. e. Kam Shai.]

"Subscribed and sworn to before me this 28th day of May, A. D. 1900.

"[Seal.] N. Fernandez,

"1st Jud. Circuit, Notary Public, Hawaiian Islands."

The testimony of Yee Fook is to the effect that by the same steamer that brought the defendant and another Chinese boy of about the same age, named Lau Koon Yau (and who, by the stipulation of counsel, was tried at the same time upon similar proceedings against him), to Honolulu he received a letter from a friend in China, inclosing photographs of the two boys, and asking him to meet them on their arrival at Honolulu, which he said he did, and recognized them from the photographs sent him, and that when the defendant landed he went to join his relatives. The testimony of Stackable is to the effect that, as collector of customs, he has charge of the admission of Chinese immigrants to the islands, and that at the time in question one Joshua K. Brown was the Chinese inspector under him, and one Lau Sam Chau was the Chinese interpreter. He produced a memorandum book used upon the examination of such immigrants, and, turning to the record there made upon the admission of the appellant, said that a part of it was in the handwriting of the interpreter (who had since been suspended in connection with these two boys), and the balance of it in the handwriting of Brown. The record shows that the witness was then questioned, and answered as follows:

"Q. Be kind enough to show the court the handwriting of Joshua K. Brown on the record. A. 'Chun Hoy,'—I give you the word,—'year 18 born, in Honolulu, born Hawaiian Islands. Went away one year old, with mother. Had a slight dark mark three years ago. Father, Chin Tung, in Honolulu;

mother, Kum Shee and Bin Tow Man Long Heong Sai; had two brothers, aged 20 and and 22, respectively, both in China,—one Ton Hee, aged 20, and the other one Ghun Tong, aged 22.' That is the report made by J. K. Brown, and it was made at the examination of these two boys. Q. And you acted upon that report? A. I acted upon it. Q. And landed them? A. I admitted them. Q. Did the father send paper for one to come, and sent passage money for him to come, and a relative guarantied the passage money? A. The steamship company demand any one. Where there is any question, they have to pay a double passage money, so that there is no question about returning them. They are paid for in advance. That is what is meant by this special passage. This portion which I have read, so far as written in the Chinese interpreter's handwriting. Then Mr. Brown takes it up, 'Chun Fook, father, confirms above statement in every particular.' This must be one of the grounds of the admission. 'August 25th, 1900, Joshua K. Brown, Chinese Inspector,'—for my special benefit, in blue pencil, 'August, 1900.' Not signed by me where they are admitted. Any question arising in those, my instructions, are that I must sign them."

The witness further stated that upon the report of Brown, and upon the certificate as to the place of the appellant's birth, hereinbefore set out, he permitted him to be landed.

We are unable to agree with counsel for the appellant in their contention that there was no basis for the judgment of the court below. On the contrary, we think there were several circumstances well calculated to make the court distrust the claim that the appellant was born in the Hawaiian Islands. In the first place, Chun Fook is claimed to be his father, and he it was who, on the 28th day of May, 1900, subscribed and swore to the certificate as to his birth in Honolulu, about 18 years before, and that one year thereafter he was taken to China by his mother. This father, according to the record, was in Honolulu when the appellant arrived there; yet it does not appear that he went to meet him, or was notified that he was to arrive, but that a total stranger—the witness Ye Fook—was notified of his intended arrival by some friend of his in China, who sent the appellant's picture, with the request that he should meet him at the ship and look out for him. These facts, we think, were quite enough to shake the confidence of the court in the pretensions put forward on behalf of the appellant. Another suspicious circumstance is the fact that on the same day that Chun Fook subscribed and swore to the certificate in respect to the appellant, to wit, May 28, 1900, Lau Koon Yau subscribed and swore to a precisely similar certificate with respect to Lau King, the other boy mentioned, giving his age also as 18 years, and as having been "taken to China by his mother 17 years ago."

The third section of the act of congress of May 5, 1892, is as follows:

"That any Chinese person, or person of Chinese descent, arrested under the provisions of this act, or the acts hereby extended, shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

In speaking of this section, it was said in the case of U. S. v. Wong Dep Ken (D. C.) 57 Fed. 206, 208:

"No one questions the power of congress to prohibit the coming into this country of any class of foreigners deemed prejudicial to the interests of our

people. Against the coming into the country of Chinese laborers, congress has been legislating for years. The reason for such legislation is an old story, and need not be repeated. But, notwithstanding the enactments upon the subject, the laws have been evaded in many ways. By false testimony and concocted evidence the courts have been imposed upon in cases almost without number, and by sea and land the prohibited class in large numbers have been smuggled into the country in one way or another. To prevent all of this, and give effect to its laws upon the subject, as far as possible, congress deemed it wise, by the provision in question, to put the burden of proof of his lawful right to remain in the United States on the Chinese person or person of Chinese descent charged with being unlawfully within their borders. To those not residents of, and not familiar with, the Pacific slope, and not so much subject to the evils intended to be guarded against by the exclusion acts, 'the lines laid down for their enforcement may,' as appropriately and well said by Judge Severens in Re Sing Lee (D. C.) 54 Fed. 334, 'seem hard, and because such summary dealings with the rights of persons are out of the common order to which we are accustomed, and are liable to produce injustice in many cases on account of their summary expedition and the presumption against the prisoners, they may seem severe, but, if the power resides in congress to enact such provisions, the discretion whether it will do so rests in the lawmaking power, and the courts must presume it was exercised upon sufficient reasons.' In respect to the provision of the Geary act putting the burden of proof on those coming within the class thus interdicted, I agree with Judge Severens, in the case cited, that there is not only nothing in it violative of the provisions of the constitution of the United States, but for the reasons given by him, and in view of the circumstances already referred to and of others that may be suggested, that the provision in question is not unreasonable. He says: 'The person brought before the commissioner is one of a class which, by the terms of the statute, is obnoxious to its operation. That must appear before the general jurisdiction can be exercised, and since, generally, that class is interdicted, he can only escape the common lot upon its appearing that he is not within the general condemnation. The means of showing this are presumably in his own control. It would be extremely inconvenient, and probably in most instances impracticable, for the government to bring proof of the negative fact that the respondent is not within the exemption. Such circumstances are the basis of the rule of evidence which devolves the burden on the party who presumably has the best means of proving the fact; but, whatever the rule which by the common law would be applicable to trials, it cannot be affirmed that in such conditions the legislature cannot prescribe such a rule of evidence.' "

We agree with what was there said. The judgment is affirmed.

FORCE v. SAWYER-BOSS MFG. CO. et al.

(Circuit Court, E. D. New York. November 15, 1901.)

1. PATENTS—VALIDITY—ESTOPPEL TO DENY.
   All persons who join in the sale and assignment of a patent, or participate in the consideration received therefor, are estopped to allege its invalidity, and a corporation of which such persons own all the stock is equally estopped.
2. SAME—INFRINGEMENT—NUMBERING MACHINE.
   The Sawyer patent, No. 462,065, for a numbering stamp, *held* infringed as to claims 1 and 2.

In Equity. Suit for infringement of patents. On final hearing.

William E. Warland, for complainant.

H. Albertus West, for defendants.

THOMAS, District Judge. The bill is filed to enjoin the defendants from infringing two certain letters patent, one of which, to wit, No. 462,065, issued October 27, 1891, is alone the subject of present controversy. The defendant is a business corporation, formed by Willard W. Sawyer, Robert A. Stewart, Thomas H. Boss, and George T. Holihan, who own all the stock of such corporation, and are its sole officers and directors. Previous to the formation of the corporation, all of such persons, either directly or indirectly, concurred in the sale of said letters patent to the complainant, and by reason of such sale, or by participation in the consideration received therefor, are estopped from averring the invalidity of the patent. Rob. Pat. 787, 984, 1021; Curran v. Burdsall (D. C.) 20 Fed. 835; Underwood v. Warren (C. C.) 21 Fed. 573; Purifier Co. v. Guilder (C. C.) 9 Fed. 155; Barrel Co. v. Laraway (C. C.) 28 Fed. 141; Woodward v. Machine Co., 8 C. C. A. 622, 60 Fed. 283. The defendant corporation is estopped by this act of the persons who created, direct, and own its capital stock, and are its sole directors and officers. National Conduit Mfg. Co. v. Connecticut Pipe Mfg. Co. (C. C.) 73 Fed. 491. Thus all the persons interested in the sale and in privity with the assignor are estopped, as against the assignee. Daniel v. Miller (C. C.) 81 Fed. 1000; Parker v. McKee (C. C.) 24 Fed. 808.

The remaining question relates to the defendants' infringement. The device is a numbering machine. The defendants' construction, as regards claim No. 2, is identical with that of the complainant, and is as follows:

"(2) In a stamp, the combination of a main frame, a longitudinally movable rod fitted thereto, and carrying similarly spaced numbering wheels, slots in said rod, a cross pin connected to the main frame, and passing through said slots, and an enlargement in one of said slots for receiving an enlarged portion of said pin to lock the rod in its depressed condition, substantially as specified."

In view of the validity of the patent as herein ascertained, infringement of that claim must be declared without further discussion. Claim 1 is as follows:

"(1) In a stamp, the combination of a main frame, a series of similarly spaced numbering wheels, corresponding ratchet wheels, detents for these numbering wheels and ratchet wheels operating radially within a support, pawls for imparting motion to said ratchet wheels, a movable yoke sustaining the numbering and ratchet wheels, a frame-like lever carrying the pawls and pivotally connected to said yoke and also to the main frame, and an inking lever fulcrumed to the main frame, and pivotally connected between its ends with the said lever which moves the pawls, substantially as specified."

In the defendants' machine the construction is such that the inking pad and the operating pawls are both on the same side of the machine, while in the complainant's device they are upon opposite sides. The argument, as regards this claim, relates chiefly to the words, "a frame-like lever carrying the pawls, and pivotally connected to said yoke, and also to the main frame." The specification indicates that the frame-like lever should be of such shape

as would carry the inking pad to the side of the machine away from the actuating pawls. The defendants have changed the shape of such lever so as to carry the inking pad to the same side of the machine as the actuating pawls. This is a mere change in the shape of the lever, whereby the inking pad is changed from one side of it to the other. There is no change in the mode of operation or the results attained. It is considered that this claim is valid, even when considered in connection with the Reinhardt patent, No. 425,581, and that the defendants should be enjoined from infringement thereof by the construction of their present device.

BRUNSWICK-BALKE-COLLENDER CO. v. THUM et al.

(Circuit Court of Appeals, Second Circuit. November 18, 1901.)

No. 10.

PATENTS—INVENTION—BOWLING APPARATUS.

The Reisky patent, No. 599,447, for an improvement in bowling apparatus, which consists of a runway or trough for the return of the balls, so constructed that the balls roll rapidly down an incline until near the players' end of the alley, and then up an ascending incline, which gradually checks their momentum, breaks the force of their impact, and prevents their injury, while apparently embodying only an obvious mechanical expedient, must be conceded patentable invention, in view of evidence showing that for many years mechanics had been engaged in attempts to improve the old-style runways to obviate the same defect, but that the patentee was the first to use the double incline for the purpose, and that his invention at once came into general use.

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

This cause comes here upon appeal from a final decree of the circuit court, Eastern district of New York, dismissing the bill. The suit is for infringement of United States letters patent No. 599,447, granted February 22, 1898, to complainant, as assignee of Emil Reisky, for "improvement in bowling apparatus."

M. B. Phillipp, for appellant.

August Reymert, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. The improvement of the patent relates to that part of a bowling alley known as the ball returnway or runway, which returns the balls from the pit end of the alley to the players' end. The old style of runway consisted of a track or trough which inclined downwardly all the way from the pit end to the players' end, down which the balls rolled with a speed increasing all the way, and dependent upon the degree of inclination given to the track. There were objections to this old style of way, which will be referred to in more detail further on. Briefly stated, most of them arose from

the circumstance that, not being retarded in its course, the ball frequently came home at the players' end with a "smashing" impact. The specification of the patent, after referring to the defects of the older structure, states that the patentee constructs—

"The ball runway with a descending portion beginning at the pit end of the alley, where the ball hopper or cage is located (if one be used), and running thence towards the players' end of the alley, and also with an upwardly inclined or ascending portion at the vicinity of the playing end of the alley, which 'up grade,' so to speak, takes the impetus or inertia out of the balls just before they are landed on the extreme end portion of the runway, or into or on that part of the runway or receptacle connected therewith, from which they are to be selected or picked out by the players for use in bowling."

The specification further states that:

"In practice the operation and effect is simply this: That the balls start from the pit end of the alley in my improved returnway, and, while they are sent home or delivered at the playing end of the alley as rapidly as desirable, they travel fast from the time they leave the pit end of the alley until they reach the ascending or up-grade portion, c, of the runway, which up grade simply operates to check the speed of the balls, or take out their inertia, so that they land on the terminal or receptacle, d, with practically no speed, or, in other words, without any momentum sufficient to produce any injurious effect on the balls."

And claim 1 (the only one in controversy) reads as follows:

"(1) A bowling-alley returnway, comprising a descending or downwardly sloped portion, beginning at the pit end of the alley, and returning towards the players' end, and an ascending or up-grade portion connected therewith, and located near the playing end of the alley, which merges into the ball receiving and retaining terminal of the runway, all in such manner, as hereinbefore described, that the balls put into the receiving end of the runway will roll downwardly toward the playing end of the alley, and then, ascending the up grade, or ascending portion, c, of the runway, will pass thence onto the terminal or ball receptacle at the players' end of the returnway without much shock or concussion, as hereinbefore set forth."

The facts in the case at bar are closely analogous to those which were before this court in Schenck v. Singer Mfg. Co., 23 C. C. A. 494, 77 Fed. 841. The improvement consists in an extremely simple, and, it would seem, perfectly obvious, application of common knowledge as to the law of gravitation. Were there nothing in the record but the bare statement of facts above set forth, we would be inclined to concur with the court below in the proposition that:

"Had any skilled mechanic been asked to perfect a structure that should gradually arrest the momentum of the returning ball, an ascent would obviously have been the structure needed."

But in this case, as in the Singer Case, the evidence shows conclusively, and, indeed, without contradiction, that this very demand for an arrester of the returning ball was before skilled mechanics for many years, and yet no one before Reisky hit upon the device which now seems so obvious. The defects of the old system were serious. The time required for the return of the ball was not uniform, and in its entirety was slow. If started with a shove, it came more quickly, but, if merely placed in the trough, it made but slow

time at the beginning; and the player, desirous often of using a particular ball, already played, became impatient. Whether started with a shove or not, its velocity steadily increased, and it was running at its highest speed when it came home against the post or other ball at rest at the players' end. Moreover, this speed was generally so high that the surfaces of the balls were broken or chipped, particularly at the vicinity of the finger holes, and thus soon became unfit for use. This damage put the alley keeper to considerable expense in keeping the balls in fair condition, or in getting new balls, and also resulted in great dissatisfaction among the players at the damaged condition of the balls. There was also constant danger of an incautious player having his hand among the homed balls when the returning ball smashed in. The evidence shows that this condition of affairs had lasted for a long time; the old style of runway persisted for 40 years. During this period there was a constant demand for an improvement which would remedy the difficulty, and to that demand the skilled mechanics who put up bowling alleys responded. Various devices were contrived,—all of them, save one, independent of the trough itself. Suspended shot bags of various shapes, some with appendages in the shape of patches or belts, weighted sections of hose pipe, whisk brooms so set that the ball would have to push through them, pieces of stiff leather arranged shutter-wise across the trough, pivoted levers having a piston entering a dashpot, are among the devices independent of the trough. It was also sought to retard the ball by successive transverse pieces of rope at the sides or bottom of the trough. So many of these devices are shown that it is apparent that the skilled mechanics were for years trying to find some way properly to retard the ball, and the proof conclusively shows that all of them were unsatisfactory. Not one of them secured retardation by a change of grade of the trough itself, until the patentee disclosed his simple method, which has so commended itself that now, within three years after the issuance of the patent, 90 per cent. of the existing bowling alleys have the new style, or Reisky, returnways. In the face of this evidence, we cannot hold that his improvement is devoid of patentable invention. Infringement of claim 1 is manifest, and apparently not disputed.

The decree is reversed, with costs, and cause remanded, with instructions to decree in conformity with this decision.

HOWELL TORPEDO CO. v. E. W. BLISS CO.

(Circuit Court, E. D. New York. November 19, 1901.)

PATENTS—INFRINGEMENT—MARINE TORPEDOES.

The Howell patent, No. 311,325, for improvements in marine torpedoes, claim 1, relating to mechanism to secure fixity of direction of the torpedo and to overcome the effect of any external deflecting force, construed, and *held* not infringed by the mechanism employed for such purposes in the Whitehead torpedo.

In Equity. Suit for infringement of patent. On final hearing.

Joseph L. Levy and Ernest Wilkinson, for complainant.
Joseph A. Stetson and Arthur C. Fraser, for defendant.

THOMAS, District Judge. This suit involves the construction and infringement by defendant of claim 1 of letters patent No. 311,325, issued to Admiral John A. Howell on January 27, 1895, for "certain new and useful improvements in marine torpedoes." Claim 1 is as follows:

"(1) The combination, with the torpedo case or shell and the fly wheel mounted therein, with its rotation axis located substantially as described, to obtain a resultant axis of motion in case of deviating forces acting on the torpedo, of steering mechanism, and suitable devices for controlling the same, arranged and operating substantially in the manner hereinbefore set forth, whereby said steering mechanism shall be brought into action upon occurrence of the resultant motion, and when thus brought into action shall be caused to set up an opposite deviating force, which will counteract and neutralize the initial extraneous deviating force."

It seems to be undoubted that Admiral Howell was the first person to suggest and to use a rapidly revolving fly wheel in a marine torpedo (1) to preserve fixity of direction, (2) to steer the torpedo against the influence of deviating forces. The conception of both purposes is embodied in the letters patent mentioned, and of the first use in letters patent issued to the same inventor in 1871. The conception of this double use was the beginning of the art, and from it has sprung all essential knowledge respecting the directing and steering of torpedoes, although different and better details in the mechanisms employed have been devised by others. Although the merit of the primary conception that fixity of direction and ability to steer marine torpedoes could be acquired by the use of a revolving fly wheel adjusted in the torpedo is due to Admiral Howell, the conclusion cannot be escaped that claim 1 limits the use of the art so created and developed by the inventor, as regards steering, to steering mechanism brought into action by resultant motion, and that the letters show no appreciation of the steering mechanism employed by the defendant. The discussion can proceed clearly only by a description of the device known as a "gyroscope" and an explanation of its phenomena; for, although he does not seem to have identified specifically his proposed mechanism with the gyroscope, nor, at the outstart at least, to have understood that he was utilizing the laws of that instrument, yet the fly wheel proposed to be used by Admiral Howell in the torpedo, in connection with the torpedo's outer shell and the water, is in fact a gyroscope, and obeys its laws. If a swiftly revolving fly wheel be adjusted so that its axis is free to take any direction, its axis, in absence of external disturbing forces, will remain nearly invariable in direction. This, following the descriptive articles, may be called "the stability of direction of the axis of rotation." The fly wheel persists in rotating in the given direction, and so its axis tends to resist any deflecting influence. The gyroscope proper usually is constructed by placing the fly wheel so that it may rotate inside a circular ring around its shorter axis, the axis running

on pivots situated at opposite ends of the ring's diameter. This ring, with its supported fly wheel, is made movable inside a second ring, and around an axis at right angles to the axis of the fly wheel. This second ring in turn, with its contents, is adjusted to rotate inside a third ring, and around an axis at right angles to each of the others. The figure shows a gyroscope with three outer rings, K, L, and M. For the purposes of the following discussion, L will be termed the outer ring, and M will be disregarded.

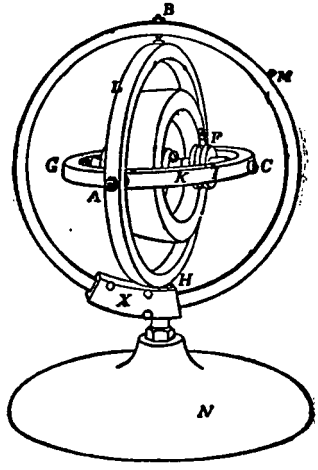
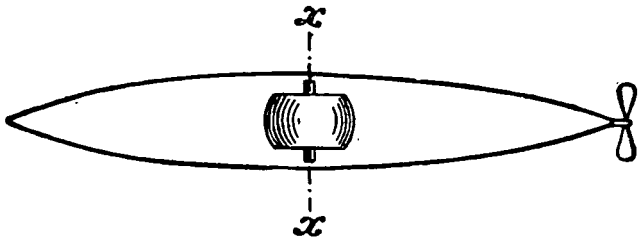


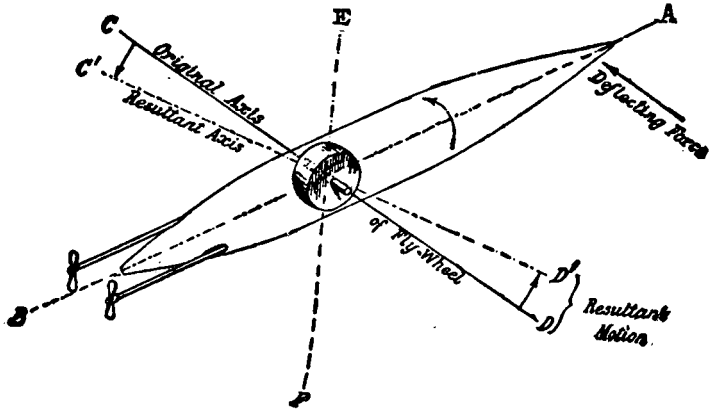
Fig. 1.

"It consists of a fly wheel, with a heavy rim accurately turned and balanced, which can rotate round an axis, GC, forming a diameter of the ring, K This ring also can rotate about the axis, AF, which is at right angles to GC, and is a diameter of the ring, L. Similarly, this ring, L, can rotate about the vertical axis, BH, which is perpendicular both to GC and AF, and forms a diameter of the ring, M, which is screwed to the heavy sole plate, N."

The fly wheel is free to move on its own axis or that of either ring, but will not move on the latter, while the wheel is rotating rapidly, in the absence of a deviating force; that is, the tendency of the revolving wheel is to keep the rings stationary. However, when some force other than that impelling the fly wheel is brought to bear on either of the rings, it will cause the fly wheel to turn on the axis of the inner ring, or the axis of the outer ring, or both, accordingly as the force may be applied, pursuant to the law that "a body actuated by several forces moves in the direction of their resultant." If now it be shown that in practice the presence of one resultant motion brings into play the complainant's steering mechanism, the meaning of claim 1 may be understood. The specification represents the axis of the fly wheel as transverse to the torpedo, although it states that such axis may be placed longitudinally, but no steering mechanism for the second location is described or suggested. But by placing the axis transversely, its ends are supported in the shell of the torpedo. In its simplest form this is shown as follows:



Here the sides of the torpedo form the first or inner ring, in which the axis of the fly wheel is located in the gyroscope shown above. The outer ring is absent; but as the water allows the fly wheel, when disturbed, to tip on a vertical axis, and also to either side with lateral motion of the torpedo, the freedom of motion permitted in a gyroscope is attained. So, also, there are attained the resultant motions observed when extrinsic forces come in contact with the rings of the gyroscope. The only resultant motion that is employed by Admiral Howell in claim 1 is that which may take place on the axis of the inner ring of the gyroscope as shown, which corresponds to the longitudinal axis of the torpedo; or, in short, it is the motion of the torpedo rolling on one of its sides. The cause and nature of that lateral rolling are shown by the following figure:



If, as shown, the deflecting force be applied at the starboard bow of the torpedo while the fly wheel is revolving from right to left, looking at the torpedo from that side, the torpedo will roll to port under the influence of the fly wheel made fast to its sides; that is, a new force combined with the existing force operating the fly wheel results in rolling the torpedo sideways, thereby elevating the starboard side and lowering the port side. It is not worth while to try to trace the cause. It is enough that this is the exact law of the gyroscope when subjected to a similar foreign force, and, of course, the result would not be attained except for the presence of a gyro-

scope. But here it is well to keep in mind that an undisturbed gyroscope, acting normally, tends to maintain the first position of its parts, and not to turn on the axes of its outer rings. Hence it is the revolving fly wheel, in connection with the shell of the torpedo and the water, all combined, which results in the rolling, when in collision with the deflecting force. It should be noted carefully that a torpedo, under the influence of the wheel, tends to roll, rather than deviate from its course. The torpedo is now tipped to port. Applying again the same law of the gyroscope, if a force be applied to the torpedo aft of the fly wheel, on the side opposite to that to which it has rolled, the tendency will be for the torpedo, under the influence of the fly wheel, to roll back to starboard, seeking its equilibrium. The following extract and figures from the letters patent explain the steering mechanism and its action and source of action:

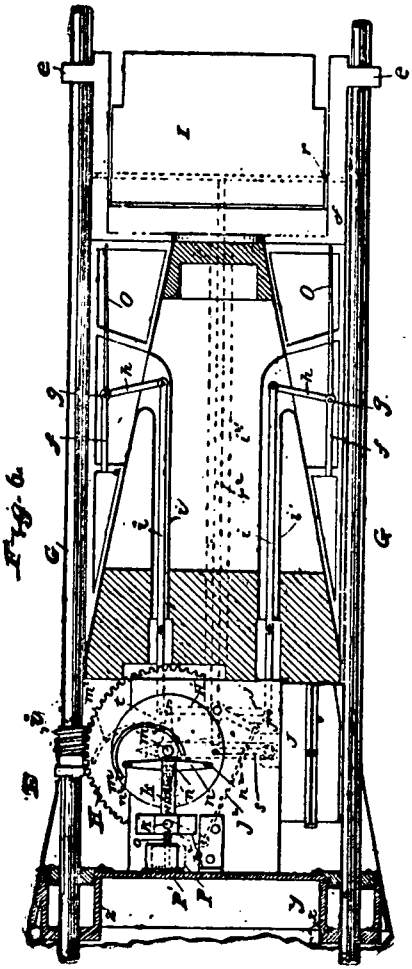


Fig. 6.

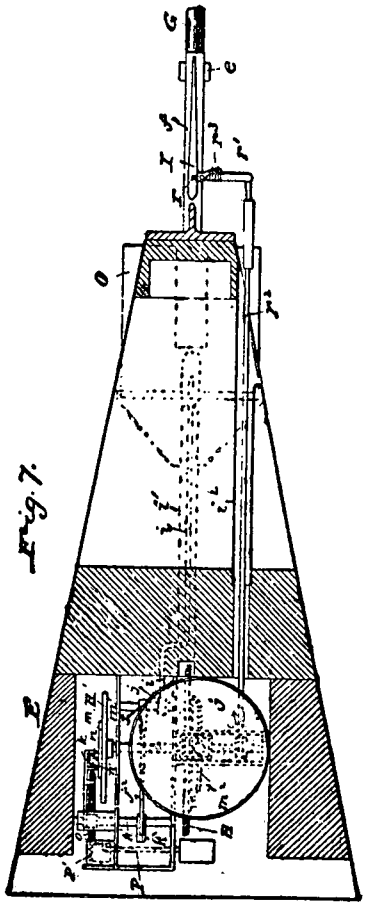


Fig. 7.

"The steering mechanism will now be described. I make use of two steering rudders, O, in the present instance, although I may use one only, or even more than two, if desired. These rudders are vertical, and turn on vertical posts or axes, g, in the framework, f, and are arranged one on each side of the after portion of rear section, E. Each of them is slotted, as indicated by dotted lines in Fig. 7, so that it will straddle the adjoining propeller shaft and framework, and be free to move without interfering with the latter. These rudders are by arms, h, and links or rods, i (which latter pass through tubes, i', in the water-tight part of section E, into the forward open part of said section), connected to opposite ends of a centrally pivoted lever, j, whose axle is provided with a radial arm, j', connected by a link, j^2, to a crank arm, k^2, on the axle, k', of the tiller, k. Under this arrangement it will be seen that both rudders can, by moving the tiller, be moved to starboard or port or be brought midships, as occasion may demand. The automatic action of the tiller for this purpose is brought about as follows: On one of the propeller shafts G, is a worm, l, Fig. 6, which gears with and drives a wheel, H, mounted on a vertical axle, m', in the open part of section E, and on the same axle is fixed a wheel, H', having a cam rib, m, on its upper face. The axle revolves continuously so long as the propeller shaft revolves. The tiller, k, overhangs the cam wheel H', and at its outer end carries a pivoted arm, n, arranged crosswise of the torpedo, the axle, n', of which is hung in ears or bearings on the under side of the outer end of the tiller, and is connected by means of a flexible shaft, o,—for instance, a shaft of closely coiled wire,—to the axle, p', of a pendulum, p, as indicated in Figs. 6 and 7. The axle, n', of the arm, n, is horizontal, and extends in the direction of the length of the torpedo, and the axis of the pendulum is on the prolongation of it. The arm, n, at its ends has points, n^2, one or the other of which will engage the cam wheel whenever the latter is inclined laterally in one direction or the other relatively to the arm. The operation of the parts is as follows: The pendulum, p, tends to keep the points, n^2, of the arm, n, always in a horizontal plane, and the cam wheel normally lies in a plane parallel thereto. With the parts in this position, the tiller is midships, as represented in the drawings; but whenever, by an extraneous deflecting force, the torpedo is caused to roll upon its longitudinal axis in one direction or the other, the cam wheel is tilted or inclined in a corresponding direction with reference to the arm, n, which, by its pendulum, is maintained horizontal. Consequently the continuously revolving cam wheel is thrown into engagement with one or the other of the points, n^2, of the arm, with the result of putting the helm to port or starboard, as the case may be, the flexible shaft, o, permitting this movement. The steering rudders, when thus moved, set up a deflecting force opposed to the initial extraneous deflecting force, with the result of producing in the torpedo a tendency to roll in the opposite direction, the helm being put to starboard when the torpedo rolls to starboard, and vice versa. This action will continue until the rudders have rolled the torpedo back far enough to permit the disengagement of the arm, n, and cam wheel; or, in other words, until the cam wheel is in its normal horizontal position. In this way it will be seen that the torpedo can be automatically steered or kept from leaving the course in which it was pointed at the time it was launched. The rudders are not simply turned to starboard or port, as the case may be, and held there until the torpedo is brought back to its course. The revolving cam wheel imparts to them a series of impulses, and this is kept up so long as the tilting arm engages the cam wheel. The cam rib may be so formed as to impart one or more impulses to the rudder or rudders for each revolution."

It will be observed that under the intended action of the mechanism duly operating the torpedo is automatically righted or restored to equilibrium, and that this is effected with such quickness that the torpedo is not expected to deflect from its course, or at least the deflection is quickly arrested. The result is that the rudders do not directly steer the torpedo from one direction to another, but in the first instance restore the level of the torpedo; for the deviating force

usually tends in the first instance to cause the torpedo to roll, and not to deviate, and the rudder tends to cause the torpedo to roll in the opposite direction, and not to change the heading of the torpedo. It seems that the steering appliance does not in fact steer the torpedo in the usual way, because, as a rule, it operates before the torpedo leaves its course. But undoubtedly the rudder would, directly or indirectly, bring the torpedo back into its course if there were deviation, and the evidence tends to show that deviation does occur to some extent. This matter is only important as bearing upon the question whether claim 1 makes provision for steering in the usual sense, or only for leveling the torpedo, for in the defendant's machine the torpedo is steered literally. It is considered that the distinction is not sufficient to allow the defendant to escape the charge of infringement if there were not other differences. Thus far it will be seen that the Howell machine only steers when a resultant motion exists. In the absence of such motion there is no occasion for steering, and only that motion can set in operation the steering mechanism. Such is the specification, and such is claim 1. The specification states:

"The gist of my invention, so far as concerns the correcting of deviations in the course of the torpedo, lies in so placing the rotation axis of the fly wheel as to obtain a resultant axis of motion in the case of deviating forces acting on the torpedo, and in combining with the fly wheel thus placed mechanism, termed by me 'steering mechanism,' brought into action by the resultant motion, and arranged and automatically operating to set up an opposite deviating force which will counteract and neutralize the initial extraneous deviating force."

This language is most fortunate to express concisely what is stated with great particularity in other parts of the specification, and describes without other reference that part of claim 1 which relates to steering the torpedo. Before considering claim 1, something may be said briefly about the words "resultant axis of motion," which occur in such claim, as well as in the language quoted above. The scientists connected with the case have disputed concerning the meaning of the phrase, quite unnecessarily for a fair understanding of the inventor's meaning. Admiral Howell states:

"In the patent specification I have used the terms 'resultant axis' and 'resultant axis of motion' meaning by these, not the axis of the fly wheel, or any position which this axis may assume, but that line or axis about which the axis of the fly wheel swings in tilting, due to the action of a deviating force. Thus, if the fly wheel is rotating, and the deflecting force is applied tending to tilt its axis, this axis will tilt, but in a direction approximately 90° from the direction of the deflecting force, and the line about which the whole wheel tilts will be the resultant axis of motion. In the Howell torpedo, with the fly wheel arranged transverse and horizontal, a deflecting force will cause the axis of the fly wheel to tilt up about a line running longitudinally through the torpedo, and this line will be the resultant axis of motion about which the axis of the fly wheel tilts."

Again, he states:

"I use axis in the ordinary sense as the line about which motion takes place, and by 'resultant axis' I mean that axis about which the resultant motion takes place."

Whether the term be used with scientific exactness is unimportant. The inventor's meaning is sufficiently clear. Claim one means: (1) That the fly wheel shall be mounted in a torpedo case or shell, so as "to obtain a resultant axis of motion in case of deviating forces acting on the torpedo"; that is, so that the wheel is free to turn in any direction, as in the case of the gyroscope. (2) That there shall be steering mechanism, and suitable devices for steering the same, arranged and operated substantially in the manner set forth in the specification, which mechanism "shall be brought into action upon occurrence of the resultant motion." Thus it will be seen that, as regards steering, or even a necessity for steering, there must be resultant motion; and such resultant motion, and that alone, by reason of its actual existence, furnishes the condition under which the steering mechanism can be used. In short, if the torpedo does not tilt or roll or tip, there is no possibility of deviation under ordinary influences; hence there is no occasion for steering; and, even if there were, the steering mechanism would not be brought into action. Therefore resultant motion must inevitably precede the operation of the steering gear. Without considering whether defendant's "steering mechanism, and suitable devices for controlling the same," infringe that described in claim 1, which is to be "arranged and operated substantially in the manner hereinbefore set forth," it will be sufficient to illustrate that the defendant's system of steering, as employed in the Whitehead torpedo, is not only not dependent upon "resultant motion," but becomes ineffectual in proportion as such motion occurs. The statement to be illustrated seems to be this: If resultant motion were impossible, the defendant's mechanism would be worthless; if resultant motion actually occur, the function of the defendant's mechanism is impaired or destroyed. Such resultant motion must be possible, otherwise the mechanism would not be a gyroscope. Without a gyroscope, the axis of the fly wheel would not have the fixity which holds the two encircling rings in place, the outer of which rings, so long and so far as it remains stable, and has no resultant motion, is used to steer the torpedo in the manner soon to be explained. This stability arises from and depends upon the revolving fly wheel, and any diminution of that stability—that is, resultant motion—hurts or vitiates the operation of the steering mechanism, while in the Howell torpedo instability of the outer ring is the condition precedent to the operation of the rudders. The Whitehead torpedo, as regards its steering mechanism, is as follows: A gyroscope is placed in the torpedo, with the axis of the fly wheel parallel with the longitudinal axis of the torpedo, which is pointed at the target. As the gyroscope is free to turn on the vertical axis of its outer ring, the torpedo is free to move around such axis when deflected from its course. But the deflection of the torpedo does not deflect the axis of the fly wheel, which remains fixedly pointing at the target. So long as the axis remains fixed, the two inclosing rings remain stationary. If now the valve arm, which sets in motion the steering gear, be so placed that it will engage with a pin on the outer ring when the torpedo deflects to one side or the other, the valve will be opened, and the torpedo

brought back into position. This may be seen clearly by means of the following figure and accompanying explanation:

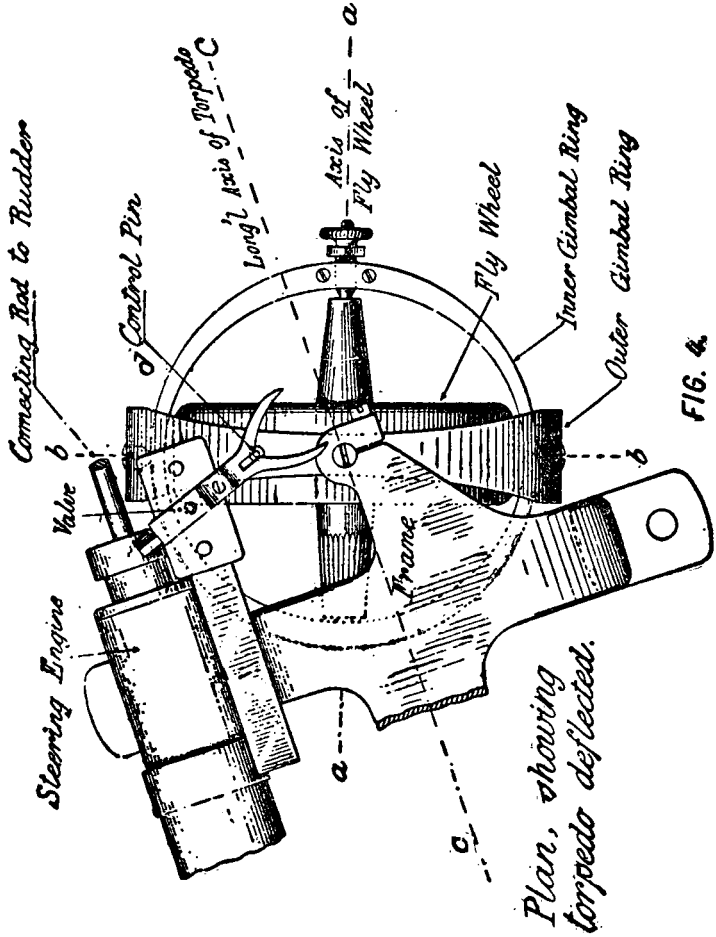


FIG. 4.

Fig. 4 shows the gyroscopic wheel as supported in the torpedo, so that its axis is free to move in any direction relatively to any point of the torpedo. The axis, a, a, is pointed at the target, and is parallel with the longitudinal axis of the torpedo. If now a deviating force deflect the longitudinal axis of the torpedo to c, c, yet the axis, a, a, of the wheel will remain pointing as before, and the outer gimbal ring will maintain its position. The control pin, d, is set vertically in the outer gimbal ring, within the fork of the valve arm, e. If the bow of the torpedo be deflected to port, throwing the stern to starboard, the forked arm will engage the control pin in the outer gimbal ring on account of the motion of the torpedo, and the steering gear will be set in operation, so that the rudder will tend to swing the torpedo back into its course. If it should swing back so that its axis goes

beyond the axis of the fly wheel, the valve arm will be turned so that the rudders will tend to swing the torpedo back to its true course. This alternating action will tend to direct the torpedo on its true course, as indicated by the axis of the fly wheel. When the valve arm is turned, compressed air is admitted to one end or the other of the cylinder of the engine, and the rudder is thereby turned to port or starboard. The essential fact to be observed is that "the relative movement between the axis of the torpedo and the gyroscope wheel when revolving operates the valve of the steering engine, giving motion to the steering rod; the steering rod, by suitable mechanism, operates a pair of vertical rudders, by which the horizontal direction errors of the torpedo are controlled." But it is not important what the steering mechanism is. It is in detail totally unlike that in the Howell torpedo, and is actuated by a different force and totally dissimilar appliances. The vital element is a stable pin in a stable ring, against which a valve arm, moved by the deviating torpedo, of which it is a part, presses, so as to open a valve and set the steering gear in motion. This stability of the pin in the ring is established by the revolving fly wheel, and depends upon its power; but as the power fails, and the stability of the ring is diminished, the valve arm is pressing against a yielding pin, and, of course, its ability to open the valve is decreased. Now, the pin can only yield when the ring in which it is inserted yields, and such yielding is resultant motion, and is the resultant motion upon whose existence the operation of the steering gear contemplated in claim 1 is dependent. In the Whitehead torpedo the nonexistence of resultant motion, so far as the same can be achieved, is essential to the desired operation of the steering mechanism; in the Howell invention the existence of such motion is at once the occasion and primary cause of the operation of the steering mechanism, without which the steering gear would be passive. This is well expressed in the specification:

"Under these conditions the axis of resultant rotation, or motion due to the application of a laterally deflecting force, will be the longitudinal axis of the torpedo,—in other words, the torpedo will roll; and this rolling can be conveniently availed of to bring into action steering mechanism arranged and operating to apply automatically an opposite deflecting or deviating force, which will restore the status quo. As soon as the rolling ceases, the steering mechanism becomes inactive; but until then it constantly offers to the deflecting force an opposition which in the end overcomes and suppresses it."

Complainant was understood on the argument to contend that, as the stability of either ring in a gyroscope can be possible only when resultant motion is possible, the stability of the ring is traceable to resultant motion. Stability is not the effect of resultant motion, nor is it dependent upon it. Stability of the rings depends solely upon the rotation of the fly wheel undisturbed by friction or extraneous forces, and is the normal condition of the gyroscope in operation. On the other hand, resultant motion is error, fortuitous and undesired rotation of the fly wheel on a second axis, the revolution of a ring, all produced by the introduction of a new force foreign to that under which the fly wheel was operating. The Whitehead steering gear depends upon fixity of axis, and rings, unaffected by an extrinsic

force; the Howell steering mechanism depends upon the introduction of an outer force that shall destroy such fixity, and produce abnormal operation of the gyroscope, and cause the ring to change that status which the revolution of the fly wheel tends to produce. The possibility of resultant motion is indispensable. Its occurrence in the torpedo is a detriment. In the Whitehead it tends to baffle the operation of the steering gear; in the Howell the evil is turned to its own correction. But it is urged on the part of the complainant that perfect stability of the outer ring cannot be secured, and that there must be some resultant motion. To this again and finally it is answered that such resultant motion is the effect of the valve arm pushing against the wheel, and the yielding of the wheel is an infirmity, tending to debilitate or destroy the operation of the steering mechanism; but in the Howell torpedo such motion is the first source of the movement of the steering gear. To Admiral Howell belongs the distinguished honor and service of suggesting the use of a rapidly revolving fly wheel for the purpose of giving fixity of direction to a submarine boat, and for the purpose of steering the same by employing the motions resulting from its disturbance by deviating forces. That is, he made the fly wheel and torpedo parts of a gyroscope, that either maintained its normal position, or automatically made use of its instability to right itself. Such is claim 1, giving it a construction that shall not limit it to the steering mechanism described in the specification to which the claim refers. Admiral Howell did not perceive, so far as can be gathered from the record, that a gyroscope proper could be mounted in the torpedo, complete in itself, and using no part of the torpedo in its combination; hence uninfluenced in its normal movement by any disturbance of the torpedo, and therefore not subject to sensible resultant motion, but in its turn remaining so fixed in all its parts as to influence the course of the torpedo by causing its steering engine to operate when its valve arm came in collision with the practically stable pin in the outer ring. Even if this advantage was observed by Admiral Howell, it was excluded from the claim under consideration. The steering mechanism used in the Whitehead torpedo shows a meritorious advance in the art, and may not be condemned as an infringement of Admiral Howell's invention as expressed in the claim.

The complainant's bill must be dismissed, with costs.

INTERNATIONAL TOOTH CROWN CO. v. HANKS DENTAL ASS'N.

(Circuit Court, S. D. New York. October 31, 1901.)

1. PATENTS—VALIDITY—USEFULNESS OF INVENTION.
   The degree of utility of a patented article does not affect the question of patentability, nor does the length of time it will last and continue useful, but, if it is useful at all, that is sufficient to sustain the patent.

2. SAME—ACTION AT LAW FOR INFRINGEMENT—EVIDENCE OF USEFULNESS OF INVENTION.
   In an action at law for the infringement of a patent, upon an issue as to the usefulness of the patented article as affecting the validity of

the patent, the jury may consider the fact that it has been used by defendant if they find that he has infringed.

3. SAME—CONSTRUCTION—SUPPORT FOR ARTIFICIAL TEETH.
The Low patent, No. 238,940, for improvements in dentistry, relating to a method of inserting and supporting artificial teeth, construed in a charge to the jury in an action at law for infringement.

4. SAME—INFRINGEMENT—MEASURE OF DAMAGES.
In fixing the damages for infringement of a patent, where it is shown that the patentee had an established license fee for practicing the invention, it will be taken as fixing the measure of damages, notwithstanding he may have accepted a smaller sum in settlement with licensees who were in arrears, or made a reduction therefrom, where license fees for a long term were paid in advance.

Action at Law for Infringement of Patent.

Walter D. Edmonds, for plaintiff.
Charles K. Offield, for defendant.

LACOMBE, Circuit Judge (charging jury). It is a very mistaken system of jurisprudence that leaves the decision of the issues of fact that arise in a patent case to a jury. In the very nature of things, it is extremely awkward and difficult, and many times practically impossible, for 12 laymen, untrained in the examination of the intricate questions which so frequently arise in patent causes, without any facilities for taking notes, and with no opportunity for the lengthened reflection which is frequently necessary to reach a wise conclusion in cases of this kind,—I say it is many times practically impossible for them to dispose of such questions. Nevertheless the law does allow the trial of these issues by a jury, and we have one to try here. It very rarely happens. I have sat on the bench for 15 years, and this is the first patent cause that I have tried with a jury. But, very fortunately for you and for the interests of the litigants in this case, the patent before you is quite a simple one,—easy to understand,—and the issues presented are easy of comprehension, and may be presented to you, I think, sufficiently well for you to understand them, and perhaps will not give you much trouble.

In order to show what questions of fact come before you, how much you have to do with the case, and how much the court has to do with the case, let me call your attention briefly to what a patent is. It is the policy of the law in this country, and had been enacted by congress, under the powers given to it by the constitution, that if a man finds out something new and useful,—a machine or combination or process or what not, something new and useful,—and publishes it to the world through the intermediation of the patent office, he shall in exchange for it, and as compensation for doing so, receive a patent; that is, he receives a grant of a monopoly of manufacturing, selling, and using that particular invention for a certain period of time,—17 years. That monopoly is not a monopoly in the sense in which the word first came into the English language, where, without anything at all except the mere whim of the sovereign power, some extraordinary privileges were given to individuals. The man who holds a patent monopoly has earned the right to the monopoly, because he need not have invented the novelty unless he chose, and

having invented it he might have kept it to himself if he chose, and his fellow citizens and the community at large would be without the benefit of his discovery. Therefore there is nothing obnoxious to law or good morals or to anything else in the fact that a patent secures to the holder of it a monopoly for a limited period of time. That monopoly is secured to the individual by a document which is issued by the government, and is called "Letters Patent,"—a written document, that is, a printed document, accompanied generally with diagrams,—and in the document it is stated specifically what the invention is, and what it seeks to accomplish, how it is constructed, and how it works; and also there is set forth what exactly it is that the patentee claims to have been his new and useful discovery or invention which he wishes to retain the monopoly of, and which the department, by issuing the printed document, says he shall have a monopoly of. Just exactly what that document means—what invention it is which it secures as a monopoly to the individual—is a question of law for the court; and one with which the jury has nothing to do; and therefore, when we come to that stage of the case, it will be my duty not to give you this written document, to try and make out from it what it means, but to tell you as tersely and succinctly as I can just what it is that is granted to the International Tooth Crown Company, which is the assignee of the original patentee. When you are instructed as to what that patent means, the question of fact for you to determine will be whether what the defendant has done is an infringement of that patent; in other words, whether what the defendant has done is really the practicing of the invention which is disclosed by the patent. But, before we come to that question of fact, there are two other questions of fact which have got to be decided and passed upon by you. The statute provides that patents shall be given for new and useful inventions. Whether an invention is a new one or not is a question of fact; whether the invention is a useful one or not is a question of fact; and both those questions have to be decided by the jury. The question whether it is a new invention—whether it is novel—divides into two branches. In the first place, was it anticipated,—that is, was the same thing done or known before? and, secondly, if exactly the same thing was not known before, nevertheless were there other devices known to the public, known in the art, so near this that it needed no inventive skill, no inventive ability, to make the improvement of the patent, but that any mere workman possessed of the ordinary skill of the handicraftsman in that particular art would naturally have made the changes or improvements himself on the existing structure?

As to the first branch, whether this was new in the sense that nothing just like it ever existed before,—in other words, that it was not anticipated,—I can relieve you from any trouble, because there is no testimony here which shows what is known to the patent law as "anticipation." This device shown in the Low patent, and claimed by him, did not exist, so far as this testimony shows, before he came upon the scene. It is contended by the other side that, although that be so, nevertheless there were other devices, such as the Bing patent, or Bing bridge, known to the art, and that any workman, with the

ordinary skill of his calling, would have known enough to make changes or modifications in them which would have secured this very Low device. In other words, that in finding out, devising, this concededly novel—because it was not anticipated—invention, Low did not really exhibit the skill of an inventor, and therefore there is no patentable invention in the device. That is the claim of the defendant. That question is a very unfortunate question ever to have to submit to a jury. For years the intellects of jurists, trained by successive examination of repeated cases, many of them each year, bearing upon this general matter of patents, have been sharpened in an endeavor to lay down some satisfactory definition as to what is and what is not patentable invention; and so far as my reading goes, and so far as my own judgment goes, I have not yet read any definition which is entirely satisfactory to me, and the best that can be said is that it has to be left as a question in each particular case to be determined from the facts of that case; and barring some general principles to guide us, such as the fact or the circumstance that the new device went into general use after it was made known, which would indicate that it was sought for by the public and desired by the public, —and if it was desired by the public, and no one had found it before this man, the assumption may be that the other skilled workmen did not have the gift to devise it,—except, I repeat, for such broad generalities as that, there is very little that can be set up in the way of signposts for the guidance of a jury on the question of invention. It varies, of course, a great deal according to the character of the art in which the invention is alleged to have taken place. Upon this branch of the case all I can do is to leave the matter in your hands on the statements that we have had here as to what the former devices were, and on the statement which I shall give you when I come to charge you as to what this invention was. It may help you in reaching a conclusion to call your attention to the fact that the patent, before it was granted, went through the scrutiny of the officials in the patent office, and that the mere grant of a monopoly—the grant of a United States letters patent by the general government—carries with it the presumption that the invention is a novel one, and that presumption lasts and goes with the document wherever it is presented, until affirmative evidence introduced in opposition does away with the effect of the presumption. In other words, in this case the burden of proof is on the defendant to show you that although the patent office gave this document to Low, and through him to the plaintiff, as a conveyance of the monopoly, upon the theory that he had invented something new, nevertheless it was not novel. The burden, I say, is on the defendant to convince you of that fact before he can recover. I might also say that the province of the court and the jury is not quite so sharply differentiated in the federal courts as it is in the state courts, and our practice conforms more to that of the English court. I may, therefore, without impropriety say to you that if it were a question with which I were dealing, upon the facts in this case, I certainly would feel great hesitation, upon the evidence in this case, in reaching any conclusion which would overthrow the presumption which accompanies this grant from the beginning. Never-

theless, under the jurisprudence which prevails here, it is not for me to decide that question,—it is for you; and, although that may be my opinion, it is only my individual opinion, and must have no weight or influence with you. It is a question which you are to decide yourselves, upon the evidence, whether or not this invention of Low was such an advance over prior devices that he may fairly be said to have exhibited inventive genius in its discovery and disclosure. Upon that, in order that I may charge as much of the requests that have been handed to me, I will charge you that the quality of invention must reside and be found in this Low patent; that ordinary mechanical changes made by skilled mechanics, obviously called forth by new conditions, is not invention; and, if the jury find from the evidence an ordinary skilled dentist would have advanced beyond the device of the prior art to the device invented by Low, then the verdict of the jury would have to be for the defendant.

The other question of fact which comes before you to determine is the question of utility. The grant of the patent should be made only for a new and useful invention, and if the invention is useless the patent is void. Therefore it is for you to determine whether or not there is any utility in the invention. There has been a great conflict of testimony upon that point, as you remember, some coming forward and saying that it is highly useful and a great improvement in the art; others coming and saying it is worse than useless, that it is deleterious, and a very unfortunate thing to have anything to do with. You may be very much helped in disposing of all this testimony by one or two considerations. The first of them is that, if it is useful at all, that is sufficient. If there is any utility in it, that is sufficient to support the patent. The measure of utility does not make any difference. It would be a perfectly valid patent if a device is a useful one, although 50 or 100 others might be very much more useful, and although improvements upon the device might make it more useful than it was before. Nor is it necessary that a continuation of usefulness be shown, or that it must be so for a long period of time. That is not essential. If it is useful at all, it sufficiently meets the requirements of the statute that the invention must be a new and useful one to warrant the granting of the patent. On that point you may remember that Dr. Jarvie, one of the witnesses for the defendant, said it would not be useful but for a short time, and that Dr. Littig, another witness for the defendant, said it might last six months in some mouths. I also charge you, as requested by the defendant, that if you find from the evidence that the device or method of the Low patent in suit is without utility, and is not an improvement in the industry to which it relates, then your verdict must be for the defendant. Finally, on this question of usefulness, one of the most important considerations in determining the question is the conduct of the defendant himself. If you find, in answering the other question in the case, as to infringement, that the defendant has used this invention, the testimony which he may introduce to show that the invention is a useless one is not likely to be supposed to have the same measure of weight that the same evidence would have if introduced by a person who did not use it. The mere circumstance

that the defendant chooses to use it seems to indicate that, from his point of view at least, it was a patentable invention.

As to the question of law in the case, let me instruct you exactly what it is that this patent conveys,—the exact measure of the monopoly. It is a method of inserting and supporting artificial teeth, which consists in attaching said artificial teeth to continuous bands, fitted and cemented to the adjoining teeth, whereby the artificial teeth are supported by the said permanent teeth without dependence upon the gum beneath. The artificial teeth are cut away at the back, so as to contact with the gun only along the front lower edge, and are supported by rigid attachment to the adjoining permanent teeth, and not at all by the gum. But the patented device is not restricted to any particular width of band, nor to any particular variety of band, nor to bands which do not turn over at the top. And the patent covers the connection of artificial crowns—crowns fitted upon natural roots, the crown spoken of here as the Richmond crown—by a bar or bridge bearing the artificial tooth or teeth. And it covers also a case where there is only one abutment, and the artificial tooth is hung on one only of the adjacent teeth. That is the invention which is subject to infringement, and the remaining question of fact for you to determine in the case will be whether or not the defendant infringed. What was done by the defendant has been stipulated in the case during the taking of the testimony, as to what work he did. It stands conceded before you that, to the extent of $2,080, the defendant did work which comes fairly within the description of the invention which I have just given to you. As to another sum ($520 worth of work) there arises, however, a question. The stipulation says that as to that $520 the bridge which bore the artificial teeth so carried them that they pressed down on the gum. As I have charged you with regard to the meaning of this patent, the teeth, in order to be within the patent, may contact with the gum, they may contact closely with the gum,—so closely, indeed, that no one could perceive, perhaps, that there was any space between them, or that it was possible to pass anything, water or what not, between them. But they, nevertheless, must not derive any of their support from the gum. If, therefore, from the testimony in this case, you reach the conclusion that although the teeth put in by the defendant in these cases, which amount to $520 worth, actually rested on the gum,—that is, actually touched the gum,—but did not receive support from it, then as to that $520 infringement also would be shown. If, however, you reach the conclusion from the evidence that in those cases the teeth not only touched the gum so as to make an apparent closing of all view-point between, but actually derived support from resting upon, the gum, then as to that $520 your verdict would have to be that there was no infringement.

If you reach the conclusion that there is infringement, it will only remain for you to settle the question of damages. The plaintiff claims that that is an easy matter for you, because he had a regular license rate fixed; and the testimony tends to show that there was a license charged by him at one time, and accepted under a license agreement by the defendant, of $25 for each year that the invention

was practiced, and 15 per cent. upon all money received for practicing the invention. There is some testimony brought in as to the fact that the plaintiff did not always receive, or did not always exact, that amount. It will be for you, from all the testimony in the case, to determine whether the plaintiff has fairly made out a case as to the $25 a year and 15 per cent. royalty, being the regular license fee that was charged. The mere circumstance that, after some infringer or some licensee had got way behindhand, and owed money for past obligations, both royalty and license, the plaintiff chose to accept some lump sum smaller than the license, in order to get the case settled, would not have a very material bearing on the question. Nor would it be of very material importance that in individual cases, where a man was willing to pay for five years in advance, some discount should be allowed for a payment of that sort. If you are satisfied from the evidence that the plaintiff had a regular license fee of $25 a year, and 15 per cent. royalty, then I charge you that as to the $2,080 the plaintiff would be entitled to recover $25 for each of the five years during which the invention was practiced, and 15 per cent. on $2,080. If, moreover, you reach the conclusion as to the $520, making the total amount $2,600, that it also was an infringement, the same application of license fee and royalty should be made. The license fee would not double, but the $25 license fee for practicing would cover practicing every variety of the invention.

Those are the questions, and the only questions, for you to pass upon. You are first to decide from the testimony whether there is any invention disclosed. If you reach the conclusion that there is no invention disclosed, then your verdict will be for the defendant. Then you are to determine whether the invention is a useful one. If you reach the conclusion that it is a useless invention, then your verdict will be for the defendant. If, on the contrary, you reach the conclusion that patentable novelty was displayed, and that a patentable invention was disclosed, and the invention was a useful one, then it will be for you to determine whether there is any infringement as to the $520. If you reach the conclusion that there is infringement as to the $520,—that is, in the case where the teeth are said to rest on the gum,—then you will cast 15 per cent. on $2,600, and will add to that five years' license fees, at $25 each, and give a verdict for that amount, with interest. If, on the contrary, you reach the conclusion that there was no infringement as to the $520, but you have found already that there was invention and usefulness in the patent, then you will cast your 15 per cent. on $2,080, and add to that five years' license fee, at $25, and for that sum, with interest, you will give your verdict. As to the amount of interest, the words "with interest" will be sufficient. It is a question of law as to what period the interest will run from in this case, and the court will fix the amount and the dates when your verdict comes in.

I will put down here on paper a few figures for you. They will be figures enough for you to take with you to enable you to reach a result: $2,080, infringements as charged; $520, infringements in dispute,—that is, as to whether or not the teeth resting on the gums

are supported by the gums; the rate of royalty, 15 per cent.; license fee, $25 per annum; number of years, five.

Now, I will take any requests to charge. Except as charged, I decline to charge each and every one of the 11 requests submitted by the defendant, but do charge the request submitted this morning as the twelfth one, that the burden of proving infringement rests on the plaintiff.

The jury rendered the following verdict: For the plaintiff in the amount of 15 per cent. on $2,080, and five years' license fees, making a total of $437, with interest.

(November 16, 1901.)

I do not think this is a proper case for treble damages. A defense similarly prosecuted, after the questions raised in this action shall have been passed upon, if so passed upon favorably to complainant, might present a very different situation.

R. THOMAS & SONS CO. v. ELECTRIC PORCELAIN & MFG. CO. et al.

(Circuit Court, D. New Jersey. November 11, 1901.)

1. PATENTS—INVENTION—ELECTRICAL INSULATORS.

The Boch patent, No. 600,475, for an electrical insulator and method of making same, describes a porcelain insulator for use with high-tension conductors, made, according to the process shown, in two or more separate parts or shells molded so as to nest or fit into each other, and which when dried are coated with glaze, placed together with the open side up, and extra liquid glaze poured into annular channels provided to receive it between the parts. When placed in the oven for firing in this position, the extra glazing material melts, and flows down as the clay shrinks, and fills the spaces and any crevice or crack which may form in the process of firing. *Held*, that while neither the making of insulators in parts fitted into each other, nor the uniting of such parts by glazing, was novel, the combination of them with the further step of supplying an extra amount of liquid glaze sufficient to not only fuse the parts into a whole, but to fill all crevices, the result being a superior article, constituted invention, and was not anticipated by anything in the prior art. Such patent also *held* infringed.

2. SAME—ANTICIPATION.

An unsuccessful and abandoned experiment does not operate as an anticipation, particularly where it involved no use or discovery of the process or product subsequently invented, however close it may have come to doing so.

3. SAME—PRIORITY OF INVENTION—INTERFERENCE PROCEEDINGS—ACCESS TO FILES.

Semble, where interference proceedings are declared between two different applications for a patent, it will not be presumed that one applicant derived anything from the other, merely because of having access under the rules of the patent office to the other's files.

4. SAME—PATENTABILITY—ESTOPPEL.

While the defendant in infringement proceedings may not be estopped from contesting the question of patentability, because of his having himself applied for the same identical patent, it does not come with good grace for him or his assigns to do so.

5. SAME—NEW RESULT.

While the application of an old process to a similar or analogous subject, with no change in the manner of the application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated, yet, if a new

combination and arrangement of known elements produce a new and beneficial result never attained before, it is evidence of invention as a general rule.

6. SAME—PRIORITY OF INVENTION—CONCLUSIVENESS OF DECISION IN INTERFERENCE PROCEEDINGS.

Where the question of priority of invention between two applicants for patents for the same article or process has been determined in interference proceedings in the patent office, and especially where the decision of the commissioner has been affirmed on appeal by the court of appeals of the District of Columbia, such decision is conclusive between the parties, at least when no new evidence is adduced, and the question will not be reopened.

In Equity. Suit for infringement of patent. On final hearing.

The following cuts and extracts from the specification illustrate the Boch insulator, and the process of its manufacture:

FIG. 1.

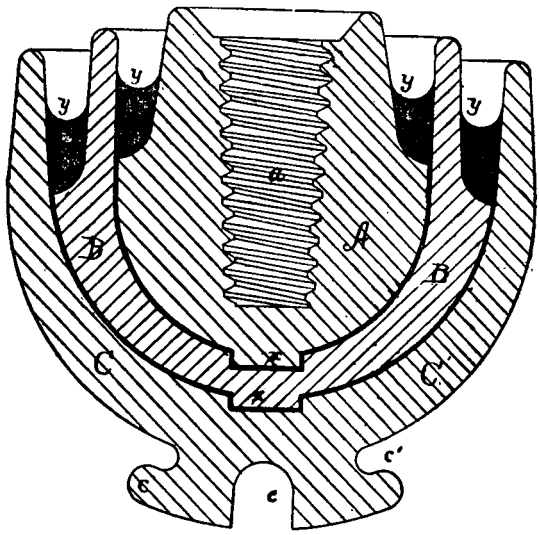
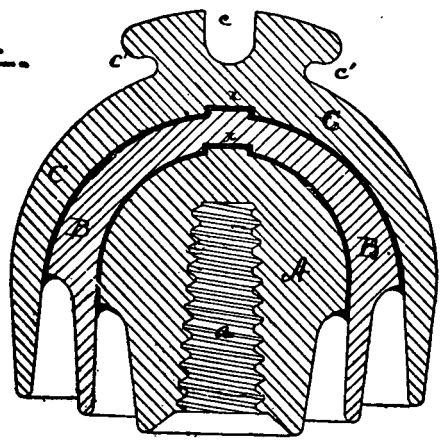


FIG. 2.



"In the accompanying drawings, Fig. 1 is a sectional view illustrating one step in the manufacture of my improved insulator. Fig. 2 is a sectional view of a finished insulator. In the drawings I have shown a triple petticoat type of insulator, but my invention may be employed in the manufacture of double petticoat insulators or other styles. The insulator is built up of two or more separately molded parts of clay. In the case of the triple petticoat style of insulator it is preferred to make it of three separately molded pieces of clay. The inner part, A, is pressed or molded with a threaded or other suitable socket, a, for the reception of the usual pin of iron or other suitable material, and the outer part, C, shaped like an inverted bowl, is provided with a cross notch, c, on the top for the reception of the electrical conductor, and has side shoulders, c', c', by which the conductor may be wired down. The intermediate part, B, is made bowl-shaped, and the several parts are molded so as to nest or fit into each other in the manner shown, preferably with corresponding centering projections and recesses, x, x. In carrying out my invention, the separately molded parts, A, B, C, after coming from the press, are first dried out separately. This is preferably done in an oven or kiln in the usual manner of drying clay articles by the process known as 'biscuit firing.' When these separate parts have thus been biscuit fired or otherwise dried, and are ready to be put into the vitrifying kiln, they are each coated with a glazing material, preferably all over, as by dipping the article into such liquid glazing material. The two or more parts of each insulator thus coated are now fitted into each other, and are stood upside down, as it were; that is, with the lower ends of the bowls uppermost, as shown in Fig. 1. Glazing material is then put into the joints, —that is, into the annular channels between the petticoats,—and this may be most conveniently done by pouring the liquid glaze into the channels, as indicated at y, in said figure. The parts thus put together and supplied with glazing are now put into a sagger, with the petticoats uppermost, as shown in Fig. 1, and placed in a kiln, in which, under great heat, the clay shrinks and becomes vitrified, as usual, and the glazing material melts and becomes of a glass-like character. That glaze which was put into the annular channels between the petticoats flows down into and fills all the spaces between the parts of the insulator; such spaces either being there by lack of correct fit of the parts, or arising during the shrinkage by the vitrifaction of the clay. The result is that the two or more separately molded parts are firmly united to each other throughout by means of the glass-like glaze. Owing to the supply of the extra glazing material between the petticoats or at the joints, I prevent the formation of air spaces or cracks for the entrance of moisture in the finished insulator, and which are almost certain to occur in the absence of such provision of additional glazing material. A solid and practically impenetrable layer or layers of glaze will thus be formed between the conductor and the supporting pin intermediate between the porcelain or earthenware parts of the insulator."

Hubert Howson, for plaintiff.
Howard P. Denison, for defendants.

ARCHBALD, District Judge.[1] The defendants do not dispute that there has been an infringement, if the patent in suit is a valid one; but they deny that it is, on the ground that it has no novelty, and that the process involved in it is not patentable, and, if these be found against them, they further assert that Locke was the real inventor, and not Boch, under whom the plaintiff claims. The patent is for a high-tension porcelain electric insulator, manufactured according to a specified method, as set forth in letters patent issued to John W. Boch, March, 1898, on an application filed Octo-

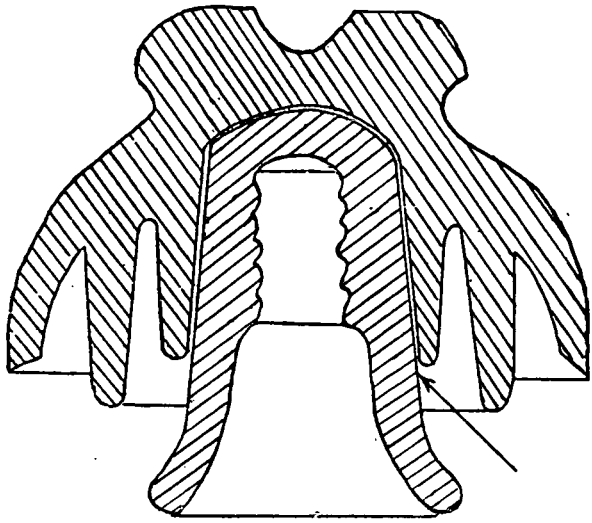
[1] Of Middle district of Pennsylvania, specially assigned.

ber 23d previous. Porcelain is recognized as the best resisting material, but the difficulty is to keep it free from flaws and imperfections which make it puncturable. Where there is a high voltage, the tendency of the electric current is to arc, especially in wet weather, by seeking out any existing defects in the insulating material, and to prevent this the greatest care has to be exercised to see that there are no cracks or flaws where dust and dampness can get in, and there is the least likelihood of this where the porcelain is baked in thin pieces. Acting on this idea, the Boch insulator is made up of two or more bowls or shells, molded so as to nest or fit into each other, being calculated in this shape to vitrify as perfectly as possible; and, in order to weld them into one, they are fitted together upside down, and liquid glaze poured into the cup-like spaces or channels provided to receive it in between, and upon being put in the oven in this position the glazing material flows down as the clay shrinks, not only filling up the joints, but penetrating into whatever cracks or crevices may form in the process of firing, and at the same time cementing and solidifying the parts into a single mass, so as to stand the requisite high mechanical strain. It is this process and the resulting product that the patent in suit is intended to cover and protect.

There is no novelty in an insulator made up of separate parts fitted into each other, whether of the same or different material. This appears in the Varley English patent (1861), the Johnson & Phillips (1878), the Pass and Seymour Cuban insulator (1892), the Hauty (1893), the Locke (1896), and the Locke Cornell two-part insulator of February, 1897. Neither does fusing the two parts together add anything. Admittedly this is an ordinary process in pottery, which is exemplified in the N. Boch door knob (1875), the Geery mantle (1879), and the Anderson irrigating tile (1886). In the Locke insulator of February, 1897, also the shells were to be fused into one.

But the novelty claimed for the patent in suit consists not in these things alone, but in a combination of them, with the other and further step of supplying an extra amount of liquid glaze, sufficient not only to fuse the separate parts into a single whole, but to so fuse them that all the cracks and crevices which exist or may arise in the process of firing shall be completely closed and filled. This is secured, as already said, by turning the parts with the petticoats up, and thus providing a receptacle or reservoir to hold the glazing material, and conduct it down in between the porcelain shells as they are being fired. In other words, it is not so much the fusing as the particular manner of doing so, and the results thereby obtained, that constitute the invention; and this, in my judgment, has not been anticipated by anything found in the prior state of the art.

The Dinsmore experiment comes the nearest to doing so. About the middle of January, 1897, Locke sent to the Imperial Porcelain Works, a firm doing business at Trenton, blueprints from which to have some two-part insulators constructed. Mr. Dinsmore, one of the firm, had dies cut out according to the patterns so given him, and insulators molded from them, somewhat in the annexed form:



And, after having dried and biscuit fired them, the shells were separately dipped in glaze, and fitted into each other for the final burning. In a few instances, Mr. Dinsmore, finding the inner piece too small, thought he would try whether, by putting in some extra glaze, he could not keep it central, and prevent it from tipping, but the results were not satisfactory. When the insulators were put into the kiln, with the petticoats up, the glaze, with its natural shrinkage, flowed down into the bottom between the two shells, leaving a considerable space unfilled between them. And in those cases where the petticoats were turned down the glaze flowed out, and left the space almost entirely empty. About 150 of these insulators were made for Locke at this time, but only a few were delivered to him, because he did not pay for them. Whether any of those delivered were of the extra glaze experimental lot does not appear. The rest were never put in use or sold, and were ultimately broken up, and consigned to the scrap heap. Locke tries to claim the benefit of this experiment, whatever it was, and asserts that it was conducted according to his instructions. But Dinsmore denies that Locke had anything to do with it, and says that what he did was entirely his own idea, and in this he is confirmed by his partner, Duggan, as well as by the general circumstances. At all events, it was not followed up, and nothing came of it, and, what is still more to our purpose, it did not produce a glaze-filled insulator such as the one in suit, nor was it calculated to do so.

This unsuccessful and abandoned experiment does not operate as an anticipation of the present patent. Deering v. Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153. It involved no use or discovery of the process or product invented by Boch, however close it may have come to it. Dinsmore's whole effort, as we have seen, was directed to steadying the inner shell so that it would fuse true. He had no conception of supplying extra glaze to flow in and fill the

cracks and interstices left in baking. And neither the form of the shells nor the course taken with regard to them would have done so. He turned them, indifferently, up or down, and, even if the shells had been kept upright, their form, and the close way in which they fitted together, provided no receptacle to hold the glaze, and conduct it in, as the parts contracted in firing, which is an essential feature of the Boch process. Not only, therefore, did nothing practical come of the experiment, but nothing involved in the patent in suit is found in it, except the single circumstance that there was an attempt to fuse the parts with extra glaze, which falls far short of that which we have here.

Equally futile is it to assert that the rejected Locke application of February 5, 1897, was a prior publication as to Boch, which disclosed to him, as well as anticipated, what he has since put in shape. This, in a way, is a new phase of the old question of priority decided adversely to Locke in the second interference proceedings, if it is not, indeed, an attempt to reopen it. Passing by that feature, however, for the moment, there is no merit in it, independently considered. While it is true that when in September, 1897, the two applications of Locke and Boch were thrown into interference, Boch had access, under the rules, to Locke's files, yet there is nothing to show that he derived anything from this opportunity, nor, indeed, do I see how he could. To reach that conclusion, I must hold that the Locke application virtually embodied the present invention, and that is really the argument which is made for it. The process there described, it is said, calls for fusing; and in the diagram which accompanies it, by a heavy black line between the two parts of the insulator where the fusing is to take place, the use of extra glaze it is claimed is shown, thus anticipating Boch's use of it, and suggesting it to him, as is proved by his application of October 23d, immediately following. To this, however, there are several things to be said. In the first place, I am far from persuaded that Locke's application really shows extra glaze. Admittedly it says nothing about it, and Locke himself swears, in the course of the interference proceedings referred to, that he did not disclose to his attorneys, when giving them instructions for the 1897 application, that he filled the space between the two shells with extra glaze for the purpose of fusing them together, thus showing, to say the least, that it had no great prominence in his mind. He explains the omission by saying that he did not consider the fusing with glaze patentable, but that does not do away with the effect of omitting it. And, if his first application covered the subject, why was it necessary for him to make a new and independent one, as he did in 1898, when he discovered that Boch had obtained the patent in controversy? It is contended, however, that Locke shows extra glaze, even if he says nothing about it; this being indicated, as claimed, by the heavy black line between the shells. But in the specification of his invention the black line which is now relied upon is declared to represent simply the fusing together of the two parts of the insulator, or, to quote his own words, in describing the process of manufacture, "The two insulators are again put into the kiln and fused together, as shown by the dark line, c." Furthermore, in

the blueprint sent to Dinsmore, which must be taken as an original, the apparent extra thickness of the line between the inner and outer shell is plainly due to the lines having run together in printing, the two at several points being distinctly separate.

But even assuming that all this is not so, and that Locke's application really discloses, in the way he contends, the use of extra glaze for the purpose of fusing, the whole argument that Boch got his ideas from it, and that as to him it amounts to a prior publication, is built up on the theory that the patent in suit is one for extra glaze only, or essentially. This, it must be apparent from what has already been said, falls far short of a true apprehension of it. It is not alone for that, although that is involved in it, but for the whole process by which the glaze is supplied, including the exact manner of supplying it, and this could not possibly be gleaned from anything in Locke's application which has no suggestion of it.

But, as intimated a moment ago, the argument with regard to the Locke application is no more than a specious attempt to reopen the question of priority, which was decided adversely to Locke in the second interference proceedings. Those proceedings did not end with the decision of the commissioner of patents, but were carried to the court of appeals of the District of Columbia. Had they stopped short of this, and rested with the hearing before the commissioner, his decision of itself would have had to be accepted as controlling, in the absence of evidence carrying thorough conviction to the contrary. Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657. Much more is this effect to be given to it when it has been confirmed, as it has, by the judgment of the court of appeals. Whether this made it res judicata or not I do not need to determine. It is sufficient to hold that with no new evidence adduced the question of priority in all its forms and phases is concluded between the parties, and will not be reopened.

As to the question of patentability, which is the only thing left, while Locke, or those claiming under him, may not be estopped from contesting it, yet, considering that Locke himself endeavored to obtain a patent for the same identical process, copying the Boch application verbatim, it does not come with good grace for him, or his assigns, to do so. Shuter v. Davis (C. C.) 16 Fed. 565. He also virtually affirmed to its patentability in the affidavits of Cahoon and himself, presented to the court of appeals in the first interference proceedings. But passing all this by, and laying no especial stress, as we might, on the fact that the patent office has pronounced in its favor and allowed the patent, why does it not embody a patentable process and product? The defendants contend that the commissioner of patents and the court of appeals of the District of Columbia have both decided in the first interference proceedings that it did not. But Locke's application was the only thing involved in those proceedings, and it was that alone that was passed upon. The fusing there spoken of, it was held, must be regarded as the ordinary process by slip or glaze, which, being such as any potter would employ, was not patentable. In the Boch patent, however, while the fusing by glaze is made use of, it is a special, and not an ordinary, use, and there is

the difference. The process is of such a character, take it all in all, as would not be in the mind of the ordinary potter, but needed the genius of an inventor to devise and suggest. It consists, as we have already seen, in so arranging the several parts of the insulator, and giving them such form, that a receptacle or reservoir is provided between each set, into which, the petticoats being turned upward, the extra glaze is put, in such sufficient quantity that when the whole is fired it will flow down into the intervening spaces, and completely fill them, as well as any other crevices or intervals which may occur in firing. This is something which up to that time no one had thought of or employed. If it was the use of an old process, it was its use under new conditions, and in such combinations as to produce new and extraordinary, as well as highly satisfactory, results, the success of which, where others failed, has no little to do in proving its novelty and value. While it is true, as declared in Pennsylvania R. Co. v. Locomotive Engine Safety-Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of the application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated, yet the very exception there recognized is to be found in the case before me, for a substantial and distinct result has in fact been attained. We may better apply the words of Mr. Justice Bradley in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, that "it may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention,"—a principle which has been recognized in numerous subsequent cases. In my judgment, the present falls fully within it, and is therefore to be sustained.

Let a decree be drawn affirming the validity of the patent, appointing a master, and directing an account.

The defendants thereupon applied for and obtained a reargument on the ground that the fourth claim of the patent, being for a product, was not patentable, the same being capable of being produced by other processes, and particularly could not be included in one and the same patent with claims for the process by which it was produced.

(December 26, 1901.)

ARCHBALD, District Judge. I am not persuaded by the reargument that any mistake was made in sustaining the Boch patent in its entirety,—not only the process specified in the first three claims, but the product covered by the fourth as well. The truth is it is the product that is the important thing, rather than the process by which it is brought about, although that devised by the inventor seems peculiarly well calculated to produce it. In considering the invention, regard must be had to the difficulties to be overcome and the purposes to be accomplished in view of the prior state of the art. As already pointed out in high tension insulators, the greatest care has to be taken to keep the porcelain free from flaws and imperfec-

tions, and this is best done by molding and baking it in thin parts, and then welding the parts together. But by the ordinary processes this is but imperfectly effected at the best, and, even when fused with glaze, that a perfect union will be brought about, so that the whole shall be one solid mass, cannot be implicitly relied upon. The most that can be hoped for is one which will meet the mechanical strain to which the insulator is likely to be liable. But this fulfills only a part of the requirements. It does not provide for the cracks or flaws which may occur in the porcelain itself in firing, or the gaping of joints or the misfitting of parts due to shrinking, imperfect molding, or displacement. It was a distinct advance in the art, therefore, to overcome this difficulty and produce an insulator which, molded and baked in thin pieces, should be fused into one solid mass, with the flaws, joints, and imperfections at the same time taken care of; and it is with an insulator of this character, made practically impuncturable, that the electric world is particularly concerned. It does not matter to them by what process such an insulator is made. It is the product that they are after. This product, as a new and useful article of manufacture, the inventor is entitled to patent and protect. Nickel Co. v. Pendleton (C. C.) 15 Fed. 746, 21 Blatchf. 226; Badische Anilin Soda Fabrik v. Kalle (C. C.) 94 Fed. 175. And that is what we have here. Boch has conceived and perfected that which others had striven for in vain. Characterized in a phrase, his invention may be spoken of as a glazed-filled multipart porcelain insulator. Its particular features have already been adverted to. The process he employs and has patented seems peculiarly fitted to accomplish the end desired, but the fact that there may be others does not debar him from laying claim to the result attained, of which he seems to be the discoverer. There is nothing in the law that I can see to interfere with this. It is no doubt true that an inventor who devises a new process cannot patent the product, simply because it is a result of that process, if it is not itself also new. Rob. Pat. § 519. But that, as I understand it, is as far as the restriction goes. There is nothing to bar the patenting of the product, as well as the process, if both are new, and especially if one is the peculiar result of the other. Nor does there seem to be anything to prevent both being embraced in one and the same patent. The rule which prevailed at one time in the patent office to the contrary has been changed.

Finding no error, therefore, in my former conclusions, the case will proceed to a master as heretofore ordered.

PETTERSSON et al. v. EMPIRE TRANSP. CO.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1901.)

No. 646.

1. SEAMEN—SETTLEMENT ON DISCHARGE—CONCLUSIVENESS OF STATUTORY RELEASE.

Under the provisions of Rev. St. §§ 4549, 4552, requiring seamen to be discharged and paid their wages before a shipping commissioner, in whose presence a mutual release shall be signed and attested by him,

if the parties agree upon a settlement, and further providing that "such release shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto on account of wages in respect of the past voyage or engagement," a release so executed and attested without fraud or coercion is conclusive on the parties.

2. SAME.

The purpose of the statute in requiring settlements with seamen to be made before a shipping commissioner is to guard against their being overreached by the master, by placing the parties on an equal footing; and the provision of Rev. St. § 4552, that on the completion of any discharge and settlement "the master or owner and each seaman respectively, in the presence of the shipping commissioner shall sign a mutual release, * * * and the shipping commissioner shall also sign and attest it," does not require that all the parties shall appear before the commissioner and execute such release at the same time; but a master may leave with a commissioner a proposition for settlement, together with the wages due thereunder, and a release executed by him before the commissioner, and upon the acceptance of the money by the seamen, and the signing of the release by them, and its attestation by the commissioner, such release becomes effective, under the statute.

3. SAME—COERCION—FACTS CONSIDERED.

Seamen signed for service on a vessel employed as a government transport for a voyage to Manila and such other ports as the master might direct, and return to the Pacific Coast for discharge; the voyage not to exceed six months. At the expiration of the six months the vessel was at Manila, and they demanded their payment and discharge. Under orders of the military governor, their demand was refused, and on their refusal to serve longer they were arrested and confined by the military authorities, and subsequently returned to San Francisco by another vessel. In the meantime the transport had arrived and departed on another voyage; the master leaving with a shipping commissioner the amount of their wages to the time they were taken from the vessel, together with a release executed by him. On their arrival they demanded wages up to that time. They were told by the commissioner (in a joking way, as he testified) that they were lucky to get anything, and that they were not ordered shot at Manila. They were without money, and finally accepted the sum left with the commissioner, and executed the release. *Held*, that there was nothing in such circumstances amounting to legal duress or coercion, and that they were concluded by the release.

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

H. W. Hutton and Walter G. Holmes, for appellants.

E. S. Pillsbury and H. D. Pillsbury, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. Appellants, who were libelants in the court below, signed shipping articles on November 1, 1898, before the United States shipping commissioner at San Fancisco, for a voyage on the steamship Pennsylvania, described in the articles as follows: "From the port of San Francisco, California, to Manila, P. I.; thence to such other ports and places in any part of the world as the master may direct, and return to a port of discharge on the Pacific Coast of the United States; voyage not to exceed six calendar months,"—seven of the libelants as seamen at the wages of $30 a month each, and the other (James Mahoney) as a fireman at the wages of $45

per month. The Pennsylvania was owned by the respondent corporation, and was by it engaged during the voyage in question in transporting troops and supplies for the United States government. From San Francisco the ship went to Manila, and from there was ordered by the government to other places in the Philippine Islands, and returned to Manila on the 2d day of May, 1899, one day after the expiration of the "six calendar months" mentioned in the shipping articles. The appellants thereupon demanded their discharge and pay. The chief officer of the ship was sent by its captain ashore to see the United States consul at that port in regard to the matter. The consul said that he could do nothing, as martial law prevailed in the islands, and referred the officer of the ship to Maj. Gen. Otis, who was at that time military commander of the islands. Together they went to see Gen. Otis, who refused to permit the appellants to be discharged, and said that they must proceed with the ship to San Francisco under the same agreement they signed for before shipping. The chief officer then returned to the ship and reported to the crew the result of his interviews with the consul and with Gen. Otis, to which all of the crew agreed except the eight appellants. They refused to accede to the requirement, and persisted in their demand for their discharge and pay. The next day the second officer again went ashore to see the consul, who returned with him to the ship, and there told the appellants that they must remain with the ship, as Gen. Otis would not permit their discharge, and that if they insisted on leaving the ship they would have to go to prison. He thereupon indorsed the following upon the ship's articles: "By decision of Maj. Gen. Otis, military governor, made May 2, 1899, the time named in these articles is extended until S. S. reaches San Francisco, and conditions of service and pay of crew remain the same as under articles when signed,"—and signed the same, "Oscar F. Williams, U. S. Consul, Manila, P. I.," and affixed thereto his official seal. The appellants still insisting upon their right to their discharge and pay, and refusing to perform any further service on board the ship, Gen. Otis, under date of May 4, 1899, addressed to the consul the following letter, which the consul took with him on board the ship and read to the appellants:

"To Honorable O. F. Williams, Acting Consul of the U. S. under Philippine Military Government—Sir: In regard to the refractory seamen on the transport Pennsylvania, you will inform them that the vessel was held by the United States under war emergencies, and will be dispatched to San Francisco as soon as she can be coaled for the voyage. The crew on the vessel will depart with her. Such refractory members of the crew as will not abide by their instructions will be taken from the vessel and shipped under guard by another transport to the United States. They will not be discharged in Manila, nor will they be permitted liberty of action in the city, but will be held in close confinement until departure. You will make these instructions known.

"Very respectfully, your most obedient servant,

"V. (E.) S. Otis,

"Major General U. S. Volunteers, Military Governor."

The appellants still refusing to conform to these requirements, Gen. Otis on the 6th day of May, 1899, sent a police boat out to the

ship, and caused the appellants to be arrested and taken ashore, and there imprisoned. The Pennsylvania returned to San Francisco, and the appellants remained in confinement in Manila until the sailing of the transport Hancock, about six weeks thereafter, on which they were sent to San Francisco by the military commander. On his return to San Francisco with his ship, which was about the middle of June, 1899, the captain of the Pennsylvania called at the office of the shipping commissioner, and left with him the proper balance of a total of six months' pay for each of the libelants except James Mahoney, and for James Mahoney a balance which was $53.17 short of a total of six months' pay. The day after the libelants reached San Francisco they went to the shipping commissioner at that port for their discharge and pay, which they claimed should be for nine months, to wit, from November 1, 1898, the time the voyage began, to and including July 30, 1899, when they arrived in San Francisco. The shipping commissioner, through his deputy, offered them the money that had been left with the commissioner by the captain of the Pennsylvania, which the appellants objected to receiving, whereupon the deputy commissioner told the appellants that the money offered was all the master had left for them, and he added (jokingly, according to his testimony) that they were lucky to get that, and were lucky that Gen. Otis did not order them shot. The libelants were without money, and were strangers in San Francisco, from which place the Pennsylvania and her master had then departed,—the ship on a return voyage to Manila. The libelants objected a good deal to the amounts of money offered them, but finally agreed to take the money, saying that they would sue for the other three months' pay. Before the commissioner, however, would pay them the money left with him by the master of the Pennsylvania, the libelants signed the following release, which had been previously signed by the master:

"Form 1,614.

"Mutual Release.

"We, the undersigned seamen on board the S. S. Pennsylvania on her late voyage to Manila, P. I., do hereby, each for himself, by our signatures herewith given in consideration of settlements made before the shipping commissioner at this port, release the master and owners of said vessel from all claims for wages in respect of the said past voyage or engagement; and I, master of said vessel, do also release each of the seamen signing said release from all claims, in consideration of this release signed by them.

"June 15th, 1899. H. Doxrud, Master.

Seamen's Names.	Station	Amount Received.
[Here follow names of members of crew other than libelants.]		
Paid July 31st, 1899. Men left at Manila ret'd to S. F. by Hancock.		
Gust. Hagelin,	Q-Master,	186 57
Peter Wiegner,	Seaman,	177 50
Viktor Pettersson,	Seaman,	167 75
Wictor Janson,	Seaman,	148 95
James Fitzgerald,	Seaman,	157 95
A. Hallfors,	Seaman,	175 95
James Mahoney,	Coal passer and fireman,	201 83
J. D. Mactaggart,	Seaman,	178 00"

The deputy commissioner testified in respect to this release as follows:

"I would not have paid them unless they signed this release, and I so told them. They all signed this receipt without any protest, either by using the word 'protest,' or otherwise. I sometimes tell a seaman, when he objects to the amount offered by the captain, and when I think he is entitled to more, that he can take the money offered 'under protest,' and in such a case I write the words 'under protest' in the receipt before he signs it. I did not do so in this case, as I was of the opinion that these men were not entitled to more. I did not look upon what they said as a protest. I would have written the words 'under protest' in the receipt if I had considered that they were taking the money under protest, even though they had not used the word 'protest.' I did not consider it essential to their making a protest that they should use that particular word, 'protest.'"

The release so executed is, among other things, relied upon in defense of the libel, and the court below held it conclusive against the appellants by virtue of the provisions of section 4552 of the Revised Statutes. Section 4549 of those statutes is as follows:

"All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall be discharged and receive their wages in the presence of a duly authorized shipping-commissioner under this title, except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seamen belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than fifty dollars."

Section 4552 declares:

"The following rules shall be observed with respect to the settlement of wages: First. Upon the completion, before a shipping-commissioner, of any discharge and settlement, the master or owner and each seaman, respectively, in the presence of the shipping commissioner, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and the shipping-commissioner shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seamen assent to such settlement, or the settlement has been adjusted by the shipping-commissioner. Second. Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement. Third. A copy of such release, certified under the hand and seal of such shipping-commissioner to be a true copy, shall be given by him to any party thereto requiring the same, and such copy shall be receivable in evidence upon any future question touching such claims, and shall have all the effect of the original of which it purports to be a copy. Fourth. In cases in which discharge and settlement before a shipping-commissioner are required, no payment, receipt, settlement, or discharge otherwise made shall operate as evidence of the release or satisfaction of any claim. Fifth. Upon payment being made by a master before a shipping-commissioner, the shipping-commissioner shall, if required, sign and give to such master a statement of the whole amount so paid; and such statement shall, between the master and his employer, be received as evidence that he has made the payments therein mentioned."

By section 4554 it is provided:

"Every shipping-commissioner shall hear and decide any question whatsoever between a master, consignee, agent, or owner, and any of his crew, which both parties agree in writing to submit to him; and every award so

made by him shall be binding on both parties, and shall, in any legal proceedings which may be taken in the matter, before any court of justice, be deemed to be conclusive as to the rights of parties. And any document under the hand and official seal of a commissioner purporting to be such submission or award, shall be prima-facie evidence thereof."

Counsel for the appellants say in their brief:

"We have the authority not only of a court of admiralty, which, within its admiralty jurisdiction, acts on the principles of equity, but also the authority of a common-law court that a mutual release as provided for by section 4552 is not conclusive."

In the absence of any fraud or coercion, we should be much surprised to find any such decision, in view of the second subdivision of section 4552 of the Revised Statutes, in terms declaring that:

"Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages, in respect of the past voyage or engagement."

By the statutory provisions referred to, congress has provided two methods by which a settlement may be made between the master and the seaman of any merchant vessel engaged in a voyage from a port in the United States to any foreign port, or, being of the burden of 75 tons or upward, from a port on the Atlantic to a port on the Pacific Ocean, or vice versa; that is to say: The master and the seamen are authorized to assent to a settlement and sign a mutual release in the presence of a shipping commissioner, or they may agree in writing to submit to such commissioner any question in dispute between them for his award. And, to enforce the provisions in respect to the discharge of such seamen before a shipping commissioner, congress further expressly declared in the fourth subdivision of section 4552 that:

"In cases in which discharge and settlement before a shipping commissioner are required [by section 4549, supra], no payment, receipt, settlement, or discharge otherwise made shall operate as evidence of the release or satisfaction of any claim."

The cases cited by counsel for the appellants in support of his position do not at all sustain it. In Schermacher v. Yates (D. C.) 57 Fed. 668, no such question was presented to or considered by the court. Indeed, it does not appear in that case that any release of any kind was ever signed by the seamen or master. The question there presented to and considered by the court was whether Key West or New York was "a final port of discharge in the United States," at which only, by the terms of the shipping articles, the crew could be discharged. The case of The Eclipse (D. C.) 53 Fed. 273, involved a payment of wages to seamen, not before a shipping commissioner, but by the managing owner of the vessel personally. Nothing purporting to be a release under section 4552 of the Revised Statutes was signed either by the men or by the managing owner. The men merely receipted in full for their wages. That case, therefore, not only came within the provision of the fourth subdivision of section 4552 of the Revised Statutes, declaring that no such receipt shall operate as evidence of the release or satisfac-

tion of any claim, but also within the general rule of the admiralty courts referred to in the opinion in the case of The Eclipse. The case of Rosenberg v. Doe, 146 Mass. 191, 15 N. E. 510, is directly in point, but it is against the position of the appellants. In that case the court had under consideration the provisions of section 4552 of the Revised Statutes, and of it said:

"We are of opinion that the statute means to make the release conclusive, if it is executed and attested as required, without fraud or coercion."

That case came before the court a second time, and is then reported in 148 Mass. 560, 20 N. E. 176; but it was at that time disposed of on other grounds, in no way affecting its former ruling.

It is insisted on behalf of the appellants that the release in question is invalid because the master of the Pennsylvania was not present with them before the shipping commissioner. The statute does not so require. In such cases as the present both the master and the seamen are required to appear before the shipping commissioner, and, in the event of agreement, to assent to such settlement, and to manifest such assent by signing a mutual release in the presence of the commissioner, who is required to sign and attest it, and retain the same in a book to be kept by him for that purpose. There is nothing in the statute expressly or by implication requiring the master and the seamen to appear before the shipping commissioner at the same time. No good reason is perceived why a proposition of settlement may not be left with the commissioner by the party making it, to be accepted or rejected by the other party when he appears before that officer. The chief reason why the admiralty law has always looked with distrust and suspicion upon an ordinary release or receipt given at the time of or before the payment of seamen's wages is that the men and master stand upon such an unequal footing that the former may be easily overreached, and to obviate that wrong was manifestly one of the objects of the legislation of congress requiring such settlement to be made before a shipping commissioner. That object would not be at all advanced by requiring the master and men to appear before the commissioner at the same time. Indeed, there would be less opportunity for the master to influence the seamen if he was not present. At all events, we find no express requirement that the master and men should be present before the commissioner at the same time, nor any implication to that effect. "The proviso," said the court in Rosenberg v. Doe, supra, "that 'both the master and seamen assent to such settlement,' is only attached to the requirement that the parties shall sign. If they do sign, the effect of their signatures must be determined by the ordinary rules of law."

In the assent of the appellants to the settlement, or in the execution by them of the release in question, was there any fraud or coercion? It is not pretended that there was any actual fraud, but it is insisted that the pecuniary necessities of the appellants, and the statement made to them by the deputy commissioner to the effect that they were lucky to get what the master had left for them, and that it was fortunate for them that the commander at Manila

did not order them shot, amounted to coercion. In respect to the remark of the deputy commissioner, which he admitted making, his testimony is that it was made in a joking way, and meant nothing. It does not seem reasonable that any sensible man would have been in any manner influenced in his action in San Francisco by being told that he was lucky in not being shot in Manila a month or so before. Nor is the fact that the libelants were in great need of the money paid to them sufficient to show that the release was signed by them under legal duress or coercion. French v. Shoemaker, 14 Wall. 314, 20 L. Ed. 852.

We agree with the court below that the execution of the release is conclusive against the appellants, and for that reason it is unnecessary to consider the other questions argued by counsel.

The judgment is affirmed.

McALLISTER v. SOUTHERN PAC. CO.

(District Court, E. D. New York. October 21, 1901.)

SHIPPING—LOSS OF CARGO—NEGLIGENT UNLOADING OF LIGHTER.

A lighter was loaded with 100 barrels of cement in the hold and a large number of rolls of bagging, weighing 253 tons, piled upon the deck. It was the duty of respondent to transfer the load to a steamer; and when a portion of the bagging had been unloaded, all of which was taken from the side next the steamer, the lighter listed to the other side, and a portion of the bagging was thrown overboard, and lost or damaged. The load was unusual in weight and height, but not to an extent to endanger it if properly handled. It was properly loaded, and the lighter had been brought with it a considerable distance in safety. *Held*, that the fact of its unusual height required that in unloading the removal should be distributed as evenly as possible over the whole load, which was also shown to be the usual way, and that the negligent manner of unloading was the cause of the vessel's listing, and rendered respondent liable for the damage.

In Admiralty. Action to recover for loss of cargo.

Hyland & Zabriskie, for libelant.

Maxwell Evarts, for respondent.

THOMAS, District Judge. The steamship Winifred, with port side in shore, lay on the upper side of pier No. 12 in the North river, between 2 and 3 o'clock on January 30, 1900. Alongside her was lighter No. 12, with her bow out, so that the vessels were starboard to starboard. In the lighter's hold were stored 100 barrels of cement, while on the deck were 5,356 rolls of bagging, weighing 265 tons. It was the duty of the respondent to transship the bagging from the lighter to the steamer, but when such duty had been undertaken and continued for about 20 minutes the lighter careened to port, dumping a portion of her deck load in that direction. Straightway recovering, she dumped a portion of the load on the starboard side of the steamship; and for the loss of bagging thus sustained this action has been brought. It does not ap-

pear that the piles of bagging yet untouched by the stevedores on the port side of the lighter either were disturbed, toppled, or fell until the lighter lurched as stated. The listing of the lighter destroyed the equilibrium of the piles, disintegrating and causing the bagging to go overboard. They did not fall down, but were thrown down. But for such listing, the piles would have remained intact. What caused the vessel to list to port,—gradually, as libelant claims; suddenly, as respondent claims? The unloading, so far as it had proceeded, was all from the starboard side of the lighter, from the fore and aft corners progressing towards the waist and athwartship. The libelant contends that the 438 rolls, weighing 21 tons, had been transshipped when the accident happened, which corresponds with the statement of the respondent's agent, written May 16, 1900; but the respondent places the number of transferred rolls at 148. Whatever the number, it was sufficient to destroy the equilibrium of the lighter, and throw down the piles. The respondent urges that the libelant's negligence caused the accident, and the same consisted (1) in stowing the bagging to too great height, (2) in putting no sufficient dunnage under it, (3) and in not placing a binder on top of the bagging. The last accusation is not supported by the evidence. The second is open to discussion, but it may be that the scantling at the corners were connected with boards of less thickness amidships. But the inquiry is immaterial. It is not proven that the foundations of the piles gave way, nor that any undue outward inclination was given to the mass. On the other hand, the evidence is that the piles were drawn in one foot for each layer, converging the load towards the center, and that there were three binder rows at the top. If now the preponderance of evidence were that the piles fell to port, or sagged to port, causing the vessel to list, the importance of knowing the effectiveness of the dunnage would be apparent. But the careening of the vessel dumped the load, and it can hardly be claimed that the dunnage should have been sufficient to fortify the piles against such disturbance. But was the deck load negligently high? It was a large and high, but not an unprecedented, load. The number of tiers could have been 12; it is unlikely that it was over 14. What specific reason is there for inferring that such a load, with 100 barrels of cement in the hold, was improper? Was there danger of its falling apart during navigation? It had been brought from Greenpoint to pier 25, withstanding apparently all the disturbing influences of the two rivers. The evidence does not show there was any danger of its falling unless the vessel unduly listed. Was it so large and high that a removal of the inshore part to the extent that it was removed would cause the lighter to list? Such appears to have been the fact. If the cargo is removed, in the first instance, from the starboard side, the lighter must list to port. This is and was apparent. The stevedores knew this, even if they were not specifically warned of it. If the load was great, so much greater the reason for using care in distributing the work of unloading. It is urged by the respondent that the unloading was conducted ac-

cording to its custom theretofore resulting in safety. The evidence tends to show that they had been removing the load working down towards the deck on the whole starboard side. There is evidence that the removal should be made somewhat evenly from the whole load, and that such is the general way; and the court is justified by the evidence and by the very nature of the case in holding that such is the proper way. Such manner of loading the stevedores did not employ. Had it been adopted, there is no reason for inferring that the lighter would have dumped. In other words, holding that the load was unusual in weight and height, yet the rolls were united suitably, and, had the work of unloading been properly distributed, the lighter would not have listed and dumped the load. Hence the culpable negligence was not in the weight and height of the load, but in the way such a load was handled. If the load was high, the fact was apparent; hence the necessity for even distribution of the work was necessary. The danger from the height of the load lay in improper discharge; hence the height and weight were not dangerous unless the cargo were negligently handled.

The libelants should have a decree for damages and costs.

MATTHIAS v. BEECHE et al.

THE ASPHODEL.

(District Court, E. D. New York. November 9, 1901.)

1. SHIPPING—CHARTER—PRIOR REPRESENTATIONS.
Representations made by a shipowner prior to a charter respecting the speed of his vessel, but which are not embodied in the charter, are superseded by that instrument, in the absence of fraud or mutual mistake.

2. SAME—BREACH OF CHARTER—EVIDENCE CONSIDERED.
Evidence considered, and *held* insufficient to sustain the claim of a charterer that the owner failed to maintain the vessel's machinery in proper condition, as required by the charter, resulting in loss of speed, and consequent lengthening of the voyage.

3. SAME—OBLIGATIONS OF OWNER UNDER CHARTER—FURNISHING ELECTRIC LIGHTS FOR DISCHARGE OF INFLAMMABLE CARGO.
It is doubtful whether a charterer can require the shipowner to furnish electric lights to facilitate the discharge of a cargo which by reason of its inflammable nature cannot be handled safely by the use of lamps, and, at any rate, a claim for damages for delay which might have been thereby prevented will not be allowed where no demand was made on the master to furnish such lights.

In Admiralty.

Ivins, Kidder & Melcher and Benjamin J. Downer, for Beeche et al.

Convers & Kirlin and J. Parker Kirlin, for the Asphodel.

THOMAS, District Judge. In the above actions, shipowners seek to recover a balance of unpaid charter hire, and the charterers libel

the vessel for alleged nonfulfillment of the charter. The charterers pleaded false, but not fraudulent, representations respecting the speed of the vessel, which in fact preceded and are not embodied in the charter party, and are superseded by that instrument, in the absence of fraud or mutual mistake. This rule applies to usual contracts (Seitz v. Refrigerating Mach. Co., 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837 [see cases cited in the opinion]; De Witt v. Berry, 134 U. S. 306, 10 Sup. Ct. 536. 33 L. Ed. 896; Wilson v. Cattle Ranch Co., 20 C. C. A. 241, 73 Fed. 994, 999; Godkin v. Monahan, 27 C. C. A. 410, 83 Fed. 116; Lawrence v. Steamboat Co. [C. C.] 12 Fed. 850; Union Nat. Bank v. German Ins. Co., 18 C. C. A. 203, 71 Fed. 473, 476; Reid v. Glass Co., 29 C. C. A. 110, 85 Fed. 193; Buckstaff v. Russell, 25 C. C. A. 129, 79 Fed. 611), and hence to bills of lading and charter parties (The Golden Rule [C. C.] 9 Fed. 334; Baker v. Ward, 3 Ben. 499, Fed. Cas. No. 785; Rawson v. Lyon [D. C.] 23 Fed. 107; Petrie v. Heller [D. C.] 35 Fed. 310; The Lakme [D. C.] 93 Fed. 230). The charterers also allege, although quite indefinitely, failure to maintain the vessel's machinery, which by the undertaking fell to the duty of the owners. Upon the trial the charterers pointed out that by the engineer's log book the registrations of the vacuum of the condenser were abnormally low, and showed by the evidence of an expert that this indicated loss of horse power, hence decreased speed, and urged that by the delay injury accrued to the charterers. The court, by somewhat careful collocation of facts from the engineer's and deck logs, arrived at an apparently accurate conclusion that as a general rule, to which there was some exception, an abnormally low registration of the vacuum accompanied higher rates of speed, and that the vacuum decreased while the revolutions of the engine increased. This ascertainment is seen by the following table, which shows the averages of speed during the service, rejecting the period when the charterers furnished coal alleged to be inferior. To the different rates of speed as thus averaged are related the averages of the registration of the vacuum, fuel consumption, pressure on boilers, grade of expansion, and revolutions of the engine that accompanied such several rates of speed:

Speed.	Vacuum.	Fuel Consumed.	Pressure on Boilers.	Grade of Expansion.	Revolutions.
9.1375	15.865	20.56	156.04	23.62	55.45
8.414	16.16	20.02	155.5	23.34	55.33
8.	17.24	19.111	156.815	25.637	56.009
7.53	16.32	21.16	150.16	24.01	55.01
6.7	18.51	21.28	152.72	23.77	52.76
5.61	18.7	20.61	148.92	22.85	51.1
4.1	18.759	18.38	147.5	22.96	47.70

This result seems to oppose the undoubtedly correct theory that a decreased vacuum tends to cause decreased speed, and that a high-

er rate of revolutions is accompanied, under usual circumstances, by a higher and more complete vacuum. Therefore the parties were asked, by argument or evidence, to advise the court concerning this seeming antagonism of fact and principle. The several parties met the inquiry as follows: The owner furnished evidence that the gauge of the condenser was defective and did not register correctly, thereby accounting for the apparent aberrations of the condenser. The charterers showed by the evidence of White, who became the vessel's chief engineer in October, after the expiration of the charter in August, and after a sale of the vessel, (1) that under normal conditions a diminished vacuum in the condenser should accompany higher speeds, and a decrease of speed should be accompanied by an increase of vacuum; (2) that a vacuum generally increases when the revolutions of the engine decrease; (3) that about a month after the vessel's return, during which she was substantially unused, he (White) found the tubes in the boiler so choked with salt as to impair the capacity some 25 per cent., and that her condenser contained 72 pounds of grease, which impaired its action, and that there were other more serious deficiencies, all of which, as he stated, must have existed for several months; (4) that the principal cause of diminished energy was the condition of the boiler, and that the condenser also contributed; (5) that the defects decreased the vessel's capacity at least 1 knot per hour, or even as much as from 24 to 30 knots in 24 hours; (6) that, after he substantially had corrected the unfavorable conditions, the vessel, in his charge, in a voyage of 16 days, made an average speed of 7.8 knots per hour, the average going east being 7 knots, including rough weather. The log for this history was not produced. If the evidence of White is understood (for his intended meaning is not clear), the variations of the vacuum in its relation to the speed and revolutions, as shown in the above summary, are similar to what they should be in the case of a normal condenser, save that the vacuum should at all times register higher. A high rate of speed and a high number of revolutions accompany a depressed vacuum, and a low rate of speed and a lower number of revolutions are accompanied by a more complete vacuum. Such is the apparent result of White's testimony. All this to the lay mind seems inconsistent with the mechanical theory and fact that the less complete the vacuum, as indicated by increased registration, the greater the loss of power, which power is dependent on revolutions, and results in speed. If White's theories be incorrect, his credit is impaired. If they be correct, then the condenser seems to have acted normally in the tendency of its operation. In the uncertainty it is just to lay aside the registrations of the vacuum, in the disposition of the question whether the machinery was maintained properly, and look to the remaining evidence for guidance. The evidence of White shows that the boiler was so incrusted with salt that its capacity was decreased 25 per cent., and that this loss of power was increased by a grievously neglected condenser. Is this evidence true? In the first place, it may be noticed that, after correcting the defects of which he complained, White did not obtain in actual use the 25 per

cent. of gain which he says was lost by the condition of the boiler, because he made but 7.6 knots per hour during the 16 days selected by him, while under the charter the vessel steamed 45 days, 13 hours, and 18 minutes, through a distance of 8,246 nautical miles, averaging 7.41 knots per hour. This was from New York to Coronel, with heavy head winds and head seas during the greater part of the time, as the log shows; and coming east from Coronel to New York she steamed 49 days, 8 hours, and 21 minutes, through a distance of 8,607 miles, or 7.09 knots per hour, which is slightly better than White did when coming in the same easterly direction; and the vessel under charter did this after the use of Coronel coal supplied by the charterers, which the captain states was inferior to that stipulated in the charter, and injurious to the boilers. This history would seem sufficiently to dispose measurably of the error and exaggeration of the witness White. But the evidence of other witnesses adds to the disbelief in his evidence. In October, White states that he found the defects of boiler, condenser, and valves, of which those relating to the boiler were most effective to cause loss of speed. In September, after the return of the vessel, the boiler was cleaned by Hannan & Co., of Brooklyn, whose foreman stated that all the tubes, save a few disused and capped, were cleaned thoroughly under his supervision. McKay, the chief engineer, states that this was done to his satisfaction; and, above all, Mancor, a Lloyd's surveyor at this port, a man of approved skill and recognized integrity, examined the boilers on September 10th for the purpose of the vessel's classification at Lloyd's, and testified that the boiler was in "very good condition; very fair condition." If these witnesses should be believed, White is discredited as to the condition of the boiler; and, if he may not be trusted respecting the boiler, he is untrustworthy in the matter of the condenser, which by his own account was the smaller factor in the impairment of speed. The varying evidence concerning the boiler may not be solved on the charitable theory of error. The difference is too radical. The statements of Mancor, Hannan, and McKay merit preference. The vessel made some 20,745 miles, passing through the Straits of Magellan in going and coming, and, proceeding as far north as Peru, returned, entering many ports, and averaged nearly 7½ knots per hour. This is about three-tenths of a knot per hour less than White made on a short voyage of 16 days, after having put the vessel in repair, as he says; and the disparity is not unreasonable, considering the difference in the distances and vicissitudes. Moreover, allowance should be made for the breakage, disorder, and suspension of the machinery, such as occurred on or about from July 16th to 20th and August 2d, when the speed was very much reduced. Such loss is not deductible under the terms of the charter, as it is not shown to have been caused by neglect.

In arriving at the conclusion that the speed obtained indicates a reasonable fulfillment of the charter in the matter of the maintenance of the machinery, the cogent and careful argument by the charterers' advocate has not been disregarded, nor at all points does the conclusion remove difficulties and doubts raised by it. Indeed,

the inference to be drawn from the statement of the captain that the vessel did not make average time on the inward voyage, because of the inferiority of the Coronel coal, gives rise to much hesitation respecting the disposition of the case, inasmuch as, while the inferiority of the Coronel coal is undoubted, the evidence of the injury or loss of time arising therefrom is not altogether satisfactory. Nevertheless the vessel did as well on her long inward voyage as she did with White when eastward bound, and, on the whole, the charterers do not appear to have sustained the burden of pointing out where the defect, if any, was. The winch broke down for a few hours in New York. There is no evidence of trouble or delay therefrom elsewhere, and, under the charter, deduction may not be made for it, as the suspension of the work did not fall within the time stated in the charter, which should suspend the continuance of the hire.

The captain forbade the use of kerosene lamps to unload the nitrates. The prudence of this act does not seem to be disputed. It is doubtful whether the ship was obliged to supply electric lights. In any case, the charterers, their agents or contractors, should have pointed out the facilities needed, and demanded the same of the ship. It is questionable whether it was the duty of the owners to anticipate and tender peculiar provision for lighting, necessitated by the inflammable nature of the cargo.

The master of the vessel is entitled to a decree for the balance of the charter money, with interest and costs. The action against the ship is dismissed, without costs.

METROPOLITAN ST. RY. CO. v. BEATTIE.

(Circuit Court of Appeals, Second Circuit. November 11, 1901.)

No. 44.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PLAINTIFF—FINDING OF JURY.

Where the question whether or not a plaintiff was a citizen of another state from defendant at the time of the commencement of the action, as alleged in his complaint for the purpose of giving a federal court jurisdiction, is submitted to the jury under proper instructions, and on evidence which is not conclusive, their finding thereon in plaintiff's favor will not be set aside on a writ of error.[1]

2. APPEAL—REVIEW—DAMAGES AWARDED FOR PERSONAL INJURY.

An award of damages made by a jury for personal injuries, on which judgment is entered by the trial court, will not be set aside as excessive by the circuit court of appeals on a writ of error.

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

This cause comes here upon writ of error to review a judgment in favor of the defendant in error, who was plaintiff below, for $5,074.77 damages for personal injuries.

Charles F. Brown, for plaintiff in error.

Thomas P. Wickes, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The defendant is a citizen of New York. Plaintiff contends that he was a citizen of Connecticut when the action was begun, August 2, 1899. The point most relied on here is that upon the proof the court should have held that he was at that date a citizen of New York, and that therefore the complaint should have been dismissed for lack of jurisdiction. The narrative given by the plaintiff as to his various changes of residence was somewhat confused, and perhaps not altogether consistent. Nevertheless, there was in it sufficient to warrant a finding that he was a citizen of Connecticut, if the jury credited his statements as to his intent. That question was sent to them under a charge which in those particulars was not objected to, and which was very clear and full. The finding of the jury in plaintiff's favor should not now be set aside.

We do not find any harmful error in the court's striking out an answer of the witness Dr. Huntington as not responsive. Manifestly, it was not responsive. If defendant wished to retain the doctor's statement in the record, he could have done so by himself putting a question to which such statement would have been responsive.

The question whether the amount of damages was excessive is not one for the consideration of this court.

[1] Diverse citizenship as ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.

MILES v. NEW SOUTH BUILDING & LOAN ASS'N.

(Circuit Court, E. D. Louisiana. March 21, 1900.)

No. 12,810.

1. BUILDING AND LOAN ASSOCIATIONS—PROCEEDINGS IN INSOLVENCY—SETTLEMENTS WITH BORROWING STOCKHOLDERS.

In winding up the affairs of an insolvent building and loan association in a court of equity, where there are a large number of borrowing stockholders, it is proper and advisable, in the interest of an economical administration, and to facilitate settlements without litigation, that the receiver should be authorized in limine to make a uniform allowance to such stockholders as a credit on their indebtedness in settlement, based on the probable dividends which will accrue to their stock in the final distribution, where it is possible to make such allowance without endangering the rights of other parties in interest.

2. SAME—SEPARATE CLASSES OF STOCKHOLDERS—CREATION OF SEPARATE FUNDS.

The charter of a building and loan association provided for the division of its capital stock into two general classes, one consisting of a certain number of shares to be known as "Guarantee Stock," and the remainder to be known as "Series Stock." The guarantee stock was to be fully paid when issued. It also provided that the association should keep two wholly distinct and separate funds, one to be known as the "Guarantee Stock and Expense Fund," which should belong and be attributed to the guarantee stock, and the other as the "Series Stock Fund," which should belong to the series stock. It designated the items from which each fund should be made up, and the purposes to which it should be devoted, and provided that neither should have any part in or participate in the other, except in relation to the money provided for expenses which was all to be paid into the guarantee and expense fund, while expenses were to be paid from such fund. The distinction between the two funds was always maintained, and they were kept separate by the association during all the time it was a going concern. *Held* that, in proceedings to wind up the association in insolvency, neither class of stockholders had any right or interest in the fund so expressly appropriated to the other, or in the assets belonging to such fund.

3. SAME—ADJUSTMENT BY RECEIVER WITH BORROWING STOCKHOLDERS—SECURITIES PLEDGED TO SECURE BONDS.

A building and loan association issued and sold bonds secured by the hypothecation of securities, consisting of the bonds and mortgages of its borrowing stockholders, with a trustee, under an agreement which permitted it to withdraw any such security by depositing in its stead $100 in cash for each $125 in face value of such security. Proceedings were instituted to wind up the association in insolvency, and a receiver was appointed, who was also appointed receiver in ancillary proceedings in other jurisdictions. In one of such ancillary suits the court, having jurisdiction of the trustee, ordered it to turn over the securities held to the receiver for collection, but without prejudice to its rights, and the receiver was directed to deposit the proceeds of all such collections with the trustee pending the final adjustment of the rights of the parties in interest. *Held*, that the court of primary jurisdiction, in order to enable the receiver, in making amicable settlements with borrowing stockholders, to allow them a uniform credit on their indebtedness, to be considered as an advance payment on account of dividends to accrue on their stock, would authorize him to exercise the right given the association under the trust agreement, by depositing with the trustee the amount received under such settlement from a borrower whose security was pledged, together with such additional amount in cash from the general funds in his hands as would make the deposit equal to $100 for each $125 of such security surrendered; it appearing that the assets of the association were ample to pay all outside creditors.

4. SAME—ALLOWANCE OF ESTIMATED VALUE OF STOCK.
The existence of unsecured creditors of an insolvent building and loan association does not affect the right of a receiver to make such settlement with borrowing stockholders as may be approved by the court, the court having the same right to authorize such adjustment and settlement of indebtedness due the association as the association itself would have had if a going concern.

5. SAME—USURY—LAW GOVERNING CONTRACTS.
Where the charter of a building and loan association and all its contracts with borrowing stockholders provide that such contracts shall be payable at the home office of the association, and shall be governed by the laws of the state in which the association is incorporated, they will not be held usurious, if valid under the laws of such state, although the stockholders may reside in other states, and their loans be secured by mortgages on property there situated.

6. SAME—INSOLVENCY—STATEMENT OF ACCOUNTS WITH BORROWING STOCKHOLDERS.
In a settlement between the receiver for an insolvent building and loan association and a borrowing stockholder, the latter should be charged, in addition to the amount borrowed, with all installments due upon his stock, all interest and premiums due on his loan, and all insurance, taxes, and other expenses due and equitably chargeable to him up to the time of the appointment of the receiver, against which he is entitled to credit for all payments made and for the amount of his distributive share of the assets of the association, when ascertained, or, when authorized by the court, he may be given credit in the settlement with the estimated value of such share, subject to readjustment on the final settlement of the estate.

The following is the report of Hon. E. B. KRUTTSCHNITT, Special Master in Chancery:

To the Honorable the Judges of said Court: By order signed in this cause on the 31st day of October, 1899, the court appointed the undersigned special master in chancery in this cause, and referred to him the petition of the receiver filed on the 25th day of October, 1899, with directions and authority, after due notice to all parties to this cause, to take testimony and report fully to the court as to the subject-matter of said petition, and specially to ascertain and report what would be a proper basis for the adjustment, settlement, and collection at this stage of the cause of the obligations of the borrowing members of the defendant, the New South Building & Loan Association; said master being required to include in his report both his findings of fact and his conclusions of law in the premises, and to accompany his report with the evidence, oral and documentary, upon which the same is based. The order further provided that, as it is desirable that the collection of debts due the association shall proceed without avoidable delay, the master is directed to make his investigation and report with all convenient speed. After notice duly extended to all parties to the record, the reference came on to be heard at the master's office, room No. 818, Hennen Building, in the city of New Orleans, on the 18th day of November, 1899, when and where the receiver and complainant appeared through their solicitor, Joseph P. Blair, Esq. The defendant was absent and unrepresented, notwithstanding due notice served upon it, through its president, Jules A. Blanc, Esq., as per affidavit of service filed as part of this report, marked "Exhibit A." In addition to the parties of record, the special master also notified Solomon Wolff, Esq., attorney at law, of said hearing. Said notice was given to said Wolff, pursuant to his request, and in his capacity as solicitor for Mrs. Nonie M. Chase. The solicitor for the complainant and receiver thereupon proceeded to take testimony, and offered exhibits in evidence, and, pursuant to the order of court appointing the undersigned master, the master herewith files the stenographic report of said hearing, giving the evidence adduced, and noting the various documents and memoranda offered in evidence by the said solicitor for the complainant and receiver; the documentary evidence being also filed

with this report, and being marked, consecutively, "Receiver 1" to "Receiver 44," inclusive. The reference came on further to be heard, after notice duly extended to all parties to the record, at the master's office, as aforesaid, on the 9th day of December, 1899, when and where the receiver appeared in person,—the complainant, through her solicitor, Joseph P. Blair, having notified the master personally that she was willing that the hearing should go on in its absence; the defendant absent and unrepresented, notwithstanding due notice served upon it, through its president, Jules A. Blanc, as per affidavit of service filed with this report, and marked "Exhibit B." The said Solomon Wolff, solicitor for Mrs. Nonie M. Chase, was also present. The master, in the presence of the parties aforesaid, called upon the receiver for certain information and documentary evidence, as will appear from the stenographic report of the hearing, annexed to and made part of this report, and from the documents marked "Receiver 45" to "Receiver 53," inclusive, annexed to and made part of this report. The receiver also subsequently filed with the master the document hereto annexed, and herewith filed, marked "Receiver 54," being document referred to in the testimony of the receiver, near the close, giving statement as to manner in which he reaches his estimate of the probable loss which will result on the sale of the real estate belonging to the defendant association. The foregoing, with the testimony and exhibits annexed to this report, constitutes all of the evidence adduced before me, and all of the proceedings had; and upon same I submit the following report to the court:

The petition of the receiver recites the existence of the bonded and scrip indebtedness of the corporation substantially as hereinafter found by me, and the existence of stock of various classes and series, all also substantially as hereinafter found by me. It sets forth at length the present status of the association, with a description of its assets and liabilities, all of which will, in my finding of facts, hereinafter made, be given in detail, and which I therefore consider it unnecessary at this point to state at length. After reciting the facts in reference to all the matters aforesaid in great detail, the petition of the receiver shows that it is necessary that he should proceed, without avoidable delay, to collect in the obligations of borrowing members, but that in order to produce and maintain equality among all members of the association, and secure a homogeneous administration of the affairs of the association, it is, as the receiver is advised, proper and necessary that the court should instruct him in limine as to the terms and conditions upon which the borrowing members may repay their loans, and the claims in respect thereto which the receiver should assert, in cases where it is necessary for him to sue to compel the payment thereof, to the end that sufficient funds may be realized from the assets of the association not only to pay and discharge the bonded and scrip indebtedness of the corporation, and the expenses of the receivership, but also sufficient to adjust the equities between borrowing and nonborrowing members of the association, and between those whose stock subscriptions have been fully paid and those who have not fully paid for their stock. The receiver further represents that he is advised that by reason of the fact that the defendant association has ceased to be a going concern, and that the court has undertaken the administration of its affairs, for the purpose of making an equitable distribution of its assets among its creditors and stockholders, all debts due by members for loans made, as in his petition detailed, have become due and payable, and that the borrowing members can be required to repay in full what each has received, with interest, and are entitled, after payment of the debts of the association, to pro rata dividends with nonborrowers; the distributive share of each member to be determined with due regard to the payments made on account of stock, the dates of such payments, etc. The receiver further represents that he believes that without endangering the rights of creditors, and without injustice to nonborrowing members, some allowance can be made to borrowing members, in anticipation of the distributive share ultimately coming to them as stockholders, and their loans credited with such allowance, and payment only of the balance required; that in this way the burden upon borrowing members will be lightened, and the expenses of administration lessened; that, as a safeguard against loss or injustice to creditors or nonborrowing mem-

bers, the amount of such anticipatory allowance should be fixed only after making a liberal deduction for all losses in converting the assets of the association into money, and for all expenses of administration; that, with this end in view, the receiver has been diligently engaged since his appointment in accurately informing himself as to the nature and extent of the liabilities of the association, the nature and value of its assets, and the exact status of each member of the association at the date of the institution of the receivership herein. The receiver further sets forth at length the various facts in reference to the amounts and character of stock outstanding, and the value of the assets of the corporation, and submits to the court that from the data prepared by him, and which are in form to be submitted to the court, or to the master to whom his application might be referred, he has reached the conclusion that an allowance of thirty-five per cent. of the book value of the stock, as ascertained by him, may be safely granted to all borrowing members who will settle their indebtedness by promptly paying the balance, without litigation; such allowance to be credited on the loan, and considered as an advance payment on account of the distributive share of the stock held by such borrowers. This allowance is recommended by the receiver on the assumption that all premiums paid or due at the date of the receivership shall be regarded as earned, the same having been so considered in estimating the book value of the stock. He asks for a reference to a master, who shall find all the facts of the case, and state the accounts necessary in the premises, and which accounts are described by the receiver in his petition in great detail. He specially prays that the master may be instructed and authorized, after notice to all parties, to take testimony, and report to the court his findings of fact and conclusions of law in reference to the subject-matter of the application, and that, after due proceedings had, an order or decree be rendered giving him instructions how he shall deal with borrowing members of the defendant association at the present stage of the proceedings in court, and conferring upon him such special authority as may be necessary to carry out such instructions; and he further prays for any other order or decree that may be proper or necessary in the premises, and for general relief. Upon consideration of the petition of the receiver, of which the foregoing is a synopsis, of the record, and of the evidence, I submit the following as my conclusions of fact:

(1) The defendant is a corporation organized under the laws of the state of Louisiana, and is a citizen of said state. Its domicile is in the city of New Orleans, and it is an inhabitant and resident of this district. It belongs to the class of corporations known as building and loan or homestead associations, and was organized by notarial act pursuant to the general laws of the state of Louisiana, and especially to Acts 115 and 151 of the Acts of the General Assembly of said state for the year 1888. The said charter was duly recorded, and was amended at general meetings of the stockholders held September 19, 1893, and November 25, 1895. A true copy of the charter, both original and as amended, is filed with this report, such copies being marked "Receiver 2" and "Receiver 3."

(2) The capital stock of said corporation was by its charter fixed at and limited to fifty million dollars ($50,000,000), divided into five hundred thousand (500,000) shares, of one hundred dollars ($100) each, which shares were further divided into two general classes. One class, consisting of one thousand (1,000) shares, or one hundred thousand dollars ($100,000) in amount, of stock, was and is known and designated as "Guarantee Stock," and was issued at face value only, payable at such time and in such manner as the board of directors might direct, and could be issued for money only, or in exchange for property, or in payment of services rendered. All of said shares have been issued and fully paid as provided for in said charter. The second class of stock, consisting of the remaining four hundred and ninety-nine thousand (499,000) shares, was and is known and designated as "Series Stock," to be paid for in the manner hereinafter set forth. The funds of the association are by the charter in like manner divided into two parts, known as "Guarantee Stock and Expense Fund" and "Series Stock Fund," which funds are declared in the charter to be entirely separate and distinct, the entire guarantee stock and expense fund belonging and being attributed to the guarantee

stock, and the entire series fund belonging and being attributed to the series stock. The charter provides that the guarantee stock and expense fund shall consist of the amount subscribed to the guarantee stock, of the admission fees, of all transfer and withdrawal fees, attorney's fees, and fees for consideration of applications for loans, and one dollar per share per annum from each and every paid-up share of the guarantee stock, together with ten cents per share per month on each and every share of series stock that is subscribed for, payable out of the monthly installment of seventy cents per share of the series stock, whenever paid, and one dollar per share per annum from each and every share of the series stock, after it has been paid for in full, until such shares are liquidated. In any year in which the expenses of the association do not entirely consume the amount set aside to the guarantee stock and expense fund, the excess is to be set aside as reserve guarantee stock and expense fund. Out of this amount belonging to the guarantee stock and expense fund, the board of directors are required to pay and liquidate all the operating expenses of the association, the salaries of officers and agents, commissions, compensation for services of whatsoever kind, and expenses incident to printing, advertising, stationery, and all other expenses of the association, except taxes and licenses, rent, and the cost of collecting and transmitting all moneys to and from the home office. The charter, as amended, further provides that in each year the paid-up guarantee stock shall receive, and there shall be apportioned to it as dividends out of the general earnings of that year of the association, a dividend at the same rate of profit as the dividend declared on the series stock for that year. Neither the series stock fund, nor any of the branches or series of the association, shall have any right or claim upon or to any participation in said guarantee stock and expense fund at any time. The charter provides that the series stock fund shall consist of receipts that do not go to the guarantee stock and expense fund, and that no part of the series stock fund shall be used in paying any of the amounts which the guarantee stock and expense fund is, as above stated, required to pay.

(3) During the business life of the association the distinction between the said two funds has been observed, and they have been kept separate and distinct. The various sources from which the guarantee stock and expense fund were from time to time to be replenished had been generally absorbed by the operating expenses, so that no surplus arose or exists. Said fund sustained a loss of twenty-one thousand five hundred and sixty three $^{76}/_{100}$ dollars ($21,563.76) by the failure in 1896 of the American National Bank of this city, where its cash was on deposit. At the time when said loss was sustained the association was engaged in erecting a large building, to be paid for out of said guarantee stock and expense fund, and to be used as the office of the company. In order to complete said building, it became necessary for the association to incur an indebtedness, and to secure the same by a pledge of certain mortgage bonds issued for that purpose. The amount of said indebtedness so incurred was at the date of the receivership, and now is, the sum of twenty-two thousand eight hundred and twenty $^{78}/_{100}$ dollars ($22,820.78). It is secured by a pledge of thirty-five thousand dollars ($35,000) of bonds authorized by a resolution of the board of directors of the association of date November 13, 1896, and which bonds, upon their face, purport to bind the guarantee stock only, are dated January 1, 1897, bear five per cent. per annum interest, mature January 1, 1907, and are secured by special mortgage on said office building.

(4) I find that the assets or resources and liabilities of said guarantee stock and expense fund were on the day when the receiver was appointed herein, to wit, on the 3d day of June, 1899, as follows:

Resources.

Office building	$ 75,134 96	
American National Bank, in liquidation	22.352 81	
Guarantee stock and expense fund	19,355 41	
Furniture and fixtures	5,480 53	
Interstate League Building and Loan Associations	288 20	
Petty cash	73 21	
		$122,685 12

Liabilities.

Guarantee stock	$100,000 00	
Hibernia National Bank	22,685 12	
		$122,685 12

(5) The series stock of the association is divided into several classes, each having its peculiar characteristics, as hereinafter explained,—some fully paid, and some in all stages of gradual completion of payments. Stockholders or members of the association holding series stock are divisible into two classes, to wit, borrowing members, to whom loans have been made, and nonborrowing members or investors, who are not indebted to the association. The stock of each class is further divided into series numbered 1, 2, 3, and so on; all the stock issued in the same month having the same series number. The different classes into which the series stock now outstanding is divided are known and designated as classes A, B, C, E, G, J, L, M, S, and Z. The principles of classification and the rights and obligations of each class are fixed by the by-laws of the association. The by-laws are contained in the three exhibits marked "Receiver 19," "Receiver 27," and "Receiver 16," filed with this report; the first and second of which are printed pamphlets containing the by-laws as they existed May 19, 1890, and May 1, 1897, and the third of which is a typewritten document containing amendments passed subsequently to the latter date. In addition to the by-laws contained in these pamphlets, certain amendments to the by-laws were passed, and, having performed their offices, seem not to have been included in these compilations of by-laws. They constitute several of the other exhibits attached to this report, and will be referred to when necessary. All series stockholders of stock not full paid were required to pay for their stock in monthly installments of seventy cents per month, except series stockholders of class C, who paid one dollar and five cents per month. Out of the payments of seventy cents per month, sixty cents went to the series fund, and ten cents to the guarantee stock and expense fund. Out of the payments of one dollar and five cents per month, ninety cents went to the series fund, and fifteen cents to the guarantee stock and expense fund. The main features of the various series of stock will now be given.

(6) Series stock was issued under article 2, § 5, of the original by-laws, adopted May 19, 1890. It was not, however, designated as class "A" until 1894. A blank certificate, showing the essential rights and obligations arising out of the contract of subscription to this stock, is herewith filed, marked "Receiver 18." The stock is payable in monthly installments of seventy cents per share, sixty cents of which goes to the series fund. Over and above this, each subscriber was required to pay an entrance fee of one dollar per share on each share of stock subscribed for. This one dollar, and ten cents out of each monthly installment of seventy cents, went to the guarantee stock and expense fund. This stock matures whenever the amount of the monthly installments paid thereon, together with the amount of the dividends declared on and credited to said stock, amounts to one hundred dollars ($100) per share. Such stock, when so matured, ceases to be entitled to dividends, and is to be paid in cash or in interest bearing scrip of the association, as the directors may determine; the terms and conditions of said scrip being fixed by the by-laws. When the holder of such matured stock is indebted to the association, the amount of his debt is deducted from the face value of the matured stock, and the remainder, if any, is payable in cash or scrip, as aforesaid. Holders of class A stock, not in arrears or indebted to the association, have a right to surrender their stock and withdraw from the association, and receive the surrender or withdrawal value of their stock as fixed and determined by certain rules laid down in the by-laws, and under which the said withdrawal value is upon terms more and more favorable to the withdrawing member in proportion to the duration of his membership, and to the number of payments made by him. The borrowing members of class A have received loans from the association of varying amounts, not exceeding the face value of the stock subscribed for, which are evidenced by the personal obligation of the borrowers, in the shape of promissory notes, and secured outside of the state of Louisiana by first mortgage or deed of trust on real estate, and also by pledge of the stock subscribed for, and in the state of Louisiana by vendor's lien and privilege reserved, as well as by mort-

gage and pledge of stock subscribed for. The intending borrowers in the state of Louisiana were required to sell the real estate to be hypothecated by them to the association at a nominal cash consideration, equal to the amount of the proposed loan. Immediately after the sale by the borrower to the association, the association immediately (that is to say, on the same day) resold the property to the intending borrower at the same figures at which it had been acquired by the association, for a consideration of a trifling amount in cash, being the excess of the purchase price over the amount to be loaned; and for the balance of the purchase price the borrower made and subscribed his promissory note for the amount of the loan, payable at a fixed maturity after date, bearing interest at six per cent. per annum from date until paid, but with a privilege of renewal, practically annulling the clause fixing the maturity of the obligation, which renewal clause provided that if the purchaser should pay the interest on his note monthly, and should also pay the installments due upon his stock promptly and punctually, then that the principal of the note should not become exigible until the value of the stock held by the borrower, with dividends or accumulations thereon, should become equal to the amount of the obligation, with all interest and costs that might be due upon the same, at the happening of which event said stock and such indebtedness should cancel each other,—the stock and the indebtedness being alike extinguished,—and that thereupon it should be the duty of the corporation to cancel the stock and give the purchaser full receipt and acquittance, as well as to surrender to the purchaser the promissory note or obligation, or any other note that might have been furnished in place thereof. It is further provided that upon the failure of the borrower, for the term of two months, to pay the installments of interest or premiums or dues, or any portion thereof, or any and all costs and fines that might become due by said borrower to the corporation, such failure should at once, without demand or putting in default, and as a penalty, make the promissory note, with all back interest thereon, immediately due and exigible, and should entitle the corporation to enforce by executory process or by ordinary proceedings at law the collection of the note, and of all interest and premiums due thereon, together with all sums due the corporation for insurance premiums, taxes, installments on the shares of stock, and attorney's fees, as therein provided, and that any sale of the stock for arrearages under the provisions of the charter should have a similar effect. The agreement also contained provisions entitling the borrower to pay off his debt before maturity, upon certain conditions, and in an agreed manner. In the event that the promissory note or obligation should become due and exigible according to its tenor, and that the value of the stock should not be equal to the amount of the indebtedness, then the corporation bound itself to renew and extend the note in accordance with the charter and by-laws. The borrowers, in addition to the payments above mentioned, which were entirely on account of their stock subscriptions, and not on account of their loans, and which were credited on the books of the association to the stock subscriptions, were required to pay a certain fee to cover cost of abstract of title, examination of title, etc.; to pay six per cent. per annum interest and six per cent. per annum premium on their loans, payable monthly, to wit, fifty cents interest per month and fifty cents premium per month on each one hundred dollars ($100) borrowed. When the withdrawal value of the stock borrowed equaled the amount of the loan indebtedness, it was provided by the terms of the agreement that the borrower's note might be canceled and returned, and his shares canceled. The number of shares of class A, not full paid, issued and outstanding on October 1, 1899, amounted to eighty-one hundred and sixty-six (8,166) shares, none of which was matured, and of which four thousand and sixty-seven (4,067) shares standing in the names of borrowing members were pledged to the association. The amount of indebtedness due to the association by members of this class was on said date three hundred and fourteen thousand nine hundred and eighty-eight dollars ($314,988), face value, of which two hundred and eighty-eight thousand two hundred and thirty dollars ($288,230) was secured by pledge of stock and by mortgage, and twenty-six thousand seven hundred and fifty-eight dollars ($26,758) of which was secured only by pledge of stock. There is also issued and outstanding

full-paid series stock of class A, issued upon the payment of one dollar membership fee, and one hundred dollars ($100) par value of each share of stock. This full-paid stock is of three kinds, designated as "class A, full paid, ten per cent. per annum cash dividend"; "class A, full paid, eight per cent. per annum cash dividend"; and "class A, full paid, six per cent. per annum cash dividend." Each share of such full-paid stock is required to pay one dollar per annum to the association for the expense fund until such stock is liquidated. After the rest of the stock in the series to which such full-paid share belongs shall have matured, it is provided that such full-paid share becomes matured stock, and all matured stock is treated in the same way. Holders of the stock of the ten per cent. class are entitled to have paid to them the full amount of the dividends declared on such stock up to five per cent. semiannually on the face value of the stock, payable on the 1st days of July and January of each year. All dividends over and above five per cent. semiannually shall be payable to the holders of the stock when it shall have matured, and are to be liquidated at the same time and in the same manner as the certificate of stock on which it has accrued, and of which it forms a part. When the stock matures, the certificate is to be surrendered to the association and liquidated as provided in the by-laws. Holders of the eight per cent. cash dividend full-paid stock are entitled to like dividends up to four per cent. semiannually, and all dividends over and above four per cent. are in like manner payable when said stock shall have matured. Holders of the six per cent. cash dividend full-paid stock are entitled to like dividends up to three per cent. semiannually, and all dividends over three per cent. and up to four and one-half per cent. semiannually are in like manner payable upon the maturity of the stock. When any of the stock matures, the certificate is to be surrendered and liquidated as provided in the by-laws. On October 1, 1899, there were outstanding of said class A ten per cent. dividend stock three hundred and forty-five (345) shares, of the par value of thirty-four thousand five hundred dollars ($34,500); of said class A eight per cent. dividend stock, three hundred and forty seven (347) shares, of the par value of thirty-four thousand seven hundred dollars ($34,700); and of the class A six per cent. dividend stock three (3) shares, of the par value of three hundred dollars ($300).

(7) I find that the principal features of series stock, class B and class E, were and are as follows: Both of said classes consist of subscribing members who are all borrowers, and whose loans are for the face value of the stock subscribed for, evidenced by notes payable one hundred and forty-two (142) months after date. The notes of class B bear interest at the rate of six per cent. per annum, payable monthly; i. e. fifty cents per share per month. The notes of class E bear seven and two-tenths per annum interest, payable monthly; i. e. sixty cents per month per share. These loans are secured by mortgage or deed of trust and pledge of stock as in the class A loans. Members of class B and class E pay no premiums on account of their loans, and agree that they shall have only such share in the profits of the association as may be necessary to make up the par value of their stock after one hundred and forty-two (142) monthly payments of seventy cents per month shall have been made, less ten cents per month belonging to the guarantee stock and expense fund. The total number of shares outstanding October 1, 1899, of class B, is eleven hundred and eighty-two (1,182), and the loans due the association by the members thereof amount to one hundred and eighteen thousand two hundred dollars ($118,200). The total number of shares outstanding October 1, 1899, of class E, is three hundred and sixty-seven (367), and the loans due by the members thereof amount to thirty-six thousand seven hundred dollars ($36,700). Series stock class C differs from class B and class E only in that the monthly payment on account of the stock subscription is at the rate of one dollar and five cents per month, of which ninety cents goes to the series fund at the maturity of the stock, and the loan is for ninety-six (96) months, instead of for one hundred and forty-two (142) months. The amount of stock of this class issued and outstanding on October 1, 1899, was one hundred and fifty-nine (159) shares, and the loans due by the holders thereof amounted to fifteen thousand nine hundred dollars ($15,900).

(8) The stock of class G is of the same general character as the stock of classes B, C, and E, except that the maturity of the stock and loans is sixty-two months; the by-laws providing for the issuance of such stock in the form of certificates for two, or multiples of two, shares, to be retired, at a value of fifty dollars ($50) per share, when sixty-two (62) monthly dues, of seventy cents per share, have fallen due and been paid. On October 1, 1899, there were outstanding, of this class, twenty-eight (28) shares, and the amount of loans due by holders thereof amounted to fourteen hundred dollars ($1,400). The stock of class J differs from class G, in that each certificate is issued for three, or multiples of three, shares; the said stock to be retired, at the value of eighty-three and one-third dollars per share, when ninety-six (96) months' dues, of seventy cents per share, have fallen due and been paid. On October 1, 1899, there were outstanding of this class J thirty (30) shares, and the loans due by the holders thereof amounted to twenty-five hundred dollars ($2,500). The stock of class L differs from class G, in that each certificate was issued for not less than three shares; said stock to be retired, at the value of one hundred dollars for each share, when one hundred and twenty (120) months' dues, of seventy cents per share, have fallen due and been paid. On October 1, 1899, there was outstanding of this class thirty-one shares, and the loans due by the holders thereof amounted to thirty-one hundred dollars ($3,100). The stock of class M differs from class L, in that the stock is to be retired, at a value of one hundred dollars for each share, when one hundred and thirty (130) months' dues, of seventy cents per share, have fallen due and been paid. On October 1, 1899, the number of outstanding shares of this class was seven (7), and the loans due by the holders thereof amounted to seven hundred dollars ($700).

(9) Class S of the series stock consists entirely of investors' stock, no loans having been made to the members of this class. This stock is payable at any time, in installments of five dollars, or multiples of five; and on such payments the by-laws provide for the payment of interest at the rate of four per cent. per annum in cash until said stock is full paid, and thereafter it is entitled to a cash dividend up to three per cent. semiannually out of the earnings of the association; and it also receives a credit of one dollar per share, or one per cent. per annum, which is paid into the guarantee stock and expense fund, in accordance with the charter. It is further provided that full-paid stock, class S, shall not participate in the earnings beyond the seven per cent. aforesaid, namely, six per cent. cash dividend, and one per cent. per annum paid into the expense fund. The amount of this class of stock issued and outstanding October 1, 1899, was seven shares, all of which are full paid up. This stock has a withdrawal value, fixed by the by-laws.

(10) Class Z of the series stock fund is permanent, full-paid stock, issued only for one hundred dollars ($100) per share, or twenty-five dollars ($25) per quarter share, paid at the time of the subscription. The members thereof cannot withdraw from the association. Their stock can be pledged for fifty per cent. of its face value. The by-laws provide that this stock shall be paid cash dividends up to four per cent. semiannually (eight per cent. annually) out of the amount of earnings of the association, and shall also receive a credit of one dollar per share, or one per cent. per annum, which shall be paid annually into the expense fund of the association, and it participates fully in the earnings of the association. The amounts apportioned to it in each year, over and above the nine per cent. fund provided for as its dividend, are to be put to the credit of the stock in class Z, and the fund so constituted is to be invested by the directors, and the profits to belong to, and to be entirely passed to the credit of, stock class Z; but no such fund ever arose. The amount of said stock issued and outstanding October 1, 1899, was nine hundred and thirteen and one-fourth (913¼) shares, and the amount of loans outstanding thereon was five thousand six hundred dollars ($5,600), secured by a pledge of one hundred and thirteen (113) shares of said stock.

(11) The master presents the following tableau, showing the salient features of the various classes of stock, and presenting in condensed form the facts essential to decide any questions of law which may arise in reference to the rights and obligations of the persons interested therein:

DESCRIPTION OF FORMS OF STOCK OF NEW SOUTH BUILDING & LOAN ASS'N.

Series.	Obligation as Stockholder Per Month.	Obligation as Borrower Per Month.	Rights as Stockholder.
A. Not full paid.	70 cts.	6 per cent. interest and 6 per cent. premium per annum.	Participates in all profits.
— Full paid, 10 per cent.	None.	None.	10 per cent. interest, if earned, and participates in all profits; payable at maturity.
— Full paid, 8 per cent.	None.	None.	8 per cent. interest, if earned, and participates in all profits; payable at maturity.
— Full paid, 6 per cent.	None.	None.	6 per cent. interest, if earned, and participates in all profits; payable at maturity.
B. Not full paid.	70 cts. for 142 months.	6 per cent. interest per annum.	Participates in profits only to extent necessary to make up par value of stock after payments named.
C. Not full paid.	$1.05 for 96 months.	7 8-10 per cent. interest per annum.	Participates in profits only to extent necessary to make up par value of stock after payments named.
E. Not full paid.	70 cts. for 142 months.	7 2-10 per cent interest per annum.	Participates in profits only to extent necessary to make up par value of stock after payments named.
G. Not full paid.	70 cts. for 62 months.	6 per cent. interest per annum and 30 cts. premium per month.	Stock retired at $50 per share at end of 62 months.
J. Not full paid.	70 cts. for 96 months.	6 per cent. interest per annum and 20 cts. premium per month.	Stock retired at $83⅓ per share at end of 96 months.
L. Not full paid.	70 cts. for 120 months.	6 per cent. interest per annum and 15 cts. premium per month.	Stock retired at $100 per share at end of 120 months.
M. Not full paid.	70 cts. for 130 months.	6 per cent. interest per annum and 12½ cts. premium per month.	Stock retired at $100 per share at end of 130 months.
S.	For investors only. Payable $5 on application; balance at pleasure within 3 years—4 per cent. interest allowed on all amounts paid in until full paid, when bears 6 per cent., payable out of earnings, and no further participation in profits.		
Z.	Payable cash. Interest up to 8 per cent. payable out of earnings. Participates in profits beyond this, but profits go to reserve fund, and are not distributable, except in very remote contingency. May borrow up to 50 per cent. of value.		

We may still further condense as follows:

Series A. Typical building and loan association stock: That is to say, stock whose holders are burdened with the obligations and enjoy the benefits usually imposed upon or accruing to the holders of stock in, and borrowers from, building and loan associations.

Full paid ten per cent., eight per cent., and six per cent. stock: This is full-paid stock, the profits upon which, to the extent stipulated, are payable semiannually, and any profits in excess of such stipulated profits remain in the hands of the association, to the credit of such stock, until the maturity of the series to which it belongs.

Series B, C, and E. In all of these series fixed monthly payments are made on the stock for a stated number of months. Loans are made upon the stock

at different rates, as stipulated. These loans are payable out of the stock subscriptions. and the stock participates in the profits of the association only to the extent necessary to mature it; that is to say, to make it worth par.

Series G, J, L, and M. The subscription to the stock of these issues constitutes a definite contract for the payment of seventy cents per share on the stock for a fixed number of months. The borrowing members of these classes pay six per cent. interest on their loans, and a fixed number of cents per month premium. The stock payments for the definite period named extinguish the loans.

Series S and Z. These two series are for investors only, who receive interest out of the earnings. The holders of series Z stock have the privilege of borrowing from the association upon a pledge of their stock up to fifty per cent. of its full-paid value.

The resources and liabilities of the series stock fund of the association are given in detail in the document "Receiver 42," and at page 35 of the same document will be found a recapitulation of those resources and liabilities, as follows:

Resources.

1.	Real estate	$222,559 45	
2.	Loans on real estate	471,730 00	
3.	Loans on stock	32,358 00	
4.	Cash in banks	47,317 90	
5.	Bills receivable	10,560 35	
6.	H. T. Ellis, Troy, Ala	108 90	
7.	E. W. Morrill, Biloxi, Miss	492 94	
8.	P. Jacobs, Lake Charles, La	899 09	
9.	American National Bank, in liquidation	492 55	
10.	Installments due by stockholders to May 31, 1899	30,012 15	
11.	Premiums ($13,368.68) and interest ($18,271.70) due by borrowing stockholders to May 31, 1899	31,640 38	
12.	Insurance and taxes due by borrowing stockholders to May 31, 1899	2,783 16	
13.	Bond deposit in suit S. A. & E. G. Chaffin, Troy, Ala.	1,000 00	
			$851,954 87

Liabilities.

1.	Bonds A. & C.	$134,500 00	
2.	Scrip	67,994 05	
3.	Mehle & Kausler	122 00	
4.	Denegre, Cummings & Co., Limited	169 15	
5.	Guarantee stock and expense fund	228 00	
6.	Guarantee stock and expense fund, conditional on collection	4,287 45	
7.	Value of certificates of stock, all classes	639,195 74	
8.	Reserve for coupons on bonds and interest on scrip	5,458 48	
			$851,954 87

(13) I find that the value of item 1 of resources (real estate belonging to the association) may, after careful appraisement, be fixed at $122,559.45; that the value of items 2 and 11 (being amount of loans on real estate, and interest due thereon) are worth seventy-five per cent. of the face value of said items, or $367,501.70; that the value of item 3 (loans on stock) is well worth the sum of $20,553; that the fourth item (cash in bank) amounts to $47,317.90; that the fifth, sixth, seventh, and eighth items are worth their face, and amount to $12,061.28; that the ninth item (American National Bank, in liquidation), $492.55, is practically worthless; that the tenth item (installments due by stockholders to May 31, 1899), $30,012.15, should, for the purposes of this inquiry, be considered as worth its face value, because, if the installments be due by nonborrowing stockholders, they will, if the

prayer of the receiver's petition be granted, be extinguished by the dividends to be declared upon the stock, and, if due by borrowing stockholders, they will, if the prayer of the petition be granted, be paid in any settlement which may be reached with such borrowing stockholders. I find that the part of the eleventh item (of resources) consisting of the amount of premiums due by stockholders, $13,368.68, has been by the receiver entirely disregarded in his exhibit marked "Receiver 41," for the reason that he considers its recovery doubtful. I do not think it necessary at present to decide the value of this asset, but find that, for the purposes of the present application, the course adopted by the receiver in disregarding this item and treating it as of no value is eminently proper and conservative, and I therefore follow him in disregarding it. The twelfth item (being insurance and taxes due by borrowing stockholders), $2,783.16, should, for the purposes of the present inquiry, be treated as worth its face, as it is secured by mortgage on real estate, and constitutes a portion of the indebtedness in reference to which the receiver seeks the advice of the court. I find that the thirteenth item (being bond deposit, etc.) is worth its face, or $1,000. I find that the total of the above items is $603,788.64.

(14) The first item of liabilities is for bonds, amounting to $134,500. These bonds are due to third persons. Their validity is undisputed, and they constitute a liability of the association for their full face value. I shall have occasion hereafter to further refer to these bonds, and to describe them more accurately. The second item of liabilities consists of scrip of the association amounting to $67,994.05. This scrip was issued to stockholders of the association whose stock matured or had been withdrawn from the association in accordance with the terms of the charter and by-laws prior to the appointment of the receiver. It constitutes an obligation for its full face value to persons who were once series stockholders, but whose relations to the company as stockholders had been severed before the appointment of the receiver herein. The third, fourth, and fifth items of liabilities are debts due by the association to others than to series stockholders, and I find the full amount of the same to be due. The sixth item of liabilities is for the amount of $4,287.45. This amount consists of the portion of the payments of installments by stockholders which, under the terms of the charter, the by-laws, and the contracts of subscription, are due the guarantee stock and expense fund. If settlements are to be made by the receiver with borrowing stockholders, or if the amounts due by these stockholders are to be collected through judicial proceedings, this amount constitutes a liability of the series stock fund to the guarantee stock and expense fund, and should, for the purposes of the present investigation, be treated as a fixed liability. I disregard for the present the seventh item of liabilities. That item is the value of certificates of series stock of all classes, and, as it is to be postponed to obligations due to others than stockholders, it is for the present disregarded. The eighth item of liabilities, entitled "Reserve for coupons on bonds and interest on scrip," should be replaced by the figures given by the receiver in document "Receiver 41" as the amount of interest on bonds and scrip due and to become due up to June 30, 1900, and amounting to $19,604.50. An addition of the various items of liabilities as above found will give a total of $226,905.15. In his statement "Receiver 41," the receiver estimates and allows for costs of receivership, for unforeseen losses, and contingent expenses, a total of $150,000, which I find to be a full estimate for the purposes named. Adding this amount of $150,000 to the liabilities above named, I find that the total amount of liabilities, actual or contingent, to be deducted from the total of assets, in order to find the amount which will probably remain for distribution among series stockholders, is the sum of $376,905.15.

(16) The total assets of the association are, at a low valuation, well worth the sum of $603,788.64; the liabilities, actual and contingent, as above, amount to $376,905.15; leaving a remainder for distribution among series stockholders of $226,883.49.

(17) The present book value of the certificates of stock of all classes is $639,195.74. This book value is ascertained by careful, accurate, and rather intricate calculations, differing for the stock of the different classes, and the

results in each case are obtained by applying certain formulæ, fully detailed in the documents marked "Receiver 43" and "Receiver 44." A dividend of thirty-five per cent. upon the total present value of the certificates of stock of all classes, amounting as aforesaid to $639,195.74, would amount to $223,718.50.

(19) The master further considers it important to find and report the facts in relation to the issue of the security given for, and the present status of, the bonds of the association, amounting, as hereinabove set forth, to $134,500. The history of these obligations is as follows: By an agreement of date December 14, 1891 (Document Receiver 30), between the New South Building & Loan Association and the Manhattan Trust Company of New York, the association constituted the trust company a trustee for the purpose of securing the purchasers and protecting its stockholders and creditors, and securing to the purchasers of certain bonds to be issued by it the prompt payment thereof and the interest to accrue thereon. The agreement in question provides that the bonds shall be issued in such series, for such denominations, and for such period of time as the association should determine; that as security for the payment of the bonds the association might from time to time, at its discretion, deposit with the trustee cash or real estate securities, being first liens, and taken by the association in the regular course of its business, and that each series of bonds should be wholly independent of any other series in the matter of securities; that the securities should be assigned to the trust company; that the trustee should indorse its certificate of such deposit upon the bonds of the building and loan association to an amount not to exceed one hundred dollars for every one hundred dollars in cash or one hundred and twenty-five dollars ($125) in such securities so deposited; that the association should have the right at any time to withdraw from the hands of the trustee the cash or securities deposited with it, by substituting securities of equal face value, of the character mentioned in the trustee's certificate, or upon deposits of one hundred dollars ($100) cash for each one hundred and twenty-five dollars ($125) of said securities. The association further had the right, upon surrender to the trustee of any bond theretofore countersigned by the trustee, to demand the relinquishment and delivery to it of a pro rata share of the cash or securities in its hands pledged for the payment of the series whereof such bond constituted a part; and, as long as the association should not be in default, it was to be entitled to receive and collect the interest and premiums due upon the securities in the hands of the trustee. Provisions were made for proper proceedings to be taken in case of a default in the payment of the interest or principal of the bonds. The trust company further agreed to keep on deposit for the association, for the general benefit of all the members and creditors of the association, any and all securities that might be deposited with it for that purpose by the association, and to certify to the amount of the securities so deposited, and to the object for which they were deposited, from time to time, as requested by the association; such certificates to be, in substance, as follows: "This is to certify that the New South Building and Loan Association has on deposit this day with the Manhattan Trust Company of New York City, for the benefit of its members and creditors, ——— dollars ($———), of the face value of its securities." The agreement further provided that the securities, except such amount as might be specifically deposited to secure the bonds, might be withdrawn, in whole or in part, at any time by the association, upon surrender to the trustee of the certificate or certificates issued by the company as covering the deposit of such securities. The foregoing are the only provisions of the agreement which I deem it necessary to insert in these findings of fact. Subsequently to the date of said agreement, to wit, on the 23d day of February, 1894, a supplemental agreement was entered into between the New South Building & Loan Association and the Manhattan Trust Company, amending the original agreement of December 14, 1891, and limiting the amount of bonds to be issued under said agreement to one hundred thousand dollars ($100,000), par value, and increasing the deposit of securities for said one hundred thousand dollars ($100,000) of bonds to two hundred and fifty thousand dollars ($250,000), instead of one hundred and twenty-five thousand dollars ($125,000), as

was provided in the original agreement, and further amending the agreement by incorporating such new provisions in it, and making the same a part of said outstanding bonds, to continue during the life of the same, and providing that the trust company's claim for compensation for its services as trustee under said agreement should be a first lien upon the additional one hundred and twenty-five thousand dollars ($125,000) of securities deposited for the protection of said bonds as therein provided, and abrogating a provision in the original agreement providing that the claim of the trust company for compensation should be a personal one against the New South Building & Loan Association, and not a lien on the securities in its hands as trustee. The Manhattan Trust Company having declined to continue to act as trustee, the American Trust & Banking Company, located at Atlanta, Georgia, was, pursuant to the terms of the original agreement, substituted as trustee in lieu and stead of the Manhattan Trust Company. The new trustee received from the old one the sum of twelve thousand dollars ($12,000) in cash and securities. the face value of which amounted to two hundred and twenty-five thousand five hundred dollars ($225,500). By another agreement, of date December 14, 1893, the New South Building & Loan Association constituted the American Trust & Banking Company its trustee for the purpose of securing a different issue of bonds. This agreement is practically a duplicate of the one with the Manhattan Trust Company, in its amended form. Under the agreements aforesaid the American Loan & Trust Company received from the New South Building & Loan Association a very large amount of the obligations of borrowing members of the association, the amount being given by the receiver in his testimony, to this report attached, at nearly four hundred and fifty thousand dollars ($450,000), and in the bill of intervention hereinafter referred to at four hundred and forty-six thousand four hundred and sixty-six dollars ($446,466).

After the receiver had been appointed in this cause, and also under ancillary bills filed in other districts in the Fifth circuit, he filed a petition in one of those ancillary causes pending in the Northern district of Georgia, seeking the possession of the assets held by the American Trust Company of Atlanta, Georgia. This application was heard before the Honorable D. D. Shelby, circuit judge, who rendered an order that the receiver was entitled to the possession of all the assets and securities of the New South Building & Loan Association held by the American Trust & Banking Company of Atlanta, Georgia, in order that he might collect in, and administer upon the same, and distribute the proceeds under the orders of the court which appointed him, and in accordance with the rights of all parties having any claims in respect thereto, and further ordering that the American Trust & Banking Company should turn over and deliver said assets and securities into the possession of the receiver. The purpose of the delivery to the receiver by the order was declared to be to enable the receiver to protect, preserve, and collect in the said assets and securities, and to hold the proceeds thereof subject to the orders of the court which appointed him; and the order was declared to be made without prejudice to, but with full reservation of, the rights of all parties, and especially of the holders of any bonds issued under either or any of the agreements above described; such rights being reserved to the proceeds of the assets and securities, and to be asserted in appropriate proceedings hereafter. The receiver was further ordered and directed to take and keep a separate account of said assets and securities, and to deposit to his credit as receiver with the American Trust & Banking Company of Atlanta, and there to keep subject to the further orders of the court, the cash assets received under the order, and all collections made by him on the other assets turned over to him under the order. Subsequently to the rendering of the above order by the Honorable D. D. Shelby, circuit judge, the American Trust & Banking Company filed its petition for leave to intervene, and its bill of intervention, in the United States circuit court for the Northern district of Georgia, which petition and bill set forth the facts above found in reference to the agreements constituting it as trustee for the purposes above found; alleged the order of Judge Shelby; the fact that it had, under said order, delivered to the receiver herein securities amounting to four hundred and forty-six thousand four

hundred and sixty-six dollars ($446,466), face value; that, in addition to the bonded indebtedness, there were other creditors of the building and loan association, known as "scrip holders," whose claims amounted to sixty-seven or sixty-eight thousand dollars; that intervener was not sufficiently advised to state whether there were other creditors of the association or not; that, under the deeds of trust set forth in its bill, the intervener had been designated as trustee, charged with the duty of holding the securities placed in its hands for the protection of outstanding bonds; that under said deeds of trust, and likewise in compliance with the laws of Georgia, the intervener was named as trustee and depository of securities for the benefit of creditors and shareholders of the association; and that the securities, as well as the proceeds thereof, were charged with a trust for the benefit and protection of the bonded indebtedness and other indebtedness of the association, as well as of the shareholders therein. The bill further averred the insolvency of the association, and the necessity of submitting to a master the ascertainment of the indebtedness of all characters of the association, the amount of stock, and different classes thereof, and the ascertainment and defining of the rights, interests, and claims of all parties, and the distribution of the assets of the association. The bill contained other allegations, but the above are deemed by me sufficient for the purpose of explaining the scope of the bill, which prayed that the intervention might be allowed; for proper service of process; for a decree that all of the bonds of the association, with accrued interest, are due; that the intervener might have a decree and judgment for the amount of all other indebtedness, as the same might be ascertained to be owing by the association; that the same might be declared due, with interest, and that all creditors might be decreed to participate in the distribution of the proceeds of the assets pledged to intervener as trustee, in accordance with their rights and equities; that intervener might have a general decree and judgment against all of the assets of the association for the amount of principal and interest which might be ascertained to be due upon the outstanding bonds of the association; that intervener might have a special decree and judgment against the securities placed in its hands as trustee for the protection of said bonds, and against the proceeds of the same, and a general decree and judgment in favor of the creditors of the association, subject to the special decree and judgment in its favor, for the benefit of bondholders, and for the amount of principal and interest due thereon; that, subject to the general and special judgments and decrees in favor of bondholders and creditors, intervener might have a general decree for distributing the balance, if any, of the assets of the association, after the same should have been converted into money, and after deducting all of the expenses of administration of the estate, among the shareholders or other persons entitled to participate therein; that intervener might have a general decree and judgment against the estate for all the costs and expenses of administering the same, including its counsel fees, and reasonable compensation to itself as trustee for its services, and for all legitimate charges and expenses, and for all further and general relief.

The foregoing constitutes my finding of the material facts of this case, shown by the evidence adduced before me, and which I consider relevant to the inquiry which the court has directed me to make. The application of the receiver is necessarily one made ex parte. The action which the receiver seeks to take is approved of by the complainant, and apparently acquiesced in by the defendant, as it did not appear before the master, although duly notified. Neither the American Trust & Banking Company, which has filed a bill in the United States circuit court for the Northern district of Georgia, seeking to control the administration of almost all of the assets belonging to the series stock fund, and in the hands of the receiver, nor any other creditor of the defendant association, is a party to these proceedings. Only one stockholder, and that one a borrowing stockholder, voluntarily appeared before me. I state these facts very fully, in order to show the extreme care which should be exercised by the court in the premises, and the great caution to be observed in dealing with a large amount of assets in the hands of the receiver, in which so many persons are interested, none of whom, with the one or two exceptions above named,

have been heard. It is nevertheless unquestionably true that unless some scheme be devised by which a homogeneous administration of the affairs of the association may be secured, and unless a plan of liquidating the affairs of the defendant corporation can be devised which, whilst fair to nonborrowing stockholders and to creditors, will also appeal to borrowing members, and stimulate a settlement of loans, the interests of all persons concerned in the association as stockholders, whether borrowing or nonborrowing, will be sacrificed, and the assets squandered to such an extent, in expenses of a tedious litigation, that little, if anything, will be realized for any one, except creditors, whose claims are not large in proportion to the probable value of the assets, and who ought, if the affairs of the association be prudently administered, to be paid off, and a handsome surplus left for the stockholders. I do not think it possible to read the petition of the receiver, and the foregoing statement of facts, without reaching the conclusion that the course suggested by the receiver, of allowing borrowing members in the association to settle their indebtedness, after crediting it with such an amount as may safely be fixed upon, as a distributive share to hereafter accrue to said borrowing members out of the distribution of the assets of the corporation, is eminently wise, provided it be possible to make such an allowance, without infringing upon the vested rights of any one else in interest.

I shall now consider the rights and obligations of the different creditors of the association, and of the various classes of stockholders, and attempt to reach some scheme of liquidating the affairs of the association in the general manner suggested by the receiver in his petition, and which will amply protect the rights and equities of every person in interest. The process upon which the distribution of the assets of an insolvent building association is to be made is not altogether free from difficulty. One proposition is, however, too plain for discussion, to wit, that, as between outside creditors and stockholders, the former are first entitled to satisfaction of their demands, ahead of all claims based on stock holdings. See End. Bldg. Ass'ns (2d Ed.) p. 502, and authorities there cited. I shall therefore first consider the claims of outside creditors, and thereafter of stockholders. Before taking up this subject, however, it is necessary to note that the New South Building & Loan Association was a peculiar corporation, in that from the very origin of the corporation its stock and stockholders were divided into two different classes, each enjoying rights and subject to obligations so entirely distinct from the other that the association was really a dual corporation. The rights and obligations of the holders of guarantee stock were so entirely separate and distinct from the rights and obligations of the holders of the other class of stock, known as "Series Stock," that when certain bonds were to be issued for the purpose of raising funds to complete an office building, which was to be constructed at the expense of and for account of the guarantee stock, the bonds did not, upon their face, purport to bind the association itself, but only the guarantee stock. See findings of fact, supra (paragraphs 2 and 3). It therefore becomes necessary to consider the two classes of stock entirely separate from each other, and to fix the rights and obligations of the persons interested in each class of stock entirely independently of the rights and obligations of those interested in the other class of stock. As the association and both of its funds are amply solvent as to outside creditors, we are at least relieved of the consideration of some very troublesome questions which might arise as to the rights of the creditors of the respective funds if the association were insolvent as to outside creditors. With these preliminary remarks, I take up the details of the case.

Rights and Obligations of Holders of Guarantee Stock, and of Creditors Having Claims against Guarantee Stock and Expense Fund.

The capital stock of the corporation was by its charter divided into two general classes, one consisting of one thousand shares, or one hundred thousand dollars ($100,000) in amount of stock, known and designated as "Guarantee Stock," and the remainder known and designated as "Series Stock." All of the guarantee stock was issued and full paid for prior to the appointment of the receiver in this cause. The funds of the association were by its

charter divided into two parts, known, respectively, as "Guarantee Stock and Expense Fund" and "Series Stock Fund," which funds were by the charter declared to be entirely separate and distinct, the guarantee stock and expense fund belonging and being attributed to the guarantee stock, and the series fund to the series stock. The manner in which the guarantee stock and expense fund was made up, and all other necessary details as to the guarantee stock, is given in the foregoing finding of facts. Paragraphs 3 and 4. Out of the amount belonging to the guarantee stock and expense fund the board of directors were required to pay and liquidate all the operating expenses of the association, salaries of officers, commissions, compensation for services of every kind, and expenses incident to printing, advertising, stationery, and all other expenses of the association, except taxes and licenses, rent, and the cost of collecting and transmitting of moneys to and from the home office. During the whole business life of the association the difference between this stock and the series stock was maintained, and when the receiver was placed in possession of the assets and affairs of the corporation he found the assets and liabilities of the guarantee stock and expense fund stated upon the books of the association entirely apart from and independently of the assets and liabilities of the series stock. A statement of those assets and liabilities is hereinabove given. See paragraph 4 of the finding of facts. From that statement it will be seen that the only liability of this fund to outsiders is an obligation of twenty-two thousand six hundred and eighty-five dollars and twelve cents due to the Hibernia National Bank, whilst the assets are given at one hundred and twenty-two thousand six hundred and eighty-five dollars and twelve cents ($122,685.12). As the office building cost over seventy-five thousand dollars within the past four years, I think it safe to assume that this fund is solvent, as to outside creditors, and that it is perfectly safe, upon this hearing, to ignore the outside creditors of this fund. I reach this conclusion even independently of the fact that the outside creditor the Hibernia National Bank holds obligations which upon their face are obligations of the guarantee stock and expense fund alone, and not of the association.

The receiver, in his petition, avers that he is informed that the holders of some of the guarantee stock claim the right to participate on the same terms with the holders of full-paid series stock in all the assets of the association, and that the distinction made between the two funds ceased to exist when the association ceased to be a going concern. In view of this statement in the petition of the receiver, I deem it well to state fully the rights of the guarantee stockholders under the charter. The charter of the association (article 7) expressly provides that to the guarantee stock shall belong and be attributed the entire stock and expense fund, and to the series stock shall belong and be attributed the entire series stock fund; that the two funds shall be kept entirely separate and distinct; and that neither fund shall have any part in or participate in earnings or proceeds of the other, except as expressly set out in the charter. The guarantee stock and expense fund is to consist of the amount subscribed to the guarantee stock, of certain other items named in the charter, and of ten cents per share per annum on each and every share of the series stock that is subscribed for, payable out of the monthly installments of seventy cents per share for series stock, whenever paid, and one dollar per share per annum from each and every share of the series stock, after it has been paid for in full, until such shares are liquidated. With the exception of the claims of ten cents per share per month, and one dollar per share per annum, last named, the guarantee stock has no claim whatsoever against the series stock fund, and the series stock fund has no claim whatsoever against the guarantee stock fund, except for the payment of the expenses of the association, expressly made payable out of the guarantee stock and expense fund. From these provisions of the charter, it seems to me perfectly clear that neither of the two funds has any claim whatsoever upon the assets of the other. True it is that whilst the association was a going concern the guarantee stock was entitled to a certain payment from the series stock; and so, on the other hand, the series stock was entitled, in consideration of these payments, to have all salaries, commissions, and compensation for services of

every kind paid out of the guarantee stock and expense fund. I do not deem it necessary for the purposes of this hearing to decide what effect the appointment of the receiver and the winding up of the association has upon the obligations of the series stock to pay the above-described monthly and annual dues to the guarantee stock and expense fund, nor what the effect of that winding up has upon the obligation of the guarantee stock and expense fund to pay the expenses of the association, for which that fund is liable under the charter. For the purposes of the present hearing it is sufficient to say that the guarantee stock and expense fund has no claim upon the assets of the series stock fund, and hence that the guarantee stock holders may be ignored entirely in considering the application of the receiver, which application seeks the advice of the court as to settlement to be made with borrowing stockholders, holding series stock, and liable as debtors to the series stock fund. My conclusion upon the whole of this branch of the case is that the guarantee stock fund may be entirely ignored, in considering the application of the receiver, and I do so ignore it.

Rights and Obligations of Creditors and Stockholders of the Series Stock Fund.

(a) Creditors. The creditors of the association whose rights might be affected by any order to be rendered by the court upon the application of the receiver may be divided into bondholders, scrip holders, and sundry creditors. I shall first discuss the rights of the bondholders, and thereafter of all the other creditors together. The bondholders hold bonds of the association to the amount of one hundred and thirty-four thousand five hundred dollars ($134,500), upon which the interest accrued and to accrue up to June 30, 1900, amounts to an additional sum of thirteen thousand four hundred and eighty-five dollars ($13,485), thus making a total of one hundred and forty-seven thousand nine hundred and eighty-five dollars ($147,985). Under the agreements under which the Manhattan Trust Company and the American Trust & Banking Company were constituted trustees, and under which certain real estate securities of the New South Building & Loan Association were deposited with said trustees, it was expressly provided that the New South Building & Loan Association should have the right to withdraw any of the securities on deposit by it with the trustee of securities of equal amount and similar character, or upon deposit of one hundred dollars ($100) in cash for each one hundred and twenty-five dollars ($125) of said securities, or upon surrender and cancellation of the bond itself. In view of the fact that Judge Shelby, in his order directing the trustee to deliver to the receiver all the real estate securities which had been deposited with it as securities for the bonds of the association, directed that his decree should be without prejudice to, and with full reservation of, the rights of all parties, and especially of the holders of any bonds issued under either or any of the agreements in the order referred to, and reserving the rights of all parties in respect to the assets or securities transferred to the receiver, and in view of the further fact that the bondholders undoubtedly enjoy priority over all the stockholders of the association, and also over all other creditors upon the assets affected by the lien of the bonds, I believe that the wisest and most unobjectionable plan of settling with borrowing stockholders of the association, by compromise and amicable adjustment, without infringing upon the rights of the bondholders, would be to authorize and instruct the receiver to exercise the rights which the association itself possessed under the trust agreements; that is to say, to substitute one hundred dollars in cash for each and every one hundred and twenty-five dollars of securities which are affected by the lien of the trust agreements, and in reference to which the receiver may desire to effect a compromise with the debtors of the association. In view of the fact that the receiver has in his hands an amount of cash exceeding fifty thousand dollars ($50,000), this plan is perfectly feasible, and will prevent any possible injury or claim of injury to the bondholders. In order to show how this plan would work, the master submits the following example, assuming for the present that the suggestion of the receiver be adopted by the court, and that the receiver be authorized and instructed to allow borrowing stockholders thirty-five per cent. (35%) of the

book value of the stock as ascertained by the receiver; such allowance to be credited on the loan of the borrowing stockholder, and considered as an advance payment on account of the distributive share to accrue to the stock held by such borrower. If the borrowing stockholder, owing one hundred and twenty-five dollars ($125), upon a loan which has been deposited with the trustee for the benefit of the bondholders, should desire to settle with the receiver in the manner suggested by the receiver, he would be required to pay eighty-one dollars and twenty-five cents ($81.25),—that is to say, sixty-five per cent. (65%) of his indebtedness; the remaining thirty-five per cent. (35%) being allowed to him as an advance dividend upon his stock. The association, however, when it was a going concern, had no right to demand the return of the obligation in question to it, except upon deposit by it with the trustee of other securities to the amount of one hundred and twenty-five dollars ($125), or of one hundred dollars in cash. The receiver, succeeding to the rights of the association, would certainly have rights at least equal to those of the association, and could therefore demand possession of the notes or other papers given in evidence of the obligation of the borrowing stockholder, provided he should pay one hundred dollars ($100) to the trustee. The master suggests that the receiver exercise this right by depositing to his credit, as receiver in this cause, in the American Trust & Banking Company of Atlanta, Ga., pursuant to the order of Judge Shelby of date July 31, 1899, of all sums which may be received by him in amicable adjustment of any of the indebtedness pledged by the New South Building & Loan Association to the American Trust & Banking Company of Atlanta, Ga., as trustee, and by further depositing to his credit, as receiver in this cause, in said American Trust & Banking Company of Atlanta, Ga., such an amount as will, together with the amounts realized from the amicable adjustment of said indebtedness, make a total of one hundred dollars ($100) for every one hundred and twenty-five dollars ($125) of indebtedness adjusted. If this course be pursued, it is evident that no bondholder will have any right to complain, and the total amount of cash required to redeem a sufficient amount of securities to realize the total amount of the bonds and interest to June 30, 1900, would be twenty-seven thousand three hundred and seventy-seven dollars and twenty-three cents ($27,377.23). The master therefore finds that the plan of amicable adjustment with borrowing stockholders suggested by the receiver may be adopted without impairing or affecting any rights of bondholders, provided the receiver be instructed, whenever an adjustment is effected with any borrowing stockholder whose indebtedness to the association has been hypothecated with the trustee of the bonds, then and in that event to deposit with the American Trust & Banking Company of Atlanta, Ga., the proceeds of any such amicable adjustment, together with such an amount, to be taken from the general fund of the receiver, as will, together with the amount received from such amicable adjustment, make a total of one hundred dollars ($100) in cash for every one hundred and twenty-five dollars ($125) of hypothecated securities extinguished by amicable adjustment. The other class of creditors of the association to be considered are scrip holders. Inasmuch as these scrip holders are merely general creditors, having no hypothecary rights upon any of the securities of the association, the master finds that the court having the association before it as a defendant in this cause has the same right, through its receiver, to amicably adjust and compromise claims of the association, as the association itself would have had if it were still a going concern; and the master therefore finds that, if the adjustment suggested by the receiver be found by the court to be reasonable and fair, there is no reason why such adjustment should not be made, regardless of the existence of scrip holders of the association. What has been stated in reference to scrip holders is also applicable to the few other creditors of the association.

(b) Stockholders of Series Stock Fund. In discussing the rights of the various stockholders of this class, and the question whether or not the settlement proposed by the receiver is fair to the nonborrowing stockholders, at the same time that it lessens the burdens of the borrowing stockholders, it is important to note briefly the nature of this corporation, the rights and obligations resulting from the contract between borrowing members and the

association, and the effect of the dissolution of the corporation, or its equivalent, upon the duties of members and the obligations of borrowing members. There has been a very considerable number of cases bearing upon these questions, and there are at least two text-books which have been written upon the Law of Building Associations which discuss these subjects at length, to wit, Thompson on Building Associations and Endlich on Building Associations. From these books and from the authorities I think it safe to lay down the following brief statement of the law applicable in the premises, to wit: A building association is a private corporation for gain, formed for such time as may be permitted by the laws under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders in payment of the stock subscribed by them, the penalties for their nonpayment, and the profits upon their investment, of a fund to be applied from time to time in accommodating such shareholders with loans or advancements, primarily for the purpose of acquiring the free possession of real estate or constructing dwellings, or both, under terms and regulations prescribed by law or by the charter and by-laws of the association, upon principles of strict mutuality and equality of benefits and obligations, with the effect of extinguishing the liability incurred for such loans and advancements simultaneously with the termination of the shareholder's periodical contributions upon stock held by him in the association; the object of the latter being completed when the fund raised is sufficient to distribute to each member the par value of all shares subscribed by him, and held without loans, and to extinguish all loans held by shareholders. See End. Bldg. Ass'ns (2d Ed.) § 16. "When a member of a building association becomes a borrower, his original contract with the association, and that of the latter with him, together with the rights and obligations resulting therefrom to each, respectively, continue in force intact, except in such minor details, not affecting the membership of the borrower in which they may have been varied by the conditions of the new contracts entered into by both parties, whether expressed or implied. On the part of the borrower this new contract may, in general, be said to embrace the following essential features: (1) The member agrees to receive the advancement from the building association, and to allow it, for the privilege of the preference, a certain stipulated price, premium, or bonus. (2) He undertakes, and gives security in support of the undertaking, faithfully to perform, to the termination of the society's existence, or the running of a series, all the requirements of its constitution and by-laws relative to stock payments or dues, fines, and other charges upon and in respect of the shares held by him (which, as a rule, he pledges to the society as collateral security), and to be liable for and discharge all proper dues, assessments, contributions, and charges arising upon them in the same proportion and in the same manner as the rest of the members, and in addition to make a fixed periodical payment by way of interest on his loan, either by that name, or in the way of a stipulated increase in the regular dues corresponding with the interest upon the loan. (3) He agrees that upon the termination of the society, when its assets shall become distributable, it shall appropriate the proportion thereof accruing to such of his shares as were advanced to him to its own reimbursement and the payment of the premium bid, if the society runs its full course, or to its reimbursement merely if it be prematurely dissolved by reason of insolvency. (4) He agrees that in case of his failure at any time to perform the continuing conditions of his undertaking for a certain period, or for such remissness in the payment of dues, etc., as would be ground of forfeiture of his shares as a member, the society shall be absolved from the necessity of waiting until the period of dissolution for its payment, but shall have the right to demand and recover it from him at once, including in the debt not only the amount actually loaned, but all the payments and charges which may lawfully, under his obligation as member and borrower, be demanded from him, and also, in case of failure of the association and a winding up before its purposes are accomplished, to make settlement at once for what may be found due from him to it. The building association, in its turn, assumes certain corresponding obligations towards the borrower: (1) It agrees to perform, so far as he is concerned, the purposes of its incorporation, and to

permit him, so long as he does his share, to participate in the benefits and advantages of it. (2) It agrees to let him have the use of the money advanced during the continuance of the society's legal life or the running of a series, provided he lives up to the terms of his undertaking. (3) In the meanwhile it is to receive and invest the payments made by him, both as dues and as or in lieu of interest, in the same manner as those of other members, and as part of the common fund. (4) Finally, upon the winding up of the concern it is to account to him for such proportion of the whole accumulation as may be coming to his share, retaining so much as may be necessary to cover his proportionate share of the losses and expenses, and applying the balance to the liquidation of his debt, including the actual advance, interest, fines, and premium, according to his undertaking, and thereupon canceling his securities." See End. Bldg. Ass'ns (2d Ed.) pp. 116–118. Upon the effect of dissolution or its equivalent upon membership duties and borrowers' obligations, Mr. Endlich states the law as follows: "A dissolution, strictly speaking, of the association, of course, at once putting an end to all its corporate business, terminates the liability of members to continue the prescribed regular stock payments. Where that dissolution occurs in the contemplated course of events, no serious question can arise as to its effect upon the rights or duties of any class of members. But where it occurs prematurely the case is different. For the purposes of discussion of the questions then arising, no distinction need be made between a dissolution properly and technically so called, and one practically resulting from the agreement of members or the insolvency of the association. In every case the effect upon the members is to stop at once any liability for further regular stock payments. And this applies equally whether such members be merely investors or also borrowers. 'The liability to pay monthly dues or fines, or interest on the amount advanced, cannot extend beyond the existence of the association.' And the reason is obvious. The advance made to the member by the building association is not a naked loan of money, to be returned dollar for dollar. Part of the consideration of the contract which the borrower entered into upon receiving the advance was the interest he retained as a member in the accumulations of its business, and the prospect, by means of this interest, to be enabled not only to lay by, through a long period of time, small sums towards the day of repayment, but also to enjoy during that period the profits which such small sums would, when the course of the society was completed, have earned, making his credit sufficient in bulk to be set off against his liability to the association and extinguish the same. The length of time thus allowed him for the extinguishment of his debt, and the additions with the aid of which his periodical payments, by being constantly employed in producing revenues (these revenues again being invested, and so on ad infinitum), would swell to the sum total of his obligations to the society, are material elements in preventing his undertaking as to premiums, fines, etc., from proving extremely oppressive, if not ruinous. The mode of payment, in other words, is an essential part of the contract. The dissolution of the building association necessarily puts an end not only to its capacity to receive from time to time his small payments, but also to the possibility of their being turned to account for his benefit by means of the system of investment and reinvestment peculiar to the building association scheme. The main feature which has made his undertaking bearable, and in reliance upon which he has been induced to assume its obligations, is thus taken away, and it follows as an inevitable consequence that he cannot be held to its precise terms. His duty to make regular stock payments (a duty incident to membership only) ceases; for the stock itself is destroyed, there being no longer a corporation as whose stock it can figure, and the membership dies with the corporation. So far as the mortgage was given to insure the performance of this membership duty, the obligation is abrogated by the destruction of the stock and the society. The imposition of fines (a species of liquidated damages due the society, under its system of mutuality, for the neglect of a membership duty) must of necessity fall away when the membership is gone,—when there is none who can justly claim the damages, and when their exaction would be nothing more nor less than the enforcement of penalties not countenanced by the law. The agree-

ment to pay a premium for the loan, justified upon the basis of strict mutuality, and bearable by reason of the length of time allowed for its liquidation, and by the fact that it would, according to the status and intent of the contract when entered into, be in part made up by profits upon the stock payments and interest discharged by the borrower during the projected continuance of the association, as well as by similar payments made by other borrowers during the like period, and the gains and accumulations of the entire corporate business to the day of its contemplated termination, must, when that mutuality is taken away, and all the other elements embraced in the terms of its assumption removed, fail for want of a proper consideration. At least, it fails in part. The duty of the borrower, as a member, ratably to contribute to the debts and losses of the corporation, remains. That arises on considerations independent of those relating to his indebtedness, but, as has been seen, it is enforceable under and by means of the obligation given by him as a debtor. In endeavoring to formulate a rule which shall do exact justice to all the parties, in view of the considerations stated, the courts have not arrived at altogether uniform results. On one point there seems to be a general concensus, although the distinct enunciation of the principle is only of very recent date. It is this: That upon premature dissolution of the association the advanced members may be compelled to pay forthwith the balances due from them on their securities, although the latter be given in terms only for the payment of installments. Just how those balances are to be made up, however, is a question upon which there has been a diversity of opinion." See End. Bldg. Ass'ns (2d Ed.) pp. 515–519. After stating the law as above, Mr. Endlich lists the cases showing the different views which have been expressed by different courts. I deem it unnecessary to state the results reached by different courts in different cases, but respectfully submit that as satisfactory and clear a statement of the principle which should apply in this case as can be found anywhere is given by Judge Grosscup in the case of Towle v. Society (C. C.) 61 Fed. 446. In that case Judge Grosscup says: "The question reduces itself to one of simple equity and fair play. The inability of the association to proceed to its expected termination by reason of the impairment of its collectible loans is attributable alike to each stockholder. The officers of the association are their agents, and the results of their investments are alike the fortune or misfortune of each stockholder, whether it be borrower or nonborrower. When a condition thus brought about justifies a court of equity in peremptorily terminating the career of the association, the adjustment should be made as near upon the line of what would take place if the association lived out its life as possible. I can think of no fairer rule than to regard the normal life of the association as eight years, and to look upon each year short of that period as an aliquot portion thereof. This would give the borrower credit for such premium as the number of years, or fractional parts thereof, unlived by the association, bear to the whole period of its normal life of eight years. To that extent the premium is unearned. For the period already past it has been earned. It is true that the borrower might not have bid the premium if he had foreseen the premature death of the association; but neither would his fellow stockholders, with a like foreknowledge, have contributed their installments. The misfortune of the one is not greater than that of the other. If the borrower were to be credited with the entire premium, the taking of possession of the assets by a court of equity would immediately reduce the already impaired assets by the amount of the aggregate premiums. It might easily be that the intervention of equity near the close of the eight years would, under such circumstances, be a positive boon to the borrower, by incidentally deducting from the loan a large percentage of the principal. The temptation and uncertainty thus introduced ought, if possible, to be averted."

I believe that the above general statement of the law applicable to this case is sufficient for the purposes of the present application. It may, however, be well at this point to state that the question whether or not the premium charged by a building association upon the loan to one of its members is to be considered as in the nature of an additional interest, affecting the whole transaction with a taint of usury, is one upon which there is a

wide divergence of judicial opinion. The decisions upon this subject are carefully listed and analyzed by Mr. Endlich in his work from which we have already quoted (2d Ed. pp. 292–327). After reviewing all the authorities, he reaches a conclusion which I believe to be correct, and as follows: "An examination of the foregoing decisions would seem to justify the conclusion that the clear weight of judicial authority declines to look upon the transaction between a building association and its advanced member as constituting a loan, pure and simple. At the same time the conflict between those decisions emphasizes the impossibility of declaring that transaction a mere dealing in partnership funds, to the total exclusion of the idea of a loan. The truth can lie in neither of the extremes represented. It may perhaps be found most nearly accurate to say that the transaction is a loan, the terms of which are so vitally affected by the debtor's membership relation to the creditor society, in the source and profits of which the debtor has himself such a substantial interest, and the extent of his ultimate liability upon which is so contingent and uncertain at the time of its creation, that it is impossible to apply to it, in its essential features, the rules of common or statute law defining the limits of what may be bindingly assumed and lawfully exacted in ordinary transactions of borrowing and lending." For the purposes of this hearing, I may add that the supreme court of Louisiana has aligned itself with those courts holding that the premium is not to be considered as affecting the contract with usury. In Homestead Co. v. Linigan, 46 La. Ann. 1118, 15 South. 369 et seq., the court (page 1129, 46 La. Ann., and page 373, 15 South.), says, "There was from the first an element of uncertainty in the contract, excluding questions of an exclusive loan and usury." To the same effect is the case of Richard v. Association, 49 La. Ann. 481, 21 South. 643. It should also be borne in mind that every contract made by this association with its borrowers expressly provided that all moneys due from stockholder to the association, or due from the association to the stockholder, should be due and payable at the home office, New Orleans, La. This clause, under general principles of law, unquestionably made the contract a Louisiana contract, governed by the laws of the state of Louisiana on the subject of usury. If express authority be required to sustain this proposition, I need only refer to the case of Andruss v. Association, 36 C. C. A. 336, 94 Fed. 575, where the court of appeals for this circuit expressly held, through Judge Shelby as its organ, that contracts of this character are not usurious, if valid under the laws of the place of performance. I therefore conclude that none of the contracts of this association with its borrowing stockholders are tainted with usury. This conclusion is assumed by the receiver to be correct in the tableau which he has prepared, showing the state of the accounts between the association and each and every one of its stockholders. Even if this conclusion should perchance be incorrect, it would follow that the settlement by borrowing stockholders of their indebtedness upon the terms proposed by the receiver would be all the more advisable, in the interest of the trust fund in the hands of the court. The receiver has, in the document marked "Receiver 42," given the amounts due by each and every stockholder to the association, or by the association to such stockholders, and he has explained in his testimony the method adopted by him in stating the accounts between stockholders and the association, which method I believe to be fair and equitable, and to fully conform to the views expressed by Judge Grosscup as to the general principles to be followed in winding up associations similar to the one before the court. I therefore find, as my conclusion of law in the premises, and practically in the language of Judge Grosscup, that the question in this case is one of simple equity and fair play. The inability of the association to proceed to its expected termination, by reason of the impairment of its collectible loans, is attributable alike to each stockholder. The officers of the association are their agents, and the results of their investments are alike the fortune or misfortune of each stockholder, whether he be borrower or nonborrower. This condition justifies this court, as a court of equity, in peremptorily terminating the career of the association, and in adjusting the relative rights of the various persons interested upon the most equitable basis attainable; that is to say, by ascertaining and fixing the amount now due by each and

every borrowing stockholder to the association, including in the amount borrowed by such stockholder all installments due by him upon his stock, all interest due upon loans, all premiums, insurance, taxes, or other charges and expenses due and equitably chargeable to such stockholder at the date when the receiver was appointed; by further ascertaining the amount of the distributive share of such stockholder in the assets of the association; and by demanding from all of the stockholders of the association who may, under an adjustment of accounts upon the basis aforesaid, appear to be debtors of the association, the amount due by them, and paying to all stockholders who, as the result of such an adjustment of accounts, may be creditors of the association, the amounts due to them. It is evident, however, that the distributive share of the stockholders in the assets of the association cannot for the present be definitely and finally fixed, as it must be affected by the successful or nonsuccessful administration of the receivership in this cause. In view, however, of the expense, delays, and annoyance of litigation, as also the expense of administering and disposing of the real estate mortgaged to the association, in the event that foreclosure should become necessary, I deem it unquestionably wise and politic to allow borrowing stockholders to settle their indebtedness to the association at the figures due by them, and as calculated by the receiver in the tableau filed by him, and marked "Receiver 42," first crediting the amount so due with a dividend of thirty-five per cent. (35%) upon the value of the certificate or certificates of stock held by such stockholder or stockholders, which value is also shown in said document "Receiver 42." I need not add that this recommendation applies only to those stockholders who may settle their accounts upon the basis suggested without litigation, and within a reasonable delay. As to stockholders who may resist the claims of the receiver, and who may not by prompt payment justify concessions, there is neither any legal nor equitable justification for any action by this honorable court entitling them to a dividend out of the assets of the association, except in due course of administration, and at the same time that nonborrowing stockholders receive their dividends. The general views above announced will be more clearly and exactly stated in the draft of order hereinafter given.

In conclusion, I respectfully recommend that this honorable court do, after due proceedings had, enter an order in this cause substantially as follows: The receiver in this cause is hereby authorized and instructed to deal with borrowing members of the defendant association at this stage of the proceedings as follows, to wit: First. He shall at once demand of all borrowing stockholders of the association the amounts due by them to the association for installments, interest, premiums, insurance, taxes, and any other charges and expenses, as per tableau prepared by the receiver, and marked "Receiver 42," filed in this cause on the 16th day of February, 1900, with the master's report, also filed on said day; and he shall accompany his demand with a copy of this order. Second. To all borrowing stockholders who shall, within sixty days after the date when said notice shall have been mailed or delivered to them, adjust and settle in cash their indebtedness to the association, the said receiver shall allow a credit to be imputed upon said indebtedness of thirty-five per cent. (35%) of the value of the certificate or certificates of stock owned by such borrowing stockholders, as per said tableau marked "Receiver 42," as aforesaid; said allowance or dividend of thirty-five per cent. (35%) being allowed to such stockholders as may so amicably adjust their indebtedness to the association in anticipation of the distributive share which may ultimately come to them as stockholders. Upon the payment of their indebtedness by borrowing members upon the basis aforesaid, all indebtedness of such borrowing members to the association shall be canceled and extinguished, and all notes or other securities of such stockholders held by the receiver shall be surrendered to them, but said stockholders shall retain their right to participate in any distribution of the assets of the association after a like dividend of thirty-five per cent. (35%) of the book value of the stock shall first have been paid to all other stockholders. Third. The said receiver is hereby authorized and instructed immediately after the expiration of said term of sixty days allowed to said borrowing stockholders to avail themselves of the method of amicable adjustment and

settlement aforesaid to proceed by foreclosure or other proceedings to collect all amounts due from borrowing stockholders who shall have failed to avail themselves of said offer; and said receiver is hereby authorized to employ all counsel necessary, and to incur all expenses necessary, for the purpose of collecting the claims due by said borrowing stockholders. The said borrowing stockholders against whom it may be necessary to institute any legal proceedings shall not be entitled to any advance payment on account of the distributive share of the stock held by them, but shall await a distribution of the assets of the association in due course of administration by this court. The court, however, reserves the right of separately considering and acting upon the case of any borrowing stockholder or stockholders who may not accept the adjustment of accounts between themselves and the association within said sixty days, and of rendering such order in each case as may be legal and equitable. Fourth. Whenever the receiver adjusts any of the indebtedness pledged by the New South Building & Loan Association to the American Trust & Banking Company of Atlanta, Georgia, as trustee, and in accordance with the terms of this order, he shall deposit to his credit, as receiver in this cause, in said American Trust & Banking Company of Atlanta, Ga., all sums which may be received by him in amicable adjustment of any such indebtedness, together with such further amount as will, together with the amounts realized from the amicable adjustment of said indebtedness, make a total of one hundred dollars ($100) for every one hundred and twenty-five dollars ($125) of indebtedness adjusted. It is further ordered that all costs of these proceedings be taxed against the trust fund in the hands of the receiver in this cause.

All of which is respectfully submitted.

The foregoing report was by the master submitted to all of the parties who appeared at the hearing before him, to wit, to the complainant and to the receiver, through Joseph P. Blair, Esq., their solicitor, who filed no exceptions to said report with the master, and to Mrs. Nonie M. Chase, through Solomon Wolff, Esq., her solicitor, who filed exceptions to said report with the master, which exceptions are, with this report, returned into court.

Jos. P. Blair, for complainant and the receiver.
Solomon Wolff, for Nonie M. Chase, a borrowing stockholder.

Decree upon the Report of Special Master E. B. Kruttschnitt, Filed Herein on February 16, 1900.

PARLANGE, District Judge. This cause having come on to be heard at this term upon the report of E. B. KRUTTSCHNITT, Esq., appointed special master in this cause, to whom was referred the petition of Johnston Armstrong, receiver herein, filed on October 25, 1899, by order of reference herein entered on October 31, 1899, and upon the petition of the said receiver to confirm said report, and upon the exceptions of said report by Mrs. Nonie M. Chase, a borrowing stockholder of the defendant association, and was argued by counsel, and thereupon, upon consideration thereof, it is now ordered, adjudged, and decreed that the report of said special master be, and it is hereby, approved and confirmed, except as to the form of the order recommended by the said master, which is modified as hereinafter provided. It is accordingly ordered, adjudged, and decreed that the receiver in this cause is hereby authorized and instructed to deal with borrowing members of the defendant association at this stage of the proceedings as follows, to wit: First. He shall at once demand of all borrowing stockholders of the association the amounts due by them to the association for installments, interest, premiums,

insurance, taxes, and any other charges and expenses, as per tableau prepared by the receiver, and marked "Receiver 42," filed in this cause on the 16th day of February, 1900, with the master's report, also filed on said day, with further stipulated interest on the amount borrowed until paid or settled as herein provided; and he shall accompany his demand with a copy of this order. Second. To all borrowing stockholders who shall, within 60 days after the date when said notice shall have been mailed or delivered to them, adjust and settle in cash their indebtedness to the association, the said receiver shall allow a credit to be imputed upon said indebtedness of 35 per cent. of the value of the certificate or certificates of stock owned by such borrowing stockholders, as per said tableau marked "Receiver 42" as aforesaid; said allowance or dividends of 35 per cent. being allowed to such stockholders as may so amicably adjust their indebtedness to the association in anticipation of the distributive share which may ultimately come to them as stockholders. Upon the payment of their indebtedness by borrowing members upon the basis aforesaid, all indebtedness of such borrowing members to the association shall be canceled and extinguished, and all notes or other securities of such stockholders held by the receiver shall be surrendered to them; but said stockholders shall retain their right to participate in any distribution of the assets of the association after a like dividend of 35 per cent. of the book value of the stock shall first have been paid to all other stockholders: provided, however, that each borrowing member so receiving said anticipatory dividend shall thereby obligate himself to return to the receiver, on demand, any excess of said dividend over the amount of dividend which on final liquidation shall be found to be due to the stockholders of the said association. Third. The said receiver is hereby authorized and instructed, immediately after the expiration of said term of 60 days allowed to said borrowing stockholders to avail themselves of the method of amicable adjustment and settlement aforesaid, to proceed by foreclosure or other proceedings to collect all amounts due from borrowing stockholders who shall have failed to avail themselves of said offer; and said receiver is hereby authorized to employ all counsel necessary and to incur all expenses necessary for the purposes of collecting the claims due by said borrowing stockholders. The said borrowing stockholders against whom it may be necessary to institute any legal proceedings shall not be entitled to any advance payment on account of the distributive share of the stock held by them, but shall await a distribution of the assets of the association in due course of administration by this court. The court, however, reserves the right of separately considering and acting upon the case of any borrowing stockholder or stockholders who may not accept the adjustment of accounts between themselves and the association within 60 days, and of rendering such order in each case as may be legal and equitable. Fourth. Whenever the receiver adjusts any of the indebtedness pledged by the New South Building & Loan Association to the American Trust & Banking Company of Atlanta, Ga., as trustee, and in accordance with the terms of this order, he shall deposit to his credit, as receiver in this

cause, in said American Trust & Banking Company of Atlanta, Ga., all sums which may be received by him in amicable adjustment of any such indebtedness, together with such further amount as will, together with the amounts realized from the amicable adjustment of said indebtedness, make a total of $100 for every $125 of indebtedness adjusted. It is further ordered that all costs of these proceedings be taxed against the trust fund in the hands of the receiver in this cause.

MINNESOTA & M. LAND & IMPROVEMENT CO. v. CITY OF BILLINGS et al.

(Circuit Court of Appeals, Ninth Circuit. October 21, 1901.)

No. 605.

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENTS—CONSTITUTIONALITY.
A city charter which authorizes the council, in making a public improvement, to create an improvement district which shall include only such property as will be benefited by the improvement, and to assess all or a portion of the cost of such improvement upon the property within the district in proportion to the area of the lots, and which also provides for a hearing to be given upon notice to consider objections to the assessment, is not in violation of the constitution of the United States, as depriving owners of their property without due process of law, by requiring the assessment to be made without reference to benefits.

2. SAME—CONSTRUCTION OF CHARTER—CREATION OF IMPROVEMENT DISTRICTS.
Under the charter of the city of Billings, Mont., as amended in 1893, authorizing the council to "create special improvement districts within the city, designating the same by number, and to change the boundaries of said district from time to time," the city has power to create districts commensurate with the improvement to be made; and, where the improvement will benefit the entire city, it may include the entire city in a single district, to be assessed for the cost of such improvement.

3. SAME—IMPLIED POWERS—EXTENSION OF DRAINS BEYOND CITY LIMITS.
A city which is authorized by its charter to construct sewers and drains, and to do all other acts which may be necessary for the promotion of health and to prevent the spread of contagious diseases within the city, has power, in constructing a general system of drainage, to extend the same to a proper outlet without the limits of the city.

4. SAME—OBJECTIONS TO SPECIAL ASSESSMENTS—WAIVER.
Where by the charter of a city the authority to levy assessments for improvements was limited to land which had been subdivided into lots and blocks, and also provided for a hearing at which objections to any improvement or assessment should be heard and considered, a lot owner cannot object to the validity of an assessment on his property because unplatted property was not assessed, when he made no objection on that ground before the assessment was made.

5. STATUTES—AMENDATORY ACTS—VALIDITY AND EFFECT.
Under the constitution of Montana, and Pol. Code, § 292, relating to the effect of amendments to statutes, an amendatory statute will be upheld, though it purports to amend a statute which had previously been amended, and where it covers the entire subject-matter the previous amendment is repealed by implication, if not in terms.[1]

Ross, Circuit Judge, dissenting.

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[1] Amendment of amended, repealed, or invalid statutes, see note to Fence Co. v. Boyce, 44 C. C. A. 590.

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

The appellant was the complainant in a bill brought against the appellees to restrain the city of Billings from enforcing a special tax which by an ordinance of the city had been levied and declared a lien against the complainant's property. The bill alleges that the appellant was the owner of a large number of lots within the town site of the city of Billings, and that that city, which is a municipal corporation of the state of Montana, created under and by virtue of an act of the legislative assembly of the territory of Montana entitled "An act to incorporate the city of Billings," approved March 10, 1885 (Laws 1885, p. 147), did, by resolution adopted and passed by its city council and approved by the mayor of said city on July 13, 1893, set apart, create, and establish as an improvement district, designated "Improvement District No. 1," all of the territory embraced within the corporate limits of the city, and that thereafter, by an ordinance adopted and passed by the said city council and approved by the mayor on July 14, 1893, entitled "An ordinance providing for the payment of the expense of improvements in improvement district No. 1, and prescribing the manner of proceeding therein," a tax of $2.70 was assessed upon each and every lot of the area of 25 by 140 feet within said improvement district No. 1, and a proportionate amount upon each fractional part of a lot, which ordinance proceeded to prescribe the manner of assessing, levying, and collecting said tax. The bill sets forth the steps taken to collect and enforce the payment of the tax, and alleges that the appellant's property is about to be sold in such proceedings. It alleges, also, that the tax was illegally and wrongfully assessed and levied upon the appellant's property; that said special tax was levied for the purpose of creating a fund to construct drainage ditches within the said district, and extending beyond the corporate limits of the city; that the construction of said ditches is not authorized by any provision of the charter of said city or any statute applicable thereto; and that the creation of said improvement district was beyond the corporate powers of said municipality. Upon the issues created by the answer, and upon the proofs taken, the court found the equities to be with the appellees, the defendants therein, and dismissed the bill.

E. N. Harwood, for appellant.

John B. Clayberg and M. S. Gunn, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

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

The validity of the proceedings whereby the special tax was levied by the city of Billings is challenged upon several grounds, one of which is that the statute which authorized the same violates the provision of the constitution of the United States which prohibits any state from depriving any person of property without due process of law, for the reason that it permits the exclusion of the consideration of the benefits of the improvement to the property which is to bear the burden thereof. The statute (section 440g) provides that the city council shall enact by ordinance that the expense of such improvements shall be paid by the entire district; each lot therein to pay by special assessment the quotient found by dividing the whole expense by the entire number of lots; the assessment on each lot to be proportioned to its area. But section 428 of chapter 22, as amended by the act of 1893, provides as follows:

"For the purpose of payment of expenses, including all damages and costs incurred in taking of private property, and of making any improvement

mentioned in the preceding sections, the city council may by resolution levy and assess the whole or any part not less than half of such expenses as a tax upon such property as they shall determine is specifically benefited thereby." Laws 1893, p. 130.

The same section makes further provision requiring the publication of the resolution and notice of the time when the city council shall meet to hear objections which may be made to the assessments. The meaning of the statute is that the city council is only authorized to assess and levy the expense of making the improvement as a tax upon such property as they shall determine is specifically benefited thereby, or, in other words, there must be in the creation of an improvement district a determination as to what property would be benefited thereby, and only such property may be included therein. This seems the reasonable construction of these provisions of the statute, but, if the provisions of section 440g are to be taken as standing alone and unaffected by any other section, they still do not create an assessment which is void, or which takes the property of the taxpayer without due process of law; nor is Village of Norwood v. Baker, 172 U. S. 269, 19 Sup. Ct. 187, 43 L. Ed. 443, authority to the contrary. That case involved the validity of a village ordinance which imposed upon the abutting property the entire cost of opening a street through the premises of a single property owner, whose land was condemned for the street. There had been no legislative determination as to what lands were benefited, no inquiry concerning the benefits by the village council, and no opportunity to the abutting owner to be heard on that subject. The court held that the exaction from the owner of the entire cost of the public improvement, in substantial excess of the special benefits accruing to him, was, to the extent of such excess, a taking of private property for public use without compensation. The limits of the doctrine of that case have been defined by the supreme court in the recent decision of French v. Paving Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 926,—a case which involved an assessment substantially identical with that which is under consideration in the case at bar. It was a case where the cost of a pavement was apportioned, as against the lots fronting thereon, under a charter which required that the total cost of the work should be apportioned as a charge against the abutting lots according to their frontage on the improvement, without reference to any benefits which might accrue to the property upon which the charge was made. It was contended, under the authority of Village of Norwood v. Baker, that such assessment was void; but the court held otherwise, quoting with approval Dill. Mun. Corp. § 752, as follows:

"* * * Whether the expense of making such improvements shall be paid out of the general treasury, or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency."

The decision in French v. Paving Co. clearly determines the present question adversely to the appellant's contention.

The appellant denies the authority of the city to include the whole city in a single improvement district. The statute under which the improvement was made and the tax was levied, as amended by section 1 of the act of 1893, authorizes the city council "to create special improvement districts within the city, designating the same by number, and to change the boundaries of said districts from time to time as the city council may deem expedient." Laws 1893, p. 121. This provision should be construed with reference to the object which was intended to be accomplished. It is contended by the appellant that because the word "districts" is used in the plural, and authority is given to create special improvement districts "within the city," and to designate the same by number, the statute can only be complied with by creating at least two districts, and that the inclusion of the whole city in a single district is absolutely without authority of law. We think the statute should not be thus narrowed in its construction. It was intended to confer the broad power of creating special improvement districts, commensurate with the improvement which was required to be made therein. The word "special" qualifies the improvement, not the district. The improvement in this instance affected the whole city. If it had affected but three-fourths of the city, it is not disputed that all the area so affected might have been included in an improvement district. It is but to pursue the same course of reasoning to reach the conclusion that by leaving out one block all the remainder of the city might be included in one improvement district. The statute undoubtedly was intended to authorize the city council to make whatever special improvement, within the scope of enumerated powers, might be deemed necessary for the welfare of the city, or any part thereof. It was to be a continuous power, to be exercised as occasion might arise, and to be adequate to the necessities of the case,—a power to include the whole city in one district, if necessary for an improvement which affected the whole, or to divide the city into smaller districts for other special improvements which might affect only the particular portions so included. But if, indeed, it were doubtful whether the statute so quoted authorized the inclusion of the whole city in one improvement district, all doubt would seem to be removed by section 440g, which was added to chapter 22 of the Compiled Statutes of Montana by the act of 1893, and which provides that:

"Whenever it is desired to create special improvement districts for the purpose of grading, paving, macadamizing, or otherwise improving any street, avenue, or alley, or any part thereof, or building, repairing, or improving any sewer, sidewalk, or gutter; or making any other public improvements, including street sprinkling and planting of trees * * * the city council shall by resolution designate the boundaries of such district which may be composed of all or any part of any block or blocks within said city."

So, also, under subdivision 47 of section 325 of the act, the power is given to the city council to establish at a suitable point without the limits of the city, in case of necessity, a hospital, to prevent the

spread of smallpox or other contagious or infectious diseases, "and do all other acts which may be necessary for the promotion of health and to prevent the spread of contagious diseases within the city"; and in subdivision 56 the power is given "to lay off the city in suitable districts for the purpose of establishing a system of sewerage and drainage." Section 440h makes provision for giving notice by publication of the proposed creation of a special improvement district, and the boundaries thereof, and furnishes opportunity to any person owning any real estate within such district to appear before the city council and show cause why the proposed improvement should not be ordered, and why the special improvement district should not be established. All of these requisites of the statute were complied with in the present case. The appellant made no objection to the creation of the improvement district or to the proposed improvement. Its first protest was recorded after the improvement had been completed, and proceedings had been instituted to compel the payment of the assessment.

Nor is any reason perceived why a portion of the improvement should not have been made on lands without the city. The scheme was to drain the city, and thereby to benefit the property thereof and to protect the health of its inhabitants. To accomplish this, it was necessary to extend the drainage beyond the city limits, in order to obtain a proper outlet. A city council undoubtedly has the power, if it be granted the authority to make such improvement, to make it efficacious, by extending it as far as necessary beyond the corporate limits. Dill. Mun. Corp. (4th Ed.) § 446; City of Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601.

It is further contended that the enforcement of the tax should be enjoined for the reason that no assessment was levied against a large portion of the land which lies within the improvement district, and that there was omitted therefrom land equal in area to about 2,400 lots. The authority to levy the assessment is by statute confined to land which has been subdivided into lots and blocks. The record shows that the property omitted from the assessment consisted almost entirely of public property of the city, the rights of way of railroads, and other land which had not been platted, of which latter the appellant itself was the owner of an area equal to 261 lots. The record does not convince us that property within the district was excluded from the assessment which ought to have borne its proportion of the burden of the improvement, but, if it were, the time to object to its omission was prescribed by section 4400. The objection which is interposed by the present suit comes too late.

The appellant contends that the city of Billings never acquired the right to avail itself of the authority to create special improvement districts, or to order the improvement which was made in this case; for the reason that it was never reincorporated under the provisions of chapter 22, div. 5, Comp. St. Mont., and the amendment thereto. The city had been incorporated under the act of March 10, 1885, entitled "An act to incorporate the city of Billings." Laws 1885, p. 147. Under that charter it had no express

authority to make the improvement, or to levy the special tax which is here complained of. On March 10, 1887, a general statute was enacted, entitled "An act relating to the formation of municipal corporations," which became chapter 22 of the Compiled Statutes of Montana, and consisted of sections numbered 1 to 126, inclusive. Section 78 of that act authorized any city or town which had been incorporated by special charter to abandon its organization, and reorganize under the provisions of the act, by pursuing the course therein prescribed. Section 79 prescribed the course, and provided that the proceedings should be initiated upon the petition of 200 citizens, residents, freeholders, and qualified electors, and contained the provision that "all the requirements of this act as to notice of the election, the appointment of judges and clerks thereof, the returns of the election and the canvassing of the votes given, shall be complied with." At an extra session of the legislature convened in August, 1887, section 79 was amended. The amended section was set forth in full, and the amendment consisted in omitting from the section the requirement that the petitioners be freeholders. In other respects it remained as it was before the amendment. The next legislation on this subject was in 1889, by an act entitled "An act to amend chapter XXII., fifth division, of the Compiled Statutes of Montana, relating to municipal corporations, and the amendments thereto, approved September 14, 1887." Laws 1889, p. 178. Section 79, as originally embodied in chapter 22, was so amended as to provide as follows:

"The common council or board of aldermen may at any time order an election to be held at which the question of reincorporation under this act shall be decided. If a majority of the qualified voters, as defined by this act, shall vote in favor of reincorporation of the city or town, under the provisions of this act, they shall thereupon be incorporated hereunder in all respects and subject to all the provisions of this act as if originally incorporated hereunder, all the requirements of this act as to notice of the election, the appointment of judges and clerks thereof, the returns of the election, and canvassing the votes given, shall be complied with."

The appellant directs attention to the fact that the act of 1889 expressly repeals certain sections of the previous statutes relating to municipal corporations, but does not expressly repeal the amendment of the extra session of 1887, nor does it contain any general repealing clause, and contends that the amendment of 1887, not being in direct terms amended or repealed, remains in force, and that the city of Billings could not become reincorporated upon a proceeding instituted by the common council, but could only do so upon the petition of 200 citizens, residents and qualified electors, and in the manner prescribed by the amendment of 1887. We do not so construe the act. We think there can be no question that the act of 1889 expresses the legislative will upon the whole subject of the preceding legislation. Section 292 of the Political Code of Montana provides:

"Where a section or a part of a statute is amended it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment."

The statute but expresses the rule that would obtain in its absence,—that an amendatory statute will be upheld, though it purport to amend a statute which has already been amended. Com. v. Kenneson, 143 Mass. 418, 9 N. E. 761; Wire Co. v. Boyce, 44 C. C. A. 588, 104 Fed. 172; Heinze v. Mining Co., 46 C. C. A. 219, 107 Fed. 165. From and after the adoption of the amendment of 1889, the whole of the existing law concerning the method of reincorporating municipal corporations is embodied in the section thus amended. The method thereby prescribed was substantially followed in the case of the city of Billings. Its right, therefore, to avail itself of the powers conferred upon such reincorporated cities, cannot be assailed. We have discussed the question as if it were one that the appellant is entitled to raise in the present suit. The decisions, however, seem to be unanimous that the question can only be raised by the state itself upon quo warranto or other direct proceedings, and that the existence of the corporation, or its reincorporation under a new statute, cannot be questioned collaterally. Cooley, Const. Lim. (5th Ed.) p. 311; Mullikin v. City of Bloomington, 72 Ind. 161; Speer v. Board, 32 C. C. A. 101, 88 Fed. 749; Troutman v. McCleskey (Tex. Civ. App.) 27 S. W. 173; State v. Town of Dover, 41 Atl. 98.

We find no error in the decree of the circuit court. The decree will be affirmed.

ROSS, Circuit Judge, dissents.

In re NOVAK.

(District Court, N. D. Iowa, Cedar Rapids Division. December 3, 1901.)

BANKRUPTCY—POWERS OF COURT—REDEMPTION FROM SALE OF REALTY.

A court of bankruptcy has no power to grant leave to a creditor of a bankrupt to redeem from a sale of real estate made by the trustee, under an order of the referee, nor is it material that such creditor is the wife of the bankrupt who also claims an interest in the property, since such interest, if any, would not be affected by the sale.

In Bankruptcy. On certificate of referee with respect to ruling on motion of Barbara Novak for leave to redeem from sale of realty by trustee. See 111 Fed. 161.

Remley & Ney, for Barbara Novak.
Ranck & Bradley and S. H. Fairall, for trustee.
W. J. Baldwin, pro se.

SHIRAS, District Judge. The record in this case shows that the trustee, under the order of the referee, advertised for sale, at public auction, 30 feet off the east side of lot 7, block 59, in Iowa City, as part of the assets of the bankrupt estate. At the sale the property was bought by W. J. Baldwin, acting as attorney for some one or more of the creditors of the estate, the sale taking place October 26, 1901, and the sum bid being $640, the purchaser assuming the payment of the taxes on the property, which amount to $60 or there-

abouts. After the sale had been made, Barbara Novak, the wife of the bankrupt, a creditor of the estate, and a claimant of an interest in the realty, filed before the referee an application for leave to redeem from the sale, offering to pay for that purpose the sum of $728, so as to cover the costs connected with the proceedings. The referee held that he had no right to allow the redemption prayed for, and the matter has been certified to this court for its consideration. It appears that the parties endeavored to reach an arrangement by which Mrs. Novak would be permitted to take the property by paying a named sum, but this arrangement was not carried out, the parties disagreeing over the terms. This matter was gone into in the testimony before the referee, but without result, and, as already stated, the referee held that the court could not award a right to redeem the property to Mrs. Novak, and this presents the only question which can be considered by this court; for, if it be true that Mrs. Novak does not have the right to redeem from the sale, then she has shown no ground enabling the court to deprive the purchaser at the sale of the rights which he then acquired.

The title of the bankrupt in this property had passed to the trustee, and upon the sale by the latter no right of redemption existed in favor of the creditors of the estate. If it be the fact that Mrs. Novak owns the realty or an interest therein, such interest would not pass by the sale of the title of the trustee, but the ownership of an interest by Mrs. Novak does not give her a right to redeem from a sale of the interest of the bankrupt. That interest, whatever it may be, has passed to the purchaser at the sale, and no ground is perceived upon which it can be held that the court can compel this purchaser to permit Mrs. Novak to take the interest upon payment of any sum, by way of redemption or otherwise. The case may have elements of hardship in it, but, if such exist, they do not confer a right upon the court to deprive the purchaser at the sale of the rights he then acquired.

The ruling of the referee is therefore affirmed.

In re BROWN.

(Circuit Court, E. D. Missouri, E. D. November 29, 1901.)

BANKRUPTCY—INVOLUNTARY PETITION—NUMBER OF PETITIONERS REQUIRED.

Under Bankr. Law 1898, § 59d, where it appears from the answer to a petition filed by a single creditor that there are twelve or more creditors, the petition must be dismissed unless at least two others join therein; it is immaterial that the majority are creditors for merely nominal amounts, or that they are induced to refuse to join in the petition through the solicitation of the debtor.

In Bankruptcy. Hearing on involuntary petition.

Paul F. Coste, for petitioner Franklin Bank.
E. C. Lackland, for Brown.

ROGERS, District Judge. On the 25th of June, 1901, the Franklin Bank, a corporation of the city of St. Louis and state of Missouri,

filed its petition in bankruptcy against Benjamin Brown, and, after alleging the cause of bankruptcy, further averred that the creditors of the said Benjamin Brown are less than twelve in number. On the 19th of July the said Benjamin Brown answered, denying the allegations of bankruptcy, and further averring that his creditors were more than twelve in number, setting forth in his answer a list of thirteen creditors, with their addresses, and the amounts which he severally owes them. Proof was heard, and it appeared on the trial that one of his creditors, W. H. Wellpot, has assigned his claim, and his assignee has since joined in the petition. It also appears from the proof that H. W. Eggers, another creditor of his, claims that he is not a creditor at all; but, assuming that such is the case, there are still twelve creditors of the bankrupt, including the petitioning creditor.

It was urged on the trial that, inasmuch as the proof developed the fact that the bankrupt had solicited the other creditors not to unite in the petition in bankruptcy, he was guilty of collusion, and he should therefore be adjudicated a bankrupt, without reference to the number, inasmuch as the creditors, with the exception of plaintiff and one or two others, are creditors for mere nominal sums. A complete answer to this is that the petitioning creditor has also solicited nearly all of the creditors to join in the petition, and offered to take an assignment of their claims or to pay them. If one party has the right to solicit the creditors to unite in the petition, the court can see no reason why the bankrupt may not solicit them not to do so, and therefore this contention, the court thinks, is not tenable. It is true that most of the claims of the creditors are for mere nominal sums, but Bankr. Law, §§ 59b, 59d, make no discrimination as to the amounts which creditors may hold. If the creditors are more than twelve, there must be three petitioning creditors, whose claims amount, in the aggregate, to $500 or over, and this without reference to what the amounts of the claims of the other creditors may be.

The case serves to illustrate what may be fairly regarded as a defect in the statute; but the courts do not make the law, they enforce it.

The petition will be dismissed.

In re SIEGEL-HILLMAN DRY GOODS CO.

(District Court, E. D. Missouri, E. D. December 4, 1901.)

1. BANKRUPTCY—EQUITY POWERS OF COURT—ADJUSTMENT OF EQUITIES BETWEEN CREDITORS.

A district court sitting in bankruptcy can exercise the full powers of a court of equity for the ascertainment and enforcement of the rights and equities of the various parties interested in the bankrupt estate, and the adjustment of equities between creditors arising out of the provisions of the bankruptcy act is peculiarly within the rule requiring the exercise of such powers.

2. SAME—SURRENDER OF PREFERENCES.

A bank held notes of a corporation, indorsed before delivery by a partnership, which thereby became liable as a joint maker. A short

time before the corporation became bankrupt, and while insolvent, it made a payment on the notes, which was received by the bank in the usual course of business, and without notice, actual or constructive, of the corporation's insolvency. After the bankruptcy the indorser paid the remainder due on the notes. Both the bank and the partnership held other large claims against the bankrupt estate. *Held*, that if the bank was required, under the provisions of the bankruptcy act, to surrender the payment received from the corporation as a condition precedent to proving its remaining claims against the estate, the effect would be to leave the notes to that extent unpaid, and a subsisting liability not only of the estate, but also, in equity, of the partnership, as indorser, and that the court of bankruptcy, in the exercise of its power to adjust the equities between such creditors, would transfer the obligation to surrender the amount of such payment from the bank to the partnership, as a condition to the proving of its remaining claims; the circumstances of the particular case being such that the rights of general creditors would not be affected thereby.

8. SAME—PROOF OF CLAIM BY INDORSER.

An indorser of notes of a bankrupt given to a bank, who pays the same after the bankruptcy, thereby extinguishing the claim of the bank as a creditor of the estate, cannot be required, as a condition precedent to the proving of his claim on such notes, to surrender to the trustee an amount paid by the bankrupt while insolvent, and a short time before the bankruptcy, in full satisfaction of other notes given to the bank as a separate transaction, although the claimant was also indorser on such notes, where the payment was received under such circumstances that it could not be recovered from the bank.

In Bankruptcy. On exceptions to finding and ruling of referee with respect to claims of the Fourth National Bank of St. Louis and of F. Siegel & Bro.

Sale & Sale, for Bank.
Abbott & Edwards and David Goldsmith, for trustee.
Stewart, Cunningham & Eliot, for F. Siegel & Bro.

SHIRAS, District Judge. From the record certified to by the referee in this case, it appears that the Siegel-Hillman Dry Goods Company, a corporation created under the laws of the state of Missouri, was on the 6th of February, 1900, adjudged to be bankrupt, upon a petition filed by creditors under date of December 30, 1899. On March 7, 1900, the Fourth National Bank of St. Louis presented and secured the allowance of a claim in the total sum of $35,246.56, represented by several promissory notes of the corporation; and F. Siegel & Bro. on the same date secured the allowance of several claims, amounting in all to the sum of $32,287.54. Subsequently the trustee filed before the referee petitions praying for an order setting aside the allowance of these claims, mainly on the ground that the parties had received preferential payments from the bankrupt after the date of its insolvency, which they had not accounted for, and upon the hearing before the referee the facts were shown to be as follows: The claim proven up by the Fourth National Bank was for money loaned the bankrupt company, and was evidenced by six promissory notes (five for $5,000 each, and one for $10,000) executed by the bankrupt, and indorsed by B. Hillman and H. A. Loeb, who were officers of, and stockholders in, the corporation. It further appeared that during the month of De-

cember, 1899, there had been paid in money to the bank by the dry goods company sums aggregating $14,600, which were applied in part payment of other notes, amounting to $25,000, held by the bank, and which were indorsed by B. Hillman, H. A. Loeb, L. Regenstein, and F. Siegel & Bro.; these payments being all made after the actual insolvency of the corporation, but while it was yet conducting its business; the fact of insolvency being unknown to the bank. Under these facts the referee entered an order to the effect that unless the bank paid to the trustee, within 30 days, the sum of $14,600, the claim of the bank should be expunged and disallowed, but, if repayment of the sum named should be made, then the claim should be allowed in the sum of $49,846.56. With respect to the claims allowed in favor of F. Siegel & Bro., it appears that they embrace a claim of $4,142.75 for goods sold the bankrupt company; a claim of $1,869.67 for rental paid by Siegel & Bro. to the lessors of the premises occupied by the bankrupt company, who held under an assignment of a lease originally executed to Siegel & Bro., and by them assigned to the company; of a claim of $2,792.30 for taxes paid by Siegel & Bro., assessed against the property embraced within the lease assigned as above stated; of a claim for $17,609.33 moneys paid by Siegel & Bro. to the Corn Exchange Bank of New York in the month of January, 1900, to take up notes held by that bank, executed by the bankrupt company, and indorsed by Siegel & Bro.; and of a claim for $10,535.41 for moneys paid on February 21, 1900, by Siegel & Bro. to the Fourth National Bank of St. Louis, to take up two notes, of $5,000 each, and a further note of $5,000, on which was due the sum of $400, all executed by the bankrupt company, and indorsed by Siegel & Bro. Upon the hearing the referee found and held that the claim for the rental paid, amounting to $1,869.67, was not a provable claim against the estate, in that it was rent accruing for the period from January 12, 1900, to February 1st, covering a period when the premises were not in the possession of the bankrupt company, and in that the trustee never occupied the premises and never assumed the lease. The referee further found that after the insolvency of the company it had paid to Siegel & Bro. sums aggregating $5,219.63, and therefore ordered that, unless this sum should be repaid to the trustee within 30 days, the entire claim should be disallowed, but, if this amount should be repaid to the trustee, then the claim would be allowed in the sum of $40,811.65, which amount includes all the items of the original claims, except that for rental. The claimants and the trustee, also, except to the ruling and order, and the several matters thus presented have been certified to this court for its decision; Siegel & Bro. claiming that the referee erred in expunging the claim based upon the rental paid, and in holding that the payment of the sums aggregating $5,219.63 were preferential, and must be repaid as a condition to the allowance of any claim in their behalf; and the trustee claiming that the referee erred in refusing to find that Siegel & Bro. were the parties benefited by the payments to the Corn Exchange Bank and the Fourth National Bank of St. Louis, and in refusing an order requiring

the repayment of these amounts to the trustee as a condition to the allowance of any claim on behalf of Siegel & Bro.; and the Fourth National Bank claiming that it was error to hold it responsible for the repayment of the $14,600, instead of placing this obligation on Siegel & Bro.

This court, sitting in bankruptcy, can exercise the full powers of a court in equity for the ascertainment and enforcement of the rights and equities of the various parties interested in the estate of the bankrupt company. So far as the questions now presented are involved, the parties interested therein are the general creditors, represented by the trustee, the Fourth National Bank, and Siegel & Bro. The attention of counsel, in their argument, has been mainly devoted to the questions arising on the ruling of the referee with respect to the payment of the sum of $14,600 to the Fourth National Bank upon the notes for $25,000 indorsed by Siegel & Bro.; it having been held by the referee that these payments were preferential, and that the bank must repay them to the trustee, or be precluded from proving up its claim against the estate. It is not questioned that in fact these payments, aggregating $14,600, were all made after the insolvency of the company, and therefore the trustee, representing the general creditors, has the right to insist that the one receiving the preference shall not be allowed to further participate in the distribution of the estate, unless the preference received shall be surrendered, as required by clause "g" of section 57 of the bankrupt act. The general creditors, however, in cases wherein the preferential payments, as in this case, were made in the ordinary course of business, and without knowledge on part of the creditor of the insolvency of the debtor, are not entitled to demand the repayment of the money. Under these circumstances, the preferred creditor has the option given him of surrendering the preferences received, and then sharing in the estate, or of retaining the preference, and being debarred from proving his claim. The equity and right of the general creditors consist in securing one or the other of these results, to the end that the shares or dividends coming to them shall be increased either through the addition to the assets of the estate of the sum surrendered, or, if the preferential payment is not surrendered, then by means of lessening the amount of provable claims. While this right of the general creditors must be observed and be fairly protected, yet it does not prevent the court from determining in each case what may be the equities of parties interested in the same claims, and upon which one rests the ultimate duty of surrendering a preference as a condition to the allowance of a further claim against the estate. In the present case it is shown that the Fourth National Bank loaned to the bankrupt company the sum of $25,000 upon its notes secured by the indorsement of Siegel & Bro. Upon these notes during the month of December, 1899, there was paid to the bank by the maker of the notes sums aggregating $14,600. Subsequent to the initiation of the proceedings in bankruptcy Siegel & Bro. paid to the bank the balance due on the notes for $25,000, and the payment thus made forms a large part of their claim against the estate.

If the bank had not received the payments of $14,600, it would have held Siegel & Bro. for the entire sum due on the notes for $25,000; and, as Siegel & Bro. are shown to be solvent, there can be no reasonable doubt that they would have paid the entire amount to the bank, instead of the balance left after deducting the $14,600 received by the bank. In that event they would have had the right to prove up the entire amount of the notes against the estate, and the result would have been that the bank would have been paid the full amount of the notes by Siegel & Bro. and the latter would have the right to prove up the entire amount as a claim against the estate. If the bank is now compelled to repay the $14,600 received and applied in part payment of the notes on which Siegel & Bro. were liable, one of two results must follow: The bank must be deprived of the difference between the amount and the dividend received hereafter thereon, or else it must be held that the bank can recover from Siegel & Bro. the amount of this loss. Is there any good reason why, as between the bank and Siegel & Bro., the loss should fall on the former? The facts show that the bank extended the credit of $25,000 to the bankrupt company on the security afforded by the indorsement of the notes by Siegel & Bro. The latter were absolutely bound to the bank for the payment of the entire sum, but the entire amount thereof was not demanded by the bank when payment was made them by Siegel & Bro., for the reason that it had received from the maker of the notes the sum of $14,600. It now appears that under the provisions of the bankrupt act these sums must be surrendered, or the bank will be debarred from proving up its claim. This situation is not caused through any fault or by reason of any act on the part of the bank. When these payments were made the dry goods company was carrying on its business in the usual manner, and the bank had no notice, actual or constructive, of its insolvent condition. Siegel & Bro. were relieved from the payment of the full amount of the notes indorsed by them upon the assumption that the bank had received part payment thereof from the maker of the notes. It now appears that the sums so received by the bank cannot be retained by the bank without causing the forfeiture of the right to prove up its other indebtedness against the estate. In equity, moneys thus received will not be deemed to be a payment upon the debt. There can be no question that, if the bank should now surrender the $14,600 received by it, it can prove up this amount as a debt due it from the dry goods company. In other words, if the bank is compelled to surrender this money to the trustee, the debt due the bank from the dry goods company will not have been paid or discharged; and if, under such circumstances, the maker of the notes is bound, why is not the surety thereon equally bound? No good reason is perceived why the surety should be released from liability for the unpaid portion of the debt evidenced by the notes indorsed by the surety, if the circumstances are such that the maker of the notes is still liable. It certainly would be most inequitable to hold that the debt due the bank has been discharged by the payment to it of a sum which by the provisions of the bankrupt

act it is now compelled to surrender back to the estate, or else to forfeit all right to a share of the estate as dividends upon the other claims it holds against the bankrupt. If, in order to secure a dividend on the claims due it, the bank is now compelled to surrender the moneys received, then in equity it must be held that the moneys so received and surrendered did not pay or discharge the debt due the bank, but the same will continue to be due and enforceable against the parties originally liable therefor. Bartholow v. Bean, 85 U. S. 635, 21 L. Ed. 866. This being the situation, it is thus made to appear that Siegel & Bro. are the parties who, as between themselves and the bank, are ultimately liable to account for any portion of the $25,000 debt due the bank. In other words, if the bank, in obedience to the order made by the referee, should surrender to the trustee the $14,600 received from the dry goods company, then in equity it would be entitled to enforce payment of this sum from Siegel & Bro. This money was paid to and received by the bank for the common benefit of itself and of Siegel & Bro., in that the payment thereof was supposed to defray so much of the indebtedness to the bank, and thereby relieve Siegel & Bro. from liability therefor. It appearing, however, that the circumstances are such that the bank, without fault on its part, is under obligation to surrender the money to the trustee, thus reviving its claim against the dry goods company, no good reason, either at law or in equity, is perceived why the claim of the bank is not also revived against all the parties originally liable to it. The evidence shows that Siegel & Bro. were not named as payees of the notes given to the bank, but wrote their names on the notes before the delivery thereof to the bank, and became practically joint makers thereof, under the rule recognized in this state. Powell v. Thomas, 7 Mo. 440, 38 Am. Dec. 465; Otto v. Bent, 48 Mo. 23; Cahn v. Dutton, 60 Mo. 297. Holding, then, that, in case the bank should surrender the $14,600 received by it to the trustee, the claim of the bank for that amount would be revived against Siegel & Bro., as well as against the dry goods company, is it not within the power of the court, acting as a court of equity, to make such orders in the premises as will settle and enforce the rights of the bank, as well as those of the trustee, and thus save all further litigation and expense between the parties? The power of the court of equity in such cases is well stated in Riddle v. Mandeville, 5 Cranch, 322, 3 L. Ed. 114, wherein Mr. Chief Justice Marshall, speaking for the court, said:

"But the real questions in the case are understood to be whether the plaintiffs, as indorsees of a promissory note, have a right, under the laws of Virginia, to receive its amount from the indorser, on the insolvency of the maker; whether the defendants, as the original indorsers of the note, are ultimately responsible for it; and whether equity will decree the payment to be immediately made, by the person ultimately responsible, to the person who is actually entitled to receive the money. * * * The maker having proved insolvent, the plaintiffs have a legal right to claim payment from McClenachan, and, on making that payment, McClenachan would be reinvested with all his original rights in the note, and would be entitled to demand payment from Mandeville & Jameson. If there were twenty successive indorsers of a note, this circuitous course might be pursued, and by the time

the ultimate indorser was reached the value of the note would be expended in the pursuit. This circumstance alone would afford a strong reason for enabling the holder to bring all the indorsers into that court which could in a single decree put an end to litigation. No principle adverse to such a proceeding is perceived. Its analogy to the familiar case of a suit in chancery by a creditor against the legatees of his debtor is not very remote. If an executor shall have distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees. The creditor has no action at law against the legatees. Yet it has never been understood that the creditor is bound to resort to his legal remedy. He may bring the executor and legatees both before a court of chancery, which court will decree immediate payment from those who are ultimately bound. * * * The right of the executor, however, may, in a court of equity, be asserted by the creditor; and, as the legatees would be ultimately responsible for the debt, equity will make them immediately responsible."

The ruling in this case justifies the holding that in cases wherein a court of equity is charged with the distribution of an estate or a fund under its control, and has before it the several parties whose rights and interests are involved in the administration of the estate, it may, disregarding mere matters of form, but having regard to the substantial rights of all the parties, ascertain the ultimate relation and liability of the several parties, and base its decree thereon, thus avoiding the delay and expense which would be caused if the parties were remitted to the pursuit of their legal rights without aid from a court of equity. Cases in bankruptcy, such as that now before the court, are peculiarily within this rule, and call for the exercise of the full powers of the court for the ascertainment and proper enforcement of the equities of the parties; for in no other proceeding can these equities be so well determined and protected as in the bankruptcy proceedings, wherein the court is called upon to enforce the provisions of the act, which provisions largely control the rights of the parties. Viewing the question now under consideration in this light, there seems to be no good reason why the court cannot adjudge the rights and equities between the Fourth National Bank and Siegel & Bro., growing out of their connection with the indebtedness evidenced by the notes on which the bankrupt company and Siegel & Bro. were bound to the bank; and, it appearing that in fact Siegel & Bro. are equitably bound to the bank for the payment of the whole of this indebtedness, there is no good reason why, so far as these parties are concerned, the court should not now place the obligation to return the $14,600 on Siegel & Bro., rather than to place it on the bank, and then remit the bank to its right to recover the amount from Siegel & Bro. A decree to this effect will not affect injuriously the rights of the general creditors represented by the trustee. If the named amount of $14,600 is repaid to the trustee, it is matter of indifference to the general creditors by whom the repayment is made; and, if the sum is not repaid, then the right of the creditors consists in debarring the creditor, upon whom the duty of repaying the amount rests, from sharing in the estate. The conclusion reached on this branch of the case, therefore, is that the order made by the referee requiring the Fourth National Bank to repay the sum of $14,600 as a condition to being allowed to prove its claim must be set aside, and

in lieu thereof it must be ordered that Siegel & Bro. repay this amount, or be debarred from proving their claim against the estate.

The next question for consideration is that arising on the contention of the trustee that Siegel & Bro. should be required to pay to the trustee the sum of $20,000, being the total of the amounts paid to the Corn Exchange Bank by the bankrupt company within four months of the adjudication in bankruptcy, and after the actual insolvency of the dry goods company, and which payments discharged the notes of the bankrupt company discounted by the Corn Exchange Bank, and upon which Siegel & Bro. were sureties. In this transaction the Corn Exchange Bank was the real creditor of the dry goods company. The debt due the bank has been discharged in full, and the bank is not now a creditor of the bankrupt estate. The evidence does not show, nor is it claimed by the trustee, that a recovery could be had against the Corn Exchange Bank for the moneys paid it, for the reason that when the payments were made the bank did not have reason to know that the dry goods company was in fact insolvent. When payments are made to a creditor by an insolvent debtor, but the creditor does not know or have cause to know of the insolvency of the debtor, the trustee, representing the general creditors, cannot recover back the moneys thus paid; and the preferred creditor may retain the sum paid, provided he does not seek to further share in the distribution of the estate. In this case, therefore, as the Corn Exchange Bank does not seek to participate in the estate, it can rightfully hold the sums paid it; and there is no ground for holding that Siegel & Bro. should be subjected to the burden of paying to the trustee this amount of $20,000, as a condition to obtaining their share of the estate upon the indebtedness due them from the bankrupt company. No part of the sum in question was paid to or received by Siegel & Bro. True, they were benefited by the payments made to the bank, in that these payments discharged the debt upon which they were sureties; but it would be most inequitable to hold that a surety may be held accountable for moneys paid the principal creditor under circumstances enabling the latter to hold the sum received against the claims of the general creditors. Under the provisions of the bankrupt act, the sums paid to the Corn Exchange Bank were received by it under circumstances which do not entitle the general creditors to recover the same back again, and, the situation being such that the bank cannot be required to repay the amount received by it, certainly Siegel & Bro. cannot be required to pay the same, when they in fact never received a dollar thereof. The facts of the case do not bring it within the rule recognized in Re Schmechel Cloak & Suit Co. (D. C.) 104 Fed. 64, wherein it was ruled by Judge Philips that where a surety pays the claim, and then, availing himself of the right of subrogation, seeks to prove this claim against the estate, he must repay the sums received on the debt by the original holder thereof, as a condition to the allowance of the claim. In the case now before the court Siegel & Bro. are not seeking to be subrogated to the rights of the Corn Exchange Bank as the original owner of the note for

$20,000 upon which Siegel & Bro. were indorsers, and which notes were paid in full by the dry goods company. It is true that part of the claim filed by Siegel & Bro. consists of the sum of $17,500 by them paid to the Corn Exchange Bank to take up two notes (one for $10,000 and one for $7,500) executed by the dry goods company, and indorsed by Siegel & Bro.; but this payment was made after the filing of the petition in bankruptcy, and upon notes separate and distinct from those paid by the bankrupt company, and it certainly cannot be true that a surety will be debarred from proving up a claim for money paid in discharge of a debt owing primarily by the bankrupt, unless the surety pays to the estate all the moneys received by the original creditor since the insolvency of the debtor, and applied in payment of claims other than the one under which subrogation is sought by the surety claimant. It would certainly work great injustice if it should be held in cases wherein a surety pays up a claim in full, and thus in fact becomes a creditor of the original debtor for the sum thus paid, that he cannot prove the debt thus due him unless he repays to the trustee all sums received by the original creditor, amounting, perhaps, to many times the debt due the surety. Are not the rights of the general creditor sufficiently protected by holding that a surety is only required to account for the payments made on the particular claim upon which he was a surety, and not for all sums received by the original creditor? It is a question, upon which no opinion is now expressed, whether the clause of section 57 of the act, which provides that "whenever a creditor, whose claim against a bankrupt estate is secured by an individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor," can be held applicable to a case wherein a surety pays the debt owing by the bankrupt to a third party, and then seeks to prove the claim inuring to him by reason of the fact that he has paid a given sum of money for the use and benefit of the original debtor, or whether this clause is not to be confined solely to cases wherein the surety proves up the claim in the name of the original creditor, it being still the property of the latter, or possibly to cases wherein the surety relies upon the rights created by the note or other instrument evidencing the original debt, and therefore in fact places himself in the legal position occupied by the original holder of the instrument. If the surety does not seek to prove up the claim in the name of the original creditor, and does not seek to avail himself, by way of subrogation, of any advantages connected with the debt as it existed between the original creditor and the bankrupt, but simply pays the debt of the bankrupt, for which he was surety, and thus becomes in fact a creditor of the bankrupt for the sum thus paid, it certainly is a debatable question whether his rights are to be limited by the provisions of section 57, providing for subrogation, or whether the rights of the surety are not to be considered solely in connection with the debt upon which he is liable. There is equity in the holding that where a claim secured by an

indorser or accommodation maker is partly paid to the original creditor after the insolvency of the real debtor, and then the surety paying the balance seeks to prove up a claim against the estate for the amount paid by him, he should account for the sums paid on the claim after insolvency, as in that event the surety received the benefit of the sums thus paid on the debt for which he was surety; but surely it is not equitable to hold that his just claim, created by the payment of money for the benefit of the bankrupt, cannot be allowed him unless he accounts for all the sums which the original creditor would be held to repay in case he was the party in interest. The ruling of the referee on this proposition is therefore affirmed, as well as the rulings to the effect that the claim for rental paid by Siegel & Bro. is not provable in their behalf, and that the moneys paid them on the checks of the dry goods company, amounting to $5,219.63, must be deemed to be preferential payments, which must be surrendered before Siegel & Bro. can further share in the estate. These questions are fully dealt with in the opinion filed by the referee, and it is therefore sufficient to say that the conclusions reached therein by the referee are affirmed.

The case is therefore returned to the referee, with instructions to set aside the orders heretofore entered, and in lieu thereof to enter orders to the effect that the claim of the Fourth National Bank is allowed; that unless Siegel & Bro., within a time to be named in the order, repay to the trustee the sums of $5,219.63 and $14,600, they shall be debarred from proving or being allowed any claim against the estate, but, if they shall repay these sums to the trustee, then their claim, including the sums repaid, shall be allowed in full; and that the costs of this appeal shall be paid out of the estate in the hands of the trustee.

POND et al. v. UNITED STATES et al.

Circuit Court of Appeals, Ninth Circuit. October 7, 1901.)

No. 620.

1. UNITED STATES—ACTION ON BOND OF OFFICER—DEFENSES BY SURETIES.
   It is not a ground of defense by the sureties on the bond of a collector of internal revenue to an action for the recovery of the amount of defalcations of the collector that officers of the treasury department failed to notify the sureties of such defalcations until long after they acquired knowledge of them, and after the collector had become insolvent, both because Act Aug. 8, 1888 (25 Stat. 387), while making it the duty of the department to give such notice at once, expressly provides that a failure to do so shall not discharge the sureties, and for the further reason that under the general principles of law the government is not responsible to others for the laches or wrongful acts of its officers.
2. SAME—COLLECTOR OF INTERNAL REVENUE—LIABILITY ON OFFICIAL BOND.
   A collector of internal revenue is liable on his bond for any failure to account for public money or property in his hands, from whatever cause, unless it be the act of God or the public enemy; and it is no defense to an action on his bond, expressly conditioned, in accordance with the statute, for the faithful performance of the duties of the office by him-

self and his deputies, that the money sued for was embezzled by a deputy without the collector's fault or negligence.

3. SAME—ACTION ON COLLECTOR'S BOND—EVIDENCE.
The admission in evidence against a collector of internal revenue and the sureties on his bond of a statement of his accounts made up by a deputy as acting collector under an appointment made after the collector's suspension, even if erroneous, was harmless error, where the correctness of such accounts was proved by independent testimony, which was uncontradicted.

4. SAME.
A judgment against a collector of internal revenue and the sureties on his bond, conditioned that he would faithfully execute and discharge all the duties of his office according to law, account for and pay over all moneys which might come into his hands, and be responsible for the acts of his deputies, is justified by evidence showing that he received certain stamps from the government, for which he failed to account; and the measure of recovery is the face value of such stamps, as charged to him in his account. Such an action is not one for the conversion of property, but one for a breach of official duty, and is governed by the terms and conditions of the bond and the statutes which prescribe such duty; and the government is not required to prove that the stamps unaccounted for were sold, and the money received therefor, even though such fact is unnecessarily alleged in the complaint.

5. SAME—EFFECT OF STATE STATUTES.
A state statute (Code Civ. Proc. Cal. § 1502) providing that on the death of a defendant in a pending action the plaintiff must present his claim to the executor or administrator for allowance or rejection, and that no recovery shall be had in the action without proof of such presentation, is not made applicable by the conformity act to an action by the United States in a federal court on the bond of an officer, since laches is not imputable to the government, nor can its rights in a governmental matter, prescribed by its own statutes, be affected by state enactments.

6. SAME—BOND OF PUBLIC OFFICER—EFFECT OF SURETY'S DEATH.
The death of a surety on the bond of an officer of the United States does not relieve his estate from liability for a breach of the conditions of the bond occurring subsequent to his death, but during the term of office for which the bond was given, where it in terms binds the obligors and their several heirs, executors, and administrators.

7. SAME—ACTION ON OFFICER'S BOND—DISMISSAL AS TO ONE DEFENDANT.
The liability of the obligors in the bond of a federal officer is joint and several, and the erroneous dismissal by the court of an action on such bond, as against the executors of a deceased surety, does not invalidate a judgment subsequently rendered therein against each of the other sureties.

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

Rodgers, Paterson & Slack, for plaintiffs in error Pond and others.
S. F. Leib, for plaintiff in error Union Trust Co.
Marshall B. Woodworth, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This action was brought against Osca M. Welburn and sureties upon his official bond as collector of internal revenue for the First district of California. The condition of the bond is that:

"If the said Osca M. Welburn shall truly and faithfully execute and discharge all the duties of the said office according to law, and shall justly

and faithfully account for and pay over to the United States, in compliance with the orders and regulations of the secretary of the treasury, all public moneys which may come into his hands or possession, and if each and every deputy collector appointed by said collector shall truly and faithfully execute and discharge all the duties of such deputy collector according to law, then the above obligation to be void and of no effect; otherwise it shall abide and remain in full force and virtue."

The amount of the bond is $100,000. There were eight sureties upon the bond. One of them (William P. Dougherty) died March 14, 1894, within six weeks after Welburn assumed the duties of his office, and before any defalcation occurred therein. Another surety (James Thomas Murphy) died after the commencement of this action, and the Union Trust Company of San Francisco, having been appointed executor of the estate, was regularly made a party defendant. The cause was tried before the court without a jury. The case was speedily tried. The court promptly ruled upon all objections made, and at the close of the trial rendered a judgment in favor of the United States against each of the plaintiffs in error for the sum of $45,979.27 and costs of suit. The amount sued for was $41,030.33. The amount proven was $40,870.47. The balance of the judgment was for interest allowed under the provisions of section 3624, Rev. St. There are numerous assignments of error, nearly all of which are purely of a technical nature. We shall notice only those upon which counsel chiefly rely.

1. It is claimed that the court erred in striking out the third defense set up in the answer of the sureties, which, among other things, avers that for more than one year and a half prior to the 16th day of June, 1897, the plaintiff had full knowledge of all the facts and conditions which are alleged in the complaint as constituting a breach of the conditions of the bond; that the defendants had no knowledge thereof; that Welburn was financially responsible, and able to make good to the United States the deficit in his accounts; that the plaintiff had the means and opportunity to compel him so to do, but took no action in regard thereto; that defendants would have had like opportunity to compel him so to do if they had been informed as to the facts; that said plaintiff neglected and failed to notify the defendants of the facts, and did not inform these defendants of the failure of the said Welburn to account for and pay over the moneys received by him until long after Welburn's failure, and long after the defendant Welburn became insolvent and unable to pay any of his debts and liabilities; that by reason of the failure of the plaintiff to inform these defendants of the failure of Welburn to pay over and account for said moneys, and by reason of the insolvency of Welburn, these defendants have lost the opportunity to protect themselves as sureties by collecting from him the amounts which it is alleged he had so neglected and failed to account for and pay over. The ruling of the court in striking out this defense must be sustained by the express provisions of the statute of the United States "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 suits shall be brought against said

sureties upon said bonds," approved August 8, 1888, which provides that:

"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; * * * but a failure to give or mail such notice shall not discharge the surety or sureties upon such bond." 25 Stat. 387.

The ruling is also supported by the general principle of law, which is well settled, that "the government is not responsible for the laches or the wrongful acts of its officers." See authorities cited upon this subject under point 5.

In Hart v. U. S., 95 U. S. 316, 318, 24 L. Ed. 479, 480, the court said:

"Every surety upon an official bond to the government is presumed to enter into his contract with a full knowledge of this principle of law, and to consent to be dealt with accordingly. The government enters into no contract with him that its officers shall perform their duties. A government may be a loser by the negligence of its officers, but it never becomes bound to others for the consequences of such neglect, unless it be by express agreement to that effect."

2. It is also claimed that the court erred in striking out the fourth defense set forth in the answer of the sureties. This defense, briefly stated, is to the effect that one Norton, a deputy collector of internal revenue under Welburn, had embezzled the money claimed to be due and owing from Collector Welburn. In the face of the language of the bond itself, and of the provisions of section 3148, Rev. St., which declares that each internal revenue collector "shall, in every respect, be responsible both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done by any of the deputies while acting as such," it would seem that we ought to have been spared the time of investigating this assignment of error. The government, in accepting bonds from an officer, does not become an insurer to protect the sureties thereon against loss. The fact that a deputy steals or embezzles the public money, or stamps, which are the equivalent of money, under the charge of the collector, is wholly immaterial. The principal and his sureties are liable if the principal does not properly account therefor, no matter in what way, or by whom the same may have been taken, unless it be by the act of God or the public enemy. The general rule upon this subject is to the effect that public officers who are intrusted with public funds, and required to give bonds for the faithful discharge of their official duties, are not mere bailees of the money, to be exonerated by the exercise of ordinary care and diligence. Their liability is fixed by their bond. The fact that money is taken, embezzled, or stolen from them without any fault or negligence upon their part does not release them from liability on their official bonds. Bosbyshell v. U. S., 23 C. C. A. 581, 77 Fed. 945; U. S. v. Bryan (C. C.) 82 Fed. 290, 292; Bryan v. U. S., 33 C. C. A. 617, 90 Fed. 473, 53 L. R. A. 218; U. S. v. Zabriskie (C. C.) 87 Fed. 714, 718;

Smythe v. U. S., 46 C. C. A. 354, 107 Fed. 376, and authorities there cited; State v. Nevin, 19 Nev. 162, 164, 7 Pac. 650, 3 Am. St. Rep. 873, and authorities there cited.

3. It is claimed that "the court erred in allowing the statement made up by the subsequent collector acting after the suspension of Welburn to be admitted in evidence as binding Welburn, or proving any case against him." Thomas had been a deputy under Welburn. After Welburn's suspension he was appointed, under the provisions of section 3149, Rev. St., as amended by section 2 of the act of March 1, 1879 (20 Stat. 327), acting collector; and the statement to which objection was made was signed by him as "acting collector," and simply covers the official transactions of Welburn for the last quarter of his term of office. The record shows that when the objections were first made to the statement the court sustained them on the ground that Thomas could not "bind the collector as acting collector." The witness then testified that he was still a deputy, as acting collector, under Mr. Welburn's bond. The witness Thomas then gave independent testimony showing as a fact that the statement signed by him as acting collector was true. Thereupon the United States offered "the last quarterly account, having proved by the witness the fact that the accounts are proper," and the statement was then admitted against the objection of counsel. The testimony of Mr. Thomas made out a clear prima facie case. He was not cross-examined, and no testimony was offered by the plaintiffs in error in opposition thereto. It is therefore unnecessary to discuss the question whether the statement of the acting collector would of itself, independent of the testimony, be sufficient to bind Welburn and his sureties.

4. It is next claimed that "the evidence is insufficient to justify the findings, and the court erred in finding that the defendant Welburn received money aggregating $40,870.47, or any other sum of money, which he failed to account for and pay over to the United States." Counsel say that the utmost that the evidence proved or tended to prove is that said collector was charged with having received certain beer stamps which were not found in the office on examination by the subsequent acting collector; that there was no showing that such beer stamps were not afterwards turned over to the United States by said Welburn, nor was there anything showing, or evidence tending to show, that he had ever received any money for such stamps; that there is not a scintilla of evidence in the record to show that Welburn ever received any money which was not turned over. The testimony shows beyond controversy a deficit in the accounts of Welburn of stamps amounting to $40,340.69$^{8}/_{10}$. This is the face value charged against Welburn as so much money. These stamps were missing and unaccounted for by Welburn for the quarter ending June 29, 1897, when he was suspended. The stamps were not in the office. It is true that, in a certain sense, stamps are not money. But the stamps represented a money value, and were, in the debit and credit accounts kept by the government with Welburn, charged as so much money. The stamps were the equivalent of money. It was the official duty of

Welburn either to turn over the stamps to the government, or to pay it the face value thereof. He did neither. He was a defaulter, and the amount of his defalcation was clearly proved. Was not this sufficient to establish the fact that Welburn did not "truly and faithfully execute and discharge all the duties of the said office according to law," which was one of the conditions in his bond, and for a violation of which he and his sureties are liable? Counsel seem to think (at least, they so argue) that, in order to enable the government to recover upon the proofs, it was necessary for it to have brought an action against Welburn for damages for not returning the stamps, or for the value of the same, for having converted them, and contend that the action is distinctly brought for not performing his contract to pay over money which he had received for them. The argument of counsel is based upon a misapprehension of the contract made by the sureties; their contention in regard thereto being that there were two contracts of Welburn which the bond covered, viz. a contract that he would turn over all money which he had received from sales of stamps, and a contract that he would return all unsold stamps. They admit that a violation of either contract would render him and his bondsmen liable, but claim that a violation of one contract cannot be alleged, and recovery had upon proof that the other contract had been violated, and upon this statement seek to have applied the principle that a party cannot sue upon one cause of action, and defeat his adversary upon another. There is virtually but one contract, covering three conditions: (1) That Welburn should faithfully execute and discharge all the duties of his office according to law; (2) account for and pay over to the United States all moneys which may come into his hands; (3) to be responsible for the acts of his deputies. For a violation of either the bondsmen were liable. But counsel single out one of the averments in the complaint, viz.: "The said defendant Osca M. Welburn did, as such collector of internal revenue, collect, receive, and obtain possession of divers public moneys as aforesaid, the same being moneys derived through the sale by him, as such collector, of beer stamps, cigar and tobacco stamps, playing-card stamps, spirit stamps, special tax stamps, cigarette stamps, and from other sources arising from and connected with the internal revenue service of said district, amounting in all to the sum of $41,030.33,"—and contend that the action is based solely upon the ground that Welburn sold the stamps and received money for them, and that the proofs only show that he had received certain stamps which he failed to turn over or account for. What more was necessary? Was this not enough to hold him and his sureties liable under the provisions of the bond? There are several averments in the complaint alleging, among other things, that Welburn has not kept or performed the conditions of the bond; that he has not discharged the duties of the trust imposed upon him; that he has not complied with the rules, orders, and regulations of the secretary of the treasury, and has not paid over or accounted for all moneys belonging to the United States which came into his possession by virtue of his office, etc. It is not unusual, nor is it

improper, in transactions of this character, to make separate averments concerning the same transaction in different forms. It might have been more artistic to have alleged that Welburn received stamps of the value of so many dollars, and that he had failed to account therefor. It was unnecessary to have alleged that he sold them. It made no difference whether he sold them or received any money therefor, whether he embezzled them, or whether they were stolen by a deputy or a stranger. His innocence or his guilt is wholly immaterial. He is responsible in either event, and his sureties are liable, because it is so nominated in the bond. It was enough to prove that he received the stamps by virtue of his office, and had failed to properly account for them to the government. This is not an action for the conversion of personal property, but it is an action upon a bond of a public officer, and must be governed and controlled by the principles of law which apply to such bonds. It is well settled that a bond requiring a faithful performance of official duty is as binding upon the principal and his sureties as if all the statutory duties and official regulations of the office were inserted in the bond.

5. The next point urged by counsel is that "the court erred in overruling the objection that the claim sued on had not been presented to the executor of James T. Murphy." In support of their objection, counsel cite section 1502 of the Code of Civil Procedure of California, which reads as follows: "If an action is pending against the decedent at the time of his death, the plaintiff must in like manner present his claim to the executor or administrator, for allowance or rejection, authenticated as required in other cases; and no recovery shall be had in the action unless proof be made of the presentations required,"—and claim that it is applicable to this case, under the general principle that when the United States appears as a suitor it voluntarily submits to the law, places itself upon the same footing with other litigants, and is not entitled to remedies which cannot be granted to individuals. U. S. v. Beebee (C. C.) 17 Fed. 36; U. S. v. Barker, 12 Wheat. 559, 6 L. Ed. 728; U. S. v. Ingate (C. C.) 48 Fed. 251, 253; U. S. v. State Bank, 96 U. S. 30, 36, 24 L. Ed. 647. This general principle is well settled, but it is always qualified and limited by the rule that neither the statute of limitations nor laches will bar the government of the United States as to any claim for relief in a purely governmental matter. U. S. v. McElroy (C. C.) 25 Fed. 804; U. S. v. Southern Colorado Coal & Town Co. (C. C.) 18 Fed. 273; U. S. v. Belknap (C. C.) 73 Fed. 19, 20; U. S. v. Beebe, 127 U. S. 338, 344, 8 Sup. Ct. 1083, 32 L. Ed. 121; U. S. v. Insley, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968. In U. S. v. Adams (C. C.) 54 Fed. 115, the precise question here involved was presented. That was an action upon the official bond of one Kelly as United States marshal. The sureties, as a defense, averred that during the time the estate was in process of settlement the plaintiff was notified that said estate was being settled, and plaintiff was requested to present any claim which it might have against said Kelly; that the plaintiff failed and neglected to present any claim to the administrator of the estate;

that by reason of the carelessness and negligence of the plaintiff the preference and priority of payment of the United States (Rev. St. U. S. § 3466) was wholly lost, and the entire estate was distributed to other creditors, and defendants were prevented from exercising the right of subrogation; and they relied upon the same general principle for which the plaintiffs in error here contend. These averments in the answer were stricken out upon the ground that the facts therein stated, if true, constituted no defense to the action. The court, in the course of its opinion, said:

"The general rule that laches is not imputable to the government is essential to the preservation of the interests and prosperity of the public. It is founded upon public policy. Any other doctrine would be ruinous in the extreme. The government can only transact its business by and through its officers and agents, and its fiscal operations are so various, and its agencies and officers so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses if the doctrine of laches could be applied to its transactions. The supreme court of the United States has uniformly and repeatedly declared that, in a case like the present one, laches cannot be set up against the government. U. S. v. Kirkpatrick, 9 Wheat. 735, 6 L. Ed. 199; U. S. v. Van Zandt, 11 Wheat. 190, 6 L. Ed. 448; U. S. v. Nicholl, 12 Wheat. 509, 6 L. Ed. 709; Dox v. Postmaster General, 1 Pet. 318, 7 L. Ed. 160; Gibson v. Chouteau, 13 Wall. 99, 20 L. Ed. 534; Gaussen v. U. S., 97 U. S. 584, 24 L. Ed. 1009; U. S. v. Thompson, 98 U. S. 489, 25 L. Ed. 194; Steele v. U. S., 113 U. S. 129, 5 Sup. Ct. 396, 28 L. Ed. 952; U. S. v. Railway Co., 118 U. S. 126, 6 Sup. Ct. 1006, 30 L. Ed. 81."

In U. S. v. Railway Co., supra, the court said:

"It is settled beyond doubt or controversy, upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided, that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless congress has clearly manifested its intention that they should be so bound."

U. S. v. Insley, 130 U. S. 263, 265, 9 Sup. Ct. 485, 32 L. Ed. 968; Stanley v. Schwalby, 147 U. S. 508, 514, 13 Sup. Ct. 418, 37 L. Ed. 259; U. S. v. American Bell Tel. Co., 159 U. S. 548, 554, 16 Sup. Ct. 69, 40 L. Ed. 255; Id., 167 U. S. 225, 265, 17 Sup. Ct. 809, 42 L. Ed. 144.

The statute of California above quoted does not come within the provisions of section 914, Rev. St. U. S., relating to "the practice, pleadings and forms and modes of proceeding in civil causes."

In U. S. v. Thompson, supra, it was held that the United States, whether named in a state statute of limitations or not, is not bound thereby, and when it sues in one of its own courts such a statute is not within the provisions of the judiciary act of 1789 (1 Stat. 73), which declares that the laws of the states, in trials at common law, shall be regarded as rules of decision in the courts of the United States in cases where they apply. The state statute does not bar the United States from a recovery against the executor of the Murphy estate. As was said in U. S. v. Backus, 6 McLean, 443, Fed. Cas. No. 14,491:

"The exclusive jurisdiction given to the probate court, in the settlement of decedents' estates, cannot affect the claims of the government, however it may bear on private claims. The mode of proceeding in the probate court,

and the time given for the settlement of accounts, cannot regulate the claims of the government, nor affect the remedies given to it under its own laws. The demand in this case has been adjusted by the accounting department under the laws of congress, and there can be no obligation to present the account for adjustment to the probate court of Michigan. Such a rule of procedure would subject the action of the federal government to the regulation of a state government. The federal government being entitled to a priority over other creditors, by the enforcement of its demand no injustice is done to the general creditors. It could not have been contemplated by the legislature of Michigan that the law should apply to the general government as a creditor. Such a construction of the act is not required from its language. It is true, there is no exception in it, but the exception necessarily arises from the nature of the case. Executors are responsible under the laws of the state, but their liability attaches on the acceptance of the trust. The eighteen months given for the adjustment of accounts against the estate of the decedent relates to the remedy, and cannot apply to a demand of the federal government."

It follows from the views herein expressed that the ruling of the court upon this point was correct.

6. Finally it is claimed that the court erred in overruling the objections to the release of the executors of William P. Dougherty, thus putting the whole burden on the other defendants. The executors of the estate of Dougherty were released upon the admission of the United States attorney that the defalcation of Welburn did not occur until long after the death of Dougherty. In this ruling the court erred. The bond declares in express terms that the principal and sureties "are held and firmly bound unto the United States of America in the full and just sum of one hundred thousand dollars, moneys of the United States to which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators." In Hecht v. Weaver (C. C.) 34 Fed. 111, 112, Judge Deady, said:

"On a careful examination of the authorities, I have concluded that whenever the undertaking of the surety is of a definite period, as for the conduct of an officer during his term of office, or for the repayment of advances made to the principal in the bond until notice is given the obligee that his liability is terminated, the estate of the surety in the hands of his administrator is answerable for any default of the principal occurring after his death; and this is especially so where, as in this case, the surety bound himself, his 'heirs, executors, and administrators.' for the performance of his undertaking. Insurance Co. v. Davies, 40 Iowa, 469, 20 Am. Rep. 581; Green v. Young, 8 Greenl. 14, 22 Am. Dec. 218; Knotts v. Butler, 10 Rich. Eq. 143; Moore v. Wallis, 18 Ala. 458; Hightower v. Moore, 46 Ala. 387; Mowbray v. State, 88 Ind. 327."

See, also, U. S. v. Keiver (C. C.) 56 Fed. 422.

But this error of the court does not in any manner affect the liability of the other sureties on the bond, nor the separate judgments entered against them. The bond is joint and several. It could be enforced against one or all of the sureties. Code Civ. Proc. Cal. § 383; U. S. v. Lawrence, 1 Cranch, C. C. 94; Fed. Cas. No. 15,575; 15 Enc. Pl. & Prac. 116, and authorities there cited. "It is always proper to sue in one suit all the parties severally liable on the bond, to enforce the several liability of each." U. S. v. Tracy, 8 Ben. 1, Fed. Cas. No. 16,536. If the court had not dismissed the action as against the executors of the estate of Dougherty, the re-

sult of the judgments against the plaintiffs in error would have been precisely the same. But, inasmuch as the dismissal might result in depriving them of their right to contribution from that estate of its proportion of the indebtedness which the plaintiffs in error may be compelled to pay, the order of dismissal is hereby set aside.

The judgment against each of the plaintiffs in error is hereby affirmed, with costs.

ANDERSON v. COMPTOIS.

In re DUBOSE.

(Circuit Court of Appeals, Ninth Circuit. September 16, 1901.)

No. 632.

On Rehearing.

For former opinion, see 48 C. C. A. 1, 109 Fed. 971.

PER CURIAM. Upon a rehearing of this matter, and a consideration of the additional testimony introduced, we are of the opinion that the findings of fact and judgment heretofore entered herein are in all things correct, and are hereby reaffirmed, and the United States marshal for the Northern district of California is hereby directed to execute the judgment heretofore entered herein forthwith.

In re LEE GON YUNG (UNITED STATES, Intervener).

(Circuit Court, N. D. California. November 13, 1901.)

No. 13,176.

1. CHINESE EXCLUSION—PRIVILEGE OF TRANSIT—ACT OF 1888.

Section 8 of the Chinese exclusion act of September 13, 1888 (25 Stat. 478), which relates entirely to the privilege of transit across the territory of the United States in the course of a journey by Chinese persons to or from other countries, was independent legislation, not dependent, like section 1, on the ratification of the treaty then pending to become a law, and it became effective on its passage.

2. SAME—CONSTRUCTION OF TREATY OF 1894—VALIDITY OF REGULATIONS.

The treaty between China and the United States of December 8, 1894, provides (article 3, par. 2, 28 Stat. 1211) that "Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States, * * * subject to such regulations by the government of the United States as may be necessary to prevent said privilege of transit from being abused." The privilege had previously been exercised under regulations prescribed by the treasury department, the last of which prior to the treaty were promulgated September 28, 1889, and were in force when the treaty was ratified. *Held*, that effect of such provision of the treaty was to recognize the regulations then in force, and to agree to their continuance, and to such modifications as might be found necessary to prevent the privilege granted from being abused.

3. SAME—CONCLUSIVENESS OF COLLECTOR'S DECISION.

Under the regulations of the treasury department of December 8, 1900, relating to the transit of Chinese persons through the territory of the United States, and also by those of September 28, 1889, it is incumbent upon a Chinese person applying for the privilege of transit to sat-

isfy the collector of the port of his bona fide intention to make such transit; and on his failure to do so the collector may order his deportation, and his decision cannot be reviewed by the courts, but only by an appeal to the department.

On Application for Writ of Habeas Corpus.

E. J. Foulds and Earll H. Webb, for petitioner.
Edward J. Banning, Asst. U. S. Atty., for intervener.

MORROW, Circuit Judge. The petitioner alleges that he is unlawfully and unjustly detained and imprisoned by Alexander Center, general agent for the Pacific Mail Steamship Company, by virtue of an order of deportation made by the collector of customs for the port of San Francisco; that on or about the 1st of September, 1901, the petitioner purchased from the agent of the Pacific Mail Steamship Company at Hong Kong, China, passage from said last-mentioned place to the City of Mexico, paying therefor the sum of 168 Mexican dollars, and received a ticket for passage on the steamship Peru to the port of San Francisco, and an order upon the San Francisco agent of the said company for passage by rail from the said city of San Francisco, Cal., to the City of Mexico, which ticket and order he now has in his possession; that petitioner is not making application to enter the United States, but to pass in transit across the territory thereof, being a Chinese laborer on his journey across the territory of the United States from the foreign country of China to the foreign country of Mexico; that the collector of customs of the port of San Francisco has made the order of deportation alleged, and petitioner is now confined in the manner described, and will be deported and sent back to China, the country from whence he came, unless prevented by the order of this court. The return of Alexander Center is to the effect that he detains the petitioner at the port of San Francisco, and refuses to permit him to pursue his journey to the City of Mexico, under and by virtue of an order to that effect issued by the collector of the port of San Francisco. The United States has intervened, by the United States attorney, and alleges, among other things, that the collector of customs, after a careful and due investigation, has decided that he is not satisfied that the petitioner does intend in good faith to continue his journey, if permitted so to do, through the territory of the United States to the republic of Mexico, and for that reason has denied to the petitioner the privilege of further continuing his journey through the territory of the United States, and has ordered the petitioner deported to China, the country from whence he came. It is further alleged by the attorney for the United States that since the decision of the collector of customs and the order of deportation made by him as aforesaid, the petitioner has, through his counsel, appealed to the secretary of the treasury of the United States from such decision and judgment and order of deportation; that said appeal is now pending and undetermined; and that the court has no jurisdiction over the petitioner or the subject-matter of the proceeding. The petitioner has demurred to the return of Alexander Center and to

the intervention of the United States on the ground that neither the return nor the intervention state facts sufficient to justify the detention of the petitioner.

The action of the collector of customs is based upon the authority contained in the regulations governing passage of Chinese in transit through the United States, prescribed by the commissioner general of immigration and approved by the secretary of the treasury, dated December 8, 1900. These regulations were addressed to collectors of customs and all other officers charged with the enforcement of the Chinese exclusion laws, and provide as follows:

"Any Chinese person arriving at your port claiming to be destined to some foreign country and seeking permission to pass through the United States, or any portion thereof, to reach such alleged foreign destination, shall be granted permission for such transit only upon complying with the following conditions:

"(1) The applicant shall be required to produce to the collector of customs at the first port of arrival a through ticket across the whole territory of the United States (and to his or her alleged foreign destination according to the steamship manifest) intended to be traversed, and such other proof as he (or she) may be able to adduce, to satisfy the said collector that a bona fide transit only is intended, and such ticket and other evidence presented must be so stamped, or marked, and dated by the said collector, or such officer as he shall designate for that purpose as to prevent their use a second time; but no such applicant shall be considered as intending bona fide to make such transit only, if he (or she) has previously, on same arrival, made application for and been denied admission to the United States."

It is contended on behalf of the petitioner that these regulations are without authority of law, and therefore void, and of no effect. The attorney for the United States finds authority for the regulations in section 8 of the act of September 13, 1888 (25 Stat. p. 478). That section provides as follows:

"That the secretary of the treasury shall be, and he hereby is, authorized and empowered to make and prescribe, and from time to time to change and amend such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of the said treaty between the United States and the empire of China, the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles. And he is hereby further authorized and empowered to prescribe the form and substance of certificates to be issued to Chinese laborers under and in pursuance of the provisions of said articles, and prescribe the form of the record of such certificate and of the proceedings for issuing the same, and he may require the deposit as a part of such record of the photograph of the party to whom any such certificate shall be issued."

It has been questioned whether any part of the act of September 13, 1888, ever became a law. Section 1 of the act provided that from and after the date of the exchange of ratifications of the then pending treaty between the United States and the empire of China it should be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States, except as in the act thereinafter provided. The treaty here referred to was never ratified, and those sections of the act relating to the entry of Chinese into the United States, being dependent upon the ratification of the treaty, never became operative. Li Sing v. U. S.,

180 U. S. 486, 488, 490, 21 Sup. Ct. 449, 45 L. Ed. 634. But it has been held in several cases in the district and circuit courts that certain sections of the act, not being so dependent, became law upon the passage of the act. U. S. v. Jim (D. C.) 47 Fed. 431; In re Mah Wong Gee (D. C.) Id. 433; U. S. v. Chong Sam, Id. 878; U. S. v. Lee Hoy (D. C.) 48 Fed. 825; U. S. v. Gee Lee, 1 C. C. A. 516, 50 Fed. 271; U. S. v. Long Hop (D. C.) 55 Fed. 58. As section 8 of the act in question does not relate to the entry of Chinese persons into the United States to remain and become a part of the population of the country, but to the privilege of transit across the territory of the United States in the course of a journey to or from other countries, I am of the opinion that the section did not depend upon the ratification of the treaty to become a law, but was independent legislation on the part of congress. To the same effect, see the opinion of Judge De Haven in the matter of the application of Fok Young Ho for a writ of habeas corpus, given on October 23, 1901. But I am of the further opinion that the authority for the regulations under which the collector of customs acted in this case may be found in the second paragraph of article 3 (28 Stat. 1211) of the treaty between this country and China entered into on December 8, 1894, which reads as follows:

"It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the government of the United States as may be necessary to prevent said privilege of transit from being abused."

It will be observed that this paragraph of the treaty provides for the continuance of the privilege of transit. It was a privilege that had been exercised under the previous treaty of July 19, 1881, and the act of congress of May 6, 1882, regulating Chinese immigration into the United States, and it was the purpose of article 3 of the treaty of December 8, 1894, to provide for its continuance. The privilege had been exercised under regulations prescribed by the department of the government of the United States having jurisdiction of that subject. The first regulations relating to the transit of Chinese persons across the territory of the United States were prescribed by the secretary of the treasury under date of January 23, 1883, without specific authority in either the then existing treaty or act of congress. These regulations continued until the act of October 1, 1888, providing for the further exclusion of Chinese laborers by prohibiting the return of all those who had once been in the United States and had departed therefrom, and all those who might thereafter come into the United States and depart therefrom. The secretary of the treasury thereupon prescribed the regulations dated September 28, 1889, the purpose of which was to enable Chinese persons to exercise the privilege of transit under the act of October 1, 1888. These regulations were in force when the treaty of December 8, 1894, was negotiated and ratified. The treaty provided for the continuance of the privilege of transit "subject to such regulations by the government of the United States as may be necessary to prevent said privilege of transit being

abused." In my opinion, this provision of the treaty recognized the regulations then in force, and agreed to their continuance and to such modification of them as might be found necessary to prevent the privilege of transit being abused. The changes or modifications contained in the new regulations dated December 8, 1900, are, however, immaterial. The authority of the collector to determine whether a Chinese person arriving at a port of the United States intends to make a bona fide transit across the territory of the United States is contained in the new regulations precisely as it was provided under the regulations of September 28, 1889. In my opinion, therefore, the treaty recognizes the binding force of these regulations, and to that extent, at least, the treaty is self-executing, and is as much the law of the land as an act of congress. It follows from these conclusions that it was incumbent upon the petitioner to satisfy the collector of customs at this port that he had a bona fide intention to make the transit across the territory of the United States, and, having failed to do so, the detention of the petitioner for deportation is within the jurisdiction of that officer, and not subject to review in this court upon this proceeding.

The writ will be discharged, and the petitioner remanded to the custody from which he was taken.

PERRY v. HOSKINS.

(Circuit Court, D. New Hampshire. January 27, 1899.)

1. PATENTS—DESIGNS—INVENTION.
   Under the rule established by the later decisions, as high a degree of invention is required to sustain design patents as in case of mechanical patents.

2. SAME—VALIDITY—DESIGN FOR MONUMENT.
   The Perry design patent, No. 22,856, for a design for a monument, covering two elements,—the shape or configuration of the monument, and a decorative design for its ornamentation,—is invalid as to both features for lack of invention.

In Equity. Suit for infringement. On final hearing.

Walter D. Hardy and John M. Mitchell, for complainant.
Streeter, Walker & Hollis, for defendant.

ALDRICH, District Judge. This is a design patent for a monument, and is numbered 22,856, and dated October 24, 1893. The patent seems to cover two elements: First, the shape or configuration of the monument; and, second, the decorative design for its ornamentation. As to the first, there is nothing in the details or in the combination which can be accepted as new and original. All the features in detail must be treated as old, for the stonecutting art, as known and practiced from a very early period, has covered all conceivable shapes and forms in monuments and statuary, and the combination does not, as it seems to me, amount to a new and original design. The second element of the design—that relating to ornamentations—comes nearer to patentable invention than the

first. The test is the appearance to the ordinary eye, which results from the design of combining the finished surfaces, the various lines, curves, figures, etc.; and, if this case could be determined in the light of the earlier decisions under the design statute, it would not be difficult to sustain this feature of the patent. But the later tendency has been to require for design patents something akin to inventive genius; or, in other words, as high a design of invention as that required by the rules which govern mechanical patents. In view of the later decisions, I arrive at the conclusion that the decorative design is not so distinctively new and different from previous designs as to bring it within the statute, which requires the design to be new and original.

The bill is dismissed, without costs.

MERRITT & CHAPMAN DERRICK & WRECKING CO. v. CHUBB et al.

(Circuit Court of Appeals, Second Circuit. November 22, 1901.)

No. 30.

ADMIRALTY—CLAIM FOR SALVAGE—INTEREST.

Where a libelant made greatly exaggerated claims for salvage services and towage, he will not be allowed interest on the amount recovered.[1]

Appeal from the District Court of the United States for the Southern District of New York.

James E. Carpenter, for appellant Merritt & Chapman Derrick & Wrecking Co.

Robt. D. Benedict, for appellant Catskill & N. Y. Steamboat Co.

Joseph Laracque, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. From the testimony in the case we are satisfied that the services of the libelant in and about the raising of the wreck of the Catskill were rendered upon an agreement with Chubb & Son that they should be compensated for as salvage services only in proportion to value of remnants salved. We see no reason, upon the testimony, to question the propriety of the amount found by the court ($500). Under the pleadings, and upon the proofs, we think the district court erred in decreeing for this sum against the steamboat company. The decree should have been against Chubb & Son. If they are entitled to recover over against the company by reason of its improperly retaining proceeds of sale, they may do so by proper proceedings. We find upon the evidence in the record that the only services rendered by the libelants for the Catskill & New York Steamboat Company or for its benefit, were the towage services rendered at its request after the vessel had been raised. We find no com-

[1] Salvage awards in federal courts, see note to The Lamington, 30 C. C. A. 280.

petent evidence in the record as to the value of these services, aside from the admission in the answer of the company that they were worth $100. Although separate controversies against different parties were joined in the same libel, there was no objection, and the cause was tried as though the joinder were proper. The only decree authorized by the evidence was a decree against Chubb & Son for $500, and against the steamboat company for $100. In view of the exaggerated claims made by the libelant, no interest should be allowed as against either respondent.

Decree is reversed and cause remanded, with instructions to decree in conformity with this opinion.

MEMORANDUM DECISIONS.

THE A. C. CHENEY. (Circuit Court of Appeals, Second Circuit. November 22, 1901.) No. 39. Appeal from the District Court of the United States for the Eastern District of New York. Le Ray S. Gone, for appellant. R. D. Benedict, for appellee. Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. There is no satisfactory evidence of any careless or negligent conduct on the part of the tug while performing the towage service, and the case for the libelant rests wholly upon the presumption arising from the fracture of the planks during the service. We are not satisfied that the court below erred in the conclusion reached, and think the decree dismissing the libel ought not to be disturbed. Decree affirmed, with costs.

In re ADAMS et al. ARMOUR PACKING CO. et al. v. ADAMS et al. (Circuit Court of Appeals, Fifth Circuit. December 10, 1901.) No. 1,075. Appeal from the District Court of the United States for the Southern District of Georgia. Marrion W. Harris and Washington Dessau, for appellants. John I. Hall and Olin J. Wimberley, for appellees. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The proper decision of this case depends upon the facts, and as the findings thereof by the trial judge, upon which he rendered the decree appealed from, are fully supported by the evidence in the case, the decree appealed from should be affirmed, and it is so ordered.

BIBBER-WHITE CO. v. WHITE RIVER VAL. ELECTRIC R. CO. et al. (Circuit Court of Appeals, Second Circuit. November 18, 1901.) No. 35. Appeal from the Circuit Court of the United States for the District of Vermont. G. B. Mumford, for the motion. W. B. C. Stickney, opposed. Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. After hearing counsel upon motion to remand record herein to circuit court, it is ordered that said record is remitted, with leave to the circuit court to amend or correct the same by inserting therein any petition, reports, documents, or other evidence which was before the court and

considered by it in granting the original order (111 Fed. 36) from which the appeal herein has been taken, or in entertaining the motion to amend the same.

In re BIDDELL. (Circuit Court of Appeals, Second Circuit. November 15, 1901.) No. 25. Appeal from the District Court of the United States for the Southern District of New York. Isaac N. Miller, for appellant. Robert Inch, for appellees. Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge. No opinion. Order of district court, appealed from, reversed in open court.

CITY OF NEW ORLEANS v. EQUITABLE LIFE ASSUR. SOC. (Circuit Court of Appeals, Fifth Circuit. December 11, 1901.) In Error to the Circuit Court of the United States for the Eastern District of Louisiana. H. G. Dupree, for city of New Orleans. E. B. Kruttschnitt, for Equitable Life Assur. Soc. Dismissed by agreement.

CORTELYOU et al. v. LOWE et al. (Circuit Court of Appeals, Second Circuit. November 14, 1901.) No. 113. Appeal from the Circuit Court of the United States for the Southern District of New York. Joab H. Banton, for appellants. S. O. Edmonds, for appellees. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. This cause comes here on appeal from an order granting preliminary injunction. The case upon which the order was granted is in its facts practically identical with the one which was before the circuit court of appeals of the Sixth circuit in Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co., 25 C. C. A. 267, 77 Fed. 288, 35 L. R. A. 728. We fully agree with the opinion of the court in that case, and think the decision should control the case at bar. The order is affirmed, with costs.

FIRST NAT. BANK OF BRYAN v. MOORING. (Circuit Court of Appeals, Fifth Circuit. November 18, 1901.) No. 1,004. Appeal from the District Court of the United States for the Northern District of Texas. George Clark and D. C. Bolinger, for appellant. Dismissed by affirmance on motion of appellant.

HOSTETTER CO. v. BRUNN. (Circuit Court of Appeals, Ninth Circuit. October 7, 1901.) No. 730. Appeal from the Circuit Court of the United States for the Southern District of California. E. Edgar Galbreth and A. H. Clarke, for appellant. E. R. Annable, for appellee. Dismissed per stipulation of counsel.

LAND v. MAHONEY et al. (Circuit Court of Appeals, Fourth Circuit. November 26, 1901.) No. 432. Appeal from the District Court of the United States for the Eastern District of Virginia. W. G. Pilkinton, for appellant. G. M. Dillard, for appellees. Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

PER CURIAM. We see no error in the decision reached by the court below. Its decree is affirmed, without prejudice, however, to any question the bankrupt may make as to his right of homestead, and without prejudice to any

claim W. G. Pilkinton, trustee, may have against the proceeds of the sale of the goods sold by him as trustee under the assignment. These proceedings are referred to the court of bankruptcy.

LAWLESS v. WARNECKE. (Circuit Court of Appeals, Second Circuit. November 13, 1901.) No. 11. Appeal from the Circuit Court of the United States for the Eastern District of New York. Clarence Kelsey, for appellant. Before WALLACE and LACOMBE, Circuit Judges. No opinion. Decree affirmed in open court.

NEW YORK BOARD OF FIRE UNDERWRITERS v. MOODY. (Circuit Court of Appeals, Second Circuit. November 14, 1901.) No. 16. In Error to the Circuit Court of the United States for the Southern District of New York. Lewis H. Freedman, for plaintiff in error. James S. Darcey, for defendant in error. Before WALLACE, Circuit Judge, and TOWNSEND, District Judge.

PER CURIAM. We regard the assignments of error as so plainly without merit that no useful purpose would be subserved by discussing them seriatim. The case involves merely the application of the familiar rules of the law of negligence to the particular facts. It presented questions of fact for the jury upon the issues of negligence on the part of the defendant and contributory negligence on the part of the plaintiff. These questions were submitted to the jury fully and plainly by the trial judge, and his instructions in respect to the legal propositions involved were adequate and accurate. We find no error in the record, and the judgment should therefore be affirmed.

OTTENDORFER v. McLELLAN DOCK CO. (Circuit Court of Appeals, Fifth Circuit. December 11, 1901.) No. 1,069. Appeal from the District Court of the United States for the Eastern District of Louisiana. S. L. Gilmore, for appellant. Harry H. Hall, for appellee. Appeal dismissed for failure to print record.

SODERGREN v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 7, 1901.) No. 721. In Error to the District Court of the United States for the Territory of Hawaii. Kinney, Ballou & McClanahan (W. A. Bigelow and Nathan H. Frank, of counsel), for plaintiff in error. Dismissed.

WHITE STAR S. S. CO. et al. v. BETSCH et al. (Circuit Court of Appeals, Ninth Circuit. October 7, 1901.) No. 718. Appeal from the Circuit Court of the United States for the District of Alaska, Second Division. Page, McCutcheon, Harding & Knight, for appellants. Dismissed.

THE WILLIAM H. BAILEY. (Circuit Court of Appeals, Second Circuit. November 14, 1901.) No. 6. Appeal from the District Court of the United States for the District of Connecticut. James D. Dewell and A. F. Cushman, for appellant. Henry F. Parmelee and W. W. Cook (George D. Watrous, of counsel), for appellee. Before WALLACE and LACOMBE, Circuit Judges. No opinion. Decree of district court (100 Fed. 115) affirmed, with interest and costs, on opinion of district judge.

COLEMAN v. WASHBURN et al. (Circuit Court, S. D. New York. November 25, 1901.) On exceptions to master's report. David McClure, for complainant. Alfred Opdyke, for defendants.

COXE, District Judge. This is an action for a partnership accounting. The master to whom it was referred to take and state the account filed, December 20, 1900, an elaborate and painstaking report in which various claims presented by both parties are disallowed. The complainant filed exceptions, 10 in all, to the adverse rulings of the master. The defendants do not except. Although the oral argument was full and complete, the court has reexamined with care each of the items in controversy, and has read everything which has been submitted by either side, with the result that it finds no reason for disturbing the conclusions of the master. Indeed, in each instance the court concurs with his findings and the reasons given therefor. The matters in controversy are all so fully discussed in the report that nothing further need be added, and the court adopts the report as an expression of its own views. The exceptions are overruled, and the report of the master is confirmed, with costs, pursuant to equity rule No. 84. The master's fees have been paid, each party paying half. This seems an equitable apportionment, and the court sees no reason for altering it.

UNITED STATES v. LEUNG QUONG et al. (District Court, D. Vermont. December 7, 1901.) Appeal by Leung Quong and Leung Ming from an order for their deportation. Rufus E. Brown, for appellants. James L. Martin, U. S. Atty.

WHEELER, District Judge. The explicit statement of the principal witness, the uncle of appellants, of the year, month, day of month, and vessel of his arrival in the United States, in his application for a laborer's certificate, shows, in connection with his testimony, that he came but once; that at the time of their birth he was in China; and that his knowledge of their birth, as he states it, would be of their birth in China. The testimony of the other witness that they were born in California, although more consistent, is not sufficient to overcome this, and make their citizenship clear. Deportation affirmed.

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Where there is a doubt, a party may take an appeal and sue out a writ of error, and the appellate court will review the proceedings in accordance with the rules of the method of review applicable to the nature of the case.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

§ 2. Nature and grounds of appellate jurisdiction.

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A decree in a suit to enforce a mechanic's lien *held* final and reviewable by the sole appeal of complainant, though another party who was not served with process was named in the petition and summons as a defendant.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

A decision rendering all the questions between the parties served res judicata between themselves *held* a final judgment, and reviewable, though the rights of such parties against strangers to the suit remained undetermined.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

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Where the trial court modifies and adopts the findings of a master, which he was not authorized to make under the reference, they must be regarded as the findings of the court, and an appellant may assign error thereon, although he did not except to the report of the master.—Cable v. United States Life Ins. Co. (C. C. A.) 19; United States Life Ins. Co. v. Cable, Id.

A party consenting to the hearing in equity of a legal cause of action *held* estopped from successfully objecting to the method of trial in the appellate court.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

Consent to try a law suit in equity, or an equitable cause of action at law, constitutes no waiver of the right to review the proceedings by appeal or writ of error as the nature of the case may demand.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

The question whether or not special findings of fact warrant the judgment rendered may be considered by the appellate court on writ of error, without any objection or exception taken at the time of the judgment entry.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

§ 5. Record and proceedings not in record.

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The clerk of the trial court must annex to and transmit with the record a copy of any opinion relating to the rulings assigned as error, though the movant fails to designate such opinion in the præcipe.—Teller v. United States (C. C. A.) 119.

The clerk of the trial court must follow the moving party's præcipe, designating the portions of the papers and proceedings to be returned in the transcript.—Teller v. United States (C. C. A.) 119.

Where the moving party files no transcript, the certificate of the clerk of the trial court must show that the transcript is a true copy of the papers and proceedings necessary to a hearing in the circuit court of appeals under rule 14 (31 C. C. A. cxxv.; 90 Fed. cxxv.).—Teller v. United States (C. C. A.) 119.

The refusal of instructions asked cannot be reviewed on appeal, unless the bill of exceptions contains the evidence relied on to make such instructions applicable to the case as submitted to the jury.—South Penn Oil Co. v. Latshaw (C. C. A.) 598.

Where the transcript on appeal does not contain all the evidence before a master with respect to a claim in controversy, the report of the master thereon cannot be set aside on any question of fact.—St. Louis Merchants' Bridge Terminal Ry. Co. v. Continental Trust Co. (C. C. A.) 669.

§ 6. Briefs.

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A statement in the charge of the court *held* not prejudicial error, even if erroneous.—Portland Gold Min. Co. v. Flaherty (C. C. A.) 312.

It is harmless error to permit a question to be answered which calls for the conclusion of the witness, where the conclusion stated was conclusively established by other evidence introduced by the adverse party.—Portland Gold Min. Co. v. Flaherty (C. C. A.) 312.

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The action of a trial court in refusing to direct a verdict for defendant in an action on a life insurance policy, on the ground that the insured committed suicide, *held* not error under the evidence.—Fidelity & Casualty Co. of New York v. Love (C. C. A.) 773.

An appeal in equity brings up the whole case, and the appellee may insist on a ground of demurrer to sustain a decree dismissing the bill, although such ground was overruled by the court below.—Blythe Co. v. Hinckley (C. C. A.) 827.

Finding of jury as to citizenship of plaintiff when the action was commenced, sustaining the jurisdiction of the court, *held* conclusive.—Metropolitan St. Ry. Co. v. Beattie (C. C. A.) 945.

An award of damages made by a jury for personal injuries, on which judgment is entered by the trial court, will not be set aside as excessive by the circuit court of appeals on a writ of error.—Metropolitan St. Ry. Co. v. Beattie (C. C. A.) 945.

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A decision of the circuit court of appeals, on the record before it, that the case should have been submitted to the jury, is not controlling upon the trial court in a second trial, where the evidence is different.—Patton v. Southern Ry. Co. (C. C. A.) 712.

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Where there are 12 or more creditors, an involuntary petition must be dismissed unless at least 3 join therein; and it is immaterial that a majority are creditors for nominal sums merely.—In re Brown (C. C.) 979.

The burden of proof rests upon a petitioner in voluntary bankruptcy to prove the required residence or domicile within the district, although the issue is not raised until after adjudication.—In re Scott (D. C.) 144.

Creditors opposing a petition in involuntary bankruptcy cannot appear and file answers raising new issues after the time fixed by Bankr. Act 1898, § 18b, has expired and the petition has been heard upon the issues as then made.—In re Mutual Mercantile Agency (D. C.) 152.

A corporation, engaged in conducting a commercial agency by the printing and publication of books of commercial ratings, which it loaned to its subscribers, *held* within the provisions of Bankr. Act 1898, § 4b, and subject to be adjudged an involuntary bankrupt.—In re Mutual Mercantile Agency (D. C.) 152.

A corporation may make the written admission of its inability to pay its debts, and its willingness to be adjudged a bankrupt on that ground, which constitutes an act of bankruptcy under Bankr. Act 1898, § 3a, cl. 5, by order of its board of directors.—In re Mutual Mercantile Agency (D. C.) 152.

Assignees under a general assignment constructively fraudulent under the bankruptcy act are not entitled to compensation from the estate for services rendered prior to the filing of petition in bankruptcy against the assignor.—Wilbur v. Watson (D. C.) 493.

A court of bankruptcy is without jurisdiction to vacate an adjudication of bankruptcy on a petition which was not filed until several terms had elapsed after the adjudication was made.—In re Ives (D. C.) 495.

A district court sitting in bankruptcy can exercise the full powers of a court of equity for the ascertainment and enforcement of the rights and equities of the various parties interested in the bankrupt estate.—In re Siegel-Hillman Dry Goods Co. (D. C.) 980.

§ 2. Assignment, administration, and distribution of bankrupt's estate.

A court of bankruptcy is not required to determine the contested right of a mortgagee to the possession of property taken from a bankrupt by the marshal, under an order of seizure on a mere motion, but may properly require him to assert his rights by an appropriate action or proceeding.—In re Young (C. C. A.) 158.

The estate of a bankrupt in lands devised to his father for life, with remainder in fee to his children or their descendants in case any survived him, *held* to be a vested remainder, which passed to his trustee as property which he could have transferred.—In re McHarry (C. C. A.) 498; McHarry v. Kingman & Co., Id.

A creditor who has received payments within four months must surrender the same before he can prove any claim, regardless of his good faith or the indebtedness on which they were paid.—In re Dickson (C. C. A.) 726; Dickson v. Wyman, Id.

A creditor who has received payments within four months in the usual course of business and in good faith will not be held to have received a preference where, as the result of the transactions, taken together, the net indebtedness to him has been increased and the bankrupt's estate has been correspondingly increased.—In re Dickson (C. C. A.) 726; Dickson v. Wyman, Id.

The bankruptcy act does not confer upon a district court of the United States, as a court of bankruptcy, jurisdiction of a controversy between a trustee and a mortgagee of the bankrupt to determine the validity of the mortgage, unless with the consent of such mortgagee.—In re San Gabriel Sanatorium Co. (C. C. A.) 892.

A judgment imposing a fine as a punishment for violation of a state statute is not a debt provable against the estate of the defendant in bankruptcy.—In re Moore (D. C.) 145.

A chattel mortgage, executed by an insolvent within four months prior to his bankruptcy to secure a past loan, and which would otherwise be voidable as a preference, is not rendered valid by an agreement to execute it when the loan was made.—In re Ronk (D. C.) 154.

Where, under the state laws, the legal title to mortgaged property remains in the mortgagor, such title vests in his trustee in bankruptcy, together with his statutory right of redemption from a foreclosure sale under a decree rendered after the adjudication.—In re Novak (D. C.) 161.

A creditor, who took an order from his debtor for the amount of his claim within four months before the latter's bankruptcy, but without reason to believe him insolvent, which order was accepted, and, after the debtor's bankruptcy, was paid by the acceptor, *held* entitled to retain the money.—In re Dundas (D. C.) 500.

A referee cannot charge a per diem for any of the services required by Bankr. Act 1898, §§ 38, 39, which are to be fully compensated by the fee of $10 provided by section 40; nor is either a referee or trustee entitled to commissions, except on the amount available for the payment of dividends and commissions.—In re Barker (D. C.) 501.

Neither at common law nor under the Vermont statute is a trustee entitled to property which had been sold to the bankrupt conditionally, to become his only when paid for.—In re Hinsdale (D. C.) 502.

A creditor, who relinquished a lien on a fund realized by the trustee of a bankrupt through a mistake of law, and in the belief that his debt had been discharged by money collected by him under garnishments, which were invalid under the bankruptcy law, *held* entitled to reinstatement in his lien on returning the money so collected to the trustee.—In re Swift (D. C.) 503; Ex parte Wilcox, Id.

Where objections to a bankrupt's discharge are referred to a referee for hearing, he is entitled to a reasonable allowance for his services, in addition to the fees allowed him by the bankruptcy law.—In re Grossman (D. C.) 507.

Bankr. Act 1898, § 60c, entitles any preferred creditor to a deduction of new credits from preferences which he is required to surrender before proving his claim, and is not limited to cases where the trustee sues to recover the preferences.—In re Soldosky (D. C.) 511.

A court of bankruptcy has power in a proper case to order an assessment on the stockholders of a bankrupt corporation for unpaid subscriptions.—In re Miller Electrical Maintenance Co. (D. C.) 515.

The rule stated governing the allowance of expenses to referees under general order No. 35 (18 Sup. Ct. ix.).—In re Pierce (D. C.) 516.

A referee in bankruptcy has no authority to collect or receive money belonging to an estate, nor to issue subpœnas.—In re Pierce (D. C.) 516.

Bankr. Act 1898, § 60c, entitles a creditor to deduct the amount of new credits from the preferences he would otherwise be required to surrender before proving his claim, and is not limited in its application to cases where the trustee sues to recover such preferences.—In re Southern Overalls Mfg. Co. (D. C.) 518.

A bankrupt's membership in a stock exchange is property, and its money value, subject to the restrictions imposed upon such membership by the laws of the association, constitutes assets of his estate.—In re Gaylord (D. C.) 717.

A seller of personal property under a contract retaining title until payment *held*, under the law of Kentucky, to have a valid lien as against the trustee in bankruptcy of the purchaser, although his contract was unrecorded.—In re Sewell (D. C.) 791.

To charge a person as a silent partner in the business of a bankrupt, so as to debar him of the rights of a creditor of the estate, where there has been no holding out as such, an actual agreement must be proved, binding on all the parties thereto.—In re Clark (D. C.) 893.

Evidence considered, and *held* insufficient to sustain a finding that one claiming to be a creditor of the estate of a bankrupt was a silent partner in his business.—In re Clark (D. C.) 893.

A seller of goods to an insolvent on credit, in reliance on a report of a mercantile agency furnished by the purchaser, which was false, *held* entitled to rescind the sale and recover the proceeds of the goods from the trustee in bankruptcy of the purchaser.—In re Weil (D. C.) 897.

A court of bankruptcy has no power to grant leave to a creditor of a bankrupt to redeem from a sale of real estate made by the trustee under an order of the referee.—In re Novak (D. C.) 978.

An indorser of notes of a bankrupt, who paid the same after the bankruptcy, cannot be required, as a condition precedent to the proving of his claim thereon, to surrender the amount of other and separate notes held by the payee and paid by the bankrupt after insolvency under such circumstances that the payment could not be recovered back.—In re Siegel-Hillman Dry Goods Co. (D. C.) 980.

A bank held notes of a bankrupt corporation indorsed by a partnership. A short time prior to the bankruptcy, and while insolvent, the corporation had made a payment on such notes, which was received by the bank without notice of the insolvency, actual or constructive; and after the bankruptcy the partnership paid the balance due thereon. Both the bank and partnership were large creditors of the bankrupt estate. *Held*, that the court of bankruptcy, in the exercise of its equitable powers, would transfer the obligation to surrender the preferential payment from the bank to the partnership as a condition to the proving of its claim, since, as between the two, the partnership was ultimately liable therefor.—In re Siegel-Hillman Dry Goods Co. (D. C.) 980.

§ 3. Rights, remedies, and discharge of bankrupt.

Evidence *held* insufficient to sustain objections to a bankrupt's discharge on the ground that he had committed offenses punishable by imprisonment.—Smith v. Keegan (C. C. A.) 157.

A bankrupt will not be permitted to amend his schedules after his property has vested in the trustee, to claim additional exemptions for the benefit of certain creditors in whose favor he had waived his right of exemption.—Moran v. King (C. C. A.) 730.

A judgment rendered on promissory notes cannot be brought within Bankr. Act 1898, § 17a, cl. 2, excepting from the provable debts released by a discharge debts which "are judgments in actions for frauds," by evidence that the debt was fraudulent in its inception; the creditor being conclusively bound by his election to waive the fraud and sue on the contract.—Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C.) 361.

The right of a bankrupt to a discharge, and its effect, are wholly distinct questions, and the latter question cannot properly arise or be considered by the court of bankruptcy on an application for a discharge. — In re McCarty (D. C.) 151.

Under the laws of New York a bankrupt cannot hold as exempt real property purchased in part with pension money, but from which he has withdrawn by way of mortgage more than the pension money put in, and used the same in other ventures.—In re Ellithorpe (D. C.) 163.

Evidence *held* to sustain objections to a bankrupt's discharge on the ground of concealment of assets and the making of false oaths to his schedule.—In re Bullwinkle (D. C.) 364.

A bankrupt *held* entitled, under the statutes of Massachusetts, to hold a watch exempt as an implement of his trade.—In re Coller (D. C.) 503.

A bankrupt, who has been refused a discharge, is not debarred from filing a second petition and obtaining a discharge thereunder; its effect being a matter to be determined whenever occasion may arise.—In re Claff (D. C.) 506.

Evidence *held* to sustain objections to a bankrupt's discharge on the ground of concealment of assets and the making of a false oath to his schedules.—In re Grossman (D. C.) 507.

A bankrupt, who dies after title to his real estate has vested in his trustee by operation of the bankruptcy act, remains seised of the same for purposes of inheritance within the provisions of the statutes of Vermont, and his widow is entitled to her dower therein.—In re Slack (D. C.) 523.

The widow of a bankrupt, who died after his personal estate had been converted into money by his trustee, *held* entitled to no fixed allowance therefrom under the laws of Vermont which a court of bankruptcy could award to her under Bankr. Act 1898, § 8.—In re Slack (D. C.) 523.

Evidence *held* insufficient to sustain an objection to a bankrupt's discharge on the ground that he had a claim against his father for wages, and that he made a false oath in verifying his schedules, in which he stated he had no assets.—In re Howden (D. C.) 723.

§ 4. Appeal and revision of proceedings.

The proper procedure for the review of an order of a court of bankruptcy allowing or rejecting a claim exceeding $500 is by appeal, and not by petition for review.—In re Dickson (C. C. A.) 726; Dickson v. Wyman, Id.

§ 5. Costs and fees.

Where proceedings for the review of an order of a court of bankruptcy are dismissed by the appellate court for want of jurisdiction, without any motion therefor, neither party will be allowed costs.—In re Dickson (C. C. A.) 726; Dickson v. Wyman, Id.

On an appeal against a trustee from an order in bankruptcy, where such order is reversed on a ground not assigned or urged by appellant, costs will not be allowed to either party.—In re Dickson (C. C. A.) 726; Dickson v. Wyman, Id.

BANKS AND BANKING.

§ 1. National banks.

An intent to injure or defraud the association is made by Rev. St. § 5209, an essential element of the offense of embezzlement by an officer of a national bank.—McKnight v. United States (C. C. A.) 735.

The giving and refusal of instruction in regard to intent, on the prosecution of an officer of a national bank for embezzlement under the statute, *held* reversible error.—McKnight v. United States (C. C. A.) 735.

BAR.

Of action by former adjudication, see "Judgment," § 5.
Of action by limitation, see "Limitation of Actions," § 4.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

BEQUESTS.

See "Wills."

BETTING.

See "Gaming."

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF REVIEW.

See "Equity," § 5.

BONDS.

County bonds, see "Counties," § 1.
In proceedings for limitation of liability, see "Shipping," § 8.

Municipal bonds, see "Municipal Corporations," § 3.
School bonds, see "Schools and School Districts," § 1.
United States officers, see "United States," §§ 1, 2.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 6.

BROKERS.

See "Exchanges."
Gaming contracts, see "Gaming," § 1.
Insurance brokers, see "Insurance," § 1.

BUILDING AND LOAN ASSOCIATIONS.

A contract of a building association, expressly and in good faith made subject to the laws of the state in which the association is domiciled, is solvable under such laws, although the security may be situated in another state.—McIlwaine v. Ellington (C. C. A.) 578.

The receiver of an insolvent building and loan association, appointed in a proceeding to wind up its affairs, is not entitled, in a suit to foreclose a mortgage given by a borrowing stockholder, to an order authorizing him to sell the stock of the defendant, also pledged as security for the loan.—McIlwaine v. Ellington (C. C. A.) 578.

If a contract between a building association and a borrowing stockholder is valid under the laws of the state where made, the amount due under it is to be ascertained by those laws, and the security is liable for that amount, although situated in another state.—McIlwaine v. Ellington (C. C. A.) 578.

Borrowing stockholders of a building and loan association, which required its borrowing members to mature half their stock for its benefit as a premium, in violation of the usury laws of the state, on a settlement with the association in insolvency, are entitled to credit on their loans for all sums paid as dues on such stock, whether paid before or after the loans were made.—Southern Building & Loan Ass'n v. Johnson (C. C. A.) 657.

A stockholder in a building and loan association is bound to take notice of the law under which it is incorporated, and of the provisions of its by-laws.—Columbia Building & Loan Ass'n v. Junquist (C. C.) 645.

A contract with a borrowing stockholder, to whom the association has advanced the full par value of his shares, that his debt shall be canceled on the payment of interest and stock dues for a certain number of months, cannot be enforced by the stockholder, where its effect would be to relieve him from payments required to mature his stock.—Columbia Building & Loan Ass'n v. Junquist (C. C.) 645.

Contracts of borrowing stockholders are not usurious, where they are valid under the laws of the state of the association's domicile and where they are made payable.—Miles v. New South Building & Loan Ass'n (C. C.) 946.

A receiver for an insolvent building and loan association may properly be authorized by the court, to facilitate settlements with borrowing stockholders and to avoid litigation, to allow such stockholders the computed value of their share in the assets of the association, where it can be done without endangering the rights of other parties in interest.—Miles v. New South Building & Loan Ass'n (C. C.) 946.

The charter of a building and loan association provided for two distinct classes of stock and for separate funds to be created and attributed to each class. *Held* that, on the insolvency of the association, the stockholders of one class had no interest in the assets belonging to the fund of the other class.—Miles v. New South Building & Loan Ass'n (C. C.) 946.

Instructions given to a receiver for the settlement of accounts with borrowing stockholders, whose bonds and mortgages had been pledged by the association to secure its bonds.—Miles v. New South Building & Loan Ass'n (C. C.) 946.

The existence of unsecured creditors of an insolvent building and loan association does not affect the right of a receiver to make such settlement with borrowing stockholders as may be approved by the court.—Miles v. New South Building & Loan Ass'n (C. C.) 946.

Rule stated for settlement with borrowing stockholders by the receiver of an insolvent association.—Miles v. New South Building & Loan Ass'n (C. C.) 946.

CAPITAL.

Of corporations in general, see "Corporations," § 1.

CARGO.

See "Shipping."

CARRIERS.

Carriage of goods by vessels, see "Shipping," § 5.
Carriage of passengers by vessels, see "Shipping," § 6.

§ 1. Carriage of live stock.

A shipper, suing to recover damages for injury to property in shipment, need not declare on the special contract under which the shipment was made, where the negligence charged is such that liability is not affected by its provisions.—Southern Pac. Co. v. Arnett (C. C. A.) 849.

Evidence *held* admissible in support of the complaint in an action against a railroad company to recover for injury to stock in shipment.—Southern Pac. Co. v. Arnett (C. C. A.) 849.

Instructions in an action against a railroad company to recover damages for injury to cattle in shipment considered and approved.—Southern Pac. Co. v. Arnett (C. C. A.) 849.

§ 2. Carriage of passengers.
Evidence considered, and *held* insufficient to charge a railroad company with liability for the death of a passenger, who was thrown from the platform of a car by a lurching of the train.—Sansom v. Southern Ry. Co. (C. C. A.) 887.

CERTIFICATE.

Of record for purpose of review, see "Appeal and Error," § 5.

CHANCERY.

See "Equity."

CHARGE.

Of legacies on property by will, see "Wills," § 1.
To jury in civil actions, see "Trial," § 3.

CHARTER PARTIES.

See "Shipping," § 2.

CHATTEL MORTGAGES.

As preference by bankrupt, see "Bankruptcy," § 2.

CHEAT.

See "False Pretenses."

CHINESE.

Exclusion or expulsion, see "Aliens," § 1.

CIRCUIT COURTS.

See "Courts," § 1.

CIRCUIT COURTS OF APPEALS.

See "Courts," § 1.

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

See "Aliens"; "Indians."
Citizenship ground of jurisdiction of United States courts, see "Courts," § 1.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 2.
Against property in hands of receiver, see "Receivers," § 2.
Against school district, see "Schools and School Districts," § 1.
Court of claims, see "Courts," § 1.
Mining claims, see "Mines and Minerals," § 1.
Of patent, see "Patents," § 3.

CLOUD ON TITLE.

See "Quieting Title."

COLLATERAL ATTACK.

On judgment, see "Judgment," § 4.
On patent of public land, see "Public Lands," § 2.

COLLECTION.

Of taxes, see "Taxation," § 2.

COLLISION.

§ 1. Overtaking vessels.
An overtaking vessel takes whatever risks attend her attempt to pass, from whatever cause arising, except from the fault of the vessel ahead, which is bound only to keep her course and speed.—The Mesaba (D. C.) 215; The Martello, Id.

The rule that a vessel shall keep her course and speed after receiving a signal from an overtaking vessel of her intention to pass does not require her to remain stationary, where she had at the time stopped her engines for an obviously temporary purpose.—The Mesaba (D. C.) 215; The Martello, Id.

Where an overtaken steam vessel fails to answer the signal of the overtaking vessel, and the latter attempts to pass without having received an answering signal of assent, in a place of doubtful safety, both are guilty of violations of article 18 of rule 8 of the inland navigation rules, and both must be charged with fault for a collision which occurs in the passing.—The Mesaba (D. C.) 215; The Martello, Id.

The effect of suction of a passing vessel considered.—The Mesaba (D. C.) 215; The Martello, Id.

A steamer 482 feet long *held* not justified in passing another at a speed of 12½ knots, within a distance of not more than 159 feet, at a place where the water was little deeper than their keels.—The Mesaba (D. C.) 215; The Martello, Id.

§ 2. Vessels in tow.
Evidence *held* to show that a collision between a loaded steamer passing up the Detroit river and a schooner, which was one of three vessels in tow, in the act of turning to proceed down stream, was due to the fault of both steamer and schooner.—The George Presley (C. C. A.) 555.

§ 3. Fog or thick weather.
Evidence considered in a case of collision between two steamers on Lake Huron during a fog, and *held* to show that both were in fault.—The George W. Roby (C. C. A.) 601.

The statutory rules governing lake navigation do not exonerate vessels from observing the requirements of prudent navigation, as established by the decisions of admiralty courts, where there are no positive provisions superseding such requirements.—The George W. Roby (C. C. A.) 601.

To exonerate a vessel from fault for a collision, where she failed to maintain a lookout, although she was navigating in a dense fog and with knowledge that another vessel was approaching ahead, the burden rests heavily upon her to show that the presence of a lookout could not have guarded against the collision.—The George W. Roby (C. C. A.) 601.

§ 4. Suits for damages.

Where a vessel is sunk in collision, and damages are awarded her owner on the basis of her total loss, he is not entitled to recover, in addition, for the loss of earnings under an unexpired term charter.—The George W. Roby (C. C. A.) 601.

The Harter act does not affect the operation of the equitable rule which gives priority to the claims of innocent cargo owners over that of the shipowner against the fund available for the payment of damages resulting from a collision for which both vessels were in fault. —The George W. Roby (C. C. A.) 601.

Stipulations in a bill of lading *held* not to affect the relative rights of the carrier and cargo owners against the proceeds of another vessel surrendered in proceedings for limitation of liability for a collision in which the first vessel and her cargo were lost and for which both vessels were in fault.—The George W. Roby (C. C. A.) 601.

Findings of trial court as to fault for a collision at sea between two schooners affirmed on appeal.—The Margaret B. Roper (C. C. A.) 623.

COMBINATIONS.

See "Conspiracy."

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

COMMON CARRIERS.

See "Carriers."

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMPENSATION.

For performance of contract, see "Contracts," § 1.
For property taken for public use, see "Eminent Domain," § 2.
Of reference in bankruptcy, see "Bankruptcy," § 2.
Salvage, see "Salvage," § 1.

COMPETENCY.

Of experts as witnesses, see "Evidence," § 3.

COMPETITION.

Unfair competition, see "Trade-Marks and Trade-Names," § 1.

COMPLAINT.

In civil actions, see "Pleading," § 1.
In criminal prosecution, see "Criminal Law," § 3.

COMPROMISE AND SETTLEMENT.

See "Release."

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONCEALMENT.

Effect on limitation, see "Limitation of Actions," § 2.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In contracts, see "Contracts," § 1.

CONFLICT OF LAWS.

See "Abatement and Revival," § 1; "Building and Loan Associations"; "Contracts," § 1; "Corporations," § 5.

CONSPIRACY.

Restraining by injunction, see "Injunction," § 1.

§ 1. Criminal responsibility.

Where striking workmen by concerted action undertake to prevent other workmen from entering or continuing in the service of their employer by the use of violence, threats, and intimidation, they are guilty of a criminal conspiracy, and it is the duty of a court of equity to enjoin the continuance of such methods.—Allis Chalmers Co. v. Reliable Lodge (C. C.) 264.

CONSTITUTIONAL LAW.

§ 1. Due process of law.

The provisions of a city charter relating to special assessments for improvements *held* not in violation of the constitution of the United States.—Minnesota & M. Land & Improvement Co. v. City of Billings (C. C. A.) 972.

CONTEMPT.

Violation of injunction, see "Injunction," § 3.

§ 1. Acts or conduct constituting contempt of court.

A federal court has jurisdiction to punish for contempt a person who conspires with defendants, who have been enjoined, and in pursuance of such conspiracy aids in the commission of acts enjoined for the purpose of defeating the injunction, though such person is a stranger to the suit in which the injunction was issued and by reason of his citizenship could not have been made a defendant therein.—W. B. Conkey Co. v. Russell (C. C.) 417; In re Bessette, Id.

CONTRACTS.

See "Specific Performance."
Liquidated damages or penalties, see "Damages," § 2.
Operation and effect of gaming laws, see "Gaming," § 1.
Operation and effect of usury laws, see "Usury," § 1.
Parol or extrinsic evidence, see "Evidence," § 2.

Contracts of particular classes of parties.

See "Corporations," § 4; "Master and Servant"; "Municipal Corporations," § 1; "United States," § 2.

Contracts relating to particular subjects.

See "Public Lands," § 2.

Particular classes of express contracts.

See "Insurance"; "Sales."
Affreightment, see "Shipping," § 5.
Charter parties, see "Shipping," § 2.
Employment, see "Master and Servant."
Mutual benefit insurance, see "Insurance," § 8.
Suretyship, see "Principal and Surety."

Particular modes of discharging contracts.

See "Release."

§ 1. Construction and operation.

Where plaintiff failed to complete a gas holder built for defendant within the time fixed by the contract, by reason of which fact defendant did not require it for use until a year later, defendant was entitled to damages at least equal to the legal interest for one year on the sum paid on the contract price and the cost of the land on which the tank was placed.—Wood v. Joliet Gaslight Co. (C. C. A.) 463.

A contract for drilling an oil well construed.—South Penn Oil Co. v. Latshaw (C. C. A.) 598.

Contract for building a railroad construed, and *held* to give the owner the right to suspend work thereunder without liability for damages.—Warren-Scharf Asphalt Pav. Co. v. Laclede Const. Co. (C. C. A.) 695.

Contracts and remedies are governed by the law of the state where the former are made and the latter are administered.—Lancashire Ins. Co. v. Barnard (C. C. A.) 702; Traders' Ins. Co. v. Same, Id.

Contracts between a contractor for a public building and subcontractor, and a creditor of the latter, construed, and their effect considered on the rights and obligations of the parties.—United States v. McIntyre (C. C.) 590.

Contract construed, and *held* not to deprive plaintiff of the right to terminate the same without notice and to sue for damages for its breach on the grounds alleged in the complaint.—Berliner Gramophone Co. v. Seaman (C. C.) 679.

CONTRIBUTORY NEGLIGENCE.

Of servant, see "Master and Servant," § 1.

CONVEYANCES.

See "Mortgages."
By sheriffs, see "Execution," § 1.
Of public lands, see "Public Lands," § 2.

CORPORATIONS.

As bankrupts, see "Bankruptcy," § 1.
Taxation of corporations and corporate property, see "Taxation," § 1.

Particular classes of corporations.

See "Building and Loan Associations"; "Exchanges"; "Municipal Corporations."
Telephone companies, see "Telegraphs and Telephones," § 1.

§ 1. Capital, stock, and dividends.

The issuance by a corporation of additional stock within its powers, and its distribution pro rata among its then stockholders, although without receiving payment therefor, is an act which is not in itself injurious to the corporation or its creditors, and of which the latter cannot complain.—Great Western Min. & Mfg. Co. v. Harris' Estate (C. C.) 38.

§ 2. Members and stockholders.

A contract between a corporation and a majority of its stockholders, in whatever form, will be closely scrutinized by a court of equity, and will be set aside if it appears to be in violation of the rights of the minority stockholders.—Mumford v. Ecuador Development Co. (C. C.) 639.

A bill by minority stockholders to set aside a contract made by the corporation *held* to state no cause of action against a defendant who is alleged only to have acted as agent for the second party in the procuring of the contract.—Mumford v. Ecuador Development Co. (C. C.) 639.

A bill filed by minority stockholders to set aside a contract made by the corporation as having been obtained by the majority stockholders in their own interest, and in fraud of the rights of complainants, need not set out such contract in hæc verba.—Mumford v. Ecuador Development Co. (C. C.) 639.

A bill by minority stockholders to set aside a contract alleged to have been fraudulently obtained by the majority, and to transfer all

the property of the corporation to them, under the name of a second corporation, for an inadequate consideration, *held* to state a cause of action.—Mumford v. Ecuador Development Co. (C. C.) 639.

§ 3. Officers and agents.

Directors of a corporation, while they may be held jointly liable for misfeasance or neglect of duty in permitting the wrongful diversion of funds of the corporation to themselves and the other stockholders, are not jointly liable for the sums so received by each of them separately as stockholders.—Great Western Min. & Mfg. Co. v. Harris' Estate (C. C.) 38.

State statutes imposing liabilities upon officers and directors of corporations do not exclude their common-law liability for misfeasance and negligence in the performance of their duties as such officers or directors.—Great Western Min. & Mfg. Co. v. Harris' Estate (C. C.) 38.

§ 4. Corporate powers and liabilities.

Where the statutes of a state authorize a corporation to convey property by deed executed by its president or vice president, when given such powers by its by-laws, a deed signed by the vice president of a corporation under authority given by the board of directors is presumptively valid.—American Exchange Nat. Bank v. Ward (C. C. A.) 782.

Stockholders of an insolvent corporation *held* liable to its bondholders for proceeds of the bonds wrongfully diverted and paid to them.—Great Western Min. & Mfg. Co. v. Harris' Estate (C. C.) 38.

§ 5. Insolvency and receivers.

So long as a corporation remains in possession and control of its property, it may lawfully prefer one creditor over another, although insolvent.—American Exchange Nat. Bank v. Ward (C. C. A.) 782.

A conveyance by an insolvent corporation, giving a preference to certain creditors who had for some time controlled its management and business, *held* valid as against another creditor.—American Exchange Nat. Bank v. Ward (C. C. A.) 782.

A corporation is not precluded from preferring a bona fide creditor because he is also one of its directors, although the burden rests upon him to prove his absolute good faith and the justice of his demand.—American Exchange Nat. Bank v. Ward (C. C. A.) 782.

An action to charge the defendant as an officer and director of a corporation for acts of misfeasance in the management of the affairs of the corporation, being for the enforcement of the common-law liability, is governed as to limitation by the law of the forum, and not by that of the domicile of the corporation.—Great Western Min. & Mfg. Co. v. Harris' Estate (C. C.) 38.

A suit to charge the defendant with liability for misfeasance as director of a corporation, in permitting diversion of its funds from which he did not receive personal benefit, abates with his death, and cannot be revived against his executors.—Great Western Min. & Mfg. Co. v. Harris' Estate (C. C.) 38.

§ 6. Reincorporation and reorganization.

Under an interlocutory decree for infringement against a New York corporation, damages cannot be awarded for infringements committed by a New Jersey corporation having the same name and in part the same officers; the complainant having through mistake sued the wrong company.—American Electrical Novelty & Mfg. Co. v. Acme Electric Lamp Co. (C. C.) 739.

COSTS.

In bankruptcy, see "Bankruptcy," § 5.

§ 1. Security for payment.

An affidavit of poverty by an administratrix, suing for wrongful death under a statute giving the right of action in favor of the widow and children of the deceased, should show that neither the estate nor the beneficiaries are able to prepay or secure the costs.—Reed v. Pennsylvania Co. (C. C. A.) 714.

An affidavit of poverty *held* not sufficiently certain in statement under the statute.—Woods v. Bailey (C. C.) 121.

§ 2. On appeal or error, and on new trial or motion therefor.

A complainant will be taxed with the costs of an appeal taken by him, where his bill fails to make the ordinary jurisdictional averments; nor will he be given leave to amend, although the question of jurisdiction was not raised by defendant in the court below.—Cochran v. Childs (C. C. A.) 433.

The act permitting actions in the federal courts to be prosecuted in forma pauperis applies to proceedings on appeal or writ of error in such actions.—Reed v. Pennsylvania Co. (C. C. A.) 714.

COUNTERFEITING.

The passage of a Confederate bill as money is not a violation of the fourth clause of Rev. St. § 5430.—United States v. Barrett (D. C.) 369.

An indictment for having in possession, with intent to sell or use, obligations or securities engraved and printed after the similitude of obligations and securities of the United States, does not charge an offense, where it shows on its face that the instruments referred to are bills issued by a bank, and purporting to be its obligations, and not those of the government.—United States v. Conners (D. C.) 734.

COUNTIES.

See "Municipal Corporations."

§ 1. Fiscal management, public debt, securities, and taxation.

Bonds issued by a county, in which it acknowledged its indebtedness to the bearer in a certain sum, to be paid, with interest, from a

special fund created by the levy of an annual tax at a specified rate on the taxable property in the county, are not negotiable instruments.—Washington County, Neb., v. Williams (C. C. A.) 801; Blair v. Washington County, Neb., Id.

Where bonds issued by a county bound it only to pay thereon the proceeds of an annual tax to be levied at a fixed rate upon the taxable property of the county, its refusal to further levy the tax or make payments does not entitle a bondholder to recover judgment for the principal of his bonds.—Washington County, Neb., v. Williams (C. C. A.) 801; Blair v. Washington County, Neb., Id.

COURT OF CLAIMS.

See "Courts," § 1.

COURTS.

Authority to compel making of affidavits, see "Affidavits."
Contempt of court, see "Contempt."
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Jurisdiction of criminal prosecutions, see "Criminal Law," § 1.

§ 1. United States courts.

A federal court may have jurisdiction of causes of action on coupons made by a municipal corporation and payable to bearer, though the original holders could not have maintained actions on them.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

The joinder of causes of action on bonds payable to an individual's order with causes of action on coupons made by a municipal corporation *held* not to deprive the court of jurisdiction of the former.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

The joinder of jurisdictional and nonjurisdictional causes *held* not to deprive the federal court of jurisdiction of the former.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

The state court's decision on questions of commercial law *held* not controlling in the federal courts.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

The method of review of proceedings in the federal court is not affected by the act of conformity or by the practice or legislation of the states.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

Where state statutes provide a remedy at law by a proceeding in the court which renders a judgment to set the same aside, such provisions, by force of the conformity act, are applicable to federal courts within the state in cases within their purview, and exclude the jurisdiction of equity.—Travelers' Protective Ass'n of America v. Gilbert (C. C. A.) 269.

A suit to enjoin the collection of taxes levied on the capital stock of a bank and exceeding $2,000 in amount, on the ground that the revenue statute under which such taxes were levied impairs the obligation of the contract embodied in the bank's charter granted by the state, is one of which a federal court has jurisdiction, without regard to the citizenship of the parties.—Union & Planters' Bank v. City of Memphis (C. C. A.) 561.

Where the amount claimed in a bill to enforce a lien exceeds $2,000, the jurisdiction of a federal court is not defeated by the fact that it appears on the face of the bill that an action to recover a portion of the claim is barred by limitation under a state statute.—Waterfield v. Rice (C. C. A.) 625.

Where the amount demanded by a plaintiff in good faith is sufficient to give a federal court jurisdiction, such jurisdiction is not defeated because it is adjudged that as to a portion of the claim plaintiff is not entitled to recover.—Washington County, Neb., v. Williams (C. C. A.) 801; Blair v. Washington County, Neb., Id.

A complainant cannot invoke the jurisdiction of a federal court by setting forth the contention which will be made by defendant in answering the bill, upon which a federal question will arise.—Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. A.) 817.

A state statute providing that, on the death of a defendant pending an action, the plaintiff shall not be entitled to recover against his estate unless he presents his claim to the executor or administrator, is not applicable to an action by the United States in a federal court on the bond of one of its officers.—Pond v. United States (C. C. A.) 989.

An action by a tribal Indian against the agent of his tribe for having caused his arrest and imprisonment on an alleged false charge of violating the laws of the United States *held* to involve a federal question, which gave a federal court jurisdiction.—Ma-ka-ta-wah-qua-twa v. Rebok (C. C.) 12.

An action at law exclusively cognizable in a federal court can only be maintained by the owner of the legal title to the cause of action, regardless of the state practice.—New York Continental Jewell Filtration Co. v. City of Sullivan (C. C.) 179.

A federal court *held* to have jurisdiction of an action by a tribal Indian for false imprisonment upon a criminal charge under a state statute, on the ground that it involved a federal question.—Peters v. Malin (C. C.) 244.

Under the provisions of the conformity act (Rev. St. § 721), the rules of evidence of the courts of a state, established by statute or decision, become those of a United States court sitting therein in actions at law.—Parker v. Moore (C. C.) 470.

Act June 27, 1898, taking away the jurisdiction conferred upon the circuit and district courts of suits against the United States by Act March 3, 1887, § 2, so far as relates to suits brought by officers to recover fees or salaries, contains no saving clause, and applies to suits pending at the time of its passage.—Amsden v. United States (D. C.) 1.

Upon the question of usury, which is statutory, the federal courts follow the decisions of the state courts.—Brown v. Grundy (D. C.) 15.

§ 2. Concurrent and conflicting jurisdiction, and comity.

A federal court, on an ancillary bill, has power to enjoin a party to the original suit, pending an appeal from the decree therein, from prosecuting a subsequent action brought in a court of another state involving issues determined by such decree.—Riverdale Cotton Mills v. Alabama & G. Mfg. Co. (C. C.) 431.

COVERTURE.

See "Husband and Wife."

CREDITORS.

See "Bankruptcy."

CRIMINAL LAW.

Crimes of Indians in Indian country or reservations, see "Indians."
Penalties, see "Penalties."
Restraining criminal acts by injunction, see "Injunction," § 1.

Particular offenses.

See "Conspiracy," § 1; "Contempt"; "Counterfeiting"; "False Pretenses"; "Homicide."
Offenses against customs laws, see "Customs Duties," § 3.
Operation of launch without licensed engineer, see "Shipping," § 1.
Violation of banking laws, see "Banks and Banking," § 1.

§ 1. Jurisdiction.

Whether a homicide committed within a state is a crime within federal jurisdiction depends upon the question of law whether there has been such a cession of territory to the United States as to make it a place within the exclusive jurisdiction of the United States, and, if so, upon the question of fact whether the act was committed within such territory.—United States v. Lewis (C. C.) 630.

§ 2. Former jeopardy.

A prisoner once tried for felony before a jury regularly impaneled, which failed to agree and was discharged by the court without the prisoner's consent and without any actual imperious necessity, cannot, under the fifth constitutional amendment, be retried for the same offense.—Ex parte Glenn (C. C.) 257.

§ 3. Preliminary complaint, affidavit, warrant, examination, commitment, and summary trial.

A federal court will not order a person removed to another district for trial on an indictment which does not charge facts constituting an offense, although the prisoner does not resist the removal, or even if he consents thereto.—United States v. Conners (D. C.) 734.

§ 4. Trial.

The fact that a prisoner made no objection to the discharge of the jury, but remained silent, is not a consent to such discharge.—Ex parte Glenn (C. C.) 257.

Code W. Va. c. 159, § 7, does not authorize a court to discharge the jury in a felony case and hold the prisoner for another trial, unless by the prisoner's consent, or the record shows a case of imperious necessity.—Ex parte Glenn (C. C.) 257.

A prisoner on trial for a felony cannot waive any constitutional right.—Ex parte Glenn (C. C.) 257.

CUSTOMS DUTIES.

§ 1. Goods subject to duty, rate, and amount.

Under paragraph 697 of the tariff act of 1897, citizens of the United States returning from abroad are entitled to bring in free of duty, as personal effects, only such as were taken with them out of the country and $100 worth in addition.—United States v. One Pearl Necklace (C. C. A.) 164.

Lace window curtains, composed in chief value of cotton, made on a Nottingham lace curtain machine, but which, after having been finished by the usual process, are ornamented by cord designs sewed thereon by a different machine, are dutiable under paragraph 339 of the tariff act of 1897, and not under paragraph 340.—Smith v. Read (C. C. A.) 795.

§ 2. Entry and appraisal of goods, bonds, and warehouses.

Rev. St. §§ 2799, 2801, 2802, relating to the entry of passengers' baggage and forfeitures of dutiable articles not mentioned for entry, construed.—United States v. One Pearl Necklace (C. C. A.) 164.

§ 3. Violations of customs laws.

A passenger who fails to mention dutiable articles in his baggage to the officer who takes his entry is not relieved from the statutory forfeiture by the fact that the forms used for the entry and prepared by the treasury department are misleading and unintelligible.—United States v. One Pearl Necklace (C. C. A.) 164.

An instruction, in an action for forfeiture of an article of baggage for a failure to declare the same for duty, *held* erroneous.—United States v. One Pearl Necklace (C. C. A.) 164

CUTTING TIMBER.

On public lands, see "Public Lands," § 1.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.
For breach by seller of contract for sale of goods, see "Sales," § 1.
For collision, see "Collision," § 4.

§ 1. Grounds and subjects of compensatory damages.

Speculative or contingent damages cannot form the basis of a lawful judgment, as only actual damages established by proof of facts are recoverable.—Central Coal & Coke Co. v. Hartman (C. C. A.) 96.

Loss of profits from the interruption of an established business *held* recoverable, where the plaintiff makes it reasonably certain what the amount of his actual loss was.—Central Coal & Coke Co. v. Hartman (C. C. A.) 96.

§ 2. Liquidated damages and penalties.

A stipulation, in a contract for the sale of cattle, for the payment by the seller of a certain sum per head for any shortage on a failure to deliver the full number sold, is void under Code Mont. §§ 2242, 2243.—Home Land & Cattle Co. v. McNamara (C. C. A.) 822.

A stipulation, in a contract for the sale of cattle, for the payment by the seller of a certain sum per head for any shortage in the number delivered of a certain class, *held* one for a penalty, which a court of equity would not enforce. —Home Land & Cattle Co. v. McNamara (C. C. A.) 822.

§ 3. Pleading, evidence, and assessment.

Conjectures of witnesses, unfounded in the knowledge of actual facts, from which the amount of damages can be inferred with reasonable certainty, cannot sustain the judgment.—Central Coal & Coke Co. v. Hartman (C. C. A.) 96.

Evidence *held* insufficient to sustain a verdict for damages for the loss of anticipated profits.—Central Coal & Coke Co. v. Hartman (C. C. A.) 96.

Proof of expenses and income of business for a reasonable time anterior to and during the interruption charged *held* indispensable to a lawful judgment for damages for the loss of anticipated profits of an established business. —Central Coal & Coke Co. v. Hartman (C. C. A.) 96.

DEATH.

Dower to widow of bankrupt, see "Bankruptcy," § 3.
Of party to action ground for abatement, see "Abatement and Revival," § 1.

§ 1. Actions for causing death.

An action for wrongful death, under the Tennessee statute, abates and the right of action is extinguished, on the death of the statutory beneficiary in whose favor the right accrued. Sanders' Adm'x v. Louisville & N. R. Co. (C. C. A.) 708.

Under the special statute of Montana giving a right of action for wrongful death to the heirs of the person killed, such right of action is joint, and all the heirs must join as plaintiffs.—Whelan v. Rio Grande W. Ry. Co. (C. C.) 326.

DEBTOR AND CREDITOR.

See "Bankruptcy."

DEEDS.

By sheriffs, see "Execution," § 1.
Of public lands, see "Public Lands," § 2.

DEMURRAGE.

See "Shipping," § 7.

DEMURRER.

In pleading, see "Equity," § 3.

DESCENT AND DISTRIBUTION.

See "Wills."

DEVISES.

See "Wills."

DIRECTING VERDICT.

In civil actions, see "Trial," § 2.

DISCHARGE.

From indebtedness, see "Bankruptcy," § 3; "Release."
From liability as surety, see "Principal and Surety," § 1.
Of jury in criminal prosecutions, see "Criminal Law," § 4.

DISCOVERY.

§ 1. Under statutory provisions.

An application for an order for the inspection of documents under the California statute must describe the documents or papers with such particularity as to advise the adverse party and to enable the court to determine the propriety of the order asked, and also show the competency and materiality of such documents or papers as evidence.—San Fernando Copper Mining & Reduction Co. v. Humphrey (C. C.) 772.

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 7.

DISTRIBUTION.

Of estate of bankrupt, see "Bankruptcy," § 2.

DISTRICT COURTS.

See "Courts," § 1.

DISTRICT OF COLUMBIA.

Courts, see "Courts," § 1.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 1.

DOCUMENTS.

Production and inspection of writings, see "Discovery," § 1.

DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 1.

DONATIONS.

Of public lands, see "Public Lands," § 2.

DOWER.

To widow of bankrupt, see "Bankruptcy," § 3.

DRAINS.

Improvements by municipality, see "Municipal Corporations," § 1.

DUE PROCESS OF LAW.

See "Constitutional Law," § 1.

DUTIES.

Customs duties, see "Customs Duties."

ELECTION.

Between testamentary provisions and other rights, see "Wills," § 1.

EMBEZZLEMENT.

By officer of national bank, see "Banks and Banking," § 1.

EMINENT DOMAIN.

§ 1. Nature, extent, and delegation of power.

The fact that a local corporation is auxiliary to one of another state does not affect its right to exercise the power of eminent domain under the statutes of Idaho.—Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho (C. C. A.) 842.

Under the statutes of Idaho a telegraph company may condemn right of way for its line over the right of way of a railroad, when such use will not interfere with the operation of the railroad and will better subserve the public interest.—Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho (C. C. A.) 842.

§ 2. Compensation.

An award of damages to a railroad company for right of way for a telegraph line *held* not so inadequate as to be reversible on error.—Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho (C. C. A.) 842.

§ 3. Proceedings to take property and assess compensation.

A judgment awarding a telegraph company right of way for its line over the right of way of a railroad *held* not objectionable for indefiniteness.—Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho (C. C. A.) 842.

An award fixing the value of land condemned for public use will not be set aside because the committee making it excluded evidence to show the probable profit which could be derived from the land by the erection of a particular kind of building thereon, nor for the exclusion of testimony giving estimates of value on account of particular facts, where such facts are shown and were presumably considered by the committee.—Gage v. Judson (D. C.) 350.

An award filed in proceedings for the condemnation of land by the United States for a public building, and made by persons as arbitrators under a written submission signed by counsel, *held* not binding on the United States.—Gage v. Judson (D. C.) 350.

A committee appointed under the Connecticut statute to value land condemned for public use does not act as a strictly judicial tribunal to determine the facts on evidence merely, and must be allowed a wide discretion as to the evidence it will admit in the hearing before it.—Gage v. Judson (D. C.) 350.

§ 4. Remedies of owners of property.

Under the Vermont statute, where the question of damages for a railroad right of way is submitted to arbitration, an award is made, and the company takes possession, but fails to pay the damages, the remedy of the landowner is limited to an action on the award.—Bibber-White Co. v. White River Val. Electric R. Co. (C. C.) 36.

Under the Vermont statute, where a railroad company has entered upon and used land for right of way, either with or without the consent of the owner, the latter cannot maintain a suit to enforce a lien for the damages until after the expiration of two years.—Bibber-White Co. v. White River Val. Electric R. Co. (C. C.) 36.

EMPLOYES.

See "Master and Servant."

ENTRY.

Of imported goods, see "Customs Duties," § 2.
Of judgment, see "Appeal and Error," § 3.
Of public lands, see "Public Lands," § 2.

EQUITY.

Equitable estoppel, see "Estoppel," § 1.
Relief against judgment, see "Judgment," § 3.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Injunction"; "Partition," § 1; "Public Lands," § 2; "Quieting Title"; "Receivers"; "Specific Performance"; "Taxation."

Suits for infringement of patents, see "Patents," § 5.

§ 1. Jurisdiction, principles, and maxims.

Vendors of realty *held* barred from relief in equity and remitted to their remedies at law by their bad faith and unconscionable acts in foreclosing mortgages they had agreed to pay.—Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co. (C. C. A.) 284.

Equity will not entertain bills to enforce forfeitures.—Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co. (C. C. A.) 284.

Equity will grant no relief to one who in the transaction has been guilty of bad faith or unrighteous dealing.—Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co. (C. C. A.) 284.

Holders of a series of bonds issued by a county *held* not entitled to join and maintain a suit in equity thereon.—Washington County, Neb., v. Williams (C. C. A.) 801; Blair v. Washington County, Neb., Id.

§ 2. Parties and process.

A suit in equity *held* not maintainable for want of an indispensable party.—Shingleur v. Jenkins (C. C.) 452.

§ 3. Pleading.

Exceptions to an answer considered.—Barrett v. Twin City Power Co. (C. C.) 45.

A demurrer to an answer in equity is unknown, nor can exceptions serve the office of a demurrer by presenting the question of its legal sufficiency.—Barrett v. Twin City Power Co. (C. C.) 45.

The only mode of taking advantage of defects in an answer is by written exceptions on the grounds that it contains matter which is either scandalous or impertinent, or of its insufficiency in not answering fully the statements and allegations of the bill.—Barrett v. Twin City Power Co. (C. C.) 45.

The principal office of exceptions for insufficiency is to obtain more perfect discovery from defendant under oath.—Barrett v. Twin City Power Co. (C. C.) 45.

A court of equity will not rigidly enforce its rules of pleading, where it will require questions to be disposed of on purely technical grounds.—Barrett v. Twin City Power Co. (C. C.) 45.

The court will not order matter in an answer alleged to be impertinent to be struck out on exceptions, unless the impertinence is fully and clearly made out.—Barrett v. Twin City Power Co. (C. C.) 45.

§ 4. Masters and commissioners, and proceedings before them.

When a cause has by consent been referred to a master to make findings on all the issues both of fact and law, a party may file exceptions to the master's conclusions of law after his report has been filed in court, under equity rule 83, notwithstanding his failure to file any exceptions before the master.—Home Land & Cattle Co. v. McNamara (C. C. A.) 822.

§ 5. Bill of review.

In a case in which no appeal to the supreme court is allowed by law, an attempted appeal to that court does not suspend the running of the time within which a bill of review may be filed, and such bill cannot be entertained after the expiration of the six months allowed for an appeal to the circuit court of appeals.—Blythe Co. v. Hinckley (C. C. A.) 827.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.

ESTOPPEL.

By assignment of patent, see "Patents," § 4.
By judgment, see "Judgment," § 5.
Of municipality in action on bonds, see "Municipal Corporations," § 3.
To avoid or forfeit insurance policy, see "Insurance," § 3.
To enforce forfeiture of insurance policy, see "Insurance," § 8.
To enforce lien, see "Mechanics' Liens," § 5.

§ 1. Equitable estoppel.

An estoppel is as conclusive when founded on statements without, as where it is founded on those within, a negotiable instrument.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

EVIDENCE.

See "Affidavits"; "Discovery."

Review on appeal or writ of error, see "Appeal and Error," § 7.

As to particular facts or issues.

See "Damages," § 3; "Estoppel," § 1; "Judgment," § 7.

Utility of patent, see "Patents," § 1.

In actions by or against particular classes of parties.

See "Carriers," §§ 1, 2; "Master and Servant," § 1.

Trustees in bankruptcy, see "Bankruptcy," § 2.

In particular civil actions or proceedings.

Actions for breach of towage contract, see "Towage."
Action for unfair competition in trade, see "Trade-Marks and Trade-Names," § 1.
Action on insurance policy, see "Insurance," § 7.
Admiralty, see "Collision," § 4.
Bankruptcy, see "Bankruptcy," § 1.
Personal injuries, see "Master and Servant," § 1.

§ 1. Relevancy, materiality, and competency in general.

A statement constituting a mere narrative of a past transaction is no part of the res gestæ.—Fidelity & Casualty Co. v. Haines (C. C. A.) 337.

Admission by local agent of insurance company that claimant was insured *held* no part of the res gestæ.—Fidelity & Casualty Co. v. Haines (C. C. A.) 337.

Unsworn statements made by a third person *held* not admissible as part of the res gestæ.—Southern Pac. Co. v. Arnett (C. C. A.) 849.

§ 2. Parol or extrinsic evidence affecting writings.

Where a contract describes a person as trustee, without stating for whom or what purpose, the surrounding circumstances and negotiations leading up to the contract may be shown to enable the court to correctly construe it.—American Bonding & Trust Co. of Baltimore, Md., v. Takahashi (C. C. A.) 125.

§ 3. Opinion evidence.

Witnesses shown to have had experience in raising and handling cattle *held* competent to express opinions as to the condition of cattle at the time of their shipment, and the effect of such condition on their ability to safely endure the journey under the conditions shown by the evidence.—Southern Pac. Co. v. Arnett (C. C. A.) 849.

EXCEPTIONS.

To pleadings, see "Equity," § 3.

EXCEPTIONS, BILL OF.

Necessity for purpose of review, see "Appeal and Error," § 4.
Taking exceptions at trial, see "Trial," § 1.

§ 1. Settlement, signing, and filing.

Rev. St. § 953, as amended by Act June 5, 1900, does not authorize the allowance and signing of a bill of exceptions by another judge merely because the judge before whom the cause was tried is absent from the district or circuit.—Western Dredging & Improvement Co. v. Heldmaier (C. C. A.) 123.

EXCHANGES.

Membership as property of bankrupt, see "Bankruptcy," § 2.

The trustee of bankrupts *held* entitled to the proceeds of their seats in a stock exchange, sold by a committee of the exchange on their expulsion, after payment of any indebtedness due the association or its members.—In re Gaylord (D. C.) 717.

EXECUTION.

§ 1. Sale.

Under the Montana Code, a redemptioner from an execution sale is not required to pay to the sheriff the amount which the purchaser has paid in purchasing the property at a tax sale, for which he holds certificates of purchase, which can only be extinguished, in the manner provided by statute, by payment to the county or municipal treasurer.—Bender v. King (C. C.) 60.

A purchaser of real estate at execution sale, who afterwards purchases the property at tax sale, does not thereby become a creditor of the judgment debtor, so as to require a redemptioner from the execution sale to pay the amount of the tax lien to effect a redemption.—Bender v. King (C. C.) 60.

Redemption statutes are to be liberally construed, and a lienholder entitled to redeem from a sale from which previous redemptions have been made or attempted by other creditors, who pays to the sheriff the amount required to redeem from the sale and prior redemptions, effects such redemption, although the prior redemptions may have been ineffective.—Bender v. King (C. C.) 60.

A plaintiff, whose action was severed after levy of attachment on realty, and judgment rendered on a part of his claim, which was admitted, in accordance with a provision of the Montana Code, does not lose the lien of his attachment on the cause of action which has not been tried by a sale of the attached property under his judgment; but such lien still exists, subject to the sale, and as the holder of a subsequent lien he is entitled to redeem from the sale under the statute.—Bender v. King (C. C.) 60.

Under the Kentucky statute, a valid sale may be made after the return day of an execution under a levy made on that day.—United States v. Hogg (D. C.) 292.

EXEMPTIONS.

In favor of bankrupt, see "Bankruptcy," § 3.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 3.

FALSE IMPRISONMENT.

Of seamen, see "Seamen."
Unlawful detention of Indian, see "Indians."

FALSE PRETENSES.

The use as money of an instrument which does not possess the requisite similitude to some national obligation or security, to perpetrate a common-law cheat, is not an offense against the United States, but is solely within state authority.—United States v. Barrett (D. C.) 369.

FEDERAL COURTS.

See "Courts," § 1.

FEDERAL QUESTIONS.

Ground for jurisdiction, see "Courts," § 1.

FELLOW SERVANTS.

See "Master and Servant," § 1.

FILING.

Of petition in bankruptcy, see "Bankruptcy," § 1.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 3.

FINDING LOST GOODS.

A public administrator, granted letters of administration on the estate of an unknown man, whose body was found floating and buried at sea, *held* entitled to possession of money taken from the body and paid into the admiralty court, after an award had been made to the salvors and paid therefrom.—Gardner v. Ninety-Nine Gold Coins (D. C.) 552.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 7.

FIXTURES.

The fittings of an opera house building, consisting of stage appliances, drop curtain, and chairs attached to the floor by screws and nails, *held* to be fixtures, which passed to a purchaser of the building at execution sale.—Bender v. King (C. C.) 60.

FOG.

Collision of vessels, see "Collision," § 3.

FORECLOSURE.

Of lien, see "Mechanics' Liens," § 6.

FOREIGN JUDGMENTS.

See "Judgment," § 6.

FORFEITURES.

Of insurance, see "Insurance," § 8.

FORGERY.

See "Counterfeiting."

FORMER ADJUDICATION.

See "Judgment," § 5.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 2.

FRAUD.

See "False Pretenses."
In procuring insurance, see "Insurance," § 2.

GAMING.

§ 1. Gambling contracts and transactions.

Under the statute of South Carolina, a broker who advanced margins for his principal on a purchase of cotton for future delivery in the New York Cotton Exchange cannot recover the same from his principal, where the latter testifies that he had no intention of accepting delivery of the cotton, although by the rules of the exchange, subject to which the contract was made with his knowledge and assent, his acceptance could have been enforced.—Parker v. Moore (C. C.) 470.

GARNISHMENT.

See "Execution."

GRANTS

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

GUARDIAN AND WARD.

Guardian of Indian, see "Indians."

HABEAS CORPUS.

§ 1. Jurisdiction, proceedings, and relief.

A circuit court of the United States has jurisdiction to discharge on habeas corpus a prisoner held for trial on indictment in a state court, where he is restrained of his liberty in violation of the constitution of the United States.—Ex parte Glenn (C. C.) 257.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 7.

HIGHWAYS.

Accidents at railroad crossings, see "Railroads," § 1.

HOMESTEAD.

Pre-emption of public lands, see "Public Lands," § 2.

HOMICIDE.

§ 1. Murder.

The elements of felonious homicide under the laws of the United States are to be determined

by the rules of the common law.—United States v. Lewis (C. C.) 630.

The elements of the crime of murder, under the laws of the United States, and of the included crime of manslaughter, and the facts which must appear to render the homicide justifiable on the ground of self-defense, defined and explained in a charge to the jury.—United States v. Lewis (C. C.) 630.

HUSBAND AND WIFE.

Right of widow of bankrupt to dower, see "Bankruptcy," § 3.

§ 1. Actions.

Complaint in an action against husband and wife for value of books sold the wife on orders of purchase signed by her *held* not sufficient.—Barrie v. Carolan (C. C.) 134.

IMPORTS.

Duties, see "Customs Duties."

IMPRISONMENT.

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."
Public improvements, see "Municipal Corporations," § 1.
Validity of assessment for local improvements as taking property without due process of law, see "Constitutional Law," § 1.

INDEMNITY.

See "Principal and Surety."

INDIANS.

See "Public Lands," § 2.
Federal jurisdiction of action by Indian as involving federal question, see "Courts," § 1.

The Sac and Fox Indians in Iowa, residing on lands purchased by them with the consent of the state, are tribal Indians, and their lands constitute a reservation, and they are under the exclusive jurisdiction and control of the United States in respect to their domestic relations.—Peters v. Malin (C. C.) 244.

A court of the state of Iowa has no jurisdiction to appoint a guardian for the persons of minors of the Sac and Fox tribe of Indians residing on their reservation, with authority to compel such minors to attend school off the reservation, contrary to the wishes of their parents.—Peters v. Malin (C. C.) 244.

The Sac and Fox Indians in Iowa are not subject to the criminal laws of the state in respect to acts which affect only members of their tribe.—Peters v. Malin (C. C.) 244.

A defendant who caused the arrest of a tribal Indian and his imprisonment while awaiting trial on a charge of violating a state statute which had no application to his act, and before a court which was without jurisdiction to try him therefor, *held* liable in damages for false imprisonment.—Peters v. Malin (C. C.) 244.

INDICTMENT AND INFORMATION.

For counterfeiting, see "Counterfeiting."

INFRINGEMENT.

Of patent, see "Patents," § 5.

INJUNCTION.

By United States court against proceedings in state court, see "Courts," § 2.
Restraining assessment and enforcement of taxes, see "Taxation."

§ 1. Subjects of protection and relief.

The fact that the remedy at law and the police protection afforded are ineffectual, from whatever cause, to prevent unlawful interference by striking workmen with nonunion workmen and their employers, affords ground for the jurisdiction of a court of equity to restrain such unlawful interference by injunction.—Southern Ry. Co. v. Machinists' Local Union No. 14 (C. C.) 49.

A striking labor union, which by maintaining pickets and in other ways threatens and menaces nonunion workmen to prevent their working, is responsible for acts of personal violence to such workmen induced by its action and for its benefit, whether committed by its members or by others, and such acts afford ground for an injunction.—Southern Ry. Co. v. Machinists' Local Union No. 14 (C. C.) 49.

Acts of striking workmen in threatening and menacing other workmen, by the employment of pickets and otherwise, *held* unlawful and to entitle the employer to an injunction.—Southern Ry. Co. v. Machinists' Local Union No. 14 (C. C.) 49.

The action of a labor union in endeavoring to persuade apprentices under contract for a term of years to leave their employer *held* in violation of the statute of Tennessee, and to entitle the employer to an injunction.—Southern Ry. Co. v. Machinists' Local Union No. 14 (C. C.) 49.

The fact that acts committed by defendants constitute criminal offenses under a statute does not deprive a court of equity of jurisdiction to enjoin such acts, where their continuance will result in irreparable injury.—Allis Chalmers Co. v. Reliable Lodge (C. C.) 264.

Evidence *held* to sustain an application for an injunction to restrain striking workmen from continuing a system of picketing which resulted in acts of violence and intimidation toward other workmen and unlawfully interfered with the business of their employer.—Allis Chalmers Co. v. Reliable Lodge (C. C.) 264.

The owner of patents cannot be enjoined from issuing letters or circulars to the trade,

asserting the validity of his patents and that they are infringed by goods manufactured and sold by another, and giving notice that infringers will be sued, where they contain no false statement of facts.—Adriance, Platt & Co. v. National Harrow Co. (C. C.) 637.

§ 2. Preliminary and interlocutory injunctions.

A telephone company *held* not entitled to a preliminary injunction to prevent another company from completing and operating its line along the same side of certain streets.—Louisville Home Tel. Co. v. Cumberland Telephone & Telegraph Co. (C. C. A.) 663.

A restraining order will not be granted to prevent the issuance of circulars by defendants describing a book published by them, merely because it may confuse the public and cause injury to complainant as publishers of a similar book, where on the showing made no question of copyright or unfair competition appears.—Halstead v. John C. Winston Co. (C. C.) 35.

§ 3. Violation and punishment.

The question whether a plaintiff, in commencing and prosecuting the action, is violating an injunction issued in a suit between the parties in another jurisdiction, must be brought properly and formally before the court by a motion for a stay or other appropriate motion.—Berliner Gramophone Co. v. Seaman (C. C.) 679.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSOLVENCY.

See "Bankruptcy."

Insolvent building and loan association, see "Building and Loan Associations."

Of corporation, see "Corporations," § 5.

Right of creditors to proceeds from insurance policy, see "Insurance," § 5.

INSPECTION.

Of writings, see "Discovery," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," § 3.

INSURANCE.

§ 1. Insurance agents and brokers.

Stipulation in contract of appointment of insurance agent that he receive as compensation commission on premiums *held* not to authorize him to adjudge losses or admit liability of principal.—Fidelity & Casualty Co. v. Haines (C. C. A.) 337.

An insurance agent, who, in accordance with a local custom among agents, turned an application over to the agent of another company, which issued a policy thereon, *held* to be the agent of such company in the transaction.—Queen Ins. Co. of America v. Union Bank & Trust Co. (C. C. A.) 697.

§ 2. The contract in general.

A statement made in an application for life insurance, whether a warranty or only a representation, speaks from the time of the delivery of the policy, and if, after the statement is made, a material change occurs in the condition of the applicant, covered by such statement, before the contract is consummated, an absolute duty rests upon the applicant to make disclosure of the fact.—Cable v. United States Life Ins. Co. (C. C. A.) 19; United States Life Ins. Co. v. Cable, Id.

A life insurance policy, delivery of which was procured while the insured was dangerously ill by a concealment of the fact, *held* void for fraud.—Cable v. United States Life Ins. Co. (C. C. A.) 19; United States Life Ins. Co. v. Cable, Id.

A life insurance company *held* not to have waived the right to insist upon the invalidity of a policy because of the illness of the insured when it was delivered, although it was advised of such illness, where material facts were concealed from it.—Cable v. United States Life Ins. Co. (C. C. A.) 19; United States Life Ins. Co. v. Cable, Id.

The delivery of an application for life insurance, together with a check for the first premium thereon, to a local agent, to be forwarded to the company, which application was rejected and the money returned, *held* not to create a contract of insurance; the applicant having died before the notice of rejection and money was received back by the local agent.—Miller v. Northwestern Mut. Life Ins. Co. (C. C. A.) 465.

§ 3. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Where the agent of an insurance company is informed by an insurer that it is his purpose to obtain a warehouse receipt for the insured property and pledge the same, together with the policy, as security for a loan, and the policy is issued with the loss made payable to the lender as his interest may appear, the insurer cannot avoid the policy on the ground that the pledge effected a change in the ownership of the property contrary to its terms.—Queen Ins. Co. of America v. Union Bank & Trust Co. (C. C. A.) 697.

§ 4. Adjustment of loss.

Insurance adjuster *held* authorized to exercise the option of his company to pay damages or reconstruct or repair.—Lancashire Ins. Co. v. Barnard (C. C. A.) 702; Traders' Ins. Co. v. Same, Id.

§ 5. Right to proceeds.

The fact that a married man was insolvent when he obtained life insurance in favor of his wife and children, where the premiums paid were moderate and there was no actual fraud, does not entitle his creditors to claim any part of the proceeds of such insur-

ance as against his widow and children.—Masonic Mut. Life Ass'n v. Paisley (C. C.) 32.

§ 6. Payment or discharge, contribution, and subrogation.

Policy construed, and *held*, that the damages were due immediately after the filing of an award, subsequent to the expiration of 30 days.—Lancashire Ins. Co. v. Barnard (C. C. A.) 702; Traders' Ins. Co. v. Same, Id.

§ 7. Actions on policies.

It is not prejudicial to an insurance company that an action on a policy is brought in the name of an insured, who had pledged the same to a creditor, for the use of such creditor, although the latter might have maintained the action in his own name.—Queen Ins. Co. v. Union Bank & Trust Co. (C. C. A.) 697.

Option to pay damages for alleged loss or to rebuild may be exercised by insurance company at any time before the expiration of the time prescribed in the policy.—Lancashire Ins. Co. v. Barnard (C. C. A.) 702; Traders' Ins. Co. v. Same, Id.

Request of insurance company for plans of burnt building after it had exercised its option not to rebuild *held* too late.—Lancashire Ins. Co. v. Barnard (C. C. A.) 702; Traders' Ins. Co. v. Same, Id.

Demand for plans and specifications of a burnt building *held* to have been made too late under the evidence, and refusal to grant it is no defense to an action on the policy.—Lancashire Ins. Co. v. Barnard (C. C. A.) 702; Traders' Ins. Co. v. Same, Id.

Whether the limitation contained in a life insurance policy requiring an action thereon to be commenced within six months after the death of the insured runs from the time of such death, or from the time the right of action accrued under other provisions of the policy, quære.—Fidelity & Casualty Co. of New York v. Love (C. C. A.) 773.

An action on a life insurance policy *held* to have been commenced within the time limited in the policy under the statute of Mississippi.—Fidelity & Casualty Co. of New York v. Love (C. C. A.) 773.

The burden rests upon a life insurance company to establish a defense of suicide, pleaded in an action on the policy.—Fidelity & Casualty Co. of New York v. Love (C. C. A.) 773.

§ 8. Mutual benefit insurance.

The relation of principal and agent *held* to exist between a beneficiary association and the clerk of a local camp, though the by-laws and certificates of membership contained a uniformly disregarded stipulation that the clerk of the local camp was not to be the agent of the association.—Modern Woodmen of America v. Tevis (C. C. A.) 113.

The actual legal relation of parties to each other and their acts and transactions *held* to prevail over previous written stipulations, which were subsequently disregarded.—Modern Woodmen of America v. Tevis (C. C. A.) 113.

Habitual acceptance of premiums by insurance company after they are due estops it from enforcing a forfeiture for default in prompt payment.—Modern Woodmen of America v. Tevis (C. C. A.) 113.

Where a deceased member of a beneficiary association has paid his assessments in due time according to customary course of collection, but, without notice of any change in such course, failed to pay some of them, the association is estopped from defeating his claim for default in prompt payment.—Modern Woodmen of America v. Tevis (C. C. A.) 113.

The habitual collection by a clerk of a local camp of a beneficiary association of benefit assessments after the time when they became due *held* to waive prompt payment and to estop the society from maintaining that the members were suspended.—Modern Woodmen of America v. Tevis (C. C. A.) 113.

INTEREST.

See "Usury."
On salvage award, see "Salvage," § 2.

INTERIOR DEPARTMENT.

See "Public Lands," § 2.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 3.

INTERNAL REVENUE.

Liabilities on bonds of revenue officer, see "United States," § 1.

INTERNATIONAL LAW.

See "Aliens."

INVENTION.

See "Patents."

ISSUES.

Presented for review on appeal, see "Appeal and Error," § 4.

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 2.

JOINDER.

Effect of joinder on jurisdiction, see "Courts," § 1.

JUDGES.

See "Courts."
Authority of judge to compel making of affidavits, see "Affidavits."

JUDGMENT.

Imposing fine as debt provable in bankruptcy, see "Bankruptcy," § 2.
In condemnation proceedings, see "Eminent Domain," § 3.
On appeal or writ of error, see "Appeal and Error," § 8.
Review, see "Appeal and Error."

§ 1. On motion or summary proceeding.

A specific tax, fixed by a bank's charter upon its shares of capital stock, in lieu of all other taxes, *held* not to exempt the bank from the assessment of ad valorem taxes upon capital in its hands.—Union & Planters' Bank v. City of Memphis (C. C. A.) 561.

§ 2. On trial of issues.

A general decree that complainant take nothing by the suit, which does not clearly show that it rests on some matter in abatement which prevents it from barring future actions, *held* not sustained by the sufficiency of proof of such matter in abatement, where there were other pleas in bar.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

Where a motion for a new trial has been submitted and taken under advisement, the clerk is not authorized to enter judgment until a formal order has been made by the court denying such motion; and an opinion filed by the judge denying the motion is not equivalent to such an order.—Schmidt v. Terry (C. C.) 290.

§ 3. Equitable relief.

To entitle a defendant to avail himself of equity jurisdiction to be relieved from a judgment on the ground of fraud, accident, or mistake, he must show that the fraud, accident, or mistake on which he relies is unmixed with negligence of himself or his agents.—Travelers' Protective Ass'n of America v. Gilbert (C. C. A.) 269.

The failure of a plaintiff in an action on a life insurance policy to plead facts in her complaint which, under a condition subsequent in the policy, would defeat her right of action, does not constitute fraud which will vitiate the judgment recovered.—Travelers' Protective Ass'n of America v. Gilbert (C. C. A.) 269.

In a bill to set aside a judgment for fraud, it is not sufficient to charge generally that the judgment was procured fraudulently, or that the court was imposed upon, but a state of facts must be disclosed from which the court can see that the conclusions stated by the pleader are properly and fairly drawn.—Travelers' Protective Ass'n of America v. Gilbert (C. C. A.) 269.

§ 4. Collateral attack.

Where the requisite diversity of citizenship to give a federal court jurisdiction appears on the face of the bill, the jurisdiction cannot be attacked by evidence dehors the record in a collateral proceeding by one who was not a party to the bill.—W. B. Conkey Co. v. Russell (C. C.) 417; In re Bessette, Id.

§ 5. Merger and bar of causes of action and defenses.

A judgment dismissing an action on the merits on a defense set up by interveners *held* conclusive between the original parties.—Smith v. City of St. Paul (C. C. A.) 308.

The decision of a court of bankruptcy that a claim presented for allowance against the estate of a bankrupt was barred by limitation renders such question res judicata between the parties, and it cannot be again litigated in a subsequent action brought on the claim against the bankrupt.—Hargadine-McKittrick Dry Goods Co. v. Hudson (C. C.) 361.

§ 6. Foreign judgments.

A judgment of a state court, when pleaded in a court of another jurisdiction, can be given only the effect as to its conclusiveness upon the matters adjudicated which it has by the "law or usage" of the courts of the state in which it was rendered.—Union & Planters' Bank v. City of Memphis (C. C. A.) 561.

Where, by the settled rule of decision in a state, a judgment in a suit to enjoin the enforcement of taxes is conclusive only as to the particular taxes involved, and not upon other questions decided therein, a judgment of such state adjudging taxes illegal will not sustain a plea of res judicata in a federal court in a suit between the same parties involving taxes levied in subsequent years, although their validity depends upon the same questions determined in the former suit.—Union & Planters' Bank v. City of Memphis (C. C. A.) 561.

§ 7. Pleading and evidence of judgment as estoppel or defense.

To raise the question of res judicata, the judgment relied on must be pleaded and proved.—Union & Planters' Bank v. City of Memphis (C. C. A.) 561.

JUDICIAL SALES.

On execution, see "Execution," § 1.

JURISDICTION.

Amount in controversy, see "Courts," § 1.

Jurisdiction of particular actions or proceedings.

See "False Pretenses"; "Habeas Corpus," § 1; "Penalties," § 2.
Criminal prosecutions, see "Criminal Law," § 1.
Relief against judgment, see "Judgment," § 3.

Jurisdiction of particular subjects.

See "Indians"; "Public Lands," § 2; "Taxation."

Special jurisdictions.

See "Bankruptcy," §§ 1, 2; "Equity," § 1.
Appellate jurisdiction, see "Appeal and Error," § 2.
Particular courts, see "Courts."

JURY.

Custody and conduct, see "Criminal Law," § 4.
Instructions in civil actions, see "Trial," § 3.

LACHES.

See "Patents," § 5.

LAND OFFICE.

See "Public Lands," § 2.

LANDS.

See "Public Lands."

LARCENY.

See "False Pretenses."

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 7.

LEGACIES.

See "Wills."

LETTERS PATENT.

For inventions, see "Patents."
For public lands, see "Mines and Minerals," § 1; "Public Lands," § 2.

LIENS.

See "Mechanics' Liens."
Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.
Of mortgage, see "Mortgages," § 1.

LIMITATION.

Of claim of patent, see "Patents," § 3.

LIMITATION OF ACTIONS.

Of actions on insurance policies, see "Insurance," § 7.

§ 1. Statutes of limitation.

An action brought in New York against a stockholder of a corporation of another state to enforce a liability imposed by the statutes of such state is barred in three years, under Code Civ. Proc. N. Y. § 394, where defendant has been during the entire period a resident of New York.—Seattle Nat. Bank v. Pratt (C. C. A.) 841.

§ 2. Computation of period of limitation.

Limitation does not run against an action to recover from a school district the consideration paid for void bonds issued by it until it has taken some action showing its intention to repudiate such bonds.—Geer v. School Dist. No. 11 (C. C. A.) 682.

The allegations of a petition *held* to state a cause of action for malicious prosecution, against which limitation ran from the date of plaintiff's arrest. — Ma-ka-ta-wah-qua-twa v. Rebok (C. C.) 12.

§ 3. Acknowledgment, new promise, and part payment.

Whether payments made by a maker of notes to the payee after their maturity amount to an acknowledgment of the validity of the notes which will suspend the running of limitation depends entirely on the intention of the payor, and the fact that such payments were applied on the notes by the payee is in itself no evidence of such intention.—Becker v. Oliver (C. C. A.) 672.

§ 4. Operation and effect of bar by limitation.

A suit by a widow to charge lands in Ohio devised by her husband with a lien for the payment of an annuity to her *held* not barred by limitation under the state statute.—Waterfield v. Rice (C. C. A.) 625.

§ 5. Pleading, evidence, trial, and review.

Whether a substitution of collateral securing notes by the maker after their maturity was an acknowledgment of their validity which removed the bar of limitation *held* properly submitted to the jury under the evidence.—Becker v. Oliver (C. C. A.) 672.

LIMITATION OF LIABILITY.

Of owner of vessel, see "Shipping," § 8.

LIVE STOCK.

Carriage of, see "Carriers," § 1.

LOAN COMPANIES.

See "Building and Loan Associations."

LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

LOST GOODS.

See "Finding Lost Goods."

MALICIOUS PROSECUTION.

Computation of period of limitation, see "Limitation of Actions," § 2.

MANDAMUS.

§ 1. Subjects and purposes of relief.

A court cannot by mandamus control the discretion of the officers of a city in the expendi-

ture of taxes collected for current expenses, although it may compel the application of any surplus on relator's judgment, rather than in payment of other debts previously contracted.—City of Cleveland v. United States (C. C. A.) 341.

A mandamus cannot be awarded to compel the officers of a municipal corporation to levy a tax, unless the duty to make such levy is imposed either expressly or by implication by some statute of the state from which the corporation derives its powers.—City of Cleveland v. United States (C. C. A.) 341.

A judgment creditor of a city *held*, on the showing made, not entitled to a writ of mandamus to compel a special appropriation or the levy of a special tax to pay such judgments.—Weaver v. City of Ogden City (C. C.) 323.

§ 2. Jurisdiction, proceedings, and relief.

Return by city to alternative writ of mandamus to compel levy of tax to pay judgment cannot be held insufficient on demurrer, where no motion was made to compel it to be made more specific.—City of Cleveland v. United States (C. C. A.) 341.

MANDATE.

See "Mandamus."

MARRIAGE.

See "Husband and Wife."

MARRIED WOMEN.

See "Husband and Wife."

MASTER AND SERVANT.

§ 1. Master's liability for injuries to servant.

Evidence considered, and *held* not to show negligence of a mining company which rendered it liable for the death of an employé.—Moon-Anchor Consol. Gold Mines v. Hopkins (C. C. A.) 298.

The general rule in respect to the duty of a master to provide his servants with a reasonably safe place in which to work cannot be applied where the servant is engaged in making safe a place which has become dangerous during the progress of the work; but in such case the servant, if knowing the danger, or if he should have known it, assumes the risk therefrom; and in an action to recover for his injury or death while so engaged it is immaterial whether or not the dangerous condition of the place was originally due to the negligence of the master.—Moon-Anchor Consol. Gold Mines v. Hopkins (C. C. A.) 298.

A mining company *held* liable for an injury to an employé because he was directed by its foreman to work in a place known to be unsafe by reason of the presence of foul air.—Portland Gold Min. Co. v. Flaherty (C. C. A.) 312.

A statement by an employé, when he was hired, that he was a miner, will not impute to him knowledge of dangers in a mine arising from the gross negligence of the master, but only those of a mine conducted with ordinary care and prudence.—Portland Gold Min. Co. v. Flaherty (C. C. A.) 312.

Plaintiff, inexperienced in mining, *held* not guilty of contributory negligence in obeying the orders of his foreman to go to work in a place which was dangerous by reason of the presence of foul air.—Portland Gold Min. Co. v. Flaherty (C. C. A.) 312.

Evidence *held* sufficient, with the reasonable inferences to be drawn therefrom, to support the allegations of a complaint as to the cause and manner of the injury sued for.—Portland Gold Min. Co. v. Flaherty (C. C. A.) 312.

A servant *held* not entitled to recover from the master for an injury on the alleged ground that the place where he was required to work was unsafe.—McKenna Steel Working Co. v. Lewis (C. C. A.) 320.

A servant *held* guilty of contributory negligence which precluded his recovery from the master for an injury.—McKenna Steel Working Co. v. Lewis (C. C. A.) 320.

A master cannot delegate the duty to use reasonable care to place fit persons in charge of his work.—Weeks v. Scharer (C. C. A.) 330.

An employé assumes the risk of the negligence of his fellow servants.—Weeks v. Scharer (C. C. A.) 330.

All who enter employment of a common master to accomplish a common undertaking are prima facie fellow servants.—Weeks v. Scharer (C. C. A.) 330.

A servant should report to his master the dangerous incompetency of his fellow servants.—Weeks v. Scharer (C. C. A.) 330.

A shift boss, who has no authority to hire or discharge employés, *held* a fellow servant of the men in his shop.—Weeks v. Scharer (C. C. A.) 330.

Where the evidence is insufficient to sustain a verdict for plaintiff, it is the duty of the court to direct a verdict for defendant.—Patton v. Southern Ry. Co. (C. C. A.) 712.

An employé of a railroad company, who went upon the track in front of an approaching switch engine and was injured, when he might have remained in a place of safety, *held* guilty of contributory negligence.—State Trust Co. v. Kansas City, P. & G. R. Co. (C. C. A.) 769; Fordyce v. Bradley, Id.

The question of the proximate cause of an injury considered upon the evidence.—Texas & P. Ry. Co. v. Carlin (C. C. A.) 777.

Under the statutes of Texas, the foreman of a bridge gang on a railroad is not a fellow servant with a workman under his charge and control, but is a vice principal, for whose negligence, resulting in an injury to the workman, the company is responsible.—Texas & P. Ry. Co. v. Carlin (C. C. A.) 777.

Evidence *held* not to show contributory negligence of a conductor, as matter of law, which

would preclude his recovery for an injury.—Baltimore & O. R. Co. v. Burris (C. C. A.) 882.

It is the well-settled rule in the courts of the United States that the burden of proving contributory negligence in an action by a servant for a personal injury rests upon the defendant.—Baltimore & O. R. Co. v. Burris (C. C. A.) 882.

Under the statute of Ohio, proof of a defect in a railroad car or locomotive, by reason of which an employé is injured, is prima facie evidence of the company's negligence, and casts upon it the burden of proof.—Baltimore & O. R. Co. v. Burris (C. C. A.) 882.

Rule of a railroad company, requiring freight conductors to see that their cars were in proper condition before starting, construed, and *held* not to charge a conductor with negligence as matter of law because of a defective car in his train, by reason of which he was injured.—Baltimore & O. R. Co. v. Burris (C. C. A.) 882.

MASTERS IN CHANCERY.

See "Equity," § 4.

MASTERS OF VESSELS.

See "Shipping," § 3.

MAXIMS.

Of equity, see "Equity," § 1.

MECHANICS' LIENS.

§ 1. Nature, grounds, and subject-matter in general.

Statutes giving liens to laborers and material men must be liberally construed.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

§ 2. Right to lien.

Under the Missouri mechanic's lien laws (Rev. St. 1899, §§ 4203, 4204, 4207), all buildings constructed on adjoining city lots, regardless of the lines, streets, and alleys among them, may constitute a single improvement, and the tract on which they stand may be a single lot, and subject to a single lien.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

§ 3. Proceedings to perfect.

A claim of a lien for excessive amount *held* sustainable pro tanto, if the true amount for which the lien was maintainable can be segregated from the aggregate amount claimed.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

A single notice of lien, for materials furnished to the same property under different contracts between the same parties, *held* sufficient.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

A claim for a lien for an aggregate amount of materials furnished under contracts between different parties in one account is void.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

Under Rev. St. Mo. 1899, § 4203, any description which will enable one familiar with the locality to identify the property is sufficient in a claim for a lien.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

§ 4. Operation and effect.

In a suit to establish a mechanic's lien on realty on which the property of the lienor has been placed, all property on such realty which is essential to the particular use to which such realty is applied becomes a part of it, whether it can be removed without physical injury to the realty or not, however slight its physical connection with such realty.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

§ 5. Waiver, discharge, release, and satisfaction.

The retention by contract of title to materials furnished as security for the purchase price by the claimant of a mechanic's lien *held* not to estop the vendor from enforcing his statutory lien.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

A mechanic's lien, attaching to the realty at the time material is furnished, is not devested by the subsequent destruction of the improvement.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

§ 6. Enforcement.

In a suit to enforce a mechanic's lien for the balance of the purchase price upon an engine to be delivered by the shipper at the city of the vendee, the vendee's direction to the railroad agent to send it to the plant *held* a mere designation of the place of delivery within the original destination, and not the starting of the engine on an additional journey.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

A suit to enforce and foreclose a mechanic's lien being a suit in equity, the decree rendered is reviewable by appeal, and not by writ of error.—Hooven, Owens & Rentschler Co. v. John Featherstone's Sons (C. C. A.) 81.

MINES AND MINERALS.

§ 1. Public mineral lands.

A patent for mineral lands, which protects rights exercised by the patentee and those under whom he claims for many years, will not be declared void as to any of the lands granted, because it purports to have been based on a single mining location and conveys more than may lawfully be included in one location, when in fact the claims were several, and might have been united in a single patent upon a proper presentation of the facts.—Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. A.) 817.

Where there might have been circumstances which under existing laws would have authorized the land department to include in a patent for mining ground all the ground therein described, it will be presumed in support of the patent, when collaterally attacked, that such circumstances existed.—Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. A.) 817.

A suit to set aside a patent for mineral lands on the ground of fraud practiced on the land department cannot be maintained by a private individual who had at the time no claim upon any of the lands.—Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. A.) 817.

Allegations in a bill *held* insufficient to state grounds for the cancellation of a patent for mineral lands on the ground of fraud.—Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. A.) 817.

After entry of a mining claim in the land office, a relocation of the premises cannot be made by another so long as that entry stands, and such a relocator acquires no rights of possession or otherwise which will sustain a suit by him in the courts to compel a conveyance to him of the legal title.—Neilson v. Champaigne Min. & Mill. Co. (C. C.) 655.

MISREPRESENTATION.

See "False Pretenses."

MISTAKE.

Affecting rights in public lands, see "Public Lands," § 2.

MORTGAGES.

§ 1. Construction and operation.

It is a rule of property in Arkansas, established by decision, that a mortgage, although filed for record, creates no lien as against subsequent purchasers unless it is properly acknowledged, even when such purchasers have actual knowledge of its existence and contents.—Cumberland Building & Loan Ass'n v. Sparks (C. C. A.) 647.

A mortgagee cannot impute fraud to a purchaser of the mortgaged property because he bought with actual knowledge of the mortgage and with the intention of defeating the same, on the ground that it was not properly acknowledged, where by the laws of the state such mortgages did not create liens as against purchasers.—Cumberland Building & Loan Ass'n v. Sparks (C. C. A.) 647.

MOTIONS.

Arrest of judgment in civil actions, see "Judgment," § 2.
Judgment on motion, see "Judgment," § 1.
Relating to pleadings, see "Pleading," § 3.

MULTIPLICITY OF SUITS.

Jurisdiction of equity to avoid, see "Equity," § 1.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.
Mandamus, see "Mandamus," § 1.
Regulation of telephones, see "Telegraphs and Telephones," § 1.
Validity of assessment for local improvements as taking property without due process of law, see "Constitutional Law," § 1.

§ 1. Public improvements.

Notice given by a city to a contractor for public work *held* sufficient to entitle the city to terminate the contract under its terms.—Boyce v. United States Fidelity & Guaranty Co. (C. C. A.) 138.

A contract with a city for public work construed with respect to a provision giving the city the right to terminate the same for delay in the work.—Boyce v. United States Fidelity & Guaranty Co. (C. C. A.) 138.

A city, authorized to construct drains and to do acts generally necessary to protect the public health, has power to extend a drain to a proper outlet beyond the city limits.—Minnesota & M. Land & Improvement Co. v. City of Billings (C. C. A.) 972.

A property owner *held* to have waived the right to object to the validity of a special assessment because other property was not assessed by a failure to make such objection to the city council before the assessment was made at the time fixed by the city charter for hearing such objections.—Minnesota & M. Land & Improvement Co. v. City of Billings (C. C. A.) 972.

A city, authorized to create improvement districts, *held* to have power to create a single district, embracing all the property in the city, where the contemplated improvement was one which would benefit the entire city.—Minnesota & M. Land & Improvement Co. v. City of Billings (C. C. A.) 972.

The White patent, No. 337,000, for a packing, *held* valid and infringed.—White v. Peerless Rubber Mfg. Co. (C. C.) 190.

§ 2. Torts.

The owner of a vessel, although a municipal corporation, is responsible in a court of admiralty, under the rule of respondeat superior, for a collision caused by the negligence of its servants in charge; and it is immaterial whether the vessel was employed in a service incident to the municipal government or acting under orders which were ultra vires.—The Major Reybold (D. C.) 414.

§ 3. Fiscal management, public debt, securities, and taxation.

Where municipal officers are required to ascertain and certify to the existence of facts requisite to the issuance of bonds, their certificate will estop the municipality, as against a bona fide holder, from proving its falsity to defeat the bonds.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

Where an innocent purchaser buys of others than a municipal corporation its negotiable

bonds, the question of excessive indebtedness *held* not to arise, and hence the purchaser was not required to consider or inquire concerning it.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

The certificate on bonds of a municipal corporation *held* to estop it, as against a bona fide purchaser, from denying that they were issued to fund a valid debt.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

Funding bonds issued by a municipal corporation neither create nor increase its indebtedness, but merely change its form.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

A municipal corporation may estop itself from denying the existence of facts empowering it to issue bonds, unless the law under which they were issued prescribes some public record as a test of the existence of such facts.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

A municipal corporation *held* estopped from defeating an action on its negotiable bonds by an innocent purchaser on the ground that their proceeds were diverted by its officers to an unlawful purpose.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

A municipal corporation *held* estopped from defeating an action by an innocent purchaser to collect its negotiable bonds on the ground that the apparent debt they were issued to satisfy was invalid.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

A corporation may be estopped from defeating an action on coupons by its recitals in the bonds.—Independent School Dist. of Sioux City v. Rew (C. C. A.) 1.

A village issuing bonds *held* estopped to deny the truthfulness of recitals therein as against a bona fide holder.—Clapp v. Village of Marice City (C. C. A.) 103.

Ohio statute relating to the making of contracts or the appropriation of money by municipal corporations *held* not to apply to the issuance of bonds under a different provision of the statute.—Clapp v. Village of Marice City (C. C. A.) 103.

Recitals in bonds issued by a village in Ohio *held* to meet the requirements of the statutes.—Clapp v. Village of Marice City (C. C. A.) 103.

The charter of a city construed, and *held* to confer no power to levy a special tax to pay an indebtedness incurred for water and lights beyond the limit of taxation for general purposes expressly imposed by such charter.—City of Cleveland v. United States (C. C. A.) 341.

Current debts incurred by a city for water furnished for public uses and for the lighting of streets are for ordinary municipal expenses, and the power to levy taxes to pay the same is governed by a limitation imposed by the charter on taxation for general purposes.—City of Cleveland v. United States (C. C. A.) 341.

If an act conferring power on a municipal corporation to create a debt, or any other law in force at the time, contains provisions for a tax to meet such obligations, no extraordinary power of taxation can be implied therefrom.—City of Cleveland v. United States (C. C. A.) 341.

Where the charter of a city places a limitation upon the total levy of taxes for all general purposes in any one year, the fact that in past years it has not made the full levy does not authorize it to make a levy in excess of the limitation in a subsequent year.—City of Cleveland v. United States (C. C. A.) 341.

A school district having power to borrow money for building school houses, which exercises the power and borrows the money which it uses in building a school house, is liable to the lender therefor, although he accepted bonds for the same, which by reason of a statutory limitation on the power of the district to issue bonds were void ab initio.—Geer v. School Dist. No. 11 (C. C. A.) 682.

Where a municipal corporation has recognized the validity of bonds issued by it for a long number of years, the statute under which it assumed to issue them will be given a liberal construction to sustain their validity.—Washington County, Neb., v. Williams (C. C. A.) 801; Blair v. Washington County, Neb., Id.

Statute of Nebraska construed, and *held* to confer power on counties to issue bonds in aid of railroads.—Washington County, Neb., v. Williams (C. C. A.) 801; Blair v. Washington County, Neb., Id.

Bonds issued by a city under the Iowa statute to pay the cost of street improvements in the first instance create an indebtedness of the city, and are affected by the constitutional limitation upon the power of the city to contract indebtedness.—Burlington Sav. Bank v. City of Clinton (C. C.) 439.

Where an issue of bonds made by an Iowa city to pay the cost of street improvements in itself exceeds the amount of indebtedness the city can lawfully contract, a purchaser to whom the entire issue is sold is chargeable with notice of such fact, and put upon inquiry as to the amount of prior indebtedness, and his recovery against the city on such bonds is limited to the amount of additional indebtedness it had power to contract.—Burlington Sav. Bank v. City of Clinton (C. C.) 439.

The holder of bonds of a city, issued to pay for street improvements under the Iowa statute, who is debarred by the constitutional limitation upon the city's power to contract indebtedness from enforcing full payment of such bonds from the city, has the equitable right to require the city to exercise all its lawful power to levy and collect assessments on the property benefited by the improvement, which is by the statute required to be applied in payment of such bonds, and for that purpose may join the property owners affected with the city in a suit in equity.—Burlington Sav. Bank v. City of Clinton (C. C.) 439.

A resolution adopted by the board of directors of an Iowa school district *held* to show on its face the invalidity of the bonds issued there-

under, and to charge purchasers with notice of such invalidity.—Fairfield v. Rural Independent School Dist. of Allison (C. C.) 453.

Where bonds issued by a municipal corporation of Iowa contain references to the statute and resolution under which they were issued, a purchaser is chargeable with notice of the contents of such statute and resolution, and is not authorized to rely on a recital that the resolution conforms to the statute and that the indebtedness created is within the constitutional limit, when the resolution shows on its face that such recital is untrue.—Fairfield v. Rural Independent School Dist. of Allison (C. C.) 453.

A purchaser of bonds issued by a municipal corporation of Iowa is not entitled to rely solely on a recital therein that the debt thereby created does not exceed the constitutional limit.—Fairfield v. Rural Independent School Dist. of Allison (C. C.) 453.

§ 4. Actions.

The fact that the holder of a claim against a municipal corporation has reduced the same to judgment gives him no new right in respect to the means of enforcing payment, in the absence of a statute making special provisions for the payment of judgments.—Weaver v. City of Ogden City (C. C.) 323.

MURDER.

See "Homicide," § 1.

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 8.

NAMES.

See "Trade-Marks and Trade-Names."

NATIONAL BANKS.

See "Banks and Banking," § 1.

NEGLIGENCE.

Causing death, see "Death," § 1.

By particular classes of parties.

See "Carriers," § 2; "Municipal Corporations," § 2.
Employers, see "Master and Servant," § 1.
Railroad companies, see "Railroads," § 1.

Condition or use of particular species of property, works, or machinery.

See "Railroads," § 1; "Shipping," §§ 5, 6.

Contributory negligence.

Of servant, see "Master and Servant," § 1.

§ 1. Acts or omissions constituting negligence.

The fact that an act of negligence produced an injury to another in a manner so unusual that it was not to be expected or anticipated does not relieve the party responsible from liability, when such act was one likely to cause injury in a way that might have been foreseen.—Texas & P. Ry. Co. v. Carlin (C. C. A.) 777.

§ 2. Actions.

A question of negligence dependent on evidence is one of law for the court only where there is no material conflict and the facts are such that all reasonable men must draw the same conclusions from them.—Texas & P. Ry. Co. v. Carlin (C. C. A.) 777.

NOTICE.

Of lien, see "Mechanics' Liens," § 8.

OBJECTIONS.

Necessity for purpose of review, see "Appeal and Error," § 4.

OFFICERS.

Mandamus, see "Mandamus," § 1.

Particular classes of officers.

See "Receivers."
Corporate officers, see "Corporations," §§ 3, 4.
Referees in bankruptcy, see "Bankruptcy," § 2.
United States officers, see "United States," § 1.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 3.

ORDERS.

Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Municipal ordinances, see "Municipal Corporations," § 1.

PARTIES.

Character ground of jurisdiction, see "Courts," § 1.
Death ground for abatement, see "Abatement and Revival," § 1.
In equity, see "Equity," § 2.
To actions for causing death, see "Death," § 1.
To contracts, see "Contracts," § 1.

§ 1. Defendants.

One tenant in common under a devise *held* not a necessary party to a suit by the testator's widow to charge the estate of other devisees with the lien of an annuity.—Waterfield v. Rice (C. C. A.) 625.

PARTITION.

§ 1. Actions for partition.

A tract of land *held* incapable of division in partition, without injustice to some of the

owners in common, and properly ordered sold.—East Coast Cedar Co. v. People's Bank (C. C. A.) 446.

Creditors having liens on the interests of some of the tenants in common of a tract of land are not necessary parties to a suit for its partition; but, where the land is sold, they may intervene and assert their liens against the share of their debtor in the proceeds.—East Coast Cedar Co. v. People's Bank (C. C. A.) 446.

PART PAYMENT.

Within statute of limitations, see "Limitation of Actions," § 3.

PASSENGERS.

See "Carriers," § 2.

PATENTS.

For public lands, see "Mines and Minerals," § 1; "Public Lands," § 2.

§ 1. Patentability.

To entitle evidence of the utility of a patented machine and of its extensive use to consideration on the question of invention, it must clearly show utility superior to that of other like machines and a more extensive use.—Sperry Mfg. Co. v. J. L. Owens Co. (C. C. A.) 388.

Letters patent No. 297,382, for metallic screening, *held* anticipated by English patent.—Expanded Metal Co. v. Board of Education of City of St. Louis (C. C. A.) 395.

Where in the device of a patent the departure from former means is small, but the change is important, the fact that such device at once displaced those of other inventors may be considered on the question of invention.—Star Brass Works v. General Electric Co. (C. C. A.) 398.

With reference to patents for improvements in machines for pasting paper boxes, the question of anticipation depends in part on the nature of the paper box to be finished and the method of finishing it.—Hobbs Mfg. Co. v. Gooding (C. C. A.) 403.

The unsupported testimony of a patentee that a sale of a machine embodying his invention for use more than two years before his application is insufficient to establish his claim that such sale and use were experimental.—Swain v. Holyoke Mach. Co. (C. C. A.) 408.

A combination of old elements to render them adaptable to a new use may involve invention and sustain a patent, where the combination possesses utility, and produces a new and useful result in the art to which it is applied, and was not obvious to one skilled in such art.—Wilfley v. Denver Engineering Works Co. (C. C.) 760.

In an action at law for the infringement of a patent, upon an issue as to the usefulness of the patented article as affecting the validity of the patent, the jury may consider the fact that it has been used by defendant, if they find that he has infringed.—International Tooth Crown Co. v. Hanks Dental Ass'n (C. C.) 916.

The degree of utility of a patented article does not affect the question of patentability, nor does the length of time it will last and continue useful; but, if it is useful at all, that is sufficient to sustain the patent.—International Tooth Crown Co. v. Hanks Dental Ass'n (C. C.) 916.

Where a new combination of known elements produces a new result, it is evidence of invention.—R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. (C. C.) 923.

The decision of the commissioner of patents in interference proceedings on the question of priority of invention between two applicants for patents, affirmed on appeal by the court of appeals, is conclusive between the parties, at least unless new evidence is adduced.—R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. (C. C.) 923.

Under the rule established by the later decisions, as high a degree of invention is required to sustain design patents as in case of mechanical patents.—Perry v. Hoskins (C. C.) 1002.

§ 2. Applications, and proceedings thereon.

Where interference proceedings are declared between certain applications for a patent, it will not be presumed that one applicant derived anything from the other.—R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. (C. C.) 923.

Where question of priority in invention has been determined in the patent office, and is affirmed on appeal by the court of appeals of the District of Columbia, the appeal is conclusive, where no new evidence is adduced.—R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. (C. C.) 923.

§ 3. Construction and operation of letters patent.

A claim for an article formed substantially as set forth in specification *held* limited to an article made substantially in the way described in the specification.—Expanded Metal Co. v. Board of Education of City of St. Louis (C. C. A.) 395.

Where a feature of a patented machine is not referred to in the specification or claims, infringement cannot be predicated upon its adoption by another.—Hobbs Mfg. Co. v. Gooding (C. C. A.) 403.

An express functional limitation in a claim cannot be ignored in its construction to determine infringement.—Masseth v. Larkin (C. C.) 409.

§ 4. Title, conveyances, and contracts.

All persons who join in the sale and assignment of a patent, or participate in the consideration received therefor, are estopped to allege its invalidity; and a corporation of which such persons own all the stock is equally estopped.—Force v. Sawyer-Boss Mfg. Co. (C. C.) 902.

§ 5. Infringement.

A patent should not be declared void, on demurrer, for lack of invention apparent on its face, unless it is clear that no evidence which could be adduced would change the opinion of the court.—A. R. Milner Seating Co. v. Yesbera (C. C. A.) 386.

Where a defendant has appropriated all the advantages of a patented invention, he cannot avoid infringement by changes of form only.—Morrison v. Sonn (C. C.) 172.

Where the owner of a patent has granted an exclusive license to make and sell, but not to use, the patented article within a specified territory, an action at law against an infringer by using the article within such territory can only be maintained in the name of the licensor.—New York Continental Jewell Filtration Co. v. City of Sullivan (C. C.) 179.

A mere change in the form of an element or part of a patented device, where it performs the same function in substantially the same manner, does not avoid infringement.—Adams Co. v. Schreiber & Conchar Mfg. Co. (C. C.) 182.

The mere strengthening of a part in a patented device to give it longer life, where it does not improve or change the device in operation, does not constitute invention, nor differentiate the new device from the old, to avoid infringement.—Adams Co. v. Schreiber & Conchar Mfg. Co. (C. C.) 182.

A patent for an article of improved construction having elements of novelty and usefulness, though confined within narrow limits, protects the inventor within such limits from the appropriation of the substance of his improvement by the substitution of known mechanical equivalents.—Adams Co. v. Schreiber & Conchar Mfg. Co. (C. C.) 182.

One who appropriates a patented invention, so as to gain imperfectly and to a limited extent only the advantages thereof, does not thereby free himself from infringement.—White v. Peerless Rubber Mfg. Co. (C. C.) 190.

The defense of laches to a suit for infringement need not be pleaded.—Westinghouse Air Brake Co. v. New York Air Brake Co. (C. C.) 741.

Where a patent has lain dormant for 15 years, and has been infringed by defendant for 7 years with the knowledge of complainant, and without a word of protest, a decree for an accounting should not be granted.—Westinghouse Air Brake Co. v. New York Air Brake Co. (C. C.) 741.

The effect of an established license fee, fixed by a patentee and generally observed as establishing a measure of damages for infringement, is not affected by the fact that it was varied from in particular instances and under special circumstances.—International Tooth Crown Co. v. Hanks Dental Ass'n (C. C.) 916.

While defendant in infringement proceedings is not estopped to question the patentability because he had applied for the same patent, his assigns cannot well do so.—R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. (C. C.) 923.

§ 6. Decisions on the validity, construction, and infringement of particular patents.

The Low patent, No. 238,940, for improvements in dentistry relating to a method of inserting and supporting artificial teeth, construed in a charge to the jury in an action at law for infringement.—International Tooth Crown Co. v. Hanks Dental Ass'n (C. C.) 916.

The Sperry patent, No. 267,032, for a fanning mill, is void for lack of patentable invention.—Sperry Mfg. Co. v. J. L. Owens Co. (C. C. A.) 388.

The Coddington patent, No. 303,984, for machinery for manufacturing waxed tapers and coated strings, claims 2, 3, 4, and 14, *held* not anticipated and valid, but not infringed.—Coddington v. Propfe (C. C. A.) 378.

The Howell patent, No. 311,325, for improvements in marine torpedoes, claim 1, construed, and *held* not infringed by the Whitehead torpedo.—Howell Torpedo Co. v. E. W. Bliss Co. (C. C.) 906.

The Smith & Washburn patent, No. 392,698, for a coin controlled electrical weighing scale, claim 5, construed, and *held* not infringed.—National Automatic Mach. Co. v. Automatic Weighing, Lifting & Grip Mach. Co. (C. C. A.) 401.

The Griffin patent, No. 410,757, for improvements in mills for pulverizing ores, claims 13, 14, and 15, construed, and *held* not infringed.—Bradley Pulverizer Co. v. Bowker Fertilizer Co. (C. C.) 537.

The Anderson patent, No. 412,155, for improvements in trolleys for electric railway service, claim 8, construed, and *held* valid and infringed.—Star Brass Works v. General Electric Co. (C. C. A.) 398.

The Damren patent, No. 423,415, for a machine for making paper boxes, *held* valid and infringed as to claim 1, and not infringed as to claims 3 and 5.—Hobbs Mfg. Co. v. Gooding (C. C. A.) 403.

The Williams patent, No. 429,874, for improvements in diamond stone sawing machines and in methods of operating the same, construed, and *held* not anticipated, valid, and infringed as to the first three claims.—Diamond Stone Sawing Mach. Co. v. Dean (C. C.) 380.

The White patent, No. 438,788, for a lightning arrester, *held* infringed as to claim 1, and not infringed as to claim 4.—Western Electric Co. v. Kinloch Tel Co. (C. C.) 175.

The Masseth patent, No. 439,166, for a packer for deep wells, claims 1 and 2, construed, and *held* not infringed.—Masseth v. Larkin (C. C.) 409.

The Sawyer patent, No. 462,065, for a numbering machine, *held* infringed as to claim 1 and 2.—Force v. Sawyer-Boss Mfg. Co. (C. C.) 902.

The Bradley patents, Nos. 464,933 and 468,148, relating to a process for the reduction of

refractory ores by electrolysis, construed, and *held* not infringed by the process of the Hall patent, No. 400,766, for the reduction of aluminum ores.—Electric Smelting & Aluminum Co. v. Pittsburgh Reduction Co. (C. C.) 742.

The Farwell patent, No. 493,548, for an adjustable stove damper, claim 2, construed, and *held* infringed.—Adams Co. v. Schreiber & Conchar Mfg. Co. (C. C.) 182.

The Griffin patent, No. 515,673, for improvements in mills for pulverizing ores, claim 5, construed, and *held* not infringed.—Bradley Pulverizer Co. v. Bowker Fertilizer Co. (C. C.) 537.

The Morrison patent, No. 570,604, for a brush-making machine, *held* not anticipated and valid, and infringed as to claim 1.—Morrison v. Sonn (C. C.) 172.

The Sanche patent, No. 587,237, for a device known as the "Oxydonor," *held* void on its face.—Mahler v. Animarium Co. (C. C. A.) 530.

The Wilfley patent, No. 590,675, for an ore concentrator, construed, and *held* valid and infringed as to claims 1, 2, and 7.—Wilfley v. Denver Engineering Works Co. (C. C.) 760.

The Milner patent, No. 597,686, for a counter seat for stores, is not so manifestly void on its face for lack of invention in the device shown as to justify its being so declared on demurrer.—A. R. Milner Seating Co. v. Yesbera (C. C. A.) 386.

The Reisky patent, No. 599,447, for an improvement in bowling apparatus, *held* valid and infringed.—Brunswick-Balke-Collender Co. v. Thum (C. C. A.) 904.

The Boch patent, No. 600,475, for an electrical insulator and method of making the same, construed, and *held* not anticipated, valid, and infringed.—R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co. (C. C.) 923.

The Patterson design patent, No. 20,660, for a design for a case for weighing machines, is void for lack of patentable invention.—National Automatic Mach. Co. v. Automatic Weighing, Lifting & Grip Mach. Co. (C. C. A.) 401.

The Perry design patent, No. 22,856, for a design for a monument, *held* void for lack of invention.—Perry v. Hoskins (C. C.) 1002.

PATENTS ENUMERATED.

ENGLISH.

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2,125. Open metallic work..... 395

1879.

2,110. Electric arc..... 751

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20,660. Weighing machine 401
22,856. Monument 1002

ORIGINAL.

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43,026. Fanning mill..... 392
56,912. Fanning mill..... 393
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107,847. Stone sawing machine..... 385
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238,940. Support for artificial teeth..... 917
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587,612. Oxydonor 531
588,483. Oxydonor 531
590,675. Ore concentrator..... 760
597,686. Counter seat..... 386
599,447. Bowling apparatus 904
600,475. Electrical insulator..... 923
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PAUPERS.

Poverty as defense against taxation of costs, see "Costs," § 1.

PAYMENT.

By receiver, see "Receivers," § 2.
Of insurance, see "Insurance," § 6.
Of loans, see "Building and Loan Associations."
Part payment within statute of limitations, see "Limitation of Actions," § 3.
Subrogation on payment, see "Subrogation."

§ 1. Application.
Application of payments made as between one supplying materials to a contractor for government work and the surety on the contractor's bond.—United States v. Morgan (C. C.) 474.

PENALTIES.

Under contracts, see "Damages," § 2.

§ 1. Nature and grounds, and extent of liability.
While the word "penalty" has a broader meaning than the word "fine," still a fine in a judicial sense is always a penalty, although a penalty may sometimes not be a fine, or even a criminal punishment.—United States v. Nash (D. C.) 525.

§ 2. Actions and other proceedings.
Where a statute forbids or commands certain acts, its violation constitutes a public offense, punishable as such by a criminal prosecution in the courts, notwithstanding the punishment imposed by such statute is denominated a "penalty."—United States v. Nash (D. C.) 525.

PERSONAL INJURIES.

See "Negligence."
To employé, see "Master and Servant," § 1.
To passenger, see "Carriers," § 2.
To person on or near railroad tracks, see "Railroads," § 1.
To persons on railroad trains, see "Railroads," § 1.
To traveler on highway crossing railroad, see "Railroads," § 1.

PETITION.

In bankruptcy, see "Bankruptcy," § 1.

PLEA.

In civil actions, see "Equity," § 3; "Pleading," § 2.

PLEADING.

Conformity of judgment to pleadings, see "Judgment," § 2.

Allegations as to particular facts, acts, or transactions.
See "Judgment," § 7.

In actions by or against particular classes of parties.
See "Carriers," § 1; "Corporations," § 2; "Husband and Wife," § 1.

In particular actions or proceedings.
See "Equity," § 3.
Action for cancellation of mining patent, see "Mines and Minerals," § 1.
Action for infringement, see "Patents," § 5.
Action for personal injuries, see "Railroads," § 1.
Action to set aside judgment, see "Judgment," § 3.

§ 1. Declaration, complaint, petition, or statement.
A complaint in an action to recover for the alleged breach of three separate contracts *held* to state a single cause of action, where all of the breaches were alleged to have arisen from the same act of defendant.—Occidental Consol. Min. Co. v. Comstock Tunnel Co. (C. C.) 135.

§ 2. Plea or answer, cross complaint, and affidavit of defense.
Although pleas in abatement are abolished by the state Code, such a plea filed in a federal court, which is the same in substance as the special answer by which the rules of court require matters in abatement to be set up, will be treated as such an answer and considered on its merits.—Whelan v. Rio Grande Western Ry. Co. (C. C.) 326.

§ 3. Motions.
Motion to strike out pleas overruled, because of the failure of the writ and declaration to disclose with certainty the form of action intended.—Hale v. Conant (C. C.) 890.

POLICY.

Of insurance, see "Insurance."

PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 1.
In land office, see "Public Lands," § 2.
In patent office, see "Patents," § 2.
Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.
See "Habeas Corpus," § 1; "Mandamus," § 2.
Condemnation proceedings, see "Eminent Domain," § 3.

Particular proceedings in actions.
See "Abatement and Revival"; "Affidavits"; "Appearance"; "Costs"; "Damages," § 3; "Evidence"; "Execution"; "Judgment"; "Limitation of Actions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Trial."

Particular remedies in or incident to actions.
See "Discovery"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.
See "Criminal Law."

Procedure in exercise of special jurisdictions.
In admiralty, see "Admiralty"; "Collision," § 4; "Salvage," § 3; "Shipping," § 8.
In bankruptcy, see "Bankruptcy," § 1.
In equity, see "Equity."

Procedure on review.
See "Appeal and Error"; "Exceptions, Bill of."

PREFERENCES.

By insolvent corporation, see "Corporations," § 5.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.
Of creditor to property in hands of receiver, see "Receivers," § 2.

PREJUDICE.

Ground for reversal in civil actions, see "Appeal and Error," § 7.

PRELIMINARY INJUNCTION.

See "Injunction," § 2.

PRESUMPTIONS.

On appeal or error, see "Appeal and Error," § 7.

PRINCIPAL AND AGENT.

Corporate agents, see "Corporations," § 4.
Insurance agents, see "Insurance," § 1.

§ 1. Rights and liabilities as to third persons.

The agent of a surety company, who, as a condition to the furnishing of a bond, and with the approval of the company, required money to be paid to him as trustee for disbursement *held* in his capacity of trustee to represent his principal, which was responsible for his faithful execution of the trust.—American Bonding & Trust Co. of Baltimore, Md., v. Takahashi (C. C. A.) 125.

The opinion of an insurance agent that the plaintiff is insured *held* not competent evidence against his principal.—Fidelity & Casualty Co. v. Haines (C. C. A.) 337.

PRINCIPAL AND SURETY.

Liabilities of sureties on bond of United States officers, see "United States," § 1.
Surety as creditor of bankrupt principal, see "Bankruptcy," § 1.

§ 1. Discharge of surety.

Any change in a contract for the performance of which a surety is bound, made without his consent, will operate to relieve him from liability; and, where a change has been made in such contract, the burden rests upon one seeking to charge the surety to prove that he knew of and assented to such change.—United States v. McIntyre (C. C.) 590.

PROCESS.

Particular forms of writs or other process.

See "Execution"; "Injunction"; "Mandamus."

§ 1. Service.

Service of summons in an action against a corporation on an officer who was in fact the real party in interest as plaintiff *held* void.—Tortat v. Hardin Min. & Mfg. Co. (C. C.) 426.

PROPERTY.

Constitutional guaranties of rights of property, see "Constitutional Law," § 1.
Protection of rights of property by injunction, see "Injunction," § 1.
Taking for public use, see "Eminent Domain."

Particular species of property.

See "Fixtures"; "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."

PUBLIC DEBT.

See "Counties," § 1; "Municipal Corporations," § 3.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 1.

PUBLIC LANDS.

Mineral lands, see "Mines and Minerals," § 1.

§ 1. Government ownership.

The refusal of the court in a prosecution for the unlawful cutting of timber on public lands to submit an affirmative defense to the jury *held* not error under the evidence.—Stubbs v. United States (C. C. A.) 366.

An information charging the unlawful cutting of timber on public lands, although drawn to conform to the requirements of Rev. St. § 2461, and intended to charge an offense thereunder, may be treated as drawn under Act June 3, 1878 (20 Stat. 90) § 4, where it contains all the averments necessary to charge an offense thereunder.—Stubbs v. United States (C. C. A.) 366.

The burden of proof rests upon defendants, who seek to justify the cutting of timber from public lands, which would otherwise be unlawful, on the ground that it was taken for use in the construction of a railroad as authorized by statute, to bring themselves within the provisions of such statute.—United States v. Eccles (C. C.) 490.

Defendants, who unlawfully cut and removed timber from public lands, but believing in good faith that they had the lawful right to cut the same, although negligent, are liable only for its value as it stood in the trees.—United States v. Eccles (C. C.) 490.

§ 2. Survey and disposal of lands of United States.

Valid claim to public land cannot be initiated by forcible entry while it is in the possession of one having no right thereto.—Thallmann v. Thomas (C. C. A.) 277.

A competent locator can initiate a valid claim to public land by a peaceable adverse entry.—Thallmann v. Thomas (C. C. A.) 277.

Patents and deeds will not be set aside for mistake not established by clear and convincing evidence.—Thallmann v. Thomas (C. C. A.) 277.

Valid location of public land cannot be made while another has the right to possession under earlier lawful location.—Thallmann v. Thomas (C. C. A.) 277.

Act Cong. March 2, 1889, opened the land therein described to homestead entry on extinction of Indian title.—King v. McAndrews (C. C. A.) 860.

Land department can determine claims of homesteaders and town-site claimants to land described.—King v. McAndrews (C. C. A.) 860.

Land department can determine claims of homesteaders and town-site claimants to land described in Act Dak. T. March 7, 1885, and Act Cong. March 2, 1889, and the public land laws.—King v. McAndrews (C. C. A.) 860.

Land department of the United States constitutes a special tribunal to determine claim to public land.—King v. McAndrews (C. C. A.) 860.

Patent from land department *held* impervious to collateral attack.—King v. McAndrews (C. C. A.) 860.

Patent from land department *held* impervious to collateral attack for errors of law as well as mistakes of fact.—King v. McAndrews (C. C. A.) 860.

Remedy for errors of law and mistakes of fact in issue of patent to land *held* by bill in equity.—King v. McAndrews (C. C. A.) 860.

Patent to land without the jurisdiction of the land department may be collaterally attacked.—King v. McAndrews (C. C. A.) 860.

The patent of the land department is presumptive evidence of its jurisdiction and validity.—King v. McAndrews (C. C. A.) 860.

Land in Indian reservation *held* not subject to public land laws.—King v. McAndrews (C. C. A.) 860.

Act Dak. T. March 7, 1885, including a portion of an Indian reservation in a city, *held* not to withdraw this land from homestead or preemption entry.—King v. McAndrews (C. C. A.) 860.

Congress can destroy preferential rights to land.—King v. McAndrews (C. C. A.) 860.

Act March 3, 1875 (18 Stat. 482), does not authorize a railroad company to take timber from public lands for use in the construction of its road prior to the filing of its articles of incorporation and proof of organization with the secretary of the interior.—United States v. Eccles (C. C.) 490.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUNISHMENT.

See "Penalties."
For violation of injunction, see "Injunction," § 3.

QUIETING TITLE.

§ 1. **Right of action and defenses.**
A bill to remove a cloud upon the title to real estate cannot be maintained without clear proof of both possession and legal title in the plaintiff.—Dewing v. Woods (C. C. A.) 575.

RAILROADS.

Carriage of goods and passengers, see "Carriers."
Taxation, see "Taxation," § 1.

§ 1. **Operation.**
A person killed at a crossing *held* guilty of contributory negligence in failing to look for the train before going upon such crossing.—Kallmerten v. Cowen (C. C. A.) 297.

A person injured by a piece of a brakeshoe which flew from a passing car, while he was walking beside the track on the railroad right of way, *held* to have been merely a licensee, who could not hold the company liable.—Pennsylvania R. Co. v. Martin (C. C. A.) 586.

A railroad company is not chargeable with negligence because of the breaking of a brake shoe on one of the cars from a defect not discoverable by inspection, where it is shown that proper inspection was made.—Pennsylvania R. Co. v. Martin (C. C. A.) 586.

Complaint in an action against a railroad company to recover for injuries sustained by a collision between a train and a hand car on which plaintiff was riding *held* to state a cause of action.—Reynolds v. Mink (C. C. A.) 692.

The question of the liability of a railroad company under the Tennessee statute for the death of a person killed at a crossing *held* properly submitted to the jury.—Louisville & N. R. Co. v. Truett (C. C. A.) 876.

REAL ACTIONS.

See "Partition."

RECEIVERS.

Of building and loan association, see "Building and Loan Associations."
Of corporations in general, see "Corporations," § 5.
Of insolvent corporations, see "Corporations," § 5.

§ 1. **Management and disposition of property.**
A court, in ordering railroad property in the hands of its receivers in foreclosure proceedings restored to the possession of the mortgagor, may properly require the company as a condition to pay any demands which the court may

adjudge to be liabilities of the receivers; and in subsequent proceedings on the petition of an intervener to charge the receivers with liability for negligence the court will take judicial notice of such order, and may render judgment against the company.—Baltimore & O. R. Co. v. Burris (C. C. A.) 882.

§ 2. Allowance and payment of claims.
A debt incurred by a railroad company for rental of terminal property under a 40-year lease, providing for forfeiture on default in payment of rent, is not a debt of the income, entitled to preferential payment from net income under a receivership. — St. Louis Merchants' Bridge Terminal Ry. Co. v. Continental Trust Co. (C. C. A.) 669.

A claim for the construction of new tracks by the lessor of terminal property to a railroad company is one for original construction, and not a debt of the income, entitled to preference in the distribution of the property of the company in insolvency. — St. Louis Merchants' Bridge Terminal Ry. Co. v. Continental Trust Co. (C. C. A.) 669.

RECORDS.

Transcript on appeal or writ of error, see "Appeal and Error," § 5.

REDEMPTION.

From sale on execution, see "Execution," § 1.

REFERENCE.

In bankruptcy, see "Bankruptcy," § 2.
To master or commissioner in equity, see "Equity," § 4.

REINCORPORATION.

See "Corporations," § 6.

RELEASE.

See "Payment."
Of lien, see "Mechanics' Liens," § 5.

§ 1. Requisites and validity.
Complainant, injured while a passenger on defendant's railroad, *held* entitled to a rescission of a settlement made for such injury and a cancellation of a release given, on the ground of mistake.—Wilcox v. Chicago & N. W. Ry. Co. (C. C.) 435.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.

REMOVAL.

Of accused to another district for trial, see "Criminal Law," § 3.

REMOVAL OF CAUSES.

§ 1. Citizenship or alienage of parties.
A stockholder's suit against the corporation and another *held* to involve a separable controversy as to the latter, which entitled it to remove the cause.—Lamm v. Parrott Silver & Copper Co. (C. C.) 241.

To a suit for specific performance which requires the transfer of stock on the books of a corporation to render the relief prayed for effective if granted, the corporation is a necessary party; and, where it is a citizen of the same state as complainant, the principal defendant cannot remove the cause as involving a separable controversy.—Patterson v. Farmington St. Ry. Co. (C. C.) 262.

§ 2. Proceedings to procure and effect of removal.
Where the service in an action in a state court is void, defendant may appear even after judgment by default, and file petition and bond for removal.—Tortat v. Hardin Min. & Mfg. Co. (C. C.) 426.

REMOVAL OF CLOUD.

See "Quieting Title."

REPEAL.

Of statute, see "Statutes," § 1.

REQUESTS.

For instructions in civil actions, see "Trial," § 3.

RESCISSION.

Of release, see "Release," § 1.

RESERVATIONS.

Of public lands, see "Public Lands," § 2.

RES GESTÆ.

In civil actions, see "Evidence," § 1.

RES JUDICATA.

See "Judgment," § 5.

RETURN.

Of record of proceedings for purpose of review, see "Appeal and Error," § 5.

REVENUE.

See "Customs Duties"; "Taxation."

REVIEW.

See "Appeal and Error"; "Mechanics' Liens," § 6.
Bill in equity, see "Equity," § 5.

RISKS.

Assumed by employé, see "Master and Servant," § 1.

SALES.

In bankruptcy, see "Bankruptcy," § 2.
On execution, see "Execution," § 1.

§ 1. Remedies of buyer.

Where defendant failed to deliver cotton sold, but did not refuse to make such delivery until some time later, until which time plaintiffs kept urging the delivery, the breach of the contract occurred at the time of the refusal, for the purpose of fixing the measure of damages.—Ralli v. Rockmore (C. C.) 874.

SALVAGE.

§ 1. Right to compensation.

Where tugs made no effort to take a burning ship from her slip when the dock was on fire, but passed her by and went to the aid of another vessel, which at that time did not need their services, and gave her assistance only after she had been brought out by others, while entitled to compensation, their services were not of a high order of merit.—The Bremen (D. C.) 228; The Main, Id.

Where an officer of a vessel makes false claims as to the extent of salvage services rendered, and supports the same by his testimony, he will be excluded from any share in the award made for such services.—The Bremen (D. C.) 228; The Main, Id.

Where tugs, by negligently placing a burning ship in close proximity to another, without necessity or excuse, caused additional damage and loss to both vessels to an amount exceeding any reasonable award for their salvage services, they will not be awarded compensation for such services.—The Bremen (D. C.) 228; The Main, Id.

Salvors are responsible for the reasonable care of the property which they have in charge, both as respects damage to the property itself and the infliction of damage on other property.—The Bremen (D. C.) 228; The Main, Id.

§ 2. Amount and apportionment.

Where a libelant made greatly exaggerated claims for salvage services and towage, he will not be allowed interest on the amount recovered.—Merritt & Chapman Derrick & Wrecking Co. v. Chubb (C. C. A.) 1003.

The owners and crew of a fishing schooner *held* entitled to one-half of a sum of money taken from the body of an unknown man, found floating in the sea, as a salvage award.—Gardner v. Ninety-Nine Gold Coins (D. C.) 552.

§ 3. Lien and recovery.

The salvage services rendered by various tugs to the burning steamships Bremen and Main, which took fire from the burning of their dock at Hoboken, in rescuing seamen, towing the ships to where they could be beached, and in putting out the fire, considered, and awards made therefor.—The Bremen (D. C.) 228; The Main, Id.

SATISFACTION.

See "Payment"; "Release."
Of loan by borrowing stockholder, see "Building and Loan Associations."

SCHOOLS AND SCHOOL DISTRICTS.

See "Municipal Corporations," § 3.

§ 1. Public schools.

Under the constitution and statutes of Colorado, the power of school districts to borrow money for the purpose of erecting school houses, to be paid by concurrent taxation, is not limited; the limitation imposed by Mills' Ann. St. § 4057, applying only to the issuance of bonds.—Geer v. School Dist. No. 11 (C. C. A.) 682.

A suit in a federal court to enforce the payment of bonds issued by a district township or an independent district in Iowa against two or more independent districts into which the original district has been subdivided must be brought in equity.—Fairchild v. Rural Independent School Dists. of Allison and Jackson (C. C.) 108.

Where a school district has been subdivided into new districts under the statute of Iowa, and subsequently an agreement is made by the new districts for the division and apportionment between them of the indebtedness of the old district, an action at law may be maintained against them on bonds of the old district, and judgment rendered in conformity to such agreement.—Fairfield v. Rural Independent School Dist. of Allison (C. C.) 453.

SEAMEN.

Circumstances under which seamen executed a release for wages before a shipping commissioner considered, and *held* not to amount to legal duress or coercion, which entitled them to avoid the conclusive effect of such release.—Pettersson v. Empire Transp. Co. (C. C. A.) 931.

It is not essential to the validity and effectiveness of a release signed before a shipping commissioner on the discharge and payment of seamen as required by Rev. St. § 4552, that the master or owner and the seamen should appear before the commissioner and execute such release at the same time.—Pettersson v. Empire Transp. Co. (C. C. A.) 931.

A release executed before a shipping commissioner on a settlement and discharge of seamen, in conformity to Rev. St. § 4552, is conclusive on the parties, in the absence of fraud or coercion.—Pettersson v. Empire Transp. Co. (C. C. A.) 931.

Evidence *held* insufficient to sustain a libel to recover damages from a master for an alleged assault upon a subordinate.—Dorrell v. Schwerman (D. C.) 209.

A mate, who obtained liquor from the steward through connivance, after its sale to him had been forbidden by the master, and, owing to his intoxication, failed to promptly obey an order, was guilty of insubordination which gave legal cause for his discharge.—The Bertha (D. C.) 550.

Since the passage of Act Dec. 21, 1898 (2 Supp. Rev. St. p. 897), the imprisonment of a seaman in a port to coerce him to perform a contract for service on a ship is illegal, and a violation of his personal rights, which entitles him to damages.—The South Portland (D. C.) 767.

Damages awarded seamen for illegal imprisonment by the master to compel the performance of their contract for service.—The South Portland (D. C.) 767.

SEPARABLE CONTROVERSY.

Removal from state court, see "Removal of Causes," § 1.

SERVICE.

Of process, see "Process," § 1.

SETTLEMENT.

See "Payment"; "Release."

Of bill of exceptions, see "Exceptions, Bill of," § 1.

SHERIFFS AND CONSTABLES.

Sheriff's deed, see "Execution," § 1.

SHIPPING.

See "Admiralty"; "Collision"; "Salvage"; "Seamen"; "Towage."

§ 1. Regulation in general.

It is not a criminal offense under the statutes of the United States for the owner of a gasoline launch to employ the same in carrying for hire without a certificate of inspection.—United States v. Nash (D. C.) 525.

It is a criminal offense, punishable by indictment under the statutes of the United States, to operate a gasoline launch of over 15 tons burden in the carrying of passengers or freight for hire without a licensed engineer.—United States v. Nash (D. C.) 525.

§ 2. Charters.

A time charter construed, and *held* to constitute a demise of the vessel, which put the charterer in possession as owner for the voyages made during the term, and under which he could not hold the vessel liable for losses sustained through the wrongful acts of her officers while so in his service.—The Del Norte (D. C.) 542; Crescent City Transp. Co. v. Townsley, Id.

Representations made by a shipowner, prior to a charter, respecting the speed of his vessel, but which are not embodied in the charter, are superseded by that instrument, in the absence of fraud or mutual mistake.—Matthias v. Beeche (D. C.) 940; The Asphodel, Id.

Evidence considered, and *held* insufficient to sustain the claim of a charterer that the owner failed to maintain the vessel's machinery in proper condition, as required by the charter, resulting in loss of speed and consequent lengthening of the voyage.—Matthias v. Beeche (D. C.) 940; The Asphodel, Id.

§ 3. Master.

The master of a vessel will be protected in the exercise of all reasonable authority over his subordinates in the maintenance of proper discipline, even to the extent of inflicting corporal punishment, where the circumstances are such as to justify it; but he is strictly accountable for the infliction of wanton injury, or oppressive and unreasonable treatment.—Dorrell v. Schwerman (D. C.) 209.

§§ 4, 5. Carriage of goods.

A vessel *held* not liable for a breach of a contract of affreightment by the charterer and damage to the goods, without negligence on the part of the vessel.—The Highland Light (C. C. A.) 195.

A barge *held* unseaworthy from the manner of her construction for a voyage between St. Michael and Nome, Alaska, in October, and her owner for that reason not entitled to exemption under section 3 of the Harter act from liability for the loss of cargo taken on board for such a voyage.—Parsons v. Empire Transp. Co. (C. C. A.) 202.

The sinking of a barge at a dock with her cargo *held* to have been due to unseaworthiness.—Forbes v. Merchants' Exp. & Transp. Co. (D. C.) 796.

A loss of goods, thrown overboard by the listing of a lighter while being unloaded, *held* to have been due to the negligent manner in which the unloading was done.—McAllister v. Southern Pac. Co. (D. C.) 938.

§ 6. Carriage of passengers.

A steamship company *held* not chargeable with negligence, rendering it liable for the death of a passenger alleged to have been caused by the dampness of a mattress furnished him to sleep on, owing to the extraordinary number of passengers, and which he agreed to accept, before entering on the voyage, with knowledge of the conditions existing.—Van Anda v. Northern Nav. Co. of Ontario (C. C. A.) 765.

§ 7. Demurrage.

The owners of a steamer *held* entitled to demurrage from a charterer for delay in loading and discharging occasioned by the fact that she could not safely lie at the wharf where she was required to load, and because the cargo was not of the kind specified in the charter.—McCaldin v. Cargo of Scrap Iron (D. C.) 411.

A steamer having three hatches, and entitled by her charter to be furnished with cargo as fast as she can load the same, cannot be required to load at a wharf where she can lie

safely only by breasting out.—McCaldin v. Cargo of Scrap Iron (D. C.) 411.

It is doubtful whether a charterer can require the shipowner to furnish electric lights to facilitate the discharge of a cargo which by reason of its inflammable nature cannot be handled safely by the use of lamps.—Matthias v. Beeche (D. C.) 940; The Asphodel, Id.

§ 8. Limitation of owner's liability.

A transportation company *held* not entitled to a limitation of liability for loss of cargo, arising from the incompetence and negligence of its agent, having ostensible authority to act for it. —Parsons v. Empire Transp. Co. (C. C. A.) 202.

A shipowner cannot be deprived of the statutory right to a limitation of liability for damages caused by collision because no lookout was maintained on his vessel, where men to act as lookouts were provided, and the fault was that of the master in not keeping them on duty.—The George W. Roby (C. C. A.) 601.

Stipulations in a bond given for the appraised value of a vessel in proceedings for limitation of liability *held* liable under its terms for interest from the date of its execution.—The George W. Roby (C. C. A.) 601.

SINKING FUNDS.

For municipal indebtedness, see "Municipal Corporations," § 3.

SMUGGLING.

See "Customs Duties," § 3.

SPECIFIC PERFORMANCE.

§ 1. Good faith and diligence.

Complainants *held* to have violated a contract in the first instance, which precluded them from maintaining a suit for its specific performance. —Home Land & Cattle Co. v. McNamara (C. C. A.) 822.

STATES.

See "United States."

Courts, see "Courts."

STATUTES.

Adoption by United States courts of state laws as rules of decision, see "Courts," § 1.

Provisions relating to particular subjects.

See "Customs Duties"; "Discovery," § 1; "Limitation of Actions," § 1; "Mechanics' Liens."

§ 1. Repeal, suspension, expiration, and revival.

Under the constitution of Montana and Pol. Code, § 292, relating to the effect of amendment to statutes, an amendatory statute will be upheld, though it purports to amend a statute which had previously been amended; and, where it covers the entire subject-matter, the previous amendment is repealed by implication, if not in terms.—Minnesota & M. Land & Improvement Co. v. City of Billings (C. C. A.) 972.

§ 2. Construction and operation.

Where the language of a statute is unambiguous, and by its plain terms it applies to all persons, the courts are not authorized to limit it by construction to a particular class of persons.—Southern Ry. Co. v. Machinists' Local Union No. 14 (C. C.) 49.

STATUTES CONSTRUED.

UNITED STATES.

CONSTITUTION.

Art. 4, § 1 561

STATUTES AT LARGE.

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A lender of money on an express agreement that it is to be used to discharge an incumbrance on the borrower's property, and that the lender shall have a first lien thereon as security, may be subrogated to the rights of the incumbrancer whose debt was paid, as against the borrower or any subsequent purchaser with knowledge of the facts.—Cumberland Building & Loan Ass'n v. Sparks (C. C. A.) 647.

Purchasers of property *held* chargeable with notice that the holder of a defective mortgage thereon was entitled to be subrogated to the lien of a prior mortgage which its money had discharged. — Cumberland Building & Loan Ass'n v. Sparks (C. C. A.) 647.

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§ 1. Levy and assessment.

Act Nev. March 16, 1901, creating a board composed of the different county assessors to meet each year and "establish throughout the state a uniform valuation of all classes of property which by their character will admit of such uniform valuation," does not confer upon such board the power, without making any classification of railroad property, to designate a railroad company by name and fix a valuation per mile upon its road throughout the state — Central Pac. Ry. Co. v. Evans (C. C.) 71.

A court of equity has jurisdiction of a suit to enjoin the assessment of complainant's property for taxation in a manner not authorized by the laws of the state, such remedy being the only one which affords adequate and appropriate relief by requiring the assessment to be made in a lawful manner.—Central Pac. Ry. Co. v. Evans (C. C.) 71.

§ 2. Collection and enforcement against persons or personal property.

A court of equity *held* to have jurisdiction of a suit by a bank to enjoin the enforcement of taxes levied on its capital, on the ground of preventing a multiplicity of suits.—Union & Planters' Bank v. City of Memphis (C. C. A.) 561.

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§ 1. Establishment, construction, and maintenance.

A telephone company occupies the streets in a city with its lines, subject to the equal privilege of others subsequently granted the same rights, unless serious injury will be caused thereby to the operation of its own line.—Louisville Home Tel. Co. v. Cumberland Telephone & Telegraph Co. (C. C. A.) 663.

It is within the powers of a city to designate on what part of its streets a telephone company shall construct its line, and the exercise of such power is presumptively valid, and cannot be interfered with by the courts, unless shown to have been arbitrary and unreasonable.—Louisville Home Tel. Co. v. Cumberland Telephone & Telegraph Co. (C. C. A.) 663.

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A contract for towage services to be rendered by a tug to a dredging fleet construed.—Ball v. Randerson (D. C.) 212; Randerson v. Ball, Id.

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§ 1. Arguments and conduct of counsel.

Counsel cannot necessitate a new trial by their own failure to interpose seasonable objection to remarks of adverse counsel; and where, on the first objection, the court excluded the objectionable remarks from the consideration of

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§ 2. Taking case or question from jury.
Where the evidence is so conclusive that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it, the trial judge should direct a verdict when requested.—Pennsylvania R. Co. v. Martin (C. C. A.) 586.

§ 3. Instructions to jury.
Where the charge given by the court covers the entire case and properly submits it to the jury, it is not reversible error to refuse further instructions requested.—Meyer v. Richards (C. C. A.) 296.

Where but a single exception was taken, and a single assignment of error is made, covering the giving of certain instructions, the refusal to give others, and the charge as given, no question is presented which will be considered by the appellate court.—South Penn Oil Co. v. Latshaw (C. C. A.) 598.

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§ 1. Government and officers.
The failure of the treasury department to promptly notify the sureties on the bond of a collector of internal revenue of a defalcation by their principal does not discharge them from liability.—Pond v. United States (C. C. A.) 989.

The fact that money or property intrusted by the government to a collector of internal revenue was embezzled by a deputy without the collector's fault or negligence does not relieve him or his bondsmen from liability therefor.—Pond v. United States (C. C. A.) 989.

Proof that a collector of internal revenue received stamps from the government for which he failed to account authorizes a judgment against him and the sureties on his bond for the value of such stamps as charged in his account, and the government is not required to prove that he sold the same and received the money therefor, although the complaint contains an unnecessary allegation to that effect.—Pond v. United States (C. C. A.) 989.

The death of a surety on the bond of an officer of the United States does not relieve his estate from liability for a breach of the conditions of the bond occurring subsequent to his death, but during the term of office for which the bond was given, where it in terms binds the obligors and their several heirs, executors, and administrators.—Pond v. United States (C. C. A.) 989.

The liability of the obligors in the bond of a federal officer is joint and several, and the erroneous dismissal by the court of an action on such bond as against the executors of a deceased surety does not invalidate a judgment subsequently rendered therein against each of the other sureties.—Pond v. United States (C. C. A.) 989.

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