THE

FEDERAL REPORTER.

VOLUME 114.

CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

MAY—JUNE, 1902.

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1902.

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OF THE

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

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†

CASES

ARGUED AND DETERMINED

IN THE

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

SWENSEN et al. v. BENDER.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

No. 720.

1. TRIAL—ADMISSION OF EVIDENCE—ORDER OF PROOF
   The order of proof is largely within the discretion of the court, and the admission of evidence without the requisite preliminary or connecting proof is not prejudicial error, where such proof is subsequently introduced.
2. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—EVIDENCE.
   In an action by a servant against the master to recover for an injury caused by the caving in of a tunnel in which plaintiff was working, evidence of the character of the timbering was admissible on the issue of defendant's negligence, when supplemented by evidence tending to show that it was defective, and known to be so by defendant, and that such defects were responsible for the injury.
3. SAME—CONTRIBUTORY NEGLIGENCE.
   A servant injured by the caving in of a tunnel in which he was working, and which was insufficiently timbered, cannot be charged with contributory negligence as matter of law, where it was shown that he was inexperienced in the work, and there was evidence tending to show that the master assured him the place was safe, and that planks were put up by direction of the master to hide the danger from the workmen.
4. SAME—NEGLIGENCE OF FELLOW SERVANT.
   Negligent acts of fellow servants cannot be relied on as a defense to an action by a servant for a personal injury, where it is clearly shown that such acts were done under the direct orders of the master.
5. EVIDENCE—OPINIONS OF EXPERTS—HYPOTHETICAL QUESTIONS
   It is proper to permit a witness testifying as an expert to answer a hypothetical question stating only facts which there is evidence fairly tending to prove, and it is not necessary, as a general rule, that such question should embrace all the facts of the case.
6. MASTER AND SERVANT—ASSUMED RISKS.
   A servant does not assume the risk of injury from the negligence of the master in failing to exercise ordinary care to make the place where the servant works reasonably safe, considering the nature of the employment.[1]

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[1]Assumption of risks incident to employment, see note to Railroad Co. v. Hennessey, 38 C. C. A. 314.

7. DAMAGES—PERSONAL INJURY—FUTURE INCAPACITY TO WORK.
Where there was evidence tending to show that plaintiff had, ever since the injury sued for, been incapaciated from work in a greater or less degree, and that such incapacity would continue for some time, it was not error to instruct that the jury in estimating the amount of his compensatory damages should take into consideration the loss sustained through inability to work "during the period of his incapacity and probable incapacity alleged in the complaint."

8. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.
If the charge of the court, in its own language, embraces all the points of law arising in the case, it is not error to refuse further instructions requested, although they correctly state the law. It is the duty of the court to simplify its directions to the jury, and a repetition in different language not only tends to confuse the jury, but to give undue prominence to the proposition repeated.

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

Herbert Cutler Brown, for plaintiffs in error.
W. C. Petchner, for defendant in error.

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

HAWLEY, District Judge. This action was brought by the defendant in error to recover damages for injuries alleged to have been received by him through the negligence of the plaintiffs in error, who were contractors engaged in the construction of the Third Street tunnel in Los Angeles, Cal. A trial of the case before a jury resulted in a verdict in favor of the defendant in error for $1,592.75, upon which verdict a judgment was duly rendered, and thereafter a writ of error was taken to have said judgment and all proceedings had in said cause reviewed by this court.

The errors relied upon for a reversal of the judgment relate to the admission of certain testimony, to the action of the court in refusing to grant a nonsuit, to alleged errors in giving instructions to the jury, and in refusing to give certain instructions asked for by the plaintiffs in error.

The complaint, after alleging jurisdictional facts, alleges:

"That on or about December 1, 1899, plaintiff was engaged in laboring with pick and shovel inside said tunnel, in the construction thereof, and that at said time plaintiff was unskilled in such work, and unfamiliar therewith; that on said first day of December said tunnel had been constructed inward a distance of about 200 feet; and on account of the increasing distance inward, the unusual character and (un)familiarity of such work to plaintiff, and the darkness of the interior of said tunnel, on a certain day about two weeks preceding said 1st day of December, plaintiff hesitated about proceeding with his work in said tunnel, fearing that the same might be dangerous, but the person employed by the defendant to superintend the work of construction of said tunnel, * * * and who at all times herein mentioned was in charge of the work in the interior of said tunnel, and who was in immediate control of plaintiff and his said work, seeing plaintiff's hesitancy to proceed with said work, and knowing that plaintiff feared danger therefrom, ordered this plaintiff, in the presence and hearing, and with the approbation, of defendant Anthon Swensen, to go ahead with his said work, and assured plaintiff that there was no danger therein or thereabout; that thereafter plaintiff was, up to the said 1st day of December, a number of times given such assurance by said person in charge of said work; that on the

said first day of December, while plaintiff was engaged in shoveling inside said tunnel, at a point about 170 feet inward thereof, and while in full reliance on the said assurances of said person so in charge of said work, to the effect that there was no danger in or about the same, and knowing that said assurances had the approbation of these defendants, and while this plaintiff was so engaged in work, unsuspecting danger because of said assurances, a great mass of earth fell from the roof of said tunnel upon plaintiff, crushed him to the ground, and broke his right arm in two places, and greatly bruised his left arm, so that for the space of two weeks thereafter plaintiff required the services of a personal attendant to feed him and attend to all his personal wants; and because of the falling upon plaintiff of said earth he was caused great bodily suffering, and the shock that resulted from such injury greatly impaired plaintiff's nervous system, and rendered him sick, so that at this date he is unable to perform work of any character, and such incapacity will probably continue for the space of two months hence, that said injuries so received threaten to permanently impair the health of plaintiff; that said earth was caused to fall upon plaintiff, as aforesaid, by the neglect and failure of defendants to exercise ordinary care to provide a reasonably safe place for plaintiff to work in, to do which was a positive duty due from defendants, personally, to plaintiff, and because said defendants, in violation of their said duty to furnish plaintiff with a safe place in which to work, negligently and carelessly failed to properly, or at all, brace or timber said tunnel at the point where plaintiff was working under the direction of defendants, when injured, as aforesaid, or to take proper precautions to prevent the falling of said earth from the roof of said tunnel, as aforesaid, and, further, because the dangerous character of the place at which plaintiff was employed when so injured, and of the work at said place, was such as defendants, had they exercised ordinary care and diligence, should have known and apprehended, but whereof this plaintiff was unaware by reason of his inexperience, and by reason of his reliance upon the assurance, given to plaintiff as aforesaid, that no danger need be apprehended in or about said work; that by reason of the injuries sustained by the plaintiff by the carelessness and negligence of the defendants, as aforesaid, plaintiff has been unable to work since said 1st day of December, 1899, and thereby has lost 53 days' work to this date, the value whereof per day is $1.75, and the total value whereof is $92.75, to plaintiff's damage in said sum of $92.75; and that by reason of such injuries received as aforesaid, plaintiff has been further damaged in the sum of $5,000.00."

The answer of the defendants denies these allegations of the complaint, and alleges, in substance, affirmatively, that plaintiff was fully aware and informed of all the dangers of his employment; that defendants exercised every possible precaution for the protection of their employés in said tunnel; that defendants were not guilty of negligence in any respect whatsoever, but that plaintiff's injuries resulted solely and proximately from his own negligence; and, as a further defense, that plaintiff's injuries were the result of the acts of his fellow servants.

The objections made to the various rulings of the court are quite numerous. It will be unnecessary to specifically notice all of them. Several of the objections present substantially the same question, although made at different times and in different ways.

1. It is claimed that the court erred in admitting evidence, at various times, as to the strength and size of the timbers used in the tunnel, in that it does not appear from the evidence that the accident to plaintiff was caused by defective timbering. While it may be the better practice to first show how the accident occurred, it certainly was not error to overrule the objections upon the promise of counsel for Bender that he would show that the injury resulted

from the defective timbering, which was afterwards done. The order in which testimony should be introduced is largely within the discretion of the court. The rule is well settled that an error in admitting evidence without the requisite preliminary, or connecting, proof is cured by the subsequent introduction of such proof; and this is the rule in California, where the case was tried. People v. Shainwold, 51 Cal. 469; Robinson v. Bank, 81 Cal. 106, 111, 22 Pac. 478. In the light of the issues raised by the pleadings, evidence upon this point was admissible for the purpose of showing negligence upon the part of the plaintiffs in error. Testimony was thereafter given which certainly tended to show that the place where Bender was injured was unsafe, and that the timbering about that point was defective. Touching these questions Mr. Pugh, who had been engaged for about 10 years in tunnel work, after describing the usual methods of timbering used, and of his familiarity with the tunnel, and of the timbering therein, testified as follows:

"I was foreman of the excavating. I have complained many times to Mr. Swensen of the insufficiency of the timbering; that is, as to the distance apart it was placed. I told him a couple of times that the timbering was not sufficient to protect the ground and the men. He said he thought it was all right. I complained to him maybe a dozen times. The morning of the accident I * * * met him at the entrance of the tunnel, and told him that the place was in a dangerous condition, and that we ought to put, what we call generally, a set of timbers three or four feet apart. And he said to me, 'Pugh, I can't stand it; they must be six feet apart;' and I told him, 'If that is the case, Mr. Swensen, that will put the men in danger; and, another thing, they can't do their work; they are afraid to work.' He then asked me, 'Is there anything we can do there?' I said, 'Well, there is only one thing,—to put the timbers there to protect the men.' And he suggested something this way, 'Can we put some planks there?' (meaning two by twelves) 'to hide the danger from the men, so that they won't be afraid to work?' And I said, 'You can do that if you will take the responsibility of it.' * * * I had the men to work that morning just clearing out the timbers. The timbers and the dirt were in the way. I did not put the men to work where the danger was until Mr. Swensen came there. I wanted to inform him about the place and conditions before I put the men to work. After he came there he told me to put the men to work, and to get the dirt out. * * * At about half past ten or eleven Mr. Swensen came in. We were talking over some things, and Mr. Bender, he was looking around and looking up that way, and I walked up to him and said, 'Mr. Bender, it seems to me you are afraid to work in here. If you are afraid, the best thing you can do is to get out of here, because you are liable to catch a good hurt here.' Mr. Swensen passed me and went into the men, and said, 'Go ahead about your work. It is absolutely safe to work here. There is no danger at all. Go ahead with your work.' I was present at the time of the accident. * * * At the place where the accident occurred timbers two inches by twelve inches, about four or five or six, were put forward about six or seven feet, to hide the danger from the men."

Mr. Botwright, who was the timber man at the tunnel, testified as follows:

"I was doing timber work in the east end of the tunnel. I was working there on the first day of December, 1899. I was acquainted with Mr. Bender, the plaintiff in this case, and I recollect the occurrence of an accident to him in the tunnel, between one and two o'clock on the first day of December, 1899. In the morning of that day Mr. Swensen came to me outside, and we talked over about the place where the accident occurred later that day, and I asked him what I had better do; that I did not think that it was really

safe for the men to work in there. He said, 'Oh, well, go to work and put up some planks to hide the danger from the men so they will go ahead and work.' I know the spot where Bender was hurt. He was hurt right where we were working. I told Mr. Swensen that I thought we ought to timber it as fast as we could get to it to avoid danger. Pursuant to his direction to put the timbering in there, I did just exactly what he told me to do. * * * The danger of that particular spot consisted in this: We had had a cave-in, and after this cave-in came, Mr. Pugh, the foreman, and myself had started to catch up this place on the south side. We had put up one set of timbers, and wanted to get up another set, so we could make it safe for these men to work. In order to do that way, we had to work a few men to clean this dirt away. But we went to work and put up one set. * * * The next morning we were getting ready to put up another set. I was outside pretty near all morning cutting timbers, and I had a man working with me inside. As near as I can remember now, this place was scaly in the top where it had caved down, and here the accident happened. It was about eight feet from these plants [planks] to the roof of the tunnel, where it had caved in, and it was naturally dropping there all the time and falling. I and the foreman went to work ourselves in order to get this thing stopped from caving. We didn't work anybody at helping to do this timbering but ourselves and one man. Mr. Bender and three other men were shoveling in the bottom of the tunnel,—shoveling out the cave-in. I apprehended that the place from which the cave came was dangerous to those beneath, and I told Mr. Swensen it was. Mr. Swensen told me to put those planks in to hide the danger from the men, so they would not see it. I put them in * * * exactly as he directed. I got all my instructions in placing and constructing the timbering from Mr. Swensen,—nobody else. I condemned that place at which we were working, and told Mr. Swensen that I did not think his method of timbering was proper. He said it was the best he could do. He said he could not buy any more timbers; that they were costing him too much already."

The testimony of these witnesses as to the defective timbering was corroborated by other witnesses.

The court did not err in refusing to strike out the words in the foregoing testimony "to hide the danger from the men." This expression on the part of Swensen, as testified to by the witnesses, if true, tended to show a wanton disregard on the part of the plaintiffs in error to keep the tunnel safe. It tended to show that they knew the place was dangerous, and that they attempted to deceive the workmen and hide from them the knowledge which plaintiffs in error possessed as to its dangerous condition. Swensen denied having made any such remark, and denied having notified Bender that the place was perfectly safe, or directed him to go to work, and declared that Pugh was the person that gave such information and direction. He testified, among other things, that:

"The general supervision of the entire work in the tunnel was, of course, in my hands. * * * I have had no experience in placing timbers in a tunnel. I made suggestions as to the placing of timbers in this tunnel, but Mr. Pugh directed that work entirely. * * * During the morning of the accident I got to the tunnel about half-past seven. Mr. Bender was shoveling dirt into the car at the place where he was hurt. Mr. Pugh put him to work there, and I was with Mr. Pugh. The planking that was overhead where Mr. Bender was working was placed there by Mr. Pugh's directions."

Notwithstanding the statement that he "had no experience in placing timbers in a tunnel," he further said:

"I had knowledge as to the sufficiency of the timbers and the structure at the place, and on the occasion, of the accident, and they were amply sufficient to carry the load that was imposed upon them."

The entire testimony was of such a character as to eliminate from the case the question as to the injury of the defendant in error having been received by the acts of his fellow servants; as it clearly shows that the plaintiffs in error were alone responsible, and tended to show that their action in the premises was such as to induce Bender to believe that there was no danger. It is true that the putting in the planks "to hide the danger from the men" did not make the place safe, but Bender, in the light of all the facts, had reason to believe that it did; and this, with the assurances given him that the place was safe, was well calculated to allay the fears he had previously exhibited as to the danger he was in. The only reasonable inference that could be drawn by the jury from the testimony was that Bender, after the planks were put in, believed the statements as to the place being safe were true, and that he acted under that belief.

2. Dr. Schmidt was called as a witness, and testified as follows:

"I am a physician by occupation, and am engaged in active practice. I have been so practicing since 1882. I am acquainted with Mr. Bender, the plaintiff, and I knew him prior to December 1st, the time of his injury. The condition of his health prior to that time was good. From my education, training, and experience as a physician, I am familiar with nervous ailments and their causes. I have rendered medical services to the family of Mr. Bender before the accident. I have been his family physician."

It is assigned as error that the court erred in allowing a hypothetical question propounded to Dr. Schmidt to be answered, as follows:

"Q. Now, doctor, suppose a man before a certain accident has been enjoying good health, freedom from any indications of nervous disorder, and that thereafter, about December 1, 1899, he should meet with an accident of this character; that a great quantity of boards and earth should fall from a distance of seven, eight, or ten feet upon his breast and stomach and on his arms and shoulders, breaking the right arm in two places, and stunning him so that he remained in that condition for a period of three hours; that thereafter he remained in bed for about three weeks; was unable to resume his ordinary avocation, go to work for a period of eight months; that his arm is still sore; he is unable to close his hand; that before that time he treated his family with kindness,—ordinary kindness, at least; no indication of nervousness about his demeanor towards his family; since that time he is very nervous and cross; punishes his children without provocation, exhibits great irritation, so as to lead him to punish them when they talk about the room; that he has fainting spells occasionally, so that he reels about and grabs at articles that may be in reach; that he is so irritable and cross towards his wife and daughter that he has ordered both of them to leave home, without provocation; and that he had had no other accident or ailment at or about that time. What would you attribute the result of this nervousness, and this nervous condition, exhibited by him that I have referred to? A. I would attribute it to the accident."

The objection to this question was that, "It was based upon facts not in evidence, and upon a hypothetical nervous condition subsequent to the accident of which there was no evidence." This objection was properly overruled. There was testimony offered upon every fact specified in the question. It is always proper to permit such questions to be answered, and it is not, as a general rule, necessary that the questions should embrace or cover all the facts of the case. The authorities upon this point will be found in Railroad Co. v. Roller, 41 C. C. A. 22, 100 Fed. 738, 754, 49 L. R. A. 77.

3. With reference to the alleged error of the court in refusing to grant a nonsuit but little need be said. It is true that an employé assumes all the ordinary risks incident to his employment; but it was the duty of the plaintiffs in error to use reasonable care and diligence to keep the tunnel in a reasonably safe condition, so that their servant might not be exposed to unnecessary, unreasonable, or extraordinary risks. The servant only undertakes the risks of the employment so far as they spring from defects incident to the service. He does not take the risk of the negligence of the master. Railroad Co. v. O'Brien, 161 U. S. 451, 457, 16 Sup. Ct. 618, 40 L. Ed. 766, and authorities there cited. For a failure to exercise this duty which results in an injury to the employé the employer is liable. Railroad Co. v. Peterson, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. Ed. 994; Railroad Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; Same v. Archibald, 170 U. S. 665, 669, 18 Sup. Ct. 777, 42 L. Ed. 1188; Railroad Co. v. Jarvi, 3 C. C. A. 433, 53 Fed. 65, 68; Hanley v. Construction Co., 127 Cal. 232, 239, 59 Pac. 577, 47 L. R. A. 597; Bowen v. Railway Co., 95 Mo. 268, 273, 8 S. W. 230. This duty and liability is personal to the master, and cannot, in any case of this character, be so delegated by the master as to relieve him of his liability. Railroad Co. v. Herbert, 116 U. S. 642, 648, 6 Sup. Ct. 590, 29 L. Ed. 755. Applying these principles of law to the facts of this case, it is manifest that the court did not error in refusing to instruct the jury to return a verdict for the plaintiffs in error. The authorities cited by plaintiffs in error contain correct principles of law as applied to the facts of each case; but an examination of them shows that the servant either voluntarily entered a service known to him to be dangerous, or which afterward became dangerous to him, and with full knowledge thereof he continued work without notifying his employer of the danger; or where the servant knows of the hazardous character of the work and is injured by an accident which could not have been foreseen by his employer; or where the service in which the servant is engaged includes the duty on his part of preparing the timbers or appliances used in the construction of a tunnel or in the erection of buildings, etc. This case does not present any such questions. The distinction between the case at bar and the cases relied upon by plaintiffs in error are clearly pointed out in Hanley v. Construction Co., supra. In Kelley v. Dyeing Co., 12 R. I. 112, 116, 34 Am. Rep. 615, cited by counsel, the court, after holding that plaintiff had assumed the risk under the first point above stated, said:

"If, when the danger occurred, the plaintiff had notified the defendant of it, and had been induced to remain in his position by assurances that it should be remedied, or, as some of the cases hold, by a reasonable expectation that it would be remedied, then it would not necessarily be presumed from his knowledge of the danger that he had assumed the risk."

Upon the question of the assumption of risk and alleged contributory negligence upon the part of Bender, it is only necessary to add that the charge of the court upon these points, to which no specific objections were made, was as favorable to the plaintiffs in error as the law and testimony would warrant.

4. There were but two exceptions taken to the charge of the court. After stating that it was essential to a recovery that the plaintiff must prove "that the defective timbering was due to the negligence of the defendants, or, in other words, that its unsafe and dangerous condition was, or, by the exercise of ordinary care, could have been, known to the defendants in time to prevent the injuries complained of," the court said:

"On this branch of the case the court instructs you, further, that an employer does not guaranty the absolute safety of the place where the employé works; but it is the duty of the employer to exercise ordinary and reasonable care in providing a safe place for the employé to work in, and this duty cannot be delegated to a servant, so as to exempt the employer from liability for injuries caused to another servant by its omission. The servant does not undertake to incur the risks arising from negligence in providing or maintaining a suitable and safe place for his work. His contract implies that, in regard to this matter, his employer will exercise due care in making adequate provision that no danger shall ensue to him. It was the duty, therefore, of the defendants, resulting from their employment of the plaintiff as a laborer, to exercise reasonable care in properly timbering the tunnel."

This portion of the charge was objected to on the ground that it does not take into consideration the exception to the general rule therein stated, that the rule does not apply where the preparation of the place in which the employé is to work is a part of the very work which he and his fellow servants are employed to perform, and for the further reason that the rule of law set forth in the said instruction does not apply where the employé is employed to repair a defect itself obviously, and from the very nature of the case, dangerous to all persons employed in such work. It is a sufficient answer to these objections to say, in addition to what has already been said upon this subject, that the facts testified to did not bring the case within any of the exceptions to the general rule stated in the instruction.

The other portion of the charge complained of reads as follows:

"The damages, if any, in this case cannot be exemplary, that is, given by way of example or punishment, but must be limited to actual or compensatory damages; and in estimating their amount *you should take into consideration the monetary loss, if any, sustained by plaintiff through inability to work during the periods of his incapacity and probable incapacity alleged in the complaint,* also the condition of his health, and physical ability to labor, before the accident complained of, as compared with the present condition thereof, and how far the injury is probably permanent in its character and results, as well as the physical and mental suffering he has suffered, if any, by reason of the injury; and you will allow such damages as in your opinion will fairly and justly compensate plaintiff for all the injury and loss and suffering, physical and mental, sustained by him, as the direct and proximate results of the accident, not to exceed the amount demanded in the complaint."

Exceptions were taken to the use of the words we have italicized. We are of opinion that this portion of the charge was correct. The authorities in support thereof are cited in Railroad Co. v. Roller, 41 C. C. A. 22, 100 Fed. 738, 750, 49 L. R. A. 77. In that case the court, after stating that the damages, if any, which could be recovered, are compensatory damages,—such damages as would naturally

flow directly from the injury, if any, occasioned to Mrs. Roller by said collision,—said:

"These compensatory damages embrace all damages for bodily and mental pain and suffering which have resulted to said Katherine A. Roller from said injuries, and if said injuries are permanent, or she has not recovered from them, such damages, also, as you may find from the evidence it is fair to believe she will suffer from said injury in the future."

This court said, "This part of the charge was unquestionably correct." The use of the word "probable" in this instruction, which is criticised by counsel, could only be construed to have the same meaning as "it is fair to believe * * * the plaintiff will suffer * * * in the future," and does not call for any conjecture or guess upon the part of the jury, and it is apparent that the jury could not have been misled thereby. There was some evidence—perhaps slight—sufficient to authorize the court to give the instruction.

Bender himself testified:

"Before the occurrence of this accident I was very healthy, and my arms were in good condition. My right arm was broken in two places. It now pains me continuously, and is stiff. I cannot use it well. I cannot close my whole hand. * * * I am working now, and the effect of this work upon my hand is that the hand always hurts me at nighttime; and it hurts me also during the day when I am using it."

5. The entire charge of the court to the jury was substantially correct in all particulars, and was directly applicable to the issues raised by the pleadings and the testimony given at the trial, and embraced all the points upon which it was necessary to instruct the jury. Some of the instructions asked for by the plaintiffs in error which were refused contained correct principles of law, others were misleading, and some of them were clearly erroneous. As to these instructions, it is only necessary to say that the points involved therein were all embodied in the charge of the court in a clear, concise, and correct manner. It was unnecessary to repeat them. The general rule with respect to this matter is well settled that instructions on points which have been sufficiently covered by other instructions may properly be refused, although they are correctly drawn and applicable to the evidence. This is so, whether the instructions requested are covered by the general charge, or whether the mode of expression is the same or different. The duty of the court is fully discharged if the instructions embrace all the points of the law arising in the case, in the court's own language. It is the duty of the court to simplify its directions to the jury and make every effort to render them as free from complexity as possible. The reason for this rule is obvious. Repetition tends to incumber the record, and to confuse and embarrass the minds of the jury, and it is also liable to give undue prominence to the proposition repeated. 11 Enc. Pl. & Prac. 288.

The judgment of the circuit court is affirmed, with costs.

CORBUS v. LEONHARDT.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1902.)

No. 709.

1. WITNESSES—COMPETENCY — TESTIMONY AGAINST DECEDENTS — TERRITORIAL COURTS.
   Rev. St. U. S. § 858, providing that in actions by or against executors, administrators, or guardians neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, etc., has no application to territorial courts.
2. SAME—LAWS OF OREGON—APPLICABILITY TO ALASKA.
   Act May 17, 1884, "providing a civil government for Alaska" (23 Stat. 24), by section 3 provides for the establishment of "a district court for said district, with the civil and criminal jurisdiction of district courts of the United States." Section 7 declares "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." The laws of Oregon at the time made no restrictions excluding witnesses from testifying in any cause (1 Hill's Ann. Laws Or. § 710). *Held*, that such laws were in force in Alaska, and parties were not restricted from testifying with relation to transactions with or statements of decedents.
3. SAME—WHAT TESTIMONY EXCLUDED.
   In an action by a physician against an administrator for services rendered his decedent during the latter's lifetime, plaintiff's testimony as to his services, the value thereof, and that no part thereof had been paid, did not relate to any transaction with or statement of the decedent, and was admissible.
4. PHYSICIANS—ACTIONS FOR SERVICES—DEFENSES.
   Defendant's evidence tended to show that decedent was employed by a corporation, and was a subscriber to a hospital, and that a verbal contract existed between the hospital and the company that all the latter's employés, by paying $1 per month, should be entitled to medical attendance at the hospital free. There was conflict in the evidence as to whether subscribers were entitled to treatment at their homes, where decedent's treatment was received. Plaintiff testified that he never agreed to attend subscribers away from the hospital, which was not denied. *Held* not to sustain the defense that plaintiff could not recover because the services were rendered under contract with the hospital.
5. SAME—RECEIPTS—MISLEADING INSTRUCTIONS.
   A receipt given decedent by a physician recited: "To attending Mrs. D. [decedent's wife] and baby, $25.00; ferry charges, $34.00. Rec'd payment in full to date." In an action by the physician for services rendered decedent himself, plaintiff admitted that he had been paid for his services in attending the wife and baby. There was direct conflict as to whether at the time of its payment the physician had not stated that it was in full for all charges for treating decedent, as well as his wife and baby. *Held*, that a charge that defendant had introduced in evidence a receipt reciting the payment in full to date, and that the receipt was prima facie evidence that all indebtedness was paid, etc., was properly refused.
6. REQUESTED INSTRUCTIONS.
   A requested charge is properly refused where covered by charges given.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

This action was brought October 14, 1898, by the defendant in error to recover from Robert Duncan, Jr., the sum of $500 for medical services rendered during the months of January, February, and March, 1895,—in all, 100 visits, from Juneau to Douglas Island, Alaska. Duncan died April 14, 1899. The plaintiff in error was duly appointed administrator of the estate of Robert Duncan, Jr., November 2, 1899, and was afterward substituted as the defendant in said action. In his answer he admitted the rendition of the services, but denied they were worth the sum of $500, or any other sum; alleged that Robert Duncan, Jr., in his lifetime, paid plaintiff in full for all services rendered; and further alleged that all services rendered Duncan "were rendered in behalf of the St. Ann Hospital." The case was tried before a jury, and resulted in a verdict in favor of the defendant in error in the sum of $500. Judgment was duly entered for said sum.

There are but two assignments of error, viz.: "(1) The court erred in admitting in evidence to the jury the following testimony of the plaintiff, S. C. Leonhardt, to wit: 'My name is Samuel C. Leonhardt. I reside at Juneau, Alaska, and am a physician and surgeon. I knew the defendant, Robert Duncan, Jr., in his lifetime. I performed services for him in his lifetime. I was sent for, as a private case, and attended Mr. Duncan. I also attended Mrs. Duncan and the baby. I attended Mrs. Duncan during her confinement, and, for some two months after, for milk leg. The baby was what was called "stillborn," and I brought it to life. In January, 1895, I made forty visits to Mr. Duncan; in February I made thirty-five visits; and twenty-five in March. The usual charge for such visits was five dollars each, and that is what I charged, making a total of $500. Mr. Duncan never paid me for the services rendered. I made a demand on him to pay, and he didn't make any satisfactory answer. He never in his lifetime refused to pay, or denied the bill. He promised to pay it. He told me, just as soon as he was strong enough, and able to think the matter over, he would pay me handsomely for the services I had rendered him, and for me to make out a bill for Mrs. Duncan's confinement and the ferry charges, and he would pay that at once, and just as soon as he was able to be around he would attend to his part of it. He said that he appreciated the fact, or asked me to make out a bill for the whole amount, and I told him I would leave it to his own judgment as to the services for him; and he stated he appreciated the fact that I refused to make out a bill at this time to him for the services. On the 26th of March, 1895, he asked me for his bill. I said: "I rather not make out a bill to you; rather leave it to your own judgment to pay what you think best." And he said he appreciated and knew what position I was in, having just come up here, * * * and he said then, "What do you usually charge in such cases?" I said, "Twenty-five dollars;" and he then said, "Well, you make out your bill for twenty-five dollars, confinement charges for Mrs. Duncan, and the ferry charges to here, for this time, and as soon as I get well I will pay you for myself." And he said, "We can never suitably remunerate you in money for this service." He expressed himself as fully satisfied,—highly satisfied.' (2) The court erred in refusing to give, at the request of the defendant, the following instruction, to wit: 'Gentlemen of the jury, the defendant has introduced in evidence before you a receipt executed to Robert Duncan during his lifetime by the plaintiff, Dr. Leonhardt, date, March 26, 1895, reciting the receipt of payment in full to date. This receipt is prima facie evidence that all indebtedness of Robert Duncan to Dr. Leonhardt was paid; that nothing more was due from Robert Duncan on account of anything transpiring prior to March 26, 1895; and, before you can find for the plaintiff in this case, you must find that the presumption arising from the receipt is met and overcome by the preponderance of the evidence.'"

Section 858, Rev. St., referred to in the opinion of the court, reads as follows: "In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried: provided, that in actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the

other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty."

Maloney & Cobb, for plaintiff in error.
Lorenzo S. B. Sawyer, for defendant in error.

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

HAWLEY, District Judge (after stating the facts as above). 1. The objections presented by the first assignment of error are based upon the ground that the testimony of Dr. Leonhardt comes within the provisions of section 858, Rev. St., and that by this section he was not a competent witness to any transactions and conversations between himself and defendant's intestate. We are of opinion that the court did not err in admitting the testimony objected to. It is perhaps true, as claimed by the plaintiff in error, that there is no decision directly in point, but the decisions bearing upon the general question lead us to the conclusion that section 858 does not apply to territorial courts. Good v. Martin, 95 U. S. 90, 98, 24 L. Ed. 341; McAllister v. U. S., 141 U. S. 174, 11 Sup. Ct. 949, 45 L. Ed. 693; Thiede v. Utah, 159 U. S. 510, 515, 16 Sup. Ct. 62, 40 L. Ed. 237; The Coquitlam v. U. S., 163 U. S. 346, 351, 16 Sup. Ct. 1117, 41 L. Ed. 184; Jackson v. U. S., 42 C. C. A. 452, 102 Fed. 473, 479.

In Good v. Martin, supra, the court said:

"Territorial courts are not courts of the United States, within the meaning of the constitution, as appears by all the authorities. Clinton v. Englebrect, 13 Wall. 434, 20 L. Ed. 659; Hornbuckle v. Toombs, 18 Wall. 648, 21 L. Ed. 966. A witness in civil cases cannot be excluded in the courts of the United States because he or she is a party to or interested in the issue tried, but the provision has no application in the courts of a territory where a different rule prevails."

Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268, cited by the plaintiff in error, is not in opposition to these views. That decision was rendered under certain provisions of the act providing a government for the District of Columbia, which are not applicable to Alaska. In the course of the opinion the court said:

"These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the General Statutes of the United States relating to the practice and proceedings in the 'courts of the United States' are locally inapplicable to territorial courts."

By the provisions of section 3 of the "Act providing a civil government for Alaska," approved May 17, 1884 (23 Stat. 24), there was "established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States." By section 7 of this act it was provided "that the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the pro-

visions of this act or the laws of the United States." At the time this law was enacted there were no restrictions excluding witnesses from testifying in any case. 1 Hill's Ann. Laws Or. § 710. These laws were in force in Alaska at the time this suit was brought and at the time of Robert Duncan's death, and were applicable to the proceedings had in this case.

In so far as this case is concerned, there was ample evidence to sustain the verdict in the testimony of Dr. Leonhardt, independent of his testimony relating to "any transaction with or statement of the intestate." The testimony as to his services, the value thereof, and that no part thereof had been paid, was clearly admissible. In Cowdery v. McChesney, 124 Cal. 363, 366, 57 Pac. 221, the plaintiff was asked questions as follows:

"Q. Has anything been paid to you since his death on account of any services rendered by you to him during his lifetime? * * * Q. If any balance upon any account was due to you upon the death of George M. Kasson, does that balance still remain unpaid?"

Objections were made to both questions on the ground that the plaintiff was not a competent witness to testify to such facts, under the provision of section 1880 of the Code of Civil Procedure, which is substantially the same as section 858, Rev. St. The court sustained the objection, to which ruling of the court plaintiff excepted. The supreme court said:

"The inquiry contained in these questions did not relate to anything that occurred before the death of deceased, and does not fall under the inhibition of section 1880 of the Code of Civil Procedure. The ruling of the court was therefore erroneous."

In relation to these matters there was no conflict. In fact, they stand admitted by the evidence contained in the record.

The defense interposed by plaintiff in error, that Dr. Leonhardt was not entitled to recover anything for medical services rendered Robert Duncan, Jr., because the services were performed under a contract with St. Ann's Hospital, is not sustained by the evidence. The testimony on behalf of the plaintiff in error tended to show that Duncan was in the employ of the Alaska-Treadwell Gold Mining Company, and was a subscriber to St. Ann's Hospital, and that a verbal contract existed between the mining company and the hospital that all of its employés, by paying $1 per month to the hospital, were entitled to medical attendance at the hospital free. There is a conflict in the evidence as to whether the subscribers were entitled to treatment at their homes. Dr. Leonhardt testified that the subscribers were entitled to be treated free by the hospital physician "if they entered the hospital, but not if they were treated at their homes." He further testified that he never entered into any "contract to attend such subscribers away from the hospital." This is not denied. Any contract made by the subscribers with the mining company or with St. Ann's Hospital might be binding upon them, whether the subscribers were treated at the hospital or at their homes; but the physician could not be bound unless he had agreed to the contract, assented to it, or acted under it.

2. The court did not err in refusing to give the instruction asked for by the plaintiff in error. The language of the instruction was misleading, if not erroneous. The receipt in question reads as follows:

"Juneau, Alaska, March 26, 1895.

"Mr. Robert Duncan, Jr., to S. C. Leonhardt, Dr.

To attending Mrs. Duncan and baby.....	$25 00
To ferry bills for Jan., $14.00; Feb., $10.00; Mar., $10.....	34 00
	$59 00

"Rec'd payment in full to date.

"Saml. C. Leonhardt, M. D."

It will be observed that this receipt does not include any services rendered to Robert Duncan, Jr. It was only prima facie evidence of what appears on the face of the receipt. It was for attending Mrs. Duncan and the baby, and, independent of the receipt, the doctor testified that he had been paid for such services. There was a direct conflict in the evidence as to whether or not at the time of its payment the doctor had not stated that it was in full of all charges for treating Mr. Duncan, as well as his wife and baby. That conflict was settled by the verdict of the jury. Moreover, the court gave proper instructions to the jury with reference to the receipt, and was not required to repeat it in language used by counsel, even if it was admitted to be correct in all particulars. Railroad Co. v. Roller, 41 C. C. A. 22, 100 Fed. 738, 759, 49 L. R. A. 77; Swensen v. Bender (C. C. A.) 114 Fed. 1; 11 Enc. Pl. & Prac. 288.

The judgment of the district court is affirmed, with costs

FARMERS' LOAN & TRUST CO. v. EATON et al.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,512.

1. RECEIVER—AUTHORITY TO LEASE PROPERTY.
A court, having possession of property through its receiver, may authorize him to lease the same.

2. SAME—TERM—RESERVING RIGHT OF CANCELLATION.
Such lease should not be given for a period that will needlessly prolong the litigation, and, if necessary, a provision for cancellation, at the court's option, should be inserted.

3. SAME—OUSTER OF LESSEE BEFORE EXPIRATION OF TERM—RIGHT TO DAMAGES.
Where property is leased by a receiver for a fixed term, with the express sanction of the court, and no right to terminate the lease is reserved, and the lessee is ousted by order of court before the natural termination of the lease, compensation should be awarded him for such actual damage as he has sustained.

4. SAME—ELEMENTS OF DAMAGES—LOSS OF PROPERTY.
Loss of expected profits sustained by a lessee of a railroad lease executed by a receiver, due to the termination of the lease prior to its natural term by order of court, is a proper element of damages to be awarded the lessee.

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

W. H. Rossington, Charles Blood Smith, and Clifford Histed, for appellant.

J. D. McFarland and George H. Whitcomb, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The questions to be determined in this case arise on the following facts: In a certain action which was brought by the Farmers' Loan & Trust Company, as trustee, to foreclose a mortgage on the property of the St. Louis, Kansas & Southwestern Railroad Company, the circuit court of the United States for the district of Kansas, on November 27, 1896, appointed Dwight Braman as receiver of the mortgaged property. On January 27, 1897, the receiver aforesaid presented a petition to the court, requesting leave to lease the property of said railroad company to Francis S. Eaton, one of the appellees, for the period of one year from January 30, 1897, until January 30, 1898. Such leave was granted, and the proposed lease was submitted to the court and approved. On June 30, 1897, the receiver filed another application for authority to enter into another lease with said Eaton for a term of one year from July 1, 1897, with an option to said lessee to continue such lease in force for a second year. The proposed lease was authorized and approved by an order made and entered of record on June 30, 1897, and was duly executed. By the terms of the latter lease Eaton, the lessee, was to pay a deficit, in the sum of $2,780, which had accrued from the operation of the railroad from March 17, to July 1, 1897. The lessee also agreed to assume and pay certain notes, which had been given for equipment, amounting to $2,400, and were payable at the rate of $200 per month. He also agreed to pay the interest which accrued during the term of the lease on certain receiver's certificates, to the amount of $12,000, to insure the buildings along the road, to put in at least 2,000 new ties, and to place the road generally in a safe condition. The receiver, on his part, was to pay all the taxes upon the property, but the lessee was to receive all the income and earnings of the property, together with all cash then in the hands of the lessee as manager, and also all accounts and bills receivable, which accrued or were received from the operation of the road while the same had been under the charge of the lessee. On September 23, 1897, the court entered a decree of foreclosure and sale, by virtue of which the mortgaged property was sold and the sale confirmed on December 20, 1898, at which time the purchaser at the foreclosure sale was placed in possession of the mortgaged property. In the meantime, on November 30, 1898, Eaton, who had been or was about to be dispossessed of the leasehold property, filed a petition, asking, by way of relief, that he might continue to operate the road which he had leased until the 1st day of July, 1899, in accordance with the option which he had reserved by the terms of the lease. This petition on the part of Eaton was subsequently referred to a master, to report what, if any, compensation should be

allowed to him as lessee, on account of the wrongful termination of his lease. After a full hearing and report, and after exceptions to said report had been heard and considered, the lower court allowed the lessee, as damages for the cancellation of his lease before the termination thereof, the sum of $8,298.88, which was a sum somewhat in excess of the amount recommended by the master. The present appeal was taken by the Farmers' Loan & Trust Company, the complainant in the foreclosure proceedings, from such order or allowance.

The principal question which this court is called upon by the appellant to determine is whether Eaton, the lessee, is entitled to any damages on account of being dispossessed of the leasehold property, prior to the natural termination of his lease. It is conceded, apparently, that a court, having possession of property through its receiver, may authorize him to lease the same; but, if such proposition is not fully conceded, it is, at least, well sustained by the authorities. In the case of Mercantile Trust Co. v. Missouri, K. & T. Ry. Co. (C. C.) 41 Fed. 8, 11, it was held by Judge Brewer that receivers, acting under the direction of the court which appointed them, have power to execute leases without the consent of the mortgage bondholders. And in the case of Vault Co. v. McNulta, 153 U. S. 554, 560, 14 Sup. Ct. 915, 38 L. Ed. 819, it was taken for granted that such power exists. See, also, Weeks v. Weeks, 106 N. Y. 626, 13 N. E. 96; Beach, Rec. §§ 288, 289. The point relied upon by the appellant seems to be that when such leases are made, even with the approval of the court, the court has the right to terminate them whenever the necessities of the litigation so require, and that, if terminated, the lessee is not entitled to compensation for any damages which he may have sustained. We are at a loss, however, to discover any good reason by which such a doctrine can be upheld. A private person has the right to break his contract only on condition that he pays the damages incident to the breach. In some cases the right of an individual to break his contract on condition that he makes compensation in damages is not conceded, but courts of equity will compel specific performance. And no reason occurs to us why a judicial tribunal which has power to authorize a receiver to enter into a contract should be exempt from the rule which obtains as between individuals. If anything, it would seem that courts ought to be more scrupulous in keeping their engagements, and more ready than private individuals to award damages, when, in the exercise of their powers, they find it necessary to violate agreements which they have unwittingly made through their receivers. A judicial tribunal, as was said in one case (Farmers' Loan & Trust Co. v. Burlington & S. W. R. Co. [C. C.] 32 Fed. 805), "should be chary of promises, eager of performance." It was also held in a New Jersey case (Vanderbilt v. Railroad Co., 43 N. J. Eq. 669, 12 Atl. 188) that the contracts of a receiver, made with either express or implied authority, cannot be annulled or revoked at the mere pleasure of the court, except on the same conditions that an individual may break his engagements. When a court authorizes its receiver to lease, for

the time being, property in his custody, it should act with great circumspection, and see to it that the lease is not given for such a period of time as will needlessly prolong the litigation or endanger the rights of any parties thereto. If need be, clauses should be inserted in such leases reserving to the court the power to cancel them whenever it is deemed expedient to do so. But when, as in the present case, property is leased for a fixed term, with the express sanction and approval of the court, and no right to terminate the lease is reserved, and the lessee is ousted by order of the court before the natural termination of the lease, compensation should be awarded to the lessee for such actual damages as he has sustained. If this is not done, it might well be said that the court, in its own dealings, does not observe the same good faith which it compels others to observe. We are of opinion, therefore, that the lower court very properly awarded the lessee damages for the wrongful ouster, and the only question which remains for consideration is whether the damages so awarded were excessive.

Counsel for appellant concede that the basis adopted by the lower court for estimating the lessee's damages was as fair as could have been adopted, but they contend broadly that the lessee was not entitled to any allowance for what he might have made by the operation of the road if he had been allowed to operate it during the residue of his term. They characterize such damages as speculative, and not recoverable. We do not concur in that view. For the breach of such a contract as the one in question we do not perceive what damages could have been more direct and certain than the loss of the profit of operation. The lessee doubtless entered into the lease for the purpose of realizing something from the operation of the road over and above the expenses of running it and the rental. This expected profit was within the contemplation of the parties, and the ouster of the lessee necessarily deprived him of the expected gain. The most that can be said is that the amount of the profit which the lessee would have realized could not be computed with mathematical accuracy. The loss of this profit, however, was the natural and probable result of the ouster, and the fact that the amount of the profit was not susceptible of mathematical demonstration, since the lessee had not been allowed to operate the road, did not render it so uncertain that it should have been excluded, within the rule announced by this court in Trust Co. v. Clark, 34 C. C. A. 354, 92 Fed. 293. As the profit which the lessee would have realized was estimated by the master after the termination of the leasehold term, and at a period when all of the conditions which affected the earnings of the road during the period covered by the lease were fully known, we have no doubt that the probable earnings, and the probable cost of operation, during that period, were so well known that the master was able to estimate the same, at the time he did, with reasonable accuracy. We conclude that the damages allowed below were recoverable, within the doctrine announced by this court in the case above cited, and also by the doctrine enunciated in the following cases: Railroad Co. v. Howard, 13 How. 307, 344, 14 L. Ed. 157; Howard v. Manufacturing Co., 139 U. S. 199, 206, 11 Sup. Ct. 500, 35 L. Ed. 147, and cases there cited.

We have not overlooked the fact that counsel for the appellees have filed and argued a motion to dismiss this appeal upon the ground that the clerk of the lower court has merely certified that certain documents contained in the transcript, such as the bill of complaint, order appointing a receiver, etc., are full and complete copies thereof as they appear of record in his office, without certifying that the transcript is a complete one. Counsel for the appellees cite, in support of their motion to dismiss, the case of Meyer v. Implement Co., 29 C. C. A. 465, 85 Fed. 874, which seems to support their contention. We have deemed it best, however, to dispose of the case on its merits, without expressing a definite opinion with respect to the point thus raised. In making up transcripts in equity cases, it is doubtless found to be expedient, at times, to omit copies of certain proceedings, which really form a part of the record, because the omitted proceedings have no bearing upon the question intended to be presented on appeal, and merely cumber the record. To avoid such objections to the transcript as have been made in the present case, it would doubtless be well for the clerk, when the transcript is not a full and complete transcript of all the proceedings in the case, to make some appropriate mention of the fact in his certificate, stating the reasons why a portion of the proceedings are omitted, and that the transcript, as prepared, is a full and complete transcript of such proceedings in the case as it purports to contain.

The decree below is affirmed.

BRAMAN v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1902.)

No. 1,555.

1. RECEIVER—COMPENSATION—REVIEW BY APPELLATE COURTS.
   Appellate courts will not interfere with the discretion of the courts below in fixing the compensation of receivers and their counsel unless it has been abused.

2. SAME—AMOUNT OF COMPENSATION.
   Twelve thousand dollars was a reasonable compensation for two years' service as receiver of a Kansas railroad, only 60 miles in length, the volume of whose business was small, and the road itself operated during most of the receivership by a lessee, who was entitled to all the earnings, where the receiver resided in Massachusetts, and was only in Kansas on a few occasions, and where his services were confined to issuing receiver's certificates and negotiating them when he could find a purchaser.

3. SAME—ALLOWANCE FOR HOTEL BILLS.
   A claim of $2,952 for hotel bills, claimed to have been paid by the receiver while in New York on receivership business, was properly disallowed, as an unnecessary outlay.

4. SAME—RENT OF OFFICES.
   The receiver ought not to have rented an office in New York without the express sanction and approval of the court.

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

J. D. McFarland and George H. Whitcomb, for appellant.
Charles Blood Smith, W. H. Rossington, and Clifford Histed, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case arose out of an action to foreclose a mortgage, executed by the St. Louis, Kansas & Southwestern Railroad Company, that was brought by the Farmers' Loan & Trust Company, as trustee in the mortgage, on November 27, 1896. It is a companion case to the one recently decided by this court entitled "Farmers' Loan & Trust Co. v. Francis S. Eaton et al.," 114 Fed. 14, in which we had occasion to consider whether Eaton, the appellee in the latter case, who had leased the property of the aforesaid railroad company from Braman, the present appellant, who was receiver of the property, appointed as such in the foreclosure proceedings, was entitled to damages because he was ousted from possession before the natural termination of his lease. In this case the parties litigant are represented by the same counsel, but Braman, the receiver, is complaining because the lower court did not award him such compensation for his services as receiver, and for his disbursements in that capacity, as it ought to have allowed.

On October 22, 1898, the property of the aforesaid railroad company was sold under a decree of foreclosure, and the day previous Braman, as receiver, filed what he termed an account of his receipts and disbursements, but no vouchers accompanied such report. He had never before, as it seems, filed any such account in the court by which he was appointed as receiver. A few days later the Farmers' Loan & Trust Company filed exceptions to this account, accompanied by a request that the receiver be ordered and directed to file a further and correct report or account. Thereafter, on November 23, 1898, he did file a further amended account of receipts and disbursements, which was also excepted to by the trust company. These two accounts, and the exceptions thereto, were referred to a master for hearing and report, and, after considerable testimony had been heard, the receiver, of his own volition, seems to have filed another supplemental account, which was exhibited some time in April, 1899, and was immediately excepted to by the trust company. This latter supplemental account, which was filed after the hearing before the master had commenced, was the only one that appears to have been accompanied with any vouchers. After these three accounts of the receiver had undergone judicial scrutiny at great length before the master, and before the lower court on exceptions to the master's report, it seems that various sums, aggregating $11,346.58, which the receiver claimed as credits, either for services rendered as receiver or for disbursements in that capacity, were disallowed, and it was because of such disallowances that the present appeal was taken. The total sum allowed by the lower court for services and disbursements amounts to $16,699.81. No question of law is presented by the appeal, but this court is asked to review the evidence adduced before the master, and to decide that both the lower court and the master have erred in fix-

ing the value of the receiver's services and in rejecting certain claims for alleged expenditures which are said to have been incident to the proper administration of the trust.

We observe, in the first place, that appellate courts are very much disinclined to interfere with the exercise, by courts of first instance, of such a discretionary power as is involved in fixing the compensation of receivers and their counsel. The lower court usually has better knowledge of what services such officers have actually rendered, and better means of determining how valuable such services have been to the trust, and what is a reasonable compensation therefor, than an appellate tribunal can have. For these reasons they are reluctant to disturb the action which has been taken in such matters, by a court of first instance, and will not do so unless there has been an abuse of discretion which has led to an allowance that is manifestly excessive or too small. Our observation leads us to believe that courts are not prone to make allowances for the services of receivers and counsel that are too small. If they err, it is usually in the other direction. Trustees v. Greenough, 105 U. S. 527, 536, 537, 26 L. Ed. 1157; Southern California Motor Road Co. v. Union Loan & Trust Co., 12 C. C. A. 215, 64 Fed. 450; Whitney v. City of New Orleans, 4 C. C. A. 521, 525, 54 Fed. 614; Trust Co. v. McClure, 24 C. C. A. 64, 78 Fed. 209. The largest disallowed item in the receiver's account was a part of his claim for compensation. He claimed compensation for his services as receiver at the rate of $1,500 per month, a sum aggregating $18,000 per year, and succeeded in finding one witness who, upon the receiver's statement of the character of his own services, valued them at the rate of $25,000 per annum, for acting as receiver of a road which was only 60 miles in length, the volume of whose business was small, and which was in fact operated, during most of the period of the receivership, by a lessee, who, by the terms of his lease, was entitled to all the earnings of the property. The master disregarded the opinion of the latter witness, and allowed the receiver compensation for his services at the rate of $3,000 per year, but, on exceptions to his report, the lower court allowed him, in full for his services, which covered a period of about two years, the sum of $12,000. We feel confident that no injustice was done to the receiver by this allowance. It was as liberal as he had any reason to expect, unless he expected to receive largely more than he had earned. He was appointed receiver in November, 1896; the road was sold, and the sale confirmed to the purchaser, on December 22, 1898. From some time in February or March, 1897, until the road was sold and the purchaser took possession, it was operated by Eaton, as lessee, who had full charge of the same. The receiver was a broker, who resided in Boston, Mass. He does not appear to have been in Kansas, where this short piece of road was located, except on a few occasions, during the receivership, and his services as receiver seem to have been confined to issuing receiver's certificates and negotiating them when he could find a purchaser. The master, in his report, remarks "that the financiering done by Braman as receiver, in regard to the property of the St. Louis, Kansas & Southwestern Railroad Company, does not appear to have been of such a high character as to justify the estimate

placed thereon by Baldwin," who was his principal witness. We fully concur in that view. His services in financiering the property do not appear to us to have been very important or very beneficial to the trust committed to his charge. In view of all the circumstances, we are satisfied that the allowance made by the lower court to the receiver for his services was fully as large as it ought to have been, and that he has no fair pretense for complaint on that score.

Another large item in the receiver's account which was disallowed is the sum of $2,952.54, for hotel bills which he claimed to have paid in New York while he was in that city, necessarily, on business connected with the receivership. The master disallowed various alleged expenditures, making up the above sum in the aggregate, on the ground that there was nothing in the testimony to show the reason or necessity of such expenditures on the part of the receiver. We entirely agree with that conclusion of the master, and are fully persuaded that these expenditures were not made solely for the benefit of the trust, and that, if they were so made, they were unnecessary expenditures, and ought to be disallowed for that reason. Operated, as this road was, by a lessee, and being a small local road in an impoverished condition, we can conceive of no reason why the receiver should be living, at the expense of the property, in the city of New York, 1,500 miles distant from the property. The necessity of conferring with other railroad companies and being near their principal offices strikes us as being a poor excuse for such outlays. Nor do we regard it as a sufficient reason for the allowance of these hotel bills, or a part of them, that the master did allow the receiver for office rent in the city of New York up to July 1, 1897, when the Eaton lease took effect, since we are of opinion that, in view of all the circumstances, this latter expense for office rent was entirely unnecessary; but, as no appeal was taken from the latter allowance, it will be permitted to stand. Certain it is that the receiver should not have rented this office in New York without the express sanction and approval of the court, which was not obtained. Vault Co. v. McNulta, 153 U. S. 554, 14 Sup. Ct. 915, 38 L. Ed. 819.

Complaint is made because the master and lower court disallowed the sum of $3,000 which the receiver claimed to have paid to an attorney in New York for legal services rendered to him as receiver. The facts attending this transaction appear to be that Roger Foster, an attorney residing in New York, presented to the receiver a bill in the sum of $6,000, which appears to have been a bill for legal services rendered at the instance of the receiver in various matters, some of which had no legitimate connection with the receivership. The receiver says that he paid this bill with the proceeds of discounted receiver's certificates, and charged $3,000 to the account of the St. Louis, Kansas & Southwestern Railroad Company. The master found that the services rendered in behalf of the latter company, by the attorney in question, were not worth to exceed $1,000, which sum was allowed, and in that view we concur. This transaction, as explained by the receiver, is on its face exceedingly sus-

picious, and we very much doubt whether he should have received any allowance on account of money paid to the attorney.

Exceptions are alleged to various other disallowances, but we do not deem it necessary to speak of them in detail, although they have each been carefully examined. We find no occasion to disturb the action of the lower court as respects any of them. As the master well remarks, "Braman never kept any books in the ordinary acceptation of the term;" that is, books showing in detail his receipts and expenditures on account of the trust, as it was his plain duty to have done. His accounts were kept mainly in memorandum books and bank book stubs, and his vouchers consist in part of receipts and in part of his own checks, drawn to cover items contained in his reports. Because of his failure to keep proper accounts, the master observes that, "It was with great difficulty that anything could be sifted out from it which would aid, * * * to any great extent, in arriving at a proper conclusion." The receiver seems to have acted upon the theory that he could manage the property committed to his charge as if it was his private property, and not a public trust, keeping no accounts other than such as he found it convenient to keep for his private information. For that reason, if the rule applicable to such cases was strictly applied, he could be denied any compensation for his services. The master, however, took a more liberal view, resolving, as he says, every question in favor of the receiver, when he was in doubt whether an item claimed as an expenditure should be allowed or disallowed. We have no doubt that the allowances made in behalf of the receiver, both for compensation and for expenditures, were fully as great as they ought to have been, and the order made below is accordingly affirmed.

CHICK et al. v. FULLER et al.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 682.

1. CORPORATIONS—LIABILITY OF DIRECTORS—NEGLIGENCE IN PERFORMANCE OF DUTY.

Directors of an insolvent manufacturing corporation cannot be held individually liable to creditors either on the ground of negligence in the discharge of their duty or under the statute of Illinois because they declared and paid a dividend to stockholders when the company was insolvent, and permitted the creation of indebtedness exceeding its capital stock, where it is not satisfactorily shown that in the exercise of ordinary diligence they should have known that the company was insolvent when the dividend was declared, or that the indebtedness was being created; and the evidence is insufficient to charge them with notice of such facts where it shows that the president, who was the active manager of the business, deliberately wrecked the company, and defrauded both stockholders and creditors by embezzling the proceeds of goods sold and substituting fictitious notes, purporting to have been given by customers therefor, and by falsifying the books, which failed to show indebtedness for materials purchased on credit, but, on the contrary, showed the company to be solvent, and the business prosperous, and it does not appear that the directors had any reason to suspect the

president's integrity until after the dividend had been declared and the indebtedness created.[1]

2. SAME—VALIDITY OF MORTGAGE—PREFERENCE OF DIRECTORS AND STOCKHOLDERS.

A mortgage given by a corporation to secure bonds issued to pay its indebtedness to two banks, in which directors and stockholders of the corporation were large stockholders, at a time when the corporation was in fact insolvent, and shortly before it suspended business, *held*, under the evidence, to have been given in good faith, while the corporation was a going concern, and in the expectation that its business would be continued, and to be valid, the directors and stockholders who were secured thereby being ignorant of the company's insolvent condition.

Grosscup, Circuit Judge, dissenting.

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

The bill was by appellants, judgment creditors of the Northwestern Shoe Company, and in behalf of all other creditors of that company who might join in the suit against the appellees, (a) to set aside certain alleged preferences said to have been made by the directors and officers of the Shoe Company to the appellees, Allen C. Fuller, the First National Bank of Belvidere and the Second National Bank of Belvidere; (b) to hold the directors and officers (Allen C. Fuller, John J. Foote, David D. Sabin, and Calvin D. May and Steven D. May, as executors of Ezra May, deceased, being the only ones involved in this appeal) responsible to appellants for alleged negligence in the management of the assets and property of the company; (c) to hold the directors liable for assenting to and paying a dividend when the corporation was insolvent; and (d) to hold the directors liable for assenting to the incurring of indebtedness in excess of the capital stock of the corporation.

Upon the filing of the respective answers of appellees, and the replication, the court below referred the cause to a master, who found, in substance, as follows: (a) That the directors were liable to the complaining creditors for negligent discharge of their duties; (b) that the directors were liable for the declaration and payment of a dividend when the shoe company was insolvent; (c) that the directors were liable for assenting to indebtedness of the company in excess of its capital stock; and (d) that the payments made to the First and Second National Banks of Belvidere and Allen C. Fuller from the avails of the twenty-five thousand increase of stock, and the issuance and delivery of the fifty thousand dollars of bonds (hereinafter set forth more at large), were in the nature of a fraudulent preference, and should be vacated, and the mortgage set aside.

Exceptions were filed by the appellees, and sustained by the court below, and the bill dismissed. From this decree the appeal is prosecuted.

The further facts are stated in the opinion of the court.

The opinion of the circuit court by JENKINS, Circuit Judge, was as follows:

"I have given to this case a careful consideration of the evidence and the arguments of counsel, but am compelled to state the conclusions to which my mind is forced without elaboration or special argument. The case presents itself in four aspects: (a) General liability of the directors for negligence; (b) their liability under the statutes of Illinois for assenting to the incurring of indebtedness beyond the capital stock of the corporation; (c) their liability under the statutes of Illinois for assenting to and paying a dividend when the corporation was insolvent; and (d) invalidity of the trust deed executed July 1, 1892.

"The general principles by which to judge the liability of directors for negligence are authoritatively established by the decision in Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662, and are also well

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[1] Personal liability of directors of corporations for negligence, see notes to Robinson v. Hall, 12 C. C. A. 680; Warner v. Penoyer, 33 C. C. A. 230.

stated in Association v. Childs, 82 Wis. 460, 52 N. W. 600, 33 Am. St. Rep. 57. The statute of Illinois imposing liability upon directors for assenting to indebtedness in excess of capital stock is paragraph 16, c. 32, p. 1007, 1 Starr & C. Ann. St. (2d Ed.), and provides that a director, assenting to the incurring of indebtedness by a corporation in excess of its capital stock, shall be personally and individually liable for such excess to the creditors of such corporation. This statute, as I think, clearly implies that the director assenting must do so knowingly, or be guilty of such gross negligence with respect to informing himself of the conditions of the corporation, when prudent action would readily have informed him of its condition, that the law will presume knowledge. The liability imposed by statute upon directors with respect to the declaring of dividends under certain conditions is paragraph 19 of the same chapter, and implies the same assent and knowledge upon the part of the director in declaring a dividend when the company is insolvent, or which would render it insolvent, or which would impair its capital stock.

"The fraud which wrecked this corporation was artful, bold, and cunningly concealed. Graff, the president, and his co-conspirators, purposely omitted to report to and concealed from the bookkeeper and directors, and purposely omitted to enter upon the books of the corporation, all of the purchases made, so that much of the indebtedness of the corporation for goods purchased was concealed from the bookkeeper and from the directors. Graff caused to be shipped to Chicago to fictitious consignees a large amount of manufactured goods, sold them there for cash, and appropriated the proceeds. He returned to the company fictitious or forged notes as the avails of the property sold; these pretended sales, of course, being reported by him and appearing upon the books of the corporation. These notes were discounted by Graff for the corporation with the banks at Belvidere, and furnished the means by which the business was conducted. I fail to find in the evidence any actionable negligence upon the part of the directors, who have excepted to the master's report. When the citizens of Belvidere first became interested in the Graff concern, and procured its removal to Belvidere, they subscribed for and paid in in cash $15,000 to the capital stock, and the donation in addition of $7,500. The inventory of the property put in by Graff and Harris was procured to be made by those citizens of Belvidere who had interested themselves in the concern, and it was valued at $25,000, the amount invested or supposed to be invested by Graff and Harris, who were the active conductors of the business. They appeared to the citizens of Belvidere as active, energetic business men. There was nothing to suggest that Graff and Harris were not as honorable as they were energetic. It is said that the directors failed to have examination of the books. If this be true, with respect to any particular period of the time, such examination would have disclosed nothing of the fraud, and would have led to no result. These directors, who are sought to be charged with liability for negligence, acted certainly in entire good faith. In the early part of 1892, they took the unissued stock of $10,000 at par or over, advancing their own money to aid the concern. As late as the 28th of June, to the 1st of July, 1892, they increased the capital stock by the sum of $25,000 to relieve the corporation from what they supposed to be temporary embarrassment arising from attempting to do too large a business on a capital of $50,000, and paid in their own money into the concern. When Harris became obnoxious, for some reason, to the directors, or some of them, they purchased his stock at above par, and, as they supposed, got him out of the concern. They certainly acted in entire good faith, and evidenced their confidence in the corporation by their constant investment of money. They had no interest to subserve except to protect the corporation, its creditors, and themselves. I have been unable to see any one act of neglect upon their part during the time they respectively held their offices as directors, which resulted in injury to the creditors. Under the decisions referred to I am of opinion that they are not liable for negligence. I may add with respect to the director (May) who departed this life before the report of the master, and whose executors have been substituted in his place, that in my judgment the action for such negligence, irrespective of statutory liability, does not survive the death of the

party, but dies with him; and the executors should be discharged, also, upon that ground.

"With respect to the liability imposed by the statute for assenting to debts in excess of the capital stock, it is contended that the corporation indorsement of business paper discounted at the banks is a liability within the meaning of the statute. The liability of the corporation as indorser had not been fixed. It was contingent upon nonpayment of the notes at maturity, and the corporation being charged by proper proceedings for the amount of the note, I do not think the statute contemplates such an indebtedness as that, for it would be wholly impossible for any stock corporation to carry on business without rendering all its directors personally liable. The indebtedness contemplated in the statute is the direct and absolute liability of the corporation for the goods and property procured for its use. Eliminating this feature of the transaction, there is nothing upon the books to show that the indebtedness of the corporation exceeded its capital stock at the time charged, nor anything to show that these directors knowingly assented to such increase, or were guilty of any neglect of proper action which would have informed them of the true condition of affairs brought about by the fraud of Graff and his co-conspirators. The same may also be said with respect to the declaration of a dividend in the early part of 1892. The trial balance presented to the board by the president of the company, showed, as did the books, a profit which warranted a dividend. That the actual fact did not so warrant was because the concealed fraud of Graff either rendered the company insolvent at that time, or made the declaring of a dividend improvident. But most certainly these directors did not assent to the declaration of a dividend with any knowledge of such insolvency or improvidency. I find nothing in the testimony or in the facts reported by the master which warrants the conclusion reached with respect to the liability of the directors upon either of the three grounds considered.

"I have had more doubt with respect to the validity of the mortgage of July 1, 1892, under which $50,000 of bonds were issued to retire the indebtedness of the bank. The court of appeals for the circuit in Sutton Mfg. Co. v. Hutchinson, 11 C. C. A. 320, 63 Fed. 496, 24 U. S. App. 147, had occasion to consider when and under what circumstances a corporation could prefer creditors, and it was there ruled that when a corporation has become insolvent and suspends the prosecution of its business, or when it is seen that the business can no longer be prosecuted, then the directors become trustees for all the creditors and cannot give a preference. Does this case fall within that ruling? Contemporaneously with the issuing of this mortgage the directors increased the capital stock, and paid their own money therefor to take up the indebtedness of the corporation; and at the same time, in order, as they supposed, to place the company upon a firm basis, and to take up all the outstanding indebtedness to the banks of which they were informed, issued this trust deed, proposing to continue the business, and having no knowledge at that time of the frauds of Graff and Harris and their co-conspirators. They did not acquire that knowledge until after September 2, 1892, when, it would seem, creditors of the company came forward with attachments, of whose debts they, up to that time, had no knowledge whatever, at least, as to the amount, and whose debts, or the most thereof, did not appear upon the books, and they then ascertained that these notes, which Graff had turned over in payment of supposed purchases and sales of goods, were fictitious, and the fraud was disclosed which wrecked the corporation. There was no intent by this trust deed to give a preference to these banks over other creditors. It was supposed that all creditors would be taken care of and the treasury of the corporation repleted by funds arising from the subscriptions to further stock. There was no design to close up the corporation, but the purpose and object was to continue its business, and as it seemed to the directors it could be continued successfully and profitably. That there was failure in this regard arose from no fault of theirs, but from the subsequently discovered frauds of Graff and Harris which had been concealed from the directors. I think, therefore, that under the circumstances this trust deed was valid and effectual to secure the

bonds, and that their issue of bonds was valid in the hands of the creditors to whom they were delivered.

"It follows that this bill must be dismissed as to the defendants Foote, Sabin, Fuller, the executors of May, the First National Bank of Belvidere, and the Second National Bank of Belvidere. With respect to the exceptions filed, they are all sustained, except the tenth exception of the defendant Fuller, which is overruled, and the eighteenth, twenty-third, and twenty-fourth exceptions, which are overruled, because not specific. Of the exceptions of Foote and Sabin, the first exception is overruled, and the last sentence of the ninth is overruled. The twenty-eighth exception is overruled. The twenty-ninth, thirty-fourth, and thirty-fifth are overruled because not specific. I have not the exceptions filed by the executors of May before me, but the views stated will indicate which exceptions should be sustained and which overruled. A decree may be prepared in conformity with this opinion."

Wm. Z. Manning and A. W. Bulkley, for appellants.

Frank F. Reed and Charles H. Aldrich, for appellees.

Before GROSSCUP, Circuit Judge, and BUNN and SEAMAN, District Judges.

After the foregoing statement, the opinion of the court was delivered by GROSSCUP, Circuit Judge.

The facts rightly settled, this case involves no controverted questions of law. The evidentiary facts are voluminous, but the findings upon which the case turns, including what seems necessarily prefatory, may be summed up as follows:

In 1890 the Northwestern Shoe Company of Chicago entered into negotiations with certain citizens of Belvidere, Illinois, looking toward the transfer of the shoe company from Chicago to Belvidere. As a result of these negotiations, a public meeting was held in Belvidere, and a committee consisting of three of its citizens, John Hannah, Levi Murch, and James Cook, was appointed to visit the factory of the shoe company at Chicago, and investigate the standing of the concern and its management.

The committee proceeded to Chicago; made an examination of the machinery, books, and stock in trade of the company; had conversations with Barnett Graff, its then president, and Frank Harris, its then secretary, respecting the profits, assets and business of the company; and, upon returning to Belvidere, submitted a report favoring the transfer.

In reliance upon this report, the citizens of Belvidere accepted a proposition submitted to them by Barnett Graff, asking, as a consideration for the transfer, that the capital stock of the company—then five thousand dollars—be increased to fifty thousand dollars; that twenty-five thousand dollars of this stock be issued to Barnett Graff, Frank Harris and Jacob Graff, in return for tools, machinery and merchandise to be transferred; that the citizens of Belvidere subscribe for fifteen thousand dollars; leaving ten thousand dollars of the stock in the treasury. It was asked, also, that a donation should be made to the company of seven thousand five hundred dollars for the purchase of a site upon which to erect a factory; the shoe company, on its part, to employ, for a certain period of years, a minimum number of men in such factory; and to give a mortgage

upon the land and buildings so purchased and erected as security therefor.

In pursuance of the above arrangement, the citizens of Belvidere named Allen C. Fuller, John Hannah, Ezra May, W. D. Swail, S. S. Whitman and E. L. Lawrence, a committee to secure the cash bonus of seven thousand five hundred dollars, and to sell the fifteen thousand dollars stock of the company. This committee selected the site and erected the factory, at a total cost of thirteen thousand five hundred dollars, and turned the balance, nine thousand dollars, over to the treasury of the company.

Accordingly, Barnett Graff, Jacob Graff, and Frank Harris, shipped to Belvidere the machinery, tools, fixtures, etc., belonging to the Northwestern Shoe Company in Chicago, which were appraised at the instance of the committee, by Samuel C. Tribou (general manager and superintendent of the Rockford Shoe Company of Rockford, Illinois) at twenty-five thousand dollars; and thereupon stock to that amount was issued to Barnett Graff and his associates, certificates amounting to fifteen thousand dollars being issued to the Belvidere stockholders.

February 13, 1891, having completed the work intrusted to it, the committee submitted a written report to the stockholders of the reorganized Northwestern Shoe Company, and were discharged; and F. R. Smiley, Ezra May, Barnett Graff, Jacob Graff, and Frank Harris were thereupon elected directors of the new company, Barnett Graff being elected president and treasurer, and Frank Harris secretary. January 11, 1892, Allen C. Fuller, D. D. Sabin, Barnett Graff, John Hannah, and Frank Harris were elected directors. January 20, 1892, E. L. Lawrence succeeded Frank Harris as director. March 9, 1892, John J. Foote succeeded Allen C. Fuller as director. No further change took place on the board until August 9, 1892, when John J. Foote was succeeded by Irving Terwilliger.

The shoe company continued doing business until September 2, 1892. In the meantime the ten thousand dollars treasury stock was issued at par, and the money therefor received; and June 28, 1892, a further issue of twenty-five thousand dollars of stock was made—ten thousand being taken by Graff, and the balance by the Belvidere stockholders and directors—the avails being used to pay off the indebtedness to the First and Second National Banks of Belvidere and Allen C. Fuller. July 1, 1892, bonds were issued to the amount of fifty thousand dollars, secured by trust deed upon the entire property, and were used to take up the indebtedness then due to the First and Second National Banks of Belvidere. Additional to these transactions, during this interval, Graff, in the name of the shoe company, contracted debts with other parties, on account of goods purchased, to the amount of some twenty-eight thousand dollars, inclusive of the indebtedness due to the complaining creditors. But only a small amount of this appeared on the books of the company. When the crash came in September, 1892, the available assets did not exceed thirty-one thousand dollars; it being found, among other things, that of the outstanding accounts and bills receivable, amounting in all to some ninety thousand dollars,

as shown by the books to be due the company, only about five thousand dollars were collectible, the balance being largely fictitious.

There is no doubt that these transactions concealed and carried out a monstrous fraud; but it is not insisted that the appellees were purposely parties to the fraud; indeed, they were, to a large degree, victims, for they continued putting into the company, from time to time, fresh money. The deception that was practiced upon the complaining creditors, and also upon the appellees, was brought about principally by, (a) a gross overvaluation of the assets, at Chicago, upon which the twenty-five thousand dollars par value stock was issued to the Graffs and Harris; (b) the imposition upon the banks, and the shoe company of fictitious notes, said by Graff to be in payment by customers of goods previously sold; (c) a continuation, after removal to Belvidere, of this practice of bringing forward and discounting fictitious notes upon the pretense that they were in payment of goods sold to various customers; (d) the removal from the factory of manufactured goods ostensibly shipped to designated consignees, but, in fact, sold for cash, and the proceeds appropriated by Graff; and (e) omission from the books of the company of the greater part of purchases made (including those from complaining creditors) whereby a large portion of the indebtedness of the company was concealed from the stockholders and directors.

There is nothing in the record showing that the appellees, either as individuals, or directors, actually knew that the company was insolvent when the dividend complained of was declared; or that, prior to June, 1892, the indebtedness of the company exceeded the capital stock. The contention, at most, is that, owing to their negligence in taking note of the affairs of the company, they constructively had such knowledge. The whole question of liability in these respects seems to center around the inquiry, Should the appellees, in the exercise of the diligence required of them by law, have known, at the time of the transactions, the true state of the company's affairs.

After a careful study of all the evidence, our conclusions respecting the general questions of fact involved may be stated as follows:

First, taking into consideration everything that would naturally influence the committee, including a reasonable confidence in the statements of Graff, and doubtless some anxiety to obtain for their town the industry represented by the shoe company, it is not clear that men of ordinary carefulness, acting in their place, would have discovered that the company's Chicago assets were overvalued.

Second, it is not satisfactorily shown that, until near the culmination of the company's career, and after the indebtedness due to the complaining creditors had been contracted, the appellees had the means of knowing, without the exercise of unusual acuteness and diligence, that the notes said by Graff to have been in payment of goods sold to various customers were, in fact, fictitious.

Third, it is not satisfactorily shown that there came to the directors, prior to the failure, evidence to put them upon notice that

the goods shipped from the factory to the consignees named on the books were, in fact, never delivered to such consignees.

Fourth, there is not evidence sufficient to justify a finding that, until near the culmination of the company's career, and after the indebtedness to the complaining creditors had been contracted, the appellees ought, in the exercise of ordinary diligence, to have known that the books were falsely kept, and that there existed, from time to time, indebtedness that was not shown there.

Upon the basis of these findings, we cannot hold the appellees chargeable on account of the dividend declared, for, at the time the dividend was so declared, they had no means, sufficient to put them on notice, of knowing the insolvency of the company; nor can we hold the appellees to have assented to indebtedness in excess of the capital stock, for, at the time the indebtedness was created, they had no means, sufficient to put them upon notice, of knowing that such indebtedness was being created; nor can we hold them liable, upon any common-law obligation, to the complaining creditors, for negligent discharge of their duties, for, at the time the debts due the complaining creditors were contracted, the appellees had no means, sufficient to put them on notice, of knowing that the affairs of the company were not being honestly managed, and that the company was not financially sound.

Upon the remaining question—the preference given to Fuller and the banks—the members of the court entertain a difference of opinion.

The majority of the court are of the opinion that the mortgage or trust deed of July 1, 1892, securing fifty thousand dollars of bon was authorized in good faith to retire that amount of bona fide corporate indebtedness to the banks, and so used and accepted in like good faith, and that the mortgage was executed by a going concern, to secure its indebtedness, after the stockholders had put in their capital for the undoubted purpose of continuing the business; which was so continued up to the failure of September, 1892.

Upon this finding of fact—not concurred in, however, by the writer of this opinion—the transaction would not be within the condemnation of Sutton Mfg. Co. v. Hutchinson, 24 U. S. App. 145, 11 C. C. A. 320, 63 Fed. 496, or any case cited, but is upheld in all material features by the authorities, both federal and state. Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Sandford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713; Rockford Wholesale Grocery Co. v. Standard Grocery & Meat Co., 175 Ill. 89, 51 N. E. 642, 67 Am. St. Rep. 205, and cases cited. In the Sutton Case, the insolvent corporation mortgaged all its property to another corporation to secure its over-drafts, with the intention and effect of closing all further prosecution of its business immediately thereupon; and this when both corporations, debtor and creditor, were managed by the same officers and directors and the capital stock owned substantially by the same persons. On the contrary, in the finding of fact arrived at by the majority of the Court, the mortgage under consideration was executed by a going concern to secure its indebtedness for the

purpose of continuing the business, and was reinforced by fresh money contributed by the stockholders in good faith to the same end. This unquestionably would bring this case clearly within the distinctions pointed out in Sandford Fork & Tool Co. v. Howe, Brown & Co., supra, as sustaining the mortgage there in question.

In addition to this, the majority of the Court are of the opinion that the fact that two of the five directors of the shoe company, or that certain of its stockholders, were likewise either directors or stockholders of one or the other bank, receiving the security—all being free from knowledge of the true state of affairs as heretofore indicated—cannot in any view operate to invalidate the security in favor of the banks, accepted in good faith, where a large proportion of the banks' shareholders are not shareholders in the shoe company; nor, can the further fact, that directors or stockholders of the shoe company were guarantors of any part of the indebtedness of that company to the banks impugn that security thus given, as the case is not thus within the rule against the preference of corporate indebtedness to a director. Rockford Wholesale Grocery Co. v. Standard Grocery & Meat Co., 175 Ill. 89, 93, 51 N. E. 642, 67 Am. St. Rep. 205; Sandford Fork & Tool Co. v. Howe, Brown & Co., supra. As held in Hollins v. Iron Co., 150 U. S. 371, 382, 14 Sup. Ct. 127, 37 L. Ed. 1113 (approved in Manufacturing Co. v. Hutchinson, supra), the doctrine is well settled in the federal courts "that the property of a private corporation is not burdened with any specific lien or direct trust in favor of general creditors" and prior to the Bankrupt Act of 1898 it was the established rule in Illinois that an insolvent corporation is at liberty to prefer creditors not officers of the company. Blair v. Steel Co., 159 Ill. 350, 364, 42 N. E. 895, 31 L. R. A. 269, and cases cited. In this judgment the writer of this opinion would concur were he able to see that the directors and stockholders of the bank receiving the security were at the time free from knowledge of the shoe company's true state of affairs.

I cannot, however, bring myself to see the facts, centering around the preference transaction, as the majority of the Court have seen them, and feel that it may be excusable to state my own conclusions in this respect.

July 1, 1892, the board of directors of the shoe company consisted of John J. Foote, Barnett Graff, John Hannah, E. L. Lawrence and D. D. Sabin. On this date Foote was a stockholder in both banks, and a director of the First National Bank; and Sabin was a stockholder, director and vice-president of the Second National Bank. Allen C. Fuller, a director of the shoe company from January 11, 1892, until March 8, 1892, was, during that period, and until after the failure of the company, the largest stockholder in both banks. Ezra May, director of the shoe company from February 13, 1891, until January 11, 1892, was, during this period, and on July 1, 1892, a stockholder and director in both banks, and president of the Second National Bank. All the stockholders in both banks were stockholders in the shoe company, at different times. Fuller was the holder approximately of twenty-two thousand dollars of the cap-

ital stock of the two banks, or a little less than one seventh. His subscription to the twenty-five thousand dollar increase stock was six thousand two hundred and fifty dollars, which, after deducting something over thirty-five hundred dollars paid to himself, left two thousand seven hundred and fifty dollars to go upon the payment of the debts—or a little over one ninth of the whole sum paid in as increase capital stock. Foote was the owner of thirty-eight hundred dollars of the capital stock of the two banks, or about one thirty-ninth, and his subscription to the increase capital stock was four hundred dollars, or about one sixtieth. Sabin was the holder of the stock of the two banks to the amount of two thousand one hundred dollars, or about one seventy-first thereof, and his subscription to the increase capital stock was one hundred dollars, or about one two hundred and fiftieth thereof. May was the holder of stock in the two banks to the amount of six thousand five hundred dollars, or about one twenty-third thereof, and his subscription to the increase capital stock was six hundred and seventy-five dollars, or about one thirty-seventh thereof. It is thus apparent that if the avails of the increase capital stock went to the banks to pay off the liability on the fictitious notes, each of these men, considering the notes as otherwise worthless, received from the subscription a benefit considerably greater than his contribution.

The testimony shows that the bond issue of fifty thousand dollars, and the avails of the twenty-five thousand dollars increase capital stock, (except the thirty-five hundred going to Fuller) went to the two banks, to lift the so-called customer's notes, and certain notes of the shoe company itself, then held by the banks; that, after March 25, 1892, the First National Bank discounted no further paper of the shoe company, and that, after June 5, 1892, the Second National Bank discounted no further paper of the company. It is not clear what business was done by the shoe company from July 1, 1892, until the failure in September. The question is whether these transactions show that on July 1, 1892, the appellees were apprised of the insolvency of the company, and took these steps—the execution of the mortgage and the increase of stock—to obtain for their banks an advantage over the other creditors.

The fact that the banks, largely owned by these officers, directors, and stockholders of the shoe company, were the beneficiaries of the mortgage, covering every species of the shoe company's property, is in my opinion a circumstance sufficient to put the court upon inquiry. "Courts of equity" say the Supreme Court, considering a transaction similar to this, (Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516), "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." The circumstances of the transaction, in my opinion, put the burden of explanation, upon the appellees.

The explanation is that the rapidly increasing business of the shoe company made it desirable that the pending indebtedness to the banks should be liquidated, so that the banks could, in the future, carry the shoe company's current financial needs, including the discounting of customers' paper. This might be satisfactory, if it were not in conflict with the sequel. Either the shoe company had further financial needs, in which case, contrary to the explanation, the banks did not, in fact, come to its help, or, what seems more probable, the business of the shoe company was already collapsing, in which case, the explanation is shown to have been false. The explanation, indeed, is no explanation. It only intensifies the suspicion aroused by the circumstances of the transaction.

The judgment of the Circuit Judge, hearing the case below, and of the majority of this Court, seems to have been influenced by the fact that the stockholders and directors of the shoe company, at the time the mortgage was executed, subscribed and paid for the increased capital stock; and that this constituted satisfactory evidence that they did not then realize or suspect the failing condition of the shoe company. But this argument is shorn of its force, when it is remembered that the money thus going out of their pockets, as stockholders of the shoe company, came back, with increase, into their pockets, as stockholders of the banks; and that on the whole, not even taking into account the fifty thousand dollars bond transaction, that was wholly for the benefit of the bank, this transfer from one pocket to the other was to their financial advantage.

I cannot escape the conviction—looking at their conduct both preceding and following the transaction of July, 1892—that the parties above named, directors or stockholders of the bank, had reason to know at the time of the execution of the mortgage of July 1, 1892, that the shoe company was insolvent. I cannot bring myself to believe that the mortgage was given in good faith by a going concern to obtain financial assistance to keep the company upon its feet. It seems much more probable to me that the whole transaction was a device, in view of coming failure—a failure that came in fact without any further attempt to keep going—to enable the banks to obtain a preference in the distribution of the company's assets. Nor does the fact that Fuller and May, the chief stockholders in the First and Second National Banks, ceased to be directors of the shoe company in January, 1892, prevent the rule stated from applying. They continued directors and officers of the bank. Foote and Sabin, small stockholders and officers in the banks, were put upon the directory of the shoe company. The rule that creditors thus situated shall not be permitted to obtain a peculiar advantage to themselves over others goes to the core of the transaction, and is not intended to be defeated by a mere technical alignment of officers. I have no doubt, in view of this record, that Foote and Sabin, directors of the shoe company, were controlled in this transaction by Fuller and May, their associates and superior officers in the bank. Nor is this view changed by the fact that there were other stockholders of the bank. For the purposes of this transaction the men named were the representatives of the others.

In this view of the facts, this case is, in all material respects, similar to Manufacturing Co. v. Hutchinson, supra. In that case, the Hopper Lumber and Manufacturing Company, being insolvent, and having no purpose to further continue its business, executed a mortgage to the Sutton Manufacturing Company, covering its entire stock, and every article and thing used in its business, to secure the payment of drafts to the amount of eighteen thousand dollars, drawn at different times during the preceding two months by the Hopper Company upon the Sutton Company. Of the six hundred shares capital stock of the Hopper Company at the time of the mortgage, five hundred and ten shares were held by James S. Hopper, the president; thirty shares by Henry S. Hopper, secretary and treasurer, and a director; twenty shares by Fannie E. Hopper, a director; and forty shares by Elizabeth Sutton, mother of Fannie E., and mother-in-law of James S. Hopper.

Of the one thousand shares of the Sutton Manufacturing Company, one share was held by James S. Hopper; two hundred and fifty-nine shares by Fannie E. Hopper; one hundred and twenty shares by Henry S. Hopper; two hundred and four shares by Benjamin F. Sutton (a director in the Hopper Company); seventy-six shares by Mary J. Adams; one hundred and twenty shares by Walter A. Hopper; and two hundred and twenty shares by Elizabeth Sutton. Neither of the last three were officers or directors in the Hopper Company, and had no relation to the Hopper Company, other than that Mary J. Adams was his sister, and Elizabeth Sutton the mother, of Fannie E. Hopper, and Walter A. Hopper was the son of James S. Hopper by a former wife.

The court held the mortgage void, laying down the rule that when a corporation becomes insolvent, and does not expect to make further effort to accomplish the objects of its creation, its managing officers and directors came under a duty to distribute its property or its proceeds ratably among the creditors; and that, because of the existence of this duty, the law will not permit them, although creditors, to obtain any peculiar advantage for themselves to the prejudice of others.

Recognizing the fact that the mortgagee was a corporation, and not the individual directors, of the Hopper Company, and that some of its stockholders had no pecuniary relation with the Hopper Company, the rule is, notwithstanding, applied, because, as stated, two of the directors of the insolvent Hopper Company owned nearly four hundred shares out of the one thousand shares of the Sutton Company; wherefore, the mortgage had the effect to protect their interest, and to withdraw the property mortgaged from its primary liability for the debts of the mortgagor company. "The case presented" say the court "is consequently one in which an insolvent corporation, recognizing its inability to further prosecute its business, and with no hope of recovering from its financial embarrassments, gives a preference by mortgage of its property to some of its directors, being also creditors. According to the principles we have announced this could not be rightfully done."

The Illinois cases (Gottlieb v. Miller, 154 Ill. 44, 39 N. E. 992;

Blair v. Steel Co., 159 Ill. 350, 42 N. E. 895, 31 L. R. A. 269; State Nat. Bank of St. Joseph v. Union Nat. Bank of Chicago, 168 Ill. 519, 48 N. E. 82), in essence, are not in conflict with this ruling. In all these cases it is held that creditors of an insolvent corporation, who are, also, directors, can not secure preference of their claims, at the expense of other creditors; that in such a case, as distinguished from a case where the directors apply the assets of the insolvent corporation to the payment of a debt due a third person, there is a trust.

The mortgage, in my judgment, comes under the ruling of Manufacturing Co. v. Hutchinson, supra, and should, as to the complaining creditors, be declared void, and the estate should be administered according to that theory; but overruled in this particular phase of the case, as I am, by the judgment of my associates, the decree of the Circuit Court must be affirmed.

WENGER et al. v. CHICAGO & E. R. CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 753.

1. RAILROADS—REORGANIZATION—INVALIDITY FOR FRAUD AS AGAINST CREDITORS.
The sale of railroad property in foreclosure proceedings to a committee of reorganization, by whose plan the stockholders of the mortgagor appear to obtain some benefit in the purchasing company, is open to the closest scrutiny where general creditors of the mortgagor are left unprovided for; but where the foreclosure is instituted and carried on in the ordinary course for the honest purpose only of enforcing the rights of the bondholders against the property, the mere fact that stockholders of the old company may, under the purchasing arrangement, be given some interest in the securities of the new in exchange for their stock, while it may be indicative of fraud, does not render the sale fraudulent per se, and a general creditor of the old company cannot successfully attack such sale without showing actual fraud, and that property of such company, exceeding in value the mortgage debt, has, by reason of such fraud, been placed beyond his reach on execution.

2. SAME—SUIT TO CHARGE PROPERTY—PARTIES.
To a suit in equity by a creditor of a railroad company to enforce his claim against the property of such company, which has been sold in foreclosure proceedings, and passed into the hands of a reorganized company, on the ground that such sale and purchase were fraudulent, a corporation which owns all the stock of the new company and the trustee for its bondholders are both necessary parties, and a bill which neither joins them as parties nor shows that they cannot be made defendants is demurrable.

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

The bill was originally filed by appellants, citizens of Illinois against appellee, a corporation, organized under the laws of the State of Indiana, in the Circuit Court of Cook County, in the State of Illinois, and was by appellee removed to the Circuit Court of the United States for the Northern District of Illinois, Northern Division, on account of diversity of citizenship. Thereupon, an amended bill was filed. To this, appellee demurred, and the demurrer having been sustained by the Court below (105 Fed. 796) this appeal is prosecuted.

W. E. Griffin, for appellants.
F. L. Brooks, for appellee.

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

GROSSCUP, Circuit Judge. It is not necessary to set out the bill at large. In substance, so far as is material to the questions involved, it avers that prior to, and on the 10th of June, 1888, the Chicago & Atlantic Ry. Co., a corporation of the States of Ohio, Indiana and Illinois, owned and operated the line of road from Marion, Ohio, to Chicago, Illinois, that subsequently passed by foreclosure sale to the appellee; that appellant Wenger, a passenger on one of the trains operated by said Chicago & Atlantic Ry. Co., sustained through the negligence of the said company permanent injuries, resulting in the loss of his leg, on account of which, on April 4, 1889, a suit at law was instituted in the Superior Court of Cook County against the railway company to recover damages; that the appearance of the railway company was entered therein May 7, 1889, and the plea of the general issue filed; that said cause coming on to be heard October 4, 1893, resulted in a verdict in favor of Wenger for the sum of twenty-five thousand dollars, upon which judgment was subsequently entered against the railway company; that execution has been sued out upon such judgment against the Chicago & Atlantic Ry. Co. and returned unsatisfied, with the certificate of the sheriff of Cook County thereon that he could find no property whereon to make his levy; and that the said judgment, together with interest thereon, still remains in full force and effect. By proper articles of assignment and for a valuable consideration, appellant McShane has acquired an interest in the judgment.

The bill further shows that prior to the happening of any of the foregoing events, the Chicago & Atlantic Ry. Co. had executed its mortgage, or deed of trust, upon all its railway property and franchises, then owned or thereafter to be acquired, to secure six million five hundred thousand dollars first mortgage bonds; and subsequently, but prior to the injury to appellant Wenger, a second mortgage, or deed of trust, to secure its second mortgage bonds, to the extent of five million dollars.

The bill further shows that the New York, Lake Erie & Western Ry. Co., a corporation, owning and operating a line of railroad from New York to Marion, Ohio, and running in connection with the Chicago & Atlantic Ry. Co., had at the time of the execution of the first mortgage bonds guarantied the payment of the interest thereof; and that the said company was, from the beginning, the holders for value of the entire issue of second mortgage bonds; that default having been made in the payment of interest on the second mortgage bonds, and in certain installments of interest on the first mortgage bonds—upon which default the New York, Lake Erie & Western Ry. Co. had advanced, as guarantor, several hundred thousand dollars—foreclosure proceedings were instituted in 1886, in the Circuit Court of the United States for the District of Indiana; that such foreclosure suit having gone to a decree, there

was, under the order of the court, a sale by a master of the court of the property and franchises of said railway company, August 13, 1890, to Charles H. Koster and Anthony J. Thomas, representing a re-organization committee, by whom the said property was conveyed to the appellee in pursuance of the re-organization plan.

The plan of re-organization, as set forth in the exhibit to the bill, appears to be substantially as follows: The re-organized company to issue twelve million dollars first mortgage bonds in place of the six million five hundred thousand dollars first mortgage bonds foreclosed, distributable as follows: (a) Six million eight hundred and twenty-five thousand dollars in exchange for the six million five hundred thousand dollars, being at the rate of one thousand and fifty dollars of the new first mortgage bonds for each thousand dollars of the then existing mortgage bonds; (b) two million dollars to be used in settlement of debts due to the New York, Lake Erie & Western Ry. Co. and to the New York, Pennsylvania & Ohio Ry. Co., upon their surrender of coupons held, and presumably paid, by them as guarantors of the first mortgage bonds, and holders of the second mortgage bonds; (c) seven hundred thousand dollars to be used in acquiring outstanding second mortgage bonds, other than those claimed by the New York, Lake Erie & Western Ry. Co., at the rate of four hundred dollars new bonds for each ten thousand dollars of the old; and (d) such amount of first mortgage bonds as are necessary to pay the expenses of the foreclosure; the remaining two million, or more, to be used from time to time by the appellee for betterments and improvements.

The plan contemplated also the issue of ten million dollars five per cent. non-accumulative income bonds, secured by second mortgage, distributable as follows: (a) Four million dollars in exchange for the capital stock of the Chicago & Atlantic Ry. Co. at the rate of forty dollars in bonds for each share (one hundred dollars) of stock; and (b) five million dollars to the New York, Lake Erie & Western Ry. Co. as part consideration for its guaranty of the interest of the new first mortgage bonds. The plan provided also that the new capital stock, ten million dollars, should be issued to the New York, Lake Erie & Western Ry. Co. as part consideration for the foregoing guarantee. The re-organization was open, under this plan, to all the bond holders and stock-holders of the Chicago & Atlantic Ry. Co. who should come into the plan within a certain time limited.

Appellants contend, chiefly upon the authority of Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co., 174 U. S. 675, 19 Sup. Ct. 827, 43 L. Ed. 1130, that, owing to the foregoing provision in favor of the stockholders of the old road, the foreclosure sale to the Chicago & Erie Ry. Co. is fraudulent per se, and that appellants are, on that state of the case, entitled to assert their subsequently acquired judgment lien, as if the foreclosure sale had not intervened. This contention can be based solely upon the fact that the plan of re-organization included in its beneficial provisions the stock-holders of the mortgagor company, as persons who should, by reason solely of their holding such stock, have an interest in the second mortgage

income bonds of the proposed purchasing company, in the ratio of forty dollars of new bonds to one hundred dollars of the old stock.

Unquestionably, the sale of a railroad property under foreclosure proceedings to a committee of re-organization, according to whose plan the stock-holders of the mortgagor company appear to obtain some benefit in the purchasing company, is open to the closest scrutiny. While in the distribution of assets, the mortgage bond holders come first in their claim upon the railway property as security, general creditors, and especially those having reduced their claims to judgment, have a place that attaches to the property before the equity of the share-holders of the mortgagor company; and courts of equity will not permit themselves to be used as instruments to unfairly eliminate this intervening interest in favor of the share-holders. A foreclosure, in pursuance of such a scheme, while colorably legal, is in conscience and equity indefensible, and, in a proper action, is open to attack and correction. It was the possible presence of just such a purpose and result that led the Supreme Court (in Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co., supra) to the decree entered in that case.

But where, in ordinary course, foreclosure is instituted and carried out for the honest purpose only of enforcing, against the property, the mortgage obligation, the mere fact that share-holders of the old company may, under a purchasing arrangement, become interested in the securities of the new, will not make the foreclosure per se fraudulent. Such fact may be indicative of fraud, but is not a fraud per se. We see no reason why the purchaser for reorganization may not include any one whom he chooses to take into the organization, and may not contemplate even an exchange of some of the new securities for outstanding shares. To the extent that the property is worth something more than the mortgages, the general creditors are interested in any subsequent distribution. But beyond that, their interest does not extend.

In the case under consideration no showing of fraud of such nature is averred. It is plain from the bill that the interest on the first mortgage bonds had remained unpaid for a considerable period, and that no interest whatever had been paid upon the second mortgage bonds. There is no averment in the bill relating to earnings, or to the actual value of the road, or that such value and earnings were adequate to meet the mortgage obligations. So far as the bill discloses, it was a case of necessary foreclosure, in the interest of the mortgage bond holders; and in the nature of the case there remained nothing for the general creditors. Hence, there was no actual fraud upon such creditors.

The distribution of the securities of the new company under the re-organization plan carry out this view. The new first mortgage bonds—twelve million dollars—secured by no property other than that of the defaulting mortgagor company exceeded the combined first and second mortgage bond issue of the old company. Their increased value they obtained through the foreclosure was not by reason of added mortgaged property, but solely because, in the new arrangement, they were guaranteed by the New York, Lake Erie

& Western Ry. Co. In the distribution of these bonds—the equivalent of the old bond issue—the stock-holders of the old company obtained nothing. The foreclosure, therefore, was of no benefit to them, except to the extent that the intervention of the New York, Lake Erie & Western Ry. Co., as a guarantor of the new first mortgage bonds, and as owner of the new stock should, in the future adjustments of railway business, make the new income bonds valuable. But, general creditors of the old company had no intrinsic right to share in any such new value; and, having no such right, cannot object that the new owner may include beneficially in the new organization the share-holders of the old company. The question raised by the bill is not: Will the new company with its new railway connections make the income bonds valuable. The sole question is: Had the railway property, as it existed at the time of foreclosure, a value greater than the mortgage indebtedness. And that such value existed is not averred.

It seems clear, therefore, that the averments of the bill make no such case of fraud as would render the foreclosure sale void. But we need not rest our decision here. In any state of the case, the impeachment of the decree must be for actual, and not merely for constructive fraud; and a bill to set aside a decree for actual fraud is demurrable, unless all the parties interested in the controversy are brought before the court, or their absence satisfactorily accounted for. The purchaser at the sale attacked—the Chicago & Erie R. R. Co.—is not a defendant. It certainly has a substantial interest in the controversy.

The owners of the new stock—the New York, Lake Erie & Western Ry. Co.—is not a party. The decree prayed for would burden the property represented by this stock with a debt not contemplated when the stock was issued.

The trustee, or other representative of the new first mortgage bonds, is not here. Indisputably, the holders of these bonds are interested in a project that would reduce by nearly one-half their issue of bonds from a place as first mortgage bonds to a place second to appellants' judgment.

It is not averred that these parties, or any of them, are without the jurisdiction of the Court, or that they could not be made defendants without defeating the jurisdiction of the Court. No explanation, indeed, for their absence is attempted.

On the whole case we think the decree of the Circuit Court should be affirmed.

UNITED STATES v. SHEA, SMITH & CO.

(Circuit Court of Appeals, Seventh Circuit. January 21, 1902.)

No. 811.

CUSTOMS ADMINISTRATION—SUFFICIENCY OF PROTEST—EFFECT OF ERROR.

Under the procedure inaugurated by the customs administrative act of 1890, by which the decision of a collector is reviewed by a special tribunal, there is no necessity for exacting such nice precision in the protest of an importer, or such accurate knowledge of the law by him,

as to debar him from relief from an erroneous classification and excessive assessment by the collector because he fails to designate correctly the provision under which the classification should have been made.

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

The substantial facts of this case are as follows:

During the years 1893 and 1894, while the tariff act of 1890 (26 Stat. 567) was in force, appellee imported at various times from Japan, through the Chicago Custom House, certain thin paper, which was assessed by the collector of the port as "tissue paper" at a duty of eight cents per pound and fifteen per cent ad valorem under paragraph 419 of the tariff act.

Being dissatisfied with this classification, the appellee, in apt time, filed its protests, adding thereto these words: "We claim that the goods in question are specially provided for and dutiable under paragraph 425, as 'manufactures of paper', dutiable at twenty-five per cent ad valorem."

The protests having come, in due course, before the Board of General Appraisers, March 31st, 1898, it was there held that the collector was wrong in assessing the merchandise "as tissue paper" under paragraph 419; also, that the paper did not come under paragraph 425—manufactures of paper—as claimed in the protests, but that it was properly dutiable under paragraph 422 of the act at twenty-five per cent. ad valorem, as "paper not specifically provided for". The Board, thereupon, over-ruled the protests and sustained the classification of the collector, solely upon the ground that the protests had mistakenly pointed out section 425, and had failed to point out section 422, as the paragraph under which the goods were dutiable.

On appeal to the Circuit Court, the classification adopted by the Board of General Appraisers was approved, but the ruling of the Board, that the protests were insufficient and that the original classification by the collector must on that account stand, was over-ruled; and a decree was entered ordering the collector to return to the appellee the difference between the rate of eight cents per pound and fifteen per cent ad valorem, as provided for in section 419, and the rate of twenty-five per cent ad valorem, as provided in section 422.

From this ruling of the Circuit Court this appeal is prosecuted.

Oliver E. Pagin, Asst. U. S. Dist. Atty., for appellant.

Wm. Brace, for appellee.

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

GROSSCUP, Circuit Judge (after stating the facts). Section 14 of the Customs' Administrative Act of June 10, 1890 (26 Stat. 137)—a reenactment of the previous provisions on the same subject—provides:

"That the decision of the collector, as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges and exactions other than duties, shall, within ten days after, but not before, such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

It is insisted, at argument, that appellee's omission in its protests to point out section 422, and its reliance upon section 425 as the one under which the paper was properly dutiable, were calculated (though not intended) to mislead the collector, and that the protests are on that account insufficient and void.

The argument runs thus: The collector is not presumed to know the law; the object of the protests, as required by section 14, is not merely to challenge the applicability of the section under which the assessment is made, but requires with like precision that the section under which it ought to have been made be pointed out; and a failure in the latter requirement is fatal to the sufficiency of the protests. Many cases are cited in support, among others: Curtis v. Friedler, 2 Black, 461, 17 L. Ed. 273; Davies v. Arthur, 7 Fed. Cas. 43 (No. 3,611); Cummins v. Robertson (C. C.) 27 Fed. 654; In re Austin (C. C.) 47 Fed. 873; Herrman v. Robertson, 152 U. S. 521, 14 Sup. Ct. 686, 38 L. Ed. 538.

In the latter case the importation was of certain goods assessed by the collector of the port of New York, as being liable to a duty of fifty cents per pound and thirty-five per cent ad valorem, while the protest insisted that they should pay a duty of thirty-five per cent ad valorem, only, under the second half of section 2499 of the then existing tariff laws (1881). The Circuit Court having found that the goods were properly dutiable under neither of these schedules, but, under another schedule, held that the protest was, for that reason, insufficient; and this holding was affirmed by the Supreme Court in the following language:

"The protest failed to point out, or suggest in any way, the provision which actually controlled, and, in effect, only raised the question which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable. We agree with the Circuit Court, in holding the protest to have been insufficient."

This decision would seem to be in point, but it must be noted as having been made in a case coming under the tariff act previous to that of 1890, and at a time that the Customs' Administrative Act of June 10, 1890, was not in force.

A later case—U. S. v. Salambier, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167—was one arising under the two acts of 1890. The importation in that case was of certain merchandise, consisting of sweetened chocolate in the form of small cakes or tablets, manufactured from cocoa sweetened with sugar, known commercially as "Sweetened Chocolate", and was classified by the collector of the port of New York "as confectionery not specially provided for" at fifty per cent ad valorem under paragraph 239 of the act. The protest challenged this classification, claiming that the goods were dutiable at two cents per pound, but not pointing out the paragraph under which such claim was made. Two paragraphs of the act—318 and 319—impose a duty of two cents, the first, upon "chocolate", and the second upon "cocoa, prepared or manufactured". On review, the Board of General Appraisers held that the goods were dutiable at two cents per pound as "cocoa" under paragraph 319, and further, that the failure of the importer to specifically claim

under such paragraph did not vitiate the protest. This ruling was affirmed by the Circuit Court, and on appeal by the Supreme Court, Justice Shiras saying:

"The object of the statute, in requiring a protest, was to distinctly inform the collector of the position of the importer. In this instance, it was impossible for the collector to have read the protest without perceiving that his classification of the merchandise, as dutiable under paragraph 239 of the tariff act, at fifty per cent ad valorem, was objected to, and that the importer claimed that, under the law, the goods were dutiable at two cents per pound. The collector could not have been perplexed by the omission to name the specific paragraph which the importer sought to have applied, for there were but two paragraphs, besides 239, which dealt with the subject, namely paragraphs 318 and 319, and under either of them the duty was that claimed by the importer, two cents per pound. * * * We are not disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint and his design to make it the foundation for a claim against the government."

The Salambier Case is in all respects identical with the case under consideration, except that in this case the protest, in fact, named the section, as well as the rate of duty, on which it was claimed the assessment ought to have been made. We are of the opinion that as customs' duties are now levied, subject to review by the Board of General Appraisers, this mistake of the importer did not, in effect, make his claim indefinite or indistinct, and was not calculated to mislead.

The Customs' Administrative Act of 1890 created for the first time a Board of General Appraisers. Prior to that time, the classification of the collector was final, except under complaint to the Secretary of the Treasury. The procedure was to appeal directly to the courts, and, if successful, to recover from the Treasury the excess paid, together with the costs of the suit.

Under the procedure inaugurated by the act of 1890, the ruling of the collector comes under review of the Board of General Appraisers; and in such appeal no cost is incurred. The Board is, in a sense, an essential part of the Custom House machinery.

The sole function of this Board is to hear cases of this character, and to discriminate between the paragraphs of the law applicable to given importations. Upon all the questions that arise in disputes between importers and the collector, the appraisers are probably better informed than any tribunal in the country. They will be presumed to know the law—especially when the rate of duty, as claimed, is pointed out. It is no part of the purpose of the law as it now stands to exact such nice precision that the importer may not indicate his impression as to what paragraph governs except at his peril.

We are of the opinion that under the Salambier Case, and on independent construction of the law as it now stands, this decree should be affirmed.

SAUNDERS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

No. 627.

CUSTOMS DISTRICTS—COMPENSATION OF COLLECTOR—CHANGE IN STATUTE.

Act Aug. 28, 1890 (26 Stat. 363, c. 814), "to reorganize and establish the customs collection district of Puget Sound," not only by its title, but also by its provisions, shows the intention of congress to make a complete revision of the law relating to the organization of such district; and section 3, fixing the compensation of the collector at a salary of $3,500 per annum, supersedes and repeals Rev. St. § 2670, on the same subject, including the provision permitting the collector to retain fees to the amount of $2,000 in addition to his salary.

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

Wallace McCamant, for plaintiff in error.
Wilson R. Gay, U. S. Atty.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

McKENNA, Circuit Justice. This is an action upon the official bond of James C. Saunders, given as collector of customs for the district of Puget Sound, in the state of Washington. Saunders was collector from the 13th of September, 1893, to August 31, 1897. The complaint alleged the receipt by Saunders, as collector, of various sums of money between certain specified dates, amounting in all to the sum of $3,869.51, for which judgment was prayed. A demurrer was filed to the complaint, and overruled, and the defendants answered, denying certain of the allegations of the complaint, and set up an affirmative defense and counterclaim. The contention of the parties turns upon the counterclaim. It set out in detail the salary and emoluments which Saunders claimed under the statutes of the United States, which were summarized in the third paragraph of the answer as follows:

"That plaintiff, in adjusting the accounts with said collector of customs, allowed to defendant, as such collector, for all his official services, and for all his salary, compensation, emoluments, fees, rents, and storage, percentages, and allowances, the following sums or amounts, and no more: For the year ending June 30, 1894, $5,500; for the year ending June 30, 1895, $5,500; for the year ending June 30, 1896, $4,033.25; for the year ending June 30, 1897, $3,606.50; for said period commencing July 1, 1897, ending August 31st, $598.10; and that plaintiff refused to pay or allow defendant as such collector of customs any more than stated in this third paragraph, and wrongfully rejected and disallowed from the sums or amounts herein claimed and retained the following sums or amounts, to wit: For the year ending June 30, 1894, $500; for the year ending June 30, 1895, $500; for the year ending June 30, 1896, $1,966.75; for the year ending June 30. 1897, $2,000; for the said period ending August 31, 1897, $337. Total amount so wrongfully rejected and disallowed by plaintiff as aforesaid during the entire official period of defendant as such collector of customs, the sum of $5,303.75; and that said sum of $5,303.75, so wrongfully rejected and disallowed by plaintiff, should be credited to the account of defendant as such collector; and that, if this credit and claim of defendant be allowed and sustained, there would be nothing due to plaintiff from said defendant for anything whatever."

The United States demurred to the counterclaim, and the defendant Saunders (plaintiff in error) made a motion for judgment on the pleadings. The motion was denied, and the demurrer was sustained, and judgment entered for the United States. 98 Fed. 196. This writ of error was then sued out.

The contention of plaintiff in error is that he was entitled under the law to a compensation of $6,000 per annum, made up as follows:

"(1) A salary of $3.500 per annum; (2) fees and emoluments, under sections 2654 and 2659 of the Revised Statutes, not exceeding $2,000 per annum; (3) moneys earned by him for rent and storage in the public stores, not exceeding $2,000 per annum."

His construction of the statutes, he claims, was acquiesced in by the treasury department until he came to surrender his office. At that time the treasury department changed its view of sections 2654 and 2659 of the Revised Statutes of the United States, and disallowed items in his account aggregating the sum of $5,303.75. The question in the case, therefore, is whether he was entitled only to his salary, or to that and the fees and emoluments provided for in sections 2654 and 2659 of the Revised Statutes.

Section 2670 of the Revised Statutes of the United States reads as follows:

"The collector for the district of Puget Sound shall receive a salary of one thousand dollars a year, with additional maximum compensation of two thousand dollars a year, when the official emoluments and fees provided by existing laws amount to the sum."

This section was a reproduction of an act of congress passed in 1851. In that act, and in its reproduction in the Revised Statutes, there is a clear expression of the compensation of the collector. It is a salary of $1,000, with an addition of fees not exceeding $2,000,—a possible $3,000 in all. It may be conceded that that compensation was in accordance with the history of the legislation on the subject and the practice of the government, but a change was made in the words of the statute in 1890, and the effect of that change is the immediate question to be considered.

In the year 1890, congress passed an act entitled "An act to reorganize and establish the customs collection district of Puget Sound." The third and fourth sections of this act are as follows:

"Sec. 3. That the salary of the collector of customs for the district of Puget Sound shall be three thousand five hundred dollars per annum, and that of the deputy collector at Tacoma and Seattle each two thousand dollars per annum.

"Sec. 4. That all acts or parts of acts in conflict with the provisions of this act are hereby repealed." (26 Stat. 363.)

Can this act subsist with section 2670 of the Revised Statutes? In answering in the negative we are not unmindful of the rule invoked by plaintiff in error that repeals by implication are not favored. But two acts need not be in express terms repugnant for one to work a repeal of the other. The latter act may be intended as a substitute for the prior act, and will hence operate as a repeal of that act. Milling Co. v. Gardner, 173 U. S. 123, 19 Sup. Ct. 327, 43 L. Ed. 637.

The relation of the act of 1890 and section 2670 of the Revised Statutes was expressed by Judge Handford in passing on the demurrer to the counterclaim:

"Certainly," he said, "section 3 of the act of 1890, and section 2670, Rev. St., are in conflict with each other, and the latter is therefore repealed in its entirety, unless its provisions are divisible, so that one part may be retained and have force as an independent statute. When an attempt is made to divide section 2670, it must be borne in mind that congress has not passed an act to amend that section, but a part, if not the whole, of it has been repealed, and no longer exists for any purpose, even to give aid and support to any part not repealed. Now, if we take a pair of scissors, and cut out of section 2670 the part which is clearly and necessarily inconsistent with the act of 1890, we must necessarily take out all of the section from the beginning of it to the first comma, and the part remaining is so unintelligible as to be ineffective for any purpose. To make my meaning plainer, I hold that the following words found in section 2670, viz.: 'The collector for the district of Puget Sound shall receive a salary of one thousand dollars a year,' —are certainly repealed and expunged entirely, and it is obvious that the remaining part of the section is not a complete sentence, and is meaningless. I consider, also, that the title of the act of 1890, as well as the context, shows that congress intended to make a complete revision of the law relating to the organization of the customs district of Puget Sound. Statutes which are clearly intended to be a full and complete declaration of the legislative will on any particular subject have the effect to repeal all prior statutes, covering the same ground, which are not incorporated into the new act. U. S. v. Claflin, 97 U. S. 546, 24 L. Ed. 1082."

Judgment affirmed.

COWEN et al. v. ALDRIDGE, Auditor of Belmont County, Ohio.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1902.)

No. 996.

TAXATION—RAILROAD PROPERTY—OHIO STATUTES.

The statutes of Ohio relating to the taxation of railroad property (Rev. St. 1890, §§ 2770–2776) provide for the valuation of the property of a railroad company by a board consisting of the auditors of the several counties into or through which its road extends. If it extends into one county only, the auditor of such county constitutes the board. They also provide two general systems for distributing the valuation between localities for purposes of taxation. The real estate, structures, and stationary personal property are valued separately, and the valuation of each apportioned to its own local taxing district, while the valuation of the rolling stock, main track, roadbed, supplies, moneys, and credits is distributed between such districts in proportion to the mileage in each. A railroad of the state, extending through several counties, terminated at its southern end at low-water mark on the Ohio river. Such road was leased to a company owning a road on the opposite side of the river; the two being connected by a bridge and approaches owned, as shown by the pleadings, by the lessee. The approach on the Ohio side extended back from low-water mark 1,490 feet, and consisted of a permanent and expensive stone structure, having 43 arches. An additional rate was charged for passengers and freight crossing the bridge. The lessee, in making returns of the property of the lessor for taxation in Ohio, made no separate mention of such approach, but included the main track, roadbed, and right of way to low-water mark, and the same was assessed by the board of auditors, and the valuation duly apportioned

according to mileage. *Held*, that such valuation did not cover the approach as a "structure," but that the same was subject to valuation and taxation as such by the auditor of the county in which it was situated, as the property of the lessee.

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

This case was a proceeding in the circuit court of the United States for the Southern district of Ohio in a foreclosure suit brought by the Mercantile Trust Company against the Baltimore & Ohio Railroad Company to foreclose a mortgage upon the property of that company. On March 11, 1899, the receivers filed an information in the foreclosure suit, setting forth: "That the Baltimore & Ohio Railroad Company is the owner of a bridge across the Ohio river, commencing at the town of Benwood, in the state of West Virginia, and running thence across said river to the town of Bellaire. That, commencing at the line between the said states of West Virginia and Ohio, the abutments of said bridge were constructed on lands owned by the Central Ohio Railroad Company, as reorganized; passing through said lands, and into and through one of the streets of the said city of Bellaire, in the center of which the abutments of said bridge were constructed; running for a distance of about one-half of one mile from the said line between the said states. That upon said abutments so constructed a railroad track was laid about the year 1872, and the said the Baltimore & Ohio Railroad Company, being then in possession of all the property of the Central Ohio Railroad Company, as lessee, continued to run locomotives and cars over said railroad track, from the line between the said states, westward, to the city of Columbus. That all of the property in the possession of the Baltimore & Ohio Railroad Company, as such lessee, as well as the property which it owned, has been assessed and placed upon the tax duplicate of Belmont county and other counties, in the name of the Baltimore & Ohio Railroad Company; it being bound, under the terms of the said lease from the said Central Ohio Railroad Company, as reorganized, to pay all taxes and assessments against said line of railroad. That such assessments have always been made by the board of auditors composed of the auditors of Belmont, Noble, Guernsey, Muskingum, Licking, and Franklin, who were duly organized as such board of assessors or appraisers in pursuance of the statute of the state of Ohio. That about the year 1890 the authorities of Bellaire claimed that the said abutments and railroad track, commencing at the said line between the said states, and running thence west about one-half of one mile, should be assessed as a structure separate and apart from the balance of the said railroad track between said cities of Bellaire and Columbus. That said subject, having been duly presented, was considered by said board of auditors and overruled; the said board holding and deciding that the said bridge structure, and the tracks thereon, should be assessed as a part of the said railroad between the said cities of Bellaire and Columbus; and it was so assessed in the year 1890, and each year since that year, up to and until the year 1898. That at the regular annual meeting of the board of auditors in the month of May, 1898, the said authorities of said city and the auditor of Belmont county, Ohio, again presented said question of the assessment of said structure separate and apart from the balance of said railroad track to the said board of auditors. That said board duly considered the same, and again overruled such application, holding and deciding that said structure should be assessed by said board as a part of the track of said railroad between said cities of Bellaire and Columbus; and it was so assessed, as it had been each and every year subsequent to the year 1890 and previous thereto. That, notwithstanding the facts aforesaid, Madison Aldridge, auditor of Belmont county, Ohio, has served notice upon the petitioners that he would appraise said structure, and put the same upon the duplicate of Belmont county, Ohio, to be assessed separately from the other property of said railroad, and that said auditor is now threatening to so appraise and place said structure upon the said tax duplicate, and, unless re-

strained by this honorable court from so doing, he will place the same upon the said tax duplicate, and proceed to collect from the petitioners the taxes on the same for the years 1894, 1895, 1896, 1897, 1898, which, exclusive of interest and costs, exceed the sum of two thousand dollars, notwithstanding the fact that the said bridge has been already appraised as hereinbefore stated, and the taxes thereon paid by the Baltimore & Ohio Railroad Company, up to the time of the appointment of these petitioners as receivers, and by them since that date, under and in pursuance of the assessment and appraisement of said property made by said counties through which said railroad runs." To this information the auditor of Belmont county filed an answer, admitting the ownership of the bridge, and his purpose to take proceedings to require the same to be taxed in Belmont county, in Ohio, and taking issue upon the allegations of the information claiming that said property had already been assessed and taxed under the laws of Ohio.

The case was heard upon the testimony and the report of the special master to whom the case had been referred. The master's findings were as follows:

"Statement.

"The bridge in question crosses the Ohio river between Bellaire, Belmont county, Ohio, and Benwood, Marshall county, West Virginia, connecting the lines of railway of the Central Ohio Railroad Company and the Baltimore & Ohio Railroad Company, and was built by said companies jointly, under a certain article of agreement made and entered into July 12, 1865, a copy of which article is hereto attached. Under said article of agreement the bridge was to be paid for by said companies in the proportion of two-thirds by the Baltimore & Ohio Railroad Company and one-third by the Central Ohio Railroad Company. The plans of the bridge, its location, and the contracts for its erection were to be as agreed upon by said companies, and included 'all the work of continuous arches and superstructures of wood and iron necessary to span the river, streets, railroads, and other roads extending from solid ground on the Ohio side of the Ohio river to solid ground on the Virginia [West Virginia] side of said river, together with the abutments and piers necessary to support the same.' Payment for the structure was provided by the issue of certificates signed by the presidents of the two said railroad companies; the same to be a lien on the bridge, but without any claim on either of said companies, or the stockholders thereof. To meet the liability of said certificates, a tariff of charges was established on all traffic passing over said bridge, not to exceed such sum as might be necessary to maintain said bridge, pay the annual interest on said certificates and the sum of $30,000 annually toward the creation and increase of a sinking fund for the ultimate redemption of said certificates. When all of said certificates were redeemed, then the charges were to be limited as to such sum as was necessary to maintain or renew the bridge, and to furnish an income to the owners of the bridge not exceeding 10 per centum per annum on the original cost thereof. After the redemption of all of said certificates the said bridge was to be held by the two said railroad companies, as tenants in common, in the proportion of two-thirds to the Baltimore & Ohio Railroad Company and one-third to the Central Ohio Railroad Company. Said bridge was constructed under said articles of agreement, and under the general authority of an act of congress approved July 12, 1865, which act provides (section 3) 'that it shall be lawful for any other railroad company or companies whose line or lines of road may now, or shall hereafter be built to the Ohio river, above the mouth of the Big Sandy river, in accordance with the terms of the charter, or charters, of such company or companies, to build a bridge across said river for the more perfect connection of any such roads, and for the passage of trains thereof, under the limitations and conditions hereafter provided.' Section 5 of said act provides 'that any bridge or bridges erected under the provisions of this act shall be lawful structures, and shall be recognized and known as post routes, upon which, also, no higher charge shall be made for the transmission over the same of the mails, troops and munitions of war of the United States than the rate per mile which the company or companies erecting such bridge may, from time to time, receive on the balance of their line or lines for such services.' Under an act of

congress approved July 11, 1870, a board of engineers was appointed by the secretary of war to inspect and report on the bridge over the Ohio river, and in the report of that board, dated April 19, 1871 (Senate Document, 42d Congress, Ex. Doc. No. 1, p. 70, on file in this case), it is found that the bridge, then unfinished, 'was being built according to law.'

"The structure is a single-track railway bridge, connecting the main stem of the Baltimore & Ohio Railroad with the Central Ohio at the eastern terminus of the latter, and is 4,001.5 feet in length; the length of approach on the Ohio side of the river being 1,490 feet, and on the West Virginia side 864 feet. The right of way for the approaches of the bridge is through the streets and alleys of Bellaire, and over the lands of Sullivan, Barnard, and Cowen. The council of Bellaire, through its duly appointed committee, and by ordinance dated March 7, 1867, authorized the Central Ohio Railroad Company to 'extend their railroad' through and over certain streets and alleys. December 12, 1867, J. H. Sullivan, Wm. G. Barnard and B. R. Cowen, joint owners of the 'Harris Farm,' so called, on a part of which Bellaire City was located, released to the Central Ohio Railroad Company the right of way for the road of said company through and over their lands for an approach for the track or tracks of the road of said company to the said bridge. Copies of said release and of the ordinance of Bellaire council are attached to the affidavit of T. J. Frazier, filed with the papers in this cause.

"It is in evidence, and is not disputed, that an additional fare of twenty-five cents is charged passengers coming west over the Baltimore & Ohio Railroad from Moundsville, West Virginia, to Bellaire, over said bridge, over the fare charged those from Moundsville to Benwood, at the east end of the bridge, and that one cent per hundred additional is charged for freight passing over the same part of the road. (See affidavits of Geo. M. Wise, W. H. H. Showacre, and S. C. Gans, filed herewith.)

"It is also in evidence, and not disputed, that the portion of said bridge lying in West Virginia is taxed in Marshall county, in said state, at $315,000. Upon the last fact above stated, counsel for the auditor cites Pittsburgh, C., C. & St. L. R. Co. v. Board of Public Works of West Virginia, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354, as the ground upon which the present contention of the auditor is founded. In the cause cited the first point in the syllabus raises the question as to whether a writ of injunction from a United States court is the proper remedy. But that question has been settled in this case by his honor Judge Taft, who has decided that, under the Ohio Statutes, injunction is the proper remedy. The third point in the syllabus is: 'A railroad bridge is taxable under the Code of West Virginia of 1891 (chapter 29, § 67); and although the board of public works assesses separately the whole length of the railroad track within the state, and that part of the bridge within the state, yet, if the railroad company does not, as allowed by that section, apply to the auditor to correct any supposed mistake in the assessment, nor appeal, within thirty days after receiving notice of the decision of the board, to the circuit court of the county, and the officers of the state make no attempt to interfere with the company's possession and control of its real estate, nor, until after the expiration of the thirty days, either to impose a penalty for delay in paying the taxes, or to levy on personal property for nonpayment of them, the company cannot maintain a bill in equity in a court of the United States to restrain the assessment and collection of any part of the taxes.' That is to say, the railroad company, in the case cited, did not take proper steps to correct an alleged error of the board of public works, and by reason of its neglect it had no remedy, and was compelled to pay the assessment. In this case, however, the court says informant has taken the proper steps to prevent an assessment. Now, it is in evidence that that part of the bridge within the state of Ohio, and county of Belmont is upon the ground owned by the Central Ohio Railroad Company; that said company paid one-third of the cost of building the bridge, which is said to be the approximate cost of that part of the bridge structure lying within the county of Belmont. The certificate of the auditor of state of the state of Ohio, offered in evidence, shows that the Central Ohio Railroad Company, or its lessee, the Baltimore & Ohio Railroad Company, has for a number of years, up to and including the year 1898, paid

taxes on 137.3 miles of main-line track from Columbus, Ohio, to its eastern terminus at the Ohio river, in Bellaire, or 104.27 miles from Newark, Ohio, to said terminus, which is the whole of said main line of road between said points, and which includes that part which is upon and over the western approach to said bridge. (See affidavits of T. J. Frazier and Wm. P. De Hart.) All the railroad time-tables and guidebooks in current use give these distances. It appears in evidence that, of the main-line track so assessed, 1.37 miles lies within the corporate limits of Bellaire. It is contended by counsel for the auditor that this 1.37 miles of main track in Bellaire is only that part of said track which reaches up to the point where the approach to the bridge begins, because, by the terms of the agreement between the two companies under which the bridge was built, it was to be built 'for the purpose of connecting their respective lines of road,' and that the track on the bridge is 'a connecting track between the two main lines on terra firma.' But the eastern terminus of the Central Ohio Railroad is, and has been ever since its first construction, at low-water mark on the west side of the Ohio river. Upon the completion of said bridge the main-line track formerly in use on the surface of the ground was abandoned, or put into use as a switch side track, and the main track was placed upon the Ohio approach to the bridge. The point of connection between the two roads, therefore, is at low-water mark on the Ohio side of the river, as it has always been. To make this connection, the Baltimore & Ohio Railroad Company laid a track from its main stem, at Benwood, West Virginia, over the bridge, to the terminus of the Central Ohio main-line track. It is the main-line track which lies on the western approach to the bridge, as well as that part of it which lies on the surface of the ground west of said approach, and within the corporate limits of Bellaire, which goes to make up the 1.37 miles referred to, and which is included in the total main-track mileage of 137.3 miles from Columbus to the Ohio river, on which taxes were assessed and paid as aforesaid.

"It is further contended that because no mention is made of the bridge, or any part thereof, nor of the land on which it stands, in the reports of the auditor or in the report of the auditor of state, it is not, therefore, included in the assessment. But there is no mention of the bridges of said company over the Muskingum river at Zanesville, over the Licking river at Newark, or of other bridges and trestles supporting the main-line track, which would seem to indicate that it was not customary to note such structure in making assessments on the main line of that road.

"Findings:

"In view of the facts stated above, I find that the main-line track of the Central Ohio Railroad extends from Columbus, Ohio, to low-water mark on the west bank of the Ohio river, within the corporate limits of Bellaire; that the length of said track is 137.3 miles, and that the Central Ohio Railroad Company, or its lessee, the Baltimore & Ohio Railroad Company, has paid in full the taxes levied on its said entire main track, which includes that part of said track lying upon and over the western approach to said bridge; and that said 137.3 miles includes the 1.37 miles of said main line track lying within the corporate limits of Bellaire.

"Testimony was offered going to show that a proposition had been made at the meeting of the board of county auditors to assess the Ohio approach to the Bellaire bridge as a structure separate and apart from the main-line track of the road, and that the proposition had been ignored, or at least not favorably considered, but the testimony on that point is contradictory. (See affidavits of T. J. Frazier, W. P. De Hart, A. M. Beatty, and A. B. Hall.) However the fact may be, the master has not considered it material to this inquiry, in view of his findings as above."

J. H. Collins, for appellants.

W. W. Granger, for appellee.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The right to an injunction in this case turns upon the determination of the issue as to whether the Baltimore & Ohio Railroad Company has been once taxed upon the bridge mentioned in the information under proceedings already had under the tax laws of Ohio. If the receivers have established the affirmative of this proposition, further attempts to tax the same property may be enjoined under the laws of Ohio, which provide the equitable remedy of injunction against illegal taxation. Rev. St. Ohio, § 5848. In Ohio the taxing of property of railroad companies is regulated by the Revised Statutes of the state (Rev. St. 1890, §§ 2770–2776, inclusive). Where a railroad is in several counties of the state, the auditors of such counties constitute a board of appraisers and assessors for such railroad company. For any railroad company having its road, or any part thereof, in one county only, the auditor of such county constitutes the board. At its annual meeting in May the board is required to proceed to ascertain all the personal property of the company, which, it is provided, shall include the roadbed, water and wood stations, and such other realty as is necessary to the daily running operations of the road, moneys and credits of the company, the undivided profits, reserve, or contingent fund, whether the same be in money, credits, or in any manner invested, and the actual value thereof in money; and also locomotives and cars not belonging to the company, but hired for its use or run under its control on its road by a sleeping car or other company, but as to such rolling stock the company may return it separately from its own property, in which event it shall be valued separately, but included in the aggregate valuation. Such boards have power to require certain officers of the road to make a detailed statement, under oath, of the items and particulars constituting such property, moneys, and credits, and the values thereof. The value of such property, moneys, and credits, as found and determined by the board, is required to be apportioned by the board among the several counties through which said road, or any part thereof, runs, so that to each county, city, village, township, and district, or any part thereof, therein, shall be apportioned such part thereof as shall equalize the relative value of the real estate, structures, and stationary personal property of such company therein, in proportion to the whole value of the real estate, structures, and stationary personal property of such company in the state; and the rolling stock, main track, roadbed, supplies, moneys, and credits of such company shall be apportioned in such proportion as the length of such road in such county bears to the entire length thereof in all said counties. When a railroad company has part of its road in the state, and part thereof in any other state or states, the proper board shall take the value of such property, moneys, and credits so found and determined as aforesaid, and divide it in the proportion the length of said road in the state bears to the whole of such road, and determine the principal sum for the value of such road in the state accordingly, equalizing the relative value thereof in the state, as above set forth.

An analysis of these sections shows two general systems of distributing the taxable valuation of the property of railroad companies in Ohio. It is primarily made the duty of the board, whether it is to consist of one or more of the county auditors, to ascertain the property subject to taxation, and to place upon it a valuation. For the purpose of ascertaining the character and extent of the property, detailed statements may be required, under oath, from the officers of the company. The distribution of the valuation of the property, where several counties are interested, is made according to the nature of the property. Real estate, structures, and stationary personal property are to be apportioned to its own local taxing district. These valuations the statute requires to be "equalized," so that the local real estate, structures, and stationary personal property in any taxing district shall be valued in the same proportion as the value of said property in said taxing district bears to the total valuation in the state. The other class of property to be valued, which includes rolling stock, main track, roadbed, supplies, moneys, and credits, is not localized for taxation; but the aggregate value of this class of property is apportioned among the local taxing districts according to the mileage of the road in such districts, respectively. One object of this statute is evidently to require real estate and structures to be locally taxed. The valuation of the real estate and structures is apportioned to the locality where situated. This is the policy of the statute, and is in harmony with the general system of taxation in the state.

In view of this system of classification of railroad property for taxation in Ohio, to which class does the bridge in question belong? The part of the bridge which it is proposed to tax in Belmont county is the approach from the Ohio side, the length of which is 1,490 feet; on the West Virginia side, 864 feet. The approach on the Ohio side is described as consisting of 43 semicircular stone arches, with two spans of deck bridge. The piers are described as massive in structure. The bridge is an expensive and durable one. It was built under authority of an act of congress, and is made a post route of the United States, subject to regulation as such. Additional rates are charged to passengers and freight using the bridge. It has a distinct value as a bridge, irrespective of its present use for railroad purposes. It is a suggestive fact that the West Virginia portion has been valued for taxation in that state in the sum of $315,000. These considerations would seem decisive of the question as to whether this bridge is to be regarded as a structure to be locally taxed, or "roadbed" or "main track," with taxable valuation to be distributed throughout the length of the line in proportion to its mileage. It is, in our judgment, a structure, within the meaning of the statute, and to be taxed as other local structures are in the district where it is situated. Similar considerations led the supreme court of Nebraska to like conclusions in a well-considered case. Cass Co. v. Chicago, B. & Q. R. Co., 25 Neb. 348, 41 N. W. 246, 2 L. R. A. 188.

In the returns made by the Baltimore & Ohio Railroad Company for the Central Ohio Railroad, no mention is made of this structure. There is nothing in the testimony or in the finding of the master to show that it was distinctly considered in making a valuation of the

property to be taxed, notwithstanding its great value as an independent structure. But it is contended that this bridge has already been taxed as a part of the main track, including roadbed and right of way, by the board of county auditors. The findings of fact show that the Baltimore & Ohio Railroad Company is assessed and pays the taxes upon the property in Ohio of the Central Ohio Company, of which it is the lessee. This is because of the agreement between the companies, which requires this course of action. In Ohio all property is taxed against the owner. Rev. St. 1890, §§ 2734, 2735. In the return and assessments referred to, the Baltimore & Ohio Company assumes the obligation which the law imposes upon the Central Ohio Railroad Company. It is said that this bridge is included in the assessment of the 137.3 miles of main track, including roadbed and right of way; being the entire length of the line of the Ohio Central Railroad from low-water mark on the Ohio side of the river to its northern terminus at Columbus, Ohio. The finding shows that the southern terminus of the Central Ohio Railroad is at low-water mark on the Ohio side. It also appears that the tracks of the Central Ohio Railroad were raised and laid upon the approaches to this bridge. But it also appears from the allegations of the petition and the admissions of the answer that the bridge is the property of the Baltimore & Ohio Railroad Company. In the mortgage which is the subject of foreclosure in this case this bridge is described as owned and operated by that company, "known as the 'Benwood Bridge,' beginning in Marshall county, in the state of West Virginia, and running through the town of Benwood, over the Ohio river, into the town of Bellaire, in Belmont county, in the state of Ohio, together with the approaches thereof; the said bridge and approaches being of the total length of 8,556 feet, more or less." It is true that the master finds that this bridge was built under a contract between the Baltimore & Ohio Railroad Company and the Central Ohio Railroad Company, by which the latter company pays one-third of the cost of the bridge; and, after the payment of the certificates issued for such cost, the companies were to hold the same as tenants in common, in the proportion of two-thirds to the Baltimore & Ohio Railroad Company, and one-third to the Central Ohio Railroad Company. This contract cannot overcome the allegations of the pleadings as to the ownership of the bridge. Nor does the joint ownership of the structure relieve the situation from the considerations which give it a local character for the purposes of taxation. It is also found that the approach in question is upon ground of the Ohio Central Company, and that its tracks are laid upon it. This does not affect the question of the right to tax this large and costly structure against its true ownership, irrespective of the ownership of the track upon it, or of the right of way upon which it rests. When land is owned by one, and the buildings by another, the two may be separately assessed for taxation. People v. Board of Assessors of Brooklyn, 93 N. Y. 308. If this were not so, much property which must be assessed against the owner would escape taxation. It appears that the Baltimore & Ohio Railroad Company, the owner of this bridge and its approaches, is the owner, also, of a line of railroad extending across

the bridge from Ohio, and thence eastwardly, through West Virginia. We think this structure is a part of that railroad, and, within the requirements of the Ohio Statutes, taxable in Belmont county. We cannot agree that the assessment of the main track of the Ohio Central Railroad covered so much of this structure as includes the approach to this bridge from the Ohio side, or that, under the facts shown, it could be legally assessed as a part of such main track, including roadbed and right of way. It may be the practice to assess bridges as a part of such main track of railroads in Ohio. It may be that many bridges have no value except to carry the track of the company. Whether this practice, if it exists, be right or wrong, is immaterial here, in view of the character and ownership of the bridge in question.

We think the circuit court did not err in vacating the restraining order and dismissing the petition of the receivers. Judgment affirmed.

POTTS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

No. 674.

PUBLIC LANDS—INCLOSURE—FENCE ON OWNER'S LAND—MISDEMEANOR.

Where a landowner in good faith, for the purpose of inclosing his own land, builds a fence on the line extending around the tract, such act is not unlawful, and is not a violation of the act of February 25, 1885 (23 Stat. 321), which forbids the inclosure of public lands or obstructing access thereto by one who has no claim thereto, even though such fence so connects with fenced lands of other owners as thereby to inclose unclaimed public lands.

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

The plaintiff in error was indicted by the grand jury for unlawfully inclosing public land in the state of Washington, by erecting and maintaining a post and wire fence around certain land owned and leased by him, thereby preventing and obstructing any and all persons from peacefully entering upon or establishing a settlement or residence upon certain tracts of public land, and preventing and obstructing passage and transit over and through said public land. The indictment contained six counts, but only the charges contained in the first, second, and fifth counts were submitted to the jury. These counts charged as follows:

"That one Robert Potts * * * did unlawfully, as owner, make, erect, construct, and maintain an inclosure of the following described public land of the United States, containing not less than 160 acres, to wit, the N. W. ¼ of section 2, township 19 north, of range 38 east of the Willamette meridian, and the S. W. ¼ of section 26, township 20 north, range 38 east of the Willamette meridian, and section 34, township 20 north, range 38 east of the Willamette meridian; said inclosure so made, erected, constructed, and maintained, consisting of and being a post and wire fence, and he, the said Robert Potts, so making and constructing said inclosure, then and there having no claim or color of title to any of said land, made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office, to wit, the United States land office at Spokane, in said state and district, under the general land laws of the United States,—contrary to the form of the statute in such

case made and provided, and against the peace and dignity of the United States.

"That one Robert Potts * * * did unlawfully, as part owner and agent, make, erect, construct, and maintain an inclosure of the following described public land of the United States, containing not less than one hundred and sixty acres, to wit, the N. W. ¼ of section 2, township 19 north, range 38 east of the Willamette meridian, and the S. W. ¼ of section 26, township 20 north, range 38 east of the Willamette meridian, and section 34, township 20 north, range 38 east of the Willamette meridian; said inclosure so made, erected, constructed, and maintained consisting of and being a post and wire fence, and he, the said Robert Potts, so making and constructing said inclosure, then and there having no claim or color of title to any of said land, made or acquired in good faith, or an asserted right thereto, by or under claim, made in good faith with the view to entry thereof at the proper land office, to wit, the United States land office at Spokane, in said state and district, under the general land laws of the United States at the time such inclosure was so made,—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

"That one Robert Potts * * * did unlawfully, by and with a post and wire fence, prevent and obstruct from passage and transit over and through certain of the public lands, containing not less than one hundred and sixty acres, to wit, the N. W. ¼ of section 2, township 19 north, of range 38 east of the Willamette meridian, and the S. W. ¼ of section 26, township 20 north, range 38 east of the Willamette meridian, and section 34, township 20 north, range 38 east of the Willamette meridian,—contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The jury found the defendant guilty as charged in these three counts, and the court imposed a sentence of one day's imprisonment in the county jail and a fine of $100, and costs of action. Writ of error was thereupon sued out to this court.

Merritt & Merritt, for plaintiff in error.

Wilson R. Gay, U. S. Atty., and Edward E. Cushman, Asst. U. S. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It appears from the evidence that the defendant is the owner of section 25, township 20 north, range 38 east of Willamette meridian, Spokane county, Wash., and has a lease of section 36 in the same township. These two sections adjoin, and the defendant had inclosed them with a wire fence, thus making an inclosure two miles long north and south, and approximately one mile wide east and west. A county road meanders along the east line of said sections. The government land charged in the indictment to have been unlawfully inclosed by the fence of the defendant is the N. W. ¼ of section 2, township 19 north, of range 38 east, and the S. W. ¼ of section 26, and section 34, township 20 north, range 38 east. None of this land adjoins that inclosed by the defendant; but it is contended that the defendant, by connecting his fence with that of other owners of land on the north and south, has cut off the government land from access to the county road, and is thus violating the statute prohibiting the inclosing of government land. The chain of private fences complained of immediately incloses only the lands of the various owners, and the inclosing

of or obstruction of passage to the government land is merely an incident arising from the peculiar situation of the land with relation to the county road.

The act of February 25; 1885 (23 Stat. 321), provides as follows:

"That all inclosures of any public lands in any state or territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited. * * *

"Sec. 3. That no person, by force, threats, intimidations, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands. * * *"

The trial court instructed the jury, in this connection, as follows:

"The law which I have read to you has for its obvious purpose the protection of the rights of the public in and to all of the public domain, as against the selfishness of any particular individual, association, or company, or set of individuals, to appropriate to their own use the public domain and exclude the public from the equal enjoyment of the use of it while it remains public and unclaimed by private individuals. The law is broad in its terms, and it is intended to prohibit any manner of inclosing the public domain by a person or a company or a corporation that has no color of title or right to have the exclusive use of it. The inclosure by a fence, or a combination of fences, or joining of fences that is wholly upon the land which the person does own, is unlawful, if in effect it does inclose and shut out the public from any part of the public domain. A man has no right to build a fence upon his own land, that connects with another fence, that is so connected as to form an inclosure of public land, and shut the public out, or prevent their passage over the public lands."

This instruction was plainly directed to the charge contained in the fifth count of the indictment, and this count appears to have been framed under section 3 of the above-named act. Upon the evidence in the case and the charge contained in the count, the question to be submitted to the jury was whether the defendant had, by "fencing or inclosing, or any other unlawful means," prevented or obstructed free passage or transit over or through the public lands of the United States. By a well-known rule of construction the words "or any other unlawful means," in describing and giving scope to the prohibited acts, relate back to and qualify the preceding words "fencing" and "inclosing," so that those words must be read as "unlawful fencing" and "unlawful inclosing." In other words, the "fencing" or "inclosing" of land does not become unlawful merely because either of these acts prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence on a tract of the public land subject to settlement or entry under the public land laws of the United States. The act of a person in fencing or inclosing his own land is lawful. It is also lawful for a person to fence and inclose his own land up to a

point where it connects immediately with the fence or inclosure of adjoining land owned by another. It is only when, under the guise of inclosing his own land, a person builds a fence for the purpose and with the intention of inclosing the public lands of the government, that the fence or inclosure becomes unlawful. This is the law as declared by the supreme court in the case of Camfield v. U. S., 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. In that case the defendants had acquired the right to use all the odd-numbered sections of land lying within certain townships, and built fences around the boundary lines of the townships. By an ingenious arrangement of crossing the township boundary line at each section line, the fence was constructed entirely upon the odd-numbered sections, and was thus located entirely upon the land of the defendants, though completely surrounding and inclosing the even-numbered sections belonging to the government. The court held the defendants' action to be within the letter of the statute, as actually inclosing public lands without any color of title to the lands, and that the fence was therefore a nuisance, subject to abatement by the government, under the act of February 25, 1885. But the court said, in the course of its opinion:

"It is no answer to say that, if such odd-numbered sections were separately fenced in, which the owner would doubtless have the right to do, the result would be the same as in this case, to practically exclude the government from the even-numbered sections, since this was a contingency which the government was bound to contemplate in granting away the odd-numbered sections. So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of inclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to inclose the lands of the government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large."

In the case at bar, however, the evidence tends to show that no public land had actually been inclosed by the fence of the defendant alone. He had, it appears, constructed a fence around two sections of his own land. This land is situated between certain public lands and the county road. Other owners of land in the vicinity had formerly fenced their holdings, apparently without complaint from the government or adjoining settlers. The fence of the defendant, connecting with the fences of the other owners, had formed a chain of fences which presented a barrier between the public land in question and the county road. It is evident that this portion of the country is not well populated, and that public roads are few, as the greater part of the public land claimed to be unlawfully inclosed by the fence in question is two miles from the county road. Upon this evidence it was clearly the duty of the court to submit to the jury the question whether the defendant's fence or inclosure was erected by him in good faith to inclose his own land, or whether, in joining his fence to that of others, it was his intent and purpose to prevent or obstruct any person from peaceably entering upon, or establishing a settlement or residence upon, the tract of public land described in the indictment. This the court did not do, but instructed the jury that a fence built

by a person upon his own land was unlawful, if in effect it inclosed and shut out the public from any part of the public domain. This instruction, as a statement of the law upon the subject, was too broad, and was therefore subject to objection.

The other errors assigned are without merit, and require no discussion. For the reasons stated, the judgment of the circuit court is reversed, with directions to grant a new trial.

ÆTNA LIFE INS. CO. v. FRIERSON.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1902.)

No. 988.

1. ACCIDENT INSURANCE—CONSTRUCTION OF APPLICATION.

A man being about to start for Seattle with the intention at the end of six months of going from there to Alaska on an exploring trip, applied to a soliciting agent of an insurance company for an accident policy, provided it would cover the risks incident to such trip. At the suggestion of the agent, two applications were filled out, one for an annual and one for a six-months policy, and sent on to the general agent of the company, together with a letter from the agent, fully explaining the matter, and that the applications were to be treated as in the alternative. Each application contained a clause that, "I have not in contemplation any special journey or undertaking except as herein stated." No other reference to a journey was made in the formal application. *Held*, that the letter accompanying them, and which was necessary to an understanding of them, must be regarded, as the parties intended, as a part of the application itself.

2. SAME—WAIVER.

An incorporated insurance company may waive conditions which are for its benefit, notwithstanding a provision that no waiver shall be valid, unless made in a prescribed way and by certain officials. Such a provision may be itself waived, as well as any other; the question in every such case being as to whether the waiver has been made by the corporation or one authorized to act for it in the matter.

3. SAME—WAIVER BY RECEIPT OF PREMIUM.

The receipt and retention of a premium at the "home office" of an accident insurance company, after knowledge of facts and circumstances which called upon the company to elect whether it would recall the policy or assume the risk of an extrahazardous journey contemplated by the assured, is an election to ratify the contract and continue the policy.

4. SAME.

A general agent of an accident insurance company, being fully advised by a letter accompanying an application that the applicant contemplated a journey not stated in the formal application, and desired the insurance only in case the policy would cover the risks of such journey, issued the policy, and forwarded it to the soliciting agent, who collected the premium and delivered the policy. A short time thereafter the general agent, by direction of the home office, wrote the local agent to withdraw the policy, but, the insured having gone away, this was not done, and the local agent later sent in the premium, which was received and retained by the company without objection. *Held*, that the company must be presumed to have been advised of all the facts shown by the letter prior to its directing the withdrawal of the policy, and that its subsequent action was a waiver of the right to invoke provisions of the formal application to avoid the policy on account of the journey.

5. SAME—CONDITIONS—BREACH.

A provision of an accident policy exempting the company from liability for injury sustained when the insured was engaged in "adventures

into wild and uninhabited or uncivilized regions" did not become operative because the insured had started on an exploring or prospecting journey into the interior of Alaska, where he was drowned in a storm while navigating a well-known bay on the seacoast, before he had entered upon the inland journey.

6. SAME—CHANGE OF OCCUPATION.
An insurance company cannot claim that an insured had changed his occupation from that stated in his application to that of a prospecting miner, which was one more hazardous, merely because he was, when he lost his life, on his way to Alaska, with the intention of engaging in such pursuit, when he had not entered upon it at the time of his death.

7. SAME—AMOUNT OF RECOVERY—PASSENGER ON STEAM VESSEL.
An insured under an accident policy which provided that, "if injured while riding as a passenger in any passenger conveyance using steam, * * * as a motive power the amount to be paid shall be double that above specified," with others, formed a party for the purpose of ascending an Alaskan river and prospecting for gold in its vicinity. A steamship company contracted to furnish them with transportation to the coast of Alaska in one of its steamships, and from there in a river steamer, which they were to use as a base of supplies during their explorations, the company to receive as compensation one-half the profits of the expedition. After leaving the steamship, and while passing up the bay at the mouth of the river, the river steamer was wrecked, and the insured was drowned. *Held*, that he was a passenger, and the beneficiary was entitled to recover double the principal sum named in the policy.

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

This was an action on a policy of accident insurance. The insured was Robert P. Frierson. The loss, in case of death, was payable to the mother of the insured, who is the defendant in error. There was a stipulation waiving a jury and submitting the case to the court. The court rendered judgment for the plaintiff upon a special finding of facts, made a part of the record.

The company presented a number of defenses, which, so far as now material, were as follows: First. That the contract was void in consequence of a false statement in the application, in which the applicant stated, "I have not in contemplation any special journey nor hazardous undertaking, except as herein stated," whereas the applicant at the time contemplated a journey to the gold fields of Alaska for the purpose of prospecting for mines, and in fact did go to Alaska during the life of the policy, and was there drowned while prosecuting the journey to the gold fields in contemplation when he applied for insurance. Second. That the deceased at the time of his death was in violation of a condition of the policy which exempts the company from liability for injury sustained when the insured is engaged in "adventures into wild and uninhabited or uncivilized regions." Third. That the insured was placed in the preferred class as a lawyer. That he changed his occupation by going to Alaska as a "prospecting miner," and thereby rendered applicable the fourth condition of the policy, which is in these words: "If the insured is injured in any occupation or exposure classed by this company higher than the premium paid for this policy covers, the sum insured and weekly indemnity shall be only such amounts as said premium will purchase at the rate fixed for such increased hazard." Fourth. The policy insures the principal sum of $5,000, but provides for the payment of double that sum if the injuries from which death ensued "are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power." The company denied double liability under this clause, upon the ground that he was not at the time of his death a passenger in a passenger conveyance, within the meaning of this clause. The court below held upon the law and facts that the company was estopped from making the three defenses first mentioned, and that the de-

ceased was a passenger, within the meaning of the policy at the time of his death. There was, therefore, a judgment for double the principal sum insured, with interest from the date of the refusal of the company to pay. The application upon which the policy issued was made upon a printed form. All the written parts, except the signature, were filled in by the local agent of the company at Shelbyville, Tenn. The insured, Robert P. Frierson, was a lawyer living at Shelbyville.

The facts found by the court below in relation to the application for and issuance of this policy, as found by the court below, are as follows:

"(1) Robert P. Frierson, the insured, was a lawyer. On September 29, 1897, he applied to a soliciting agent of defendant at Shelbyville, Tennessee, for a policy of accident insurance, stating that he intended going in a few days to Seattle, Washington, where he would remain about six months, preparing and arranging for a speculative and prospecting trip into Alaska or the Klondike, prospecting for gold. He inquired of the agent whether defendant company would issue a policy to cover such a trip as he expected to take at the end of about six months. The agent, who had no authority to issue policies, replied that he did not know, but suggested that the way to ascertain was to send to the defendant company two applications, one for a six-months policy and the other for a twelve-months policy, and that he (the agent) would accompany them by a letter fully explaining the facts as to the proposed trip, and that the company could then determine for itself whether it would take the proposed risk, and, if not, could issue the policy for six months to cover the time assured would be in Seattle. Insured assented to this plan. The two applications were accordingly prepared and inclosed by the agent in a letter to Myron L. Long, manager of defendant company, at Cincinnati, to whom he forwarded all applications taken by him, fully explaining all the facts with respect to the stay in Seattle, and the proposed speculative and prospecting trip to Alaska or the Klondike, and that a policy for twelve months was wanted only in the event it would cover the risk of the latter trip.

"(2) Upon receipt of this letter, and with a full knowledge of the facts that, unless the insurance would cover the risk of a speculative or prospecting trip to the Klondike, a policy for only six months was desired, the manager of defendant company, at Cincinnati, Ohio, dating it September 29, 1897, mailed the policy to the agent at Shelbyville, and about October 13, 1897, forwarded the application to the home office of defendant company at Hartford, Connecticut. Upon receipt of the policy the agent mailed it to the insured, who had then gone to Seattle, and collected the premium of twenty-five dollars ($25.00), which had been left by the insured at Shelbyville for that purpose.

"(3) On October 9, 1897, the manager at Cincinnati wrote the agent at Shelbyville, as follows: 'I regret the ordering up of the policy of Robert P. Frierson. We have written him a policy for $5,000, dated September 29th, for five months. You can advise him that policy is in full force and effect, and will be mailed you immediately upon receipt of return of the other policy. I tried my best to favor you in this matter, and regret my inability to do so.' Insured was then in Seattle, and the agent did not in any way communicate with him, the beneficiary, or any one connected with either of them, the fact that the policy had been ordered up. Subsequently, and in due course of business, the agent remitted the full premium for twelve months to the manager at Cincinnati, who received it without objection, and remitted it to the chief office at Hartford, where it was received and retained. No further effort was made to cancel the policy."

In respect to the questions as to whether the assured was engaged in "adventures into wild and uninhabited or uncivilized regions," or was a "passenger in any passenger conveyance using steam, etc.," at the time of his injury, there was no specific finding of fact. The facts bearing upon both these questions, as found by the court below, constitute the sixth finding of fact, and is as follows: "Insured remained in Seattle until May 31, 1898, preparing for the proposed trip. He and a number of other young men organized a party for the purpose of ascending the Kuskokwim river in Alaska,

and prospecting the interior of Alaska or the Klondike for gold. They arranged with the Columbia Navigation Company, a common carrier, engaged in the carriage of passengers by water from Seattle to Alaska, for transportation. The relation of the party to the company is found to be as stated by Richard Chilcott, president of that company, and R. P. Camdon, stockholder and officer in the company, which the court here restates and adopts in the language of the witness. Chilcott says: 'Q. What compensation was the Columbia Navigation Company to receive for transporting the party from Seattle to Kuskokwim Bay and thence up the Kuskokwim river? A. It was to receive one-half of what the party realized in two years.' Cross-examination: 'Q. Who furnished the general stores for this party? A. I did, or the Columbia Navigation Company. When I use the personal pronoun, I am merely speaking of my company. Q. The twelve or more men you sent up there were to operate the boat and do all the other work? A. Yes. Q. They were crew and everything else? A. Yes.' Recross-examination: 'Q. Captain, were the members of the Jessie party at expense themselves in making this expedition? A. They contributed one thousand dollars each towards their supplies, but they paid no passage money. They were to pay from the proceeds of the expedition. Q. You testified, I believe, that the proceeds were to be divided half and half between your company and the individuals? A. Yes, sir. Q. Did any person on the Jessie pay fare? A. Yes, a man named Anrud. Q. Was he the only passenger from Seattle? A. Yes, with the exception of the party named. Q. This party also manned the boat? A. No. Q. You mean she was manned by others outside of the party? A. No, they were inside the party, but they were men on pay. Q. State, if you can, the names of the party on pay who manned the boat. A. Kinsler, Hare, Knudsen, and the Jap cook. Q. Who furnished the steamer Jessie for the purpose of transporting the party up the Kuskokwim river? A. The Columbia Navigation Company. Q. State fully, if you know, what instructions were given to this party with respect to communicating with the Columbia Navigation Company after they should reach Alaska. A. Each member was given a pass over all the boats of the company, and, in case any of them at any time crossed over to the Yukon river, they had the right to take the river boats up or down, and it was through these river boats that they were expected to communicate. Q. What compensation was the Columbia Navigation Company to receive for transporting the party from Seattle to Kuskokwim Bay, and thence up the Kuskokwim river? A. The Columbia Navigation Company was to get half the profits of the expedition. Q. State whether the members of this party were all, or most of them, and particularly if Robert P. Frierson was a stockholder in the Columbia Navigation Company. A. Nearly all of the party were stockholders of the Columbia Navigation Company.' Cross-examination: 'Q. You have stated that the Columbia Navigation Company was to share profits with this party. Did this party charter the steamer Jessie, giving as a price one-half of the profits of the expedition? A. No, sir; there was nothing in the way of a charter. Q. Did these fourteen names you gave us constitute the entire party which was to go on the Jessie? A. Yes, sir, with the exception that they knew that they would have to put on a pilot. Q. Then, if I understand you, the party of fourteen which left Seattle were to go up Kuskokwim river on the steamer Jessie, and the consideration moving to the navigation company was half of the profits of the expedition? A. Yes, sir; half to the navigation company and half to them. Q. At what time was the Columbia Navigation Company entitled to call for their half of the profits of the expedition? A. At any time. Q. Within the two years or later? A. Well, there was no agreement made as to that, but the understanding was they were to have our half interest in any profits. Q. That is to say, the Columbia Navigation Company assisted this party of fourteen to ascend the river a thousand miles or more to look after gold, and they were to give the Columbia Navigation Company one-half the gold which they found in consideration of the supplying the boat and provisions for the period of two years, and the other half of the gold found was to be divided equally between the party? A. That is right so far as it applies to the gold; but the party expected to find a town site, and, of course, they would simply be

deeded their one-half interest.' For the purpose of this expedition the company built a river steamer known as the Jessie. She was stocked with provisions sufficient to last two years, and was to remain with the party, and be used as the base of supplies while they were prospecting. The Jessie and the party who were to ascend the Kuskokwim river were transported on the Lackme, an ocean steamer belonging to the Columbia Navigation Company, from Seattle to a point near Kuskokwim Bay. On June 27 or 28, 1898, the Jessie was launched off Kuskokwim Bay, and started on her journey, manned by the crew, who were in the pay of the company; that is, the Columbia Navigation Company. In addition to assured and his party, whose passage was to be paid for by a share in the profits of the expedition, she carried one passenger, who paid a regular fare, and another, who paid the fare for himself and wife and child by his services as guide and pilot. The Kuskokwim river had not been previously navigated by steamboats. The region traversed by it is sparsely inhabited by Indians of a low degree of civilization, together with a few white missionaries at one point about two miles from its mouth, and traders."

Further facts essential to the determination of the questions arising upon the errors assigned will appear in the opinion.

W. B. Stephens and W. D. Carswell (Lewis Sperry, of counsel), for plaintiff in error.

Shepherd & Frierson, for defendant in error.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

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

For the company it is said: (1) That the consideration upon which the policy issued was the premium paid and "the warranties made in the application." (2) That the statement in the application that "I have not in contemplation any special journey or hazardous undertaking, except as herein stated," constituted a warranty, the breach of which was not waived as a consequence of the facts communicated by the assured to either the soliciting agent at Shelbyville or the company's "manager" at Cincinnati. (3) That the conceded fact that the insured lost his life while upon a "special journey" and "hazardous undertaking," which he had in contemplation when he made his application, constitutes a breach of the warranty, and defeats the policy.

Among the conditions made a part of the policy is this:

"No agent has authority to waive any condition of this policy; and no waiver will be recognized unless in writing, signed by either the president, vice president, secretary, or assistant secretary of the company."

It may be conceded that a contract of insurance in writing, if in unambiguous terms, must speak for itself, and cannot be altered or contradicted by parol evidence, in the absence of fraud or mistake. This ancient rule has been lately applied in respect of a fire insurance policy which was held void in consequence of the existence of other insurance at inception of contract, because consent to same was not indorsed thereon, although the fact of its existence was communicated by the assured to the company's agent before the policy was delivered. Northern Assur. Co. v. Grand View Bldg. Ass'n, 22 Sup. Ct. 133, 46 L. Ed. ——. In that case the policy provided that it should be "void if the assured now has or shall hereafter make or procure any other contract of insurance," etc., unless otherwise provided by agreement

"*indorsed hereon or added hereto.*" The policy also provided that no officer or agent of the 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, and as to such provisions or conditions *unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or remission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.*" We have underscored certain parts of the policy there involved for the purpose of calling attention to the specific character of the agreement sought in that case to be avoided by evidence tending to show knowledge of other existing insurance by the agent who issued the policy. If the defendant in error had rested her case upon an estoppel arising from the mere fact that the soliciting agent who received and forwarded these applications knew the truth as to the purposes of the applicant, the case, in that aspect of it, would, perhaps, be controlled by the case last cited. But we think the facts of the case are such as to distinguish it from Northern Assur. Co. v. Grand View Bldg. Ass'n. The statement relied upon as constituting an untruthful representation of the purposes of the applicant indicates upon its face that it was accompanied by some other statement upon the same subject. It reads thus: "I have not in contemplation any special journey or undertaking, except as herein stated." To what do the words "as herein stated" refer? No journey or undertaking was "herein stated" unless the statement which the parties agreed should accompany Frierson's applications is to be regarded as constituting a part of the application upon which the policy issued. The facts found by the court below were that two applications were made at the same time, one for a six-months policy and the other for an annual policy. The latter was desired only in case the policy would cover a trip such as he expected to make. The soliciting agent agreed to accompany these applications with "a letter fully explaining the facts as to the proposed trip." This the agent did. Upon this accompanying part of the application the general agent acted. Clearly, this statement accompanying the applications must be regarded, as both parties then intended, as a part of the application itself. The letter and the formal application should be regarded as together constituting one document. Greenl. Ev. § 283; Lee v. Dick, 10 Pet. 482, 493, 9 L. Ed. 503; Bell v. Bruen, 1 How. 169, 183, 11 L. Ed. 89.

The question is not, therefore, one of waiver; for, if the letter of the soliciting agent constituted a part of the written application for the policy upon which the policy was issued, there has been no breach of the warranty to be waived, the application truly stating the purpose of the applicant to take the very journey in course of which he met his death. But if we assume that the communication which accompanied the two applications is not to be regarded as a part of the application upon which the policy in suit issued, it is, nevertheless, operative as notice to all of the agents and officers of the company who saw it or learned of it that the applicant did contemplate the journey and enterprise in course of which he met his death, and that he had not applied for two policies of insurance, but for the annual policy if the company should consent to issue it in view of his purposes, and for

the shorter one only if it declined the risk of his contemplated journey. If the Cincinnati agent who received this communication and issued the annual policy, with all the light which that document gave him, had been himself the insurer, there could be no possible doubt of his authority to bind himself, and to waive any and every condition of the policy made for his benefit. So, too, it is not to be doubted that an incorporated insurer may waive any condition intended for its protection, even though it has prescribed that such waiver must be in writing; for it may as well waive such a condition as any other. This power of an insurance company to waive any provision or condition solely for its own benefit was affirmed in Insurance Co. v. Wolff, 95 U. S. 326, 24 L. Ed. 387, and Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689. However much those decisions may be regarded as doubted by Northern Assur. Co. v. Grand View Bldg. Ass'n, the doubt does not extend to the question of the power of an insurance company to waive any provision or condition of the policy intended for its protection. "As to this proposition," said Justice Shiras, in the case last cited, "there was, and could have been, no disagreement among the judges, but the difference arose over the sufficiency of the evidence to show the waiver." The question we must, then, meet in this aspect of the case is one of the evidence relied upon to establish that the company issued this policy with knowledge that the statement in the formal application relied upon as a warranty had been inserted by its own agent under an agreement with the applicant that he would forward therewith a full statement as to the journey and enterprise which the applicant had in view. For the purposes of this case we shall assume that the manager at Cincinnati, who received the two applications and the soliciting agent's accompanying communication, did not and could not waive the condition of the policy in respect to any breach resulting from any misrepresentation in the application. The court found that on October 2, 1897, this managing agent issued the policy now in suit, dating it September 27, 1897. On October 9, 1897, he wrote this Shelbyville agent, to whom the policy had been sent, and by whom it had been delivered to the assured, as follows:

"I regret the ordering up of the policy of Robert P. Frierson. We have written him a policy for $5,000, dated September 29th, for five months. You can advise him that that policy is in full force and effect, and will be mailed you immediately upon receipt or return of the other policy. I tried my best to favor you in this matter, and regret my inability to do so."

This act was the act of the company, and the plain inference, in the absence of explanation, is that the company had disapproved the issuance of this policy in view of the knowledge communicated to its home office through the letter of the local agent which had accompanied the application. It is true that at another point in the finding of facts it is stated that this manager had, "about October 13, 1897," forwarded the application to the home office of defendant company at Hartford, Connecticut. The date, "about October 13th," is probably a mistake, as every inference is that the home office received the application and accompanying communication prior to the direction to cancel the policy, which undoubtedly emanated from the "home office." The company could have made plain just when the home office received

these applications, and just why the cancellation of the policy was directed. Its silence justifies the presumption that the direction to recall the policy came from the managing officers of the company, and that it was due to an unwillingness to accept the risk incident to the contemplated journey of the assured, and therefore preferred to issue to him the short policy which he had applied for as an alternative. The agent did not communicate with the assured, and withdraw the annual policy, as directed. Upon the contrary he, "in due course of business," "remitted the full premium for twelve months to the manager at Cincinnati, who received it without objection, and remitted it to the chief officer at Hartford, where it was received and retained." "No further effort was made to cancel the policy." The proposal submitted by the assured to accept an annual policy, provided it would cover his contemplated journey, was accepted by the company's agent, and the act of this agent, when submitted to the company, was ratified by the receipt and retention of the premium with full knowledge of all the facts.

In Northern Assur. Co. v. Grand View Bldg. Ass'n, cited above, it is said to be sustained by all the authorities "that, when waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that, when the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to take the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent." The receipt and retention of the premium at the home office of the company, after determining to recall the policy because unwilling to take the risk incident to the journey and business contemplated by the assured, was a distinct election to ratify the contract and continue the policy. Insurance Co. v. Norton, 96 U. S. 234, 24 L. Ed. 689; Insurance Co. v. Wolff, 95 U. S. 326, 24 L. Ed. 387; Madden v. Brown, 97 Mass. 148; Kirkpatrick v. Insurance Co., 11 App. Cas. 177; North Berwick Co. v. New England F. & M. Ins. Co., 52 Me. 336; Miner v. Insurance Co., 27 Wis. 693, 9 Am. Rep. 479. In Madden v. Brown, cited above, Judge Gray, speaking for the court, said:

"Although an agent of the company had no authority to bind them by receiving payment of a premium note after it was due, the company might receive such payment at any time. If they received the amount of the note from their agent after it was due, they were bound to inform themselves of the time when it had been paid to him; and by receiving it from him without inquiry they waived the right to insist on the delay in the payment as a ground of forfeiture of the policy."

This waiver, being the act of those officials constituting the "home office," was the act of the corporation. The fact that the premium was received and retained with knowledge of the facts constitutes in itself a waiver of the right to rely upon the known breach of the condition of the policy. It was likewise a waiver of the stipulation of the policy that "no waiver will be recognized unless in writing, signed by either the president, vice president, secretary, or assistant secretary." It was just as competent for the company to dispense with the observance of this condition, being one made for its own benefit, as any other. Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills,

54 U. S. A. 291, 27 C. C. A. 212, 82 Fed. 508; Insurance Co. v. McCrea, 8 Lea, 513, 41 Am. Rep. 647; Pechner v. Insurance Co., 65 N. Y. 195; Insurance Co. v. Earle, 33 Mich. 143; Dilleber v. Insurance Co., 76 N. Y. 567. In Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills, cited above, this court said:

"Neither is it competent for the parties to disqualify themselves from ability to agree by parol to any contract which, under the law, need not be in writing; and an agreement in the terms of a policy that no change or alteration thereof shall be valid unless in writing, indorsed thereon, may itself be changed by parol."

In Northern Assur. Co. v. Grand View Building Ass'n, there is nothing in conflict with this. The court there upheld a provision in the policy which required consent to other insurance to be indorsed thereon in writing by the agent issuing the policy. The waiver then relied on was waiver resulting from the mere knowledge of the agent that such other insurance existed at the time he issued the policy.

2. What we have said applies as well to the defense that the assured lost his life through "adventures into wild, uninhabited, or uncivilized regions." The assured lost his life by a storm while a passenger on board a steam vessel called the Jessie, belonging to the Columbia Navigation Company, while crossing Kuskokwim Bay, a bay on the coast of Alaska, for the purpose of ascending the Kuskokwim river, one of the rivers of Alaska. He, with others, had been carried from Seattle as passengers upon an ocean steamer to a point off Kuskokwim Bay, where they took the Jessie for the purpose of continuing a journey to the gold fields of Alaska. The journey was not completed which the company knew he had in contemplation. It cannot be said that he was, at the time of his death, engaged in adventures in a wild, uncivilized region. He was crossing a well-known arm of the sea, and had not reached the river which it was proposed to ascend. His adventure in a wild and uncivilized region—if that may be regarded as a proper characterization of the mining regions of Alaska—had not begun.

3. The fourth condition of the policy was in these words:

"If the insured is injured in any occupation or exposure classed by this company higher than the premium paid for this policy covers, the sum insured and weekly indemnity shall be only such amounts as said premium will purchase at the rate fixed for such increased hazard."

The contention is that the insured had changed his occupation from that of a lawyer, as stated in the application, to that of a "prospector miner." But there are no facts upon which to base this defense. If the assured had lived to begin his work of prospecting for mines, there might be some room for the contention now made. That he intended to engage in "prospect mining" is not enough. To bring this provision of the policy into effect, the company must show that he was actually engaged in an occupation, at the time he sustained his injury, "classed higher than the premium paid for the policy covers." This the company has not done, for it is clear that he lost his life in a storm while a passenger on a steamer crossing the Kuskokwim Bay for the purpose of going up the Kuskokwim river, and thus into the interior of Alaska. The journey which he contemplated when he applied for insurance, and about which he informed the company through the com-

munication accompanying his application as a part thereof, had not been completed when he met his death. This defense was properly held to be unavailing by the court below.

4. It is next assigned as error that the court allowed a recovery for double the sum named as the principal sum insured. Clause "f" of the policy is in these words:

"If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the sum above specified."

There is no specific finding that the assured was a passenger at the time of his death, but the court adopted as its finding the facts testified to by Richard Chilcott, president of the Columbia Navigation Company. There was no specific finding that the assured was riding as a passenger in a passenger conveyance at the time of his death. The court, however, did find certain facts which tended to show what his relation was to the owner and navigator of the steam vessel upon which he was traveling. These facts have been elsewhere set out in full. Upon this finding of facts the court below held that the assured was a passenger, within the meaning of the double indemnity clause of the policy. While some of the persons composing the party, of whom Frierson was a member, did constitute the crew employed and paid by the navigation company to navigate the steamer, Frierson was not one so paid. He owed no duty to the navigation company in respect to the navigation of the Jessie. The agreement of the navigation company, so far as it involved the transportation of Frierson from Seattle up the Kuskokwim river, created the relation of carrier and passenger. There were other parts of the contract, by which the Jessie was to be used as a base of supplies up the river, which do not affect the carrier agreement one way or the other. The Jessie at all times continued to be under the control and management of the navigation company. The Frierson party had no exclusive rights, for she was under no charter, and she had on board a passenger who had paid a separate fare, not being a member of the Frierson party, nor within the terms of the contract under which he was being carried. The Jessie was a passenger conveyance, whose motive power was steam. Frierson was not at the time a servant, or in the employment of the owners or navigators of the Jessie. He was riding on the boat under a contract based upon a good consideration, by which the Columbia Navigation Company undertook to carry him up the Kuskokwim river. These facts constitute him a passenger. Wood, Ry. Law, § 298. The fact that the Jessie was to remain up the river, and be used as a base of supplies for exploring or mining parties, does not affect the carrier agreement which was being executed when the Jessie was wrecked. That for the service in carrying his party up the river and for the subsequent use of the boat as a warehouse or place of shelter the navigation company was to receive a definite share in the results of the expedition does not change the carrier relationship which existed while the journey was in progress. There was no partnership or charter relation in the ownership or navigation of the steamer. The counsel for defendant in error has cited and relied upon a class of cases holding that employés of railroad companies, while being carried to and from

their work, are not passengers, but employés. The cases relied on are cited and approved by this court in Railroad Co. v. Stuber, 48 C. C. A. 149, 108 Fed. 934. They have no possible application to the case at bar, for the reason that the assured was not an employé of the navigation company. That the Jessie was not "a public conveyance in the usual lines of travel as a common carrier of passengers" may be true. But, if the insurance company intended to limit the benefits of its contract to passengers who travel "in conveyances operated in the usual lines of travel as common carriers," it should have so stipulated. This it did not do.

The judgment must be affirmed.

ALASKA UNITED GOLD MIN. CO. v. MUSET.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1902.)

No. 710.

1. WRIT OF ERROR—FILING BEFORE ASSIGNMENTS OF ERROR—APPLICATION TO CORRECT—MOTION TO DISMISS.

   Where a writ of error is issued and filed before the assignments of error are filed, in violation of rule 11 of the circuit court of appeals, and at the time of filing the latter, and before the time for suing out a writ of error has expired, plaintiff in error applies to the court for leave to withdraw the writ and correct the proceeding by presenting a new petition, writ, and bond, and such application is opposed by the defendant in error, his motion thereafter made to dismiss the writ because of such irregularity should be denied.

2. MINES AND MINING—PRINCIPAL AND AGENT—FOREMAN—VICE PRINCIPAL—NEGLIGENCE.

   Where a corporation owning two mining plants has a general superintendent, with general oversight over both plants, and a foreman of each mine, who employs and discharges the men, and directs and controls the entire operations of his mine and of the various gangs of men there employed, such foreman is a vice principal, for whose acts and negligence in the conduct of such mine the owner is responsible.

3. SAME—SHAFT—BLASTING—MEANS OF ESCAPE.

   Plaintiff's intestate and another were employed in defendant's mine at the bottom of a shaft. There was an elevator in the shaft, and when about to blast they gave a certain signal to the engineer, who signified that he understood, by raising the bucket a few feet and then lowering it. They then ignited the fuse, and signaled the engineer to hoist, and were raised a short distance, and then lowered, and the engineer shouted down the shaft that the compressed air by which the elevator was operated was cut off. Deceased's companion climbed up the elevator rope and escaped, but deceased could not do so, and was killed by the explosion. The air was cut off by the foreman, who had full charge of the operation of the mine. There had been an iron ladder in the shaft, which was removed some weeks before the accident to be replaced by a new chain ladder, which was on the ground, and was to be placed in the shaft that day. *Held*, that defendant was negligent in failing to provide adequate means of escape for the men engaged in the blasting.

4. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTIONS FOR JURY.

   The question of contributory negligence of deceased and of his fellow workmen in not having the chain ladder in place before the accident was properly left to the jury, there being evidence that the mine foreman had directed the foreman of the gang in which deceased worked to

place such ladder in the shaft at noon, the accident occurring in the forenoon, and also that deceased and the other men did not know the ladder had been furnished ready to place in the shaft.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska.

Henry Muset, the administrator of the estate of Edward Hegman, deceased, brought an action against the plaintiff in error, the Alaska, United Gold Mining Company, to recover damages for the death of the decedent, which it was alleged was caused by the negligence of the plaintiff in error. At and prior to the date of his death, the deceased was an employé of the plaintiff in error, working in the Seven Hundred mine, under the direction of the foreman of the mine. The evidence was that Muset and the deceased were working together in a shaft, and that when they were ready to set off a blast at the bottom of the shaft Muset went up the shaft by the elevator to obtain a hot iron to light the fuses. Having secured the hot iron, he went down the shaft, and then rang five bells as a signal to the engineer in charge of the hoist to indicate they were about to blast. In response thereto the engineer lifted the bucket about three or four feet from the bottom of the shaft, and then dropped it down, which was his signal that he understood, and stood ready to hoist them up. When the men had lighted the fuses they rang one bell as a signal to hoist, and were raised a short distance, and let down again, when the engineer called down the shaft that the compressed air, which was the motive power of the hoist, was cut off. Muset climbed the cable, which was a quarter inch steel cable, and escaped. The deceased, it seems, was unable to do so, and was killed by the blast. It was shown that the property of the plaintiff in error was situated on Douglas Island, Alaska. That it consisted of two mines and two stamp mills, one for each mine, the mines being known as the "Ready Bullion" and the "Seven Hundred," the latter of which was situate a distance from the mill, to which the ore was carried by a tramway. C. A. Weck was the general superintendent of the plaintiff in error. Under him were four foremen, one for each mine, and one for each stamp mill. H. B. Pope was the foreman of the Seven Hundred mine. According to the testimony, it was he who personally cut off the air supply which deprived the engineer of the power of lifting the hoist. It was shown, also, that he had personal notice that the blast was about to be set off, and that he directed Muset to hurry down the shaft with the hot iron. Concerning his relation to the plaintiff in error and his powers and duties as foreman, the testimony was that in the operation of the Seven Hundred mine there were several bosses of the men engaged in the different branches of the work, such as the shop boss, the shift boss, and the pit boss, and that Pope was the general foreman or supervisor of all; that he was the man who directed the men and told them what to do, hired and discharged all the men employed in and about the mine, and gave them their time checks, upon which they were paid by the general superintendent. Muset testified: "No man showed me anything, only Pope, or gave me any orders." Another witness testified that the mine was under Pope's supervision; that his duties were to advise the men, and show them what to do and where to work; and that he had charge of the blacksmith shop and hoist, the men working in the elevator, and the miners and the direction of them, and of the entire mine. Another witness testified that the men employed in the various departments of the Seven Hundred mine, such as blacksmiths, engineers, miners, and drill men, were under Pope's immediate supervision. Evidence was introduced by the plaintiff in error to show that it had provided a way of escape from the shaft by means of an iron ladder, and that its absence from the shaft at the time when the accident occurred was owing to the negligence of the deceased or that of his fellow workmen in that shaft. The testimony of Pope was not taken on the trial, but Pianfetti, who was the boss of the particular shift in which the deceased was working when the accident occurred, testified that he and the others had received instructions to put in the shaft a new chain ladder on the morning of October 9th, the date of the accident, and that on talking the matter over

with the deceased and Muset they concluded not to put in the ladder until after the blast went off, and that at the time of the accident the chain ladder was lying in the blacksmith shop ready for their use, and that at 8 o'clock that morning Pope had told Pianfetti that the chain ladder was ready to be put in the shaft. This conversation was denied by Muset. Another witness testified that he heard the conversation between Pope and Pianfetti, and that the former instructed the latter to put the ladder down at noon. The accident occurred a little before noon. The jury returned a verdict for the defendant in error for the sum of $10,000. On motion for a new trial, the court required that $7,000 be remitted, and thereupon rendered judgment for $3,000.

Malony & Cobb and John Flournoy, for plaintiff in error.

Lorenzo S. B. Sawyer and Crews & Hellenthal, 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.

A motion is made to dismiss the writ of error. The principal ground of the motion, involving the only question which we find it necessary to discuss, is that the writ of error was issued and filed 20 days before the assignments of error were filed, whereas rule 11 of this court provides that no writ of error shall be allowed until the assignment of errors shall have been filed. The record shows, however, that on the day when the assignments of error were filed, the plaintiff in error applied to the court for leave to withdraw its writ of error, and to correct the proceedings by presenting a new petition, writ, and bond at the same time with the assignments of error. The application was opposed by counsel for the defendant in error. In view of that fact and the failure of the court to allow the application, we think the present motion should be denied. The substantial result secured by rule 11 is that the assignment of error shall be on file at the time when the writ of error is taken out and the citation issued. The defendant in error has no ground of complaint if he had notice of the filing of these papers, and in open court opposed the application for leave to file a new writ. To dismiss the writ of error would have the effect only of imposing upon the plaintiff in error the additional burden of bringing up a new transcript on a new writ of error, the time for suing out the same having not yet expired.

The assignments of error present two principal questions—First, was Pope, the foreman in charge of the mine, a fellow servant with the deceased? Second, if he was not a fellow servant, and the plaintiff in error was answerable for his negligence, did the plaintiff in error supply an adequate means of protecting the deceased against danger from blasts by providing a means of escape from the shaft other than the hoist?

Upon a consideration of the whole evidence concerning the duties of the foreman of the Seven Hundred mine, and his relation to the plaintiff in error, we are of the opinion that the trial court committed no error in ruling that he was the representative of the plaintiff in error. The plaintiff in error was a corporation owning large mining

and milling properties on Douglas Island, Alaska, all of which were placed under the charge of a single superintendent. Its properties consisted of two distinct mines, and a separate stamp mill for each. The men employed in each mine were engaged in different classes of work. They consisted of blacksmiths, engineers, miners, and drill men, with different shifts for each branch of the work. Pope, the foreman, had general supervision of the Seven Hundred mine, and of all the men employed therein or connected therewith. There was evidence that he hired and discharged the men and directed their work. He was, we think, the general superintendent in charge of that branch of the business of the plaintiff in error. Although he was called a foreman, his duties were evidently more than those of an ordinary foreman. It is not shown that Weck, the general superintendent, had any direct supervision over the men, or ever inspected the premises in which they worked, or was present at any time to see personally that they were supplied with proper appliances and a safe place wherein to work, or that it was his duty so to do. One of the witnesses, who was a workman at the Seven Hundred mine, testified: "I have no idea who was the superintendent of the mine. No man showed me anything, only Pope, or gave me any orders. They told me Mr. Weck was superintendent, but I didn't know it." We think, within the principle of the case of Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, the representative of the defendant corporation, so far as the question of the duty which the corporation owed to the employés who worked in and about the Seven Hundred mine was concerned, was Pope, and not Weck, notwithstanding the fact that Weck was the superior officer of Pope, and was the disbursing officer who had the power to approve or disapprove the acts of the foreman in hiring and discharging the men, and through whom the corporation paid all the employés of its various properties upon time checks furnished by the foreman of each. The plaintiff in error was a corporation whose home office was at a distance from the place where its properties were situated. Being a corporation, it could act only by means of officers and agents. It placed all of its properties and business on Douglas Island in charge of a general superintendent. It placed its four distinct and separate departments of business each under the charge of a foreman or superintendent, who was subject to the general superintendent, but who was given substantially the entire control of that department. The general superintendent had no personal relation to either of the four departments. He had no office or place of business at either of the mines or the mills. It is not shown that he was ever present at the Seven Hundred mine, or inspected it, or had personal knowledge of its operation or its appliances. The only officer or agent of the corporation who had such knowledge of that mine was Pope. He it was who stood in the place of the master to the men. His duty it was to see that the men were supplied with the necessary appliances for their safety. Before he cut off the supply of compressed air which operated the hoist in the shaft, on the morning of the accident, it was his duty to see that the men therein working were furnished other safe means of escape therefrom. In relation to that duty, he stood in the place of the corpora-

tion, and for his neglect to discharge it the corporation is liable. He was not a mere foreman of a gang of men, as was the case of the negligent foreman in Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, and Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390. He was the representative of the corporation placed in charge of its servants in a separate department of its business, and as such he was the vice principal, within the definition furnished in the Baugh Case. The plaintiff in error could not meet the full measure of its duty as a master to its servants by placing its various properties under the charge of a general superintendent, who was not a superintendent in fact as to any particular branch of its service, and say that, because the general superintendent who had no knowledge of the want of proper appliances or defects in machinery or apparatus was not negligent, the master shall not be held for damages for the negligence in those respects of the foreman, who had the particular supervision and control over its property and its servants. The plaintiff in error owed a positive duty to its employés,—the duty of affording them a safe place to work, and safe tools to work with. That duty was necessarily delegated to a representative,—an individual who, for that purpose, should stand in the corporation's place. We have no hesitation in saying that that duty as to the men employed in the Seven Hundred mine was delegated to the foreman, Pope.

The question of the contributory negligence of the deceased was properly left to the jury. Some of the testimony tended to show that the plaintiff in error, through its foreman, Pope, had made ample provision for the safety of the workmen in the shaft by providing a ladder whereby they might escape after blasts were lighted, and that the ladder would have been available for the deceased but for the negligence of himself or that of his fellow workmen in the shaft. There was other evidence, however, to the effect that the men who worked in the shaft had been working there and setting off blasts for three weeks without a ladder, and that when on the morning of October 9th, the day of the accident, a ladder was ready in the blacksmith shop, the foreman instructed Pianfetti, one of the fellow workmen with the deceased, to place it in the shaft that day at noon. The accident occurred a little before noon. There was other evidence that the workmen in the shaft had on several occasions mentioned the absence of the ladder in that shaft, and that none of them knew or heard that the ladder was ready for them until after the accident. It was for the jury, under these circumstances, to say whether or not the deceased was guilty of contributory negligence, and whether the negligence of his fellow workman was the cause of his death, and there was no error in submitting that question to the jury, as the court did, with proper instructions.

The judgment of the district court is affirmed.

GAZZAM et al. v. SIMPSON et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

1. STATUTE OF FRAUDS—AVOIDING CONTRACT—RECOVERY OF BENEFITS.
Defendants, stockholders in a corporation, receive no benefits under a contract by which plaintiffs, also stockholders therein, advance money to the corporation, but not to relieve defendants from pecuniary liability, and defendants agreed to vote their stock so as to keep plaintiffs in control; so that defendants, protected by the statute of frauds from liability for breach of the contract, are not liable for such money.

2. ACTION ON CONTRACT—RECOVERY ON IMPLIED ASSUMPSIT.
Plaintiff, in an action to recover on a contract, cannot recover on an implied assumpsit, defendant having set up the statute of frauds as against the contract.

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

Before WALLACE, Circuit Judge, and COXE and HAZEL, District Judges.

WALLACE, Circuit Judge. The plaintiffs in error were the plaintiffs in the court below, and challenge the ruling of the trial judge in directing a verdict for the defendants. That ruling proceeded upon the ground that the action was one to recover damages for the breach of the oral contract between the parties made in January, 1890, and as the contract was not to be performed within a year it was void by the statute of frauds. The plaintiffs in error concede that the contract was void, but insist that they were entitled to recover of the defendants the sum of $9,500 advanced to the Chautauqua Lake Railroad Company pursuant to the contract. They invoke the well-settled rule that the statute of frauds cannot be interposed as a shield by a party who has refused to perform a contract to enable him to retain without consideration a benefit which he has received under it.

The question whether the defendants received a benefit from the advances made to the railroad company is to be ascertained by the averments of the complaint, as no evidence was offered upon the trial. It appears by the complaint that June 20, 1899, the parties entered into an agreement whereby the plaintiffs were to make advances to the Chautauqua Lake Railroad Company in a sum not exceeding $12,000, and were to be given an option for one year to purchase of the defendants certain shares of the stock of the corporation owned by the defendants and certain of its bonds and obligations. It also appears that the stock controlled by the plaintiffs, together with that owned and controlled by the defendants, constituted a majority of the whole stock of the corporation. The complaint avers that by the agreement of January, 1890, the prior agreement was extended for the term of one year, and the defendants promised during the extended time to keep the plaintiffs in control of the corporation by voting their stock according to the direction of the plaintiffs, and to protect the plaintiffs from the appointment of a receiver of the corporation. It avers that in consideration of this agreement, and at the instance and request of the defendants, the plaintiffs loaned $9,500 to the Chautauqua Lake

Railroad Company, and that the loan was made by the plaintiffs "for the benefit of the defendants as owners of stock and bonds in the said railroad company." The complaint further alleges that by reason of the breach of their promise by the defendants to vote their stock as directed by the plaintiffs, and to prevent a receivership, the plaintiffs "absolutely lost the sum of $9,500."

It is apparent by these averments that the $9,500 was not advanced to the railroad company to relieve the defendants from any pecuniary liability, and that, if they were benefited by the advance at all, it was only in the sense that all the stockholders and creditors of a corporation may be remotely benefited by some advantageous transaction of the corporation. It is quite impossible to define or ascertain the pecuniary value to any stockholder or creditor accruing from a loan received by the corporation. The facts fail to disclose that the defendants received in any manner or to any extent the fruits of the performance of the contract by the plaintiffs. The advance was not made in the contemplation that it would be reimbursed by the defendants, and the circumstances are inconsistent with any implied promise by them to pay it in the event of the failure of the company to do so. This being so, the plaintiffs were not entitled to recover unless the law permits a party to recover his damages who has sustained loss by the refusal of the other party to perform a void contract. Such a recovery would amount to a rehabilitation and enforcement of the contract. Performance, either complete or partial, by one party of a contract which is void by statute cannot give him a right of action upon the contract, although it may give him one upon an implied assumpsit. If he has conveyed land, delivered goods, paid money, or rendered services under the contract, and the other party then repudiates it, he may treat the contract as a nullity, and recover what in justice the other party ought to pay for the benefit he has received without any consideration. The rule is expressed in Keener, Quasi Cont. p. 279, as follows:

"It is not, however, sufficient to enable the plaintiff to recover for him to prove that he has suffered damage in consequence of the defendant's breach of the contract. He must show that the defendant will, if he is not compelled to pay the plaintiff for that which he has received from the plaintiff, unjustly enrich himself at the plaintiff's expense."

In Browne, St. Frauds (5th Ed.) § 118a, it is said:

"The rule that where a party pays money or performs services for another upon a contract void under the statute of frauds he may recover the money upon account for money paid, or recover for the services upon the quantum meruit, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered; it does not apply to cases of money paid by the plaintiff to a third party in execution of a verbal contract between the plaintiff and the defendant, such as by the statute of frauds must be in writing."

In Dowling v. McKenney, 124 Mass. 478, the plaintiff and defendant entered into an oral agreement by which he was to complete a monument for her, and she was to accept it in part payment of the price of a lot of land. He completed the monument, and thereafter she refused to accept it or convey the land. The court held that he was not

entitled to recover for his labor in completing the monument. In its opinion it used the following language:

"It is true that when a person pays money, or renders a service, or makes a conveyance, under an agreement within the prohibition of the statute of frauds, and the other party refuses to perform it, an action will lie to recover the money so paid, or the value of the service rendered, or the property conveyed, but it is on the ground that a party who has received a benefit under an agreement which has been repudiated shall be held to pay upon an implied assumpsit for that which he has received. In the case at bar the defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss because he is unable to enforce his contract, and no recovery can be had for the labor on the monument."

In the present case not only have the defendants received no pecuniary benefit from the loan to the corporation, but the plaintiffs are precluded from a recovery, as upon an implied promise, by that provision of the statute of frauds by which no action can be brought to recover upon a promise, not in writing, to answer for the debt of a third person. The law does not raise an implied promise from an invalid express promise.

The ruling of the trial judge was correct, not only because upon the facts the plaintiffs were not entitled to recover the money loaned upon the theory of an implied assumpsit, but also because the complaint did not proceed upon that theory, but went upon the ground of a breach of the agreement. Like the case of Dunphy v. Ryan, 116 U. S. 491, 6 Sup. Ct. 486, 29 L. Ed. 703, the suit was based upon, and its purpose was to enforce, the void contract, and, as was there pointed out, "in such cases the suit should be brought upon the implied promise." So, in Reed v. McConnell, 133 N. Y., 425, 31 N. E. 22, the court held that a cause of action founded on a contract to recover damages for its breach, and a cause of action to recover the value of property received thereon by the party who afterwards repudiates it as void by the statute of frauds, are fundamentally different, and the fact that the defendant set up the statute as a defense to the cause of error pleaded did not authorize a recovery upon the implied assumpsit. The court said: "The claim that there was no valid contract, and that, therefore, there is a right of action for the value of property received under it, is totally inconsistent with the claim to enforce the contract and recover upon it."

The judgment is affirmed.

MEXICAN CENT. RY. CO. v. KNOX.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,071.

MASTER AND SERVANT—LAWS OF MEXICO—FELLOW SERVANTS IN RAILROAD SERVICE.

Under the laws of the republic of Mexico, an employé of a railroad company does not assume the risk of injury through the negligence of a co-employé, but the company is liable for such an injury in the absence of contributory negligence.

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

Mr. Davis, for plaintiff in error.

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

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. An examination of the record, in connection with the very able and elaborate briefs of counsel, satisfies us that the pleadings and evidence in the case warranted the trial judge in charging the jury to the effect that, under the laws in force in the republic of Mexico at the time the defendant in error received his injuries, railway corporations were liable for all faults or accidents occurring through tardiness, negligence, imprudence, or want of capacity of their employés, and this although the injury resulting was to another employé of the company, himself without fault; or, in other words, in the Republic of Mexico the employé of a railway corporation does not assume, as one of the risks of his employment, the negligence of a co-employé.

This disposes of the first assignment of error. The remaining assignments of error complain in different ways of the failure of the trial court, in view of plaintiff's contributory negligence, to instruct the jury to find a verdict for the defendant; and, in regard to these assignments, all that it is necessary to say is that, while the evidence is neither very complicated nor conflicting, yet it is not clear that from it all reasonable men would draw the same conclusions in respect to whether the plaintiff below, through his own fault and negligence, contributed to his own injury.

The case seems to have been submitted on a very fair and impartial charge, to which no objection is made, and in which the jury were distinctly and specifically instructed that if they "found from the testimony that the plaintiff himself was guilty of negligence in the respects mentioned by defendant's counsel (which were recited), or in any other respect, and this negligence or want of due and proper care for himself contributed to his injuries, then he could not recover."

The judgment of the circuit court is affirmed.

MORRIS v. WILSON, SONS & CO., Limited.

(Circuit Court of Appeals, Second Circuit. March 15, 1902.)

No. 161.

1. EVIDENCE—COMPETENCY.

There is no competent evidence of the weight of cattle, J. having weighed them, and called off their weight to W., who entered them on slips, and J. having then copied into a memorandum book the total of the figures, and the original slips not having been given in evidence, nor their absence accounted for, and W. not having been called to prove the accuracy of his original entries, but J. alone having testified.

2. ASSUMPTION OF CONTRACT.

A contract of a steamship company to carry cattle on certain of its steamers, with right to substitute another steamer for any of those named, is assumed by a corporation which purchases the property and assets of such company, and thereafter, through its agents, notifies the shippers of substitution of another vessel for one named in the contract.

8. SHIPPING—RIGHT TO DAMAGES.
One who contracts to furnish a certain lot of cattle to be carried by a ship, agreeing to pay for any detention of the ship while waiting for them, may, without proof that the cattle are his, there being no stipulation that they should be, recover on the stipulation in the contract for payment by carrier of expense of feed, in case of delay in sailing.

4. SAME—LIQUIDATED DAMAGES.
Provision in contract of carriage of cattle that "steamer guaranties to sail on day named, * * * or pay expenses of keep of animals at rate of fifty cents per head per day in full," is a liquidation of damages, for expense of feeding cattle, in case of delay in sailing.

Appeal from the District Court of the United States for the Southern District of New York.

The suit was instituted in 1893, in personam, against the owner, an English corporation, of the steamer Sorrento, to recover damages for breach of contract to carry live cattle to England. The breach consisted in seven days' detention of said steamer beyond the agreed date of sailing.

David Thomson, for appellant.
Alfred Opdyke, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The contract sued upon was made December 22, 1890, between Edward Morris, of Chicago, and "Sanderson & Son, agents of the steamships of the Wilson Line." It provided for the shipment of live cattle from New York to London on various specified steamers of that line, including about 250 head per Lepanto. Subsequently the steamship Sorrento was substituted for the Lepanto by oral arrangement, it being provided in the contract that any equally good Wilson Line steamship might be substituted for any ship named. The contract covered the period of January, February, and March, 1891. At the time of making the contract the Lepanto of the Wilson Line was owned by a copartnership known as Thomas Wilson Sons & Co. The defendant was not incorporated until January 26, 1891, and the Sorrento did not become the property of defendant until March 3, 1891. After such transfer Sanderson & Son acted as agents for the firm and for the corporation in the same manner as they had previously acted for the firm. On March 16, 1891, Sanderson & Son notified Barrie, general agent of the libelant, that the Sorrento would sail March 22d, and take 300 head. On March 21, 1891, Barrie notified Sanderson & Son that the 300 cattle were at this port ready for delivery to the steamer. They were in fact there at that time and ready for delivery. On March 19, 1891, after the cattle had started from Chicago, a flaw was discovered in the thrust shaft of the Sorrento, the result of a latent defect. Steps were at once taken to repair it, but such repair delayed the vessel until March 29th. The contract contained the following clauses:

"Steamer to give five running days' notice of her intended departure, and twelve hours' notice of the hour the cattle must be delivered to her, but such notices to be given or received are subject to become inoperative in case of strikes or stoppage of labor. Steamer guaranties to sail on day named in notice, as soon after shipment of all the animals as tide and weather permit, or pay expenses of keep of animals at rate of fifty cents per

head per day in full. * * * Shippers guaranty to deliver animals by expiry of notice, provided vessel is ready for them, or pay for detention of steamer at the rate £50 per day. * * * The line form of live stock bill of lading to be used for cattle shipped under this contract, and its conditions to govern any questions not provided herein."

The district court held the defendant liable for expenses of keep of animals for seven days, at 50 cents per head per day, amounting to $1,050 and interest. It also included in the decree $417 and interest for loss of weight.

We find in the record no competent evidence of the weight of the animals. They were weighed by one John Haggerty. He called off the weights to his brother William, who entered them on slips. Subsequently the figures on the slips were added up, and the slips sent to Nelson Morris. Before sending them, John Haggerty, for his own accommodation, copied the totals into a memorandum book of his own. John was present, and testified to the method of weighing and to these copies of totals in his memorandum book, but the original slips were not presented, nor their absence accounted for, nor was William Haggerty called to prove the accuracy of his original entries on the slips. There was no competent evidence of the weight, and to that extent the decree cannot be sustained.

It is contended by respondent (appellant) that the corporation is not liable upon the contract, inasmuch as the contract was made before respondent was incorporated, and before it bought the Sorrento. This contention is unsound. The Sorrento was one of the Wilson Line; Sanderson & Son were agents of that line; they were agents also of the owners of the Sorrento; the contract which they made as agents of such owners bound the ship, and remained an obligation upon her when she passed to her new owners. Not only the vessels named, but such other vessels of the line as the agents of the line and owners might elect to substitute, were within the terms of the contract. The sailing notice substituting the Sorrento for the Lepanto was given, as admitted by the answer, by Sanderson & Son as agents of the steamship, then owned by respondent. In the absence of any proof of charter or special ownership it must be held that the notice of the agents of the steamship was the notice of her owners. Such a notice brought her within the terms of the contract as fully as if she had been named with the Lepanto. For delay in shipment she would be liable in rem, and her owners in personam. The suggestion in appellant's brief that there is no evidence that appellant assumed the contract or had any intention so to do begs the whole question. When the respondent corporation acquired the property and assets of the old firm, including the steamships of the Wilson Line, and thereafter itself ran the line, and appointed Sanderson & Son its agents and the agents of its steamships, the act of the agents in substituting the Sorrento in place of another ship of the same line, owned by the same corporation, was in fact an assumption of the contract by the respondent, and no evidence of intention was necessary.

We find no force in the contention that libelant was not entitled to recover because it was not shown that he owned the cattle. He had contracted to provide a certain lot of cattle to be carried by the ship

(which would thus earn freight), and to pay, for any detention of the steamer while waiting for them, £50 per day. It was not stipulated that the cattle should be his own. He might get them where he pleased, and under whatever arrangements with the owner he might make. He did get the cattle; had them at the proper place, at the proper time, and tendered them. Because the ship was not ready to take them, they had to be fed at the place of detention for seven additional days. Libelant was the one in control of the cattle. Whether he owned them, or acted for some undisclosed principal, he was the one to pay the expenses of their keep, and whatever arrangements he might have had with others for a division of that loss is no concern of respondent. It caused this loss by its delay, and an award of the amount against it in this decree in favor of the libelant, with whom the contract was made, and payment of the same, will relieve it from any possible harassment by any other claimant. The language of the paragraph, "steamer guaranties to sail on day named, * * * or pay expenses of keep of animals at rate of fifty cents per head per day in full," clearly imports a liquidation of damages; and it being proved, as it was, that the animals were kept and fed during the seven days, it was not necessary to give evidence as to the details of the cost,—the liquidated amount stipulated in the contract became the measure of damages.

The decree is modified by striking out the item of $471 and interest for loss of weight, and as modified is affirmed, with interest and costs of appeal.

COLD BLAST TRANSP. CO. v. KANSAS CITY BOLT & NUT CO.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,585.

1. CONTRACTS FOR FUTURE DELIVERY—VOID IF QUANTITY INDETERMINABLE.
   A contract for the future delivery of personal property is void for want of consideration and mutuality if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties, but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty.

2. SAME—VALID IF MUTUAL AND QUANTITY SPECIFIED.
   An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles required by his business during this time from the party who makes the offer.

3. SAME—VOID FOR WANT OF MUTUALITY IF QUANTITY IS NOT SPECIFIED.
   But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any.

4. VOID CONTRACTS FOR FUTURE DELIVERY VALID FOR GOODS ACTUALLY DELIVERED, BUT VOID AS TO THOSE NOT DELIVERED.
   Accepted orders for goods under such void contracts constitute sales of the goods thus ordered, on the terms of the contracts; but they do

not validate the agreements as to articles which the one refuses to purchase or the other refuses to sell or deliver under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder.

5. CONTRACTS—INTENTION OF PARTIES CANNOT PREVAIL OVER TERMS OF.
The intention of parties cannot be imported into a contract where its terms are plain and unambiguous, and they do not express it.

6. VERIFIED ACCOUNT PREVAILS OVER UNVERIFIED ANSWER.
A verified account must be taken as true, against a denial and an offset pleaded in an unverified answer under Gen. St. Kan. 1897, c. 95, § 108.

(Syllabus by the Court.)

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

This writ of error challenges a judgment on the pleadings in favor of the defendant in error, who was the plaintiff in the court below. For convenience, the plaintiff in error will be called the "defendant," and the defendant in error the "plaintiff," in this statement, and in the opinion which follows it. The plaintiff's petition stated a cause of action upon a verified account for $5,573.43. The defendant in its answer denied the averments of the petition, and pleaded a counterclaim for $5,341.94 damages for the failure of the plaintiff to deliver to the defendant after June 1, 1899, certain manufactured articles which it ordered and needed, and which the defendant alleged that the plaintiff was bound to deliver under an alleged written contract, which it averred was made and broken in this way: On October 27, 1898, the plaintiff sent to the defendant this letter:

"Kansas City, Mo., Oct. 27, '98.

"C. S. Ullman, Esq., Purchasing Agent Cold Blast Transportation Co., S. & S. Packing Co.—Dear Sir: We offer to deliver at your works, during six months from November 1st, 1898, the following materials at the prices stated:

Bar iron, $1.20 flat delivered by car, $1.25 by wagon.
Soft steel bars, $1.25 car load, 1.30 by wagon.
Machine bolts, 80 and 10 % discount.
U. S. Std. sq. nuts, $6.50 off.
" " hex. " 7.40 off.
70 % off extras for tapping.

—and will make in part payment No. 1 wrought scrap at $8.50 net ton, or arch bars and transoms at $10.50 net ton, or wrought iron car axles at $12.50 net ton, delivered your works; the quantity of scrap to be taken not to exceed the weight of materials sold to you.

"Yours truly,
R. C. Howes, Secy.

"With option of renewal for 6 months from June 1st, 1899.
"The K. C. Bolt & Nut Co.,
"R. C. Howes, Sec'y."

On receipt of the proposition contained in this letter the defendant accepted it; and between November 1, 1898, and June 1, 1899, it ordered, the plaintiff delivered, and the defendant paid for, nuts, bolts, and bars of the character specified in the letter, under the terms and at the prices there stated. Before June 1, 1899, the defendant notified the plaintiff that it exercised its option to renew the contract evidenced by the letter and acceptance. Between June 1, 1899, and December 1, 1899, the defendant ordered of the plaintiff nuts, bolts, and bars of the character described in the letter, which it needed in its business, which the plaintiff refused to deliver, and which the defendant was forced to purchase of others at prices which, in the aggregate, exceeded those specified in the alleged contract between the parties by $5,341.94. In addition to the counterclaim, which has been stated, the defendant pleaded an offset of $2,727.18, founded on the alleged fact that the plaintiff had charged that amount in excess of the prices specified in the alleged contract for nuts, bolts, and bars which it had furnished to the defendant on its orders between June 1, 1899, and December 1, 1899. The

answer of the defendant was not verified. There was a reply to it. But upon this review of a judgment upon the pleadings against the defendant the averments of the reply become immaterial, because the allegations of the answer stand admitted, and those of the reply which assert new matter are denied. The only question for consideration is whether the answer stated any legal defense, counterclaim, or offset to the cause of action pleaded by the plaintiff.

N. H. Loomis, R. W. Blair, and O. L. Miller, for plaintiff in error.

W. Littlefield, D. S. Alford, and Ord Clingman, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The main question in this case is whether or not the answer states a legal counterclaim. The basis of this counterclaim is that the plaintiff failed to deliver nuts, bolts, and bars between June 1, 1899, and December 1, 1899, under the alleged renewal of the so-called contract of October 27, 1898. This supposed contract consisted of a written offer to deliver manufactured articles in unnamed quantities at certain specific prices at any time between October 27, 1898, and June 1, 1899, and the acceptance of that offer, without more. The answer contains no averment that either the plaintiff or the defendant paid any consideration or performed any act to induce the contract, except the remitting of the offer by the plaintiff, and the sending of its acceptance by the defendant. There was therefore in the inception of this alleged agreement no consideration for the promise of either of the parties to it, except the promise of the other. Neither the letter nor the acceptance names any quantity or amount of the articles specified that is to be delivered or received under it. The plaintiff does not agree to deliver, nor does the defendant contract to receive or pay for, any quantity or amount whatever of the articles named in the writings. A promise is a good consideration for a promise. But no promise constitutes such a consideration which is not obligatory upon the party promising. It must bind the promisor, so that the promisee may maintain an action for its breach, or it is without legal effect and void. A promise to furnish, deliver, or receive specified articles at certain prices, without any agreement to order or to accept any amounts or quantities of the articles, is without binding force or effect, because neither party is thereby bound to deliver or to accept any quantity or amount whatever. Such promises are void, because they lack one of the essential elements of an agreement,—certainty in the thing to be done. Contracts for the future supply during a limited time of articles which shall be required or needed or consumed by an established business, or used in the operation of certain steamships or other machinery, are no exceptions to this principle, because they fall under the rule, "Id certum est quod certum reddi potest." But an accepted promise to furnish goods, merchandise, or other property, at certain prices, during a limited time, in such quantities as the acceptor shall require or want in his business, is without consideration and void, because the acceptor is not bound thereby to require or take

any articles whatever under the supposed agreement. The line of demarkation between valid and invalid contracts here runs between the requirements of machinery, or of an established business, and the wants, desires, or requirements of the tentative vendee; and that because the former are either reasonably certain, or may be made so by evidence, while the latter are conditioned by the will of the tentative vendee alone, and are both uncertain and capable of infinite variation.

It is, however, contended that, even if this alleged contract was void in its inception, it became valid and binding upon the parties when the defendant ordered, and the plaintiff delivered and received payment for, a large quantity of the manufactured articles at the prices and in accordance with the terms of the letter of October 27, 1898. But the fatal defect in the alleged contract was that the plaintiff was not bound to deliver, nor the defendant to take and pay for, any specific quantity of the offered articles. As to all undelivered articles, that defect still inheres in the agreement. The plaintiff is not bound to deliver, nor the defendant to take and pay for, any articles that have not been delivered, because there is no specification in the alleged contract of the amount or quantity which the one is to deliver and the other to receive. The orders for these articles which have been filled by their delivery specified the amounts so delivered, and thus effected contracts for their sale. But these orders and deliveries have in no way remedied the fatal defect of the offer and acceptance regarding those articles which the defendant has ordered, and the plaintiff has refused to deliver. The defendant never agreed to order or to pay for any quantity of these undelivered articles. If it had refused to order and take them, no action could have been maintained for its failure, because no court could have determined what amount it was required to take. Nor can an action be better maintained against the plaintiff for its failure to deliver the articles which the defendant has ordered, because the offer contains no measure of the quantity which the plaintiff was to deliver, and consequently no agreement on its part to deliver any whatever. As the contract was void in its inception, and has continued to be void as to all undelivered goods, the notice of its renewal which was delivered by the defendant was futile, since the renewal of a void contract but continues its invalidity.

It is said that the intention of the parties was to make an agreement that the plaintiff should sell and deliver, and the defendant should buy, all the articles of the character specified in the offer which should be needed or required by its business between October 27, 1898, and June 1, 1899; that the purpose of the construction and interpretation of contracts is to ascertain the intention of the parties; and that this contract should be interpreted to effect this intent. The answer is that, while ambiguous terms and doubtful stipulations may be interpreted to carry out the intention of the parties when they fairly evidence it, their secret intention cannot be imported into contracts whose terms and meaning are plain and unambiguous, and do not express it. It is only the intention of the parties which the contract itself expresses that the courts may enforce. In the case at bar the offer of the plaintiff is nothing but a price list. The acceptance

of the defendant contains no agreement to buy any of the articles specified in the list, and there is no ambiguity in the terms, or doubt in the meaning, of the writings in issue. To give effect to the intention of the parties which the defendant now alleges would be to ascribe to them a purpose, and to make and enforce for them a contract, which their writings neither express nor suggest; and this is beyond the province of the courts. Railway Co. v. Bagley, 60 Kan. 424, 431, 56 Pac. 759; Woolsey v. Ryan, 59 Kan. 601, 54 Pac. 664; Davie v. Mining Co., 93 Mich. 491, 53 N. W. 625, 24 L. R. A. 357; Vogel v. Pekoc, 157 Ill. 339, 42 N. E. 386, 30 L. R. A. 491; Campbell v. Lambert, 36 La. Ann. 35, 51 Am. Rep. 1; Turnpike Co. v. Coy, 13 Ohio St. 84; Stensgaard v. Smith, 43 Minn. 11, 44 N. W. 669, 19 Am. St. Rep. 205.

The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; Minnesota Lumber Co. v. Whitebreast Coal Co. (Ill. Sup.) 43 N. E. 774, 31 L. R. A. 529; Parker v. Pettit, 43 N. J. Law, 512. But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned. Bailey v. Austrian, 19 Minn. 535 (Gil. 465); Tarbox v. Gotzian, 20 Minn. 139 (Gil. 122); Railway Co. v. Bagley, 60 Kan. 424, 433, 56 Pac. 759; Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791; Crane v. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869. Accepted orders for goods under such void contracts constitute sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder. Crane v. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869; Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791; Campbell v. Lambert, 36 La. Ann. 35; Railway Co. v. Mitchell, 38 Tex. 85, 95; Ashcroft v. Butterworth, 136 Mass. 511, 514; Drake v. Vorse, 52 Iowa, 417, 3 N. W. 465; Thayer v. Burchard, 99 Mass. 508, 520; Hoffmann v. Maffioli (Wis.) 80 N. W. 1032, 1035, 47 L. R. A. 427; Railroad Co. v. Jones, 53 Ill. App. 431, 437; Rafolovitz v. Tobacco Co. (Sup.) 25 N. Y. Supp. 1036.

Tested by these rules, the accepted offer of October 27, 1898, was void in its inception for want of consideration and mutuality. No quantity of nuts, bolts, or bars was named in the offer or in the

acceptance. The defendant was not bound to order, to receive, or to pay for any of the articles named in the offer; and there was therefore no consideration for the offer itself, and no mutuality in the supposed agreement. The orders which were made and filled prior to June 1, 1899, constituted valid contracts for the purchase and sale of the goods so ordered at the prices named in the offer. But they effected no agreement on the part of the defendant to order, or on the part of the plaintiff to deliver, any other goods under the offer, because the amount of goods whose delivery was contemplated was still unnamed. The defendant was not legally bound to order, to receive, or to take any articles which it had not ordered, so that there was still no consideration and no mutuality in the contract as to any articles which the defendant had not ordered, or which the plaintiff had not delivered. The refusal of the plaintiff to honor the orders of the defendant was therefore no breach of any valid contract, and formed no legal cause of action for the counterclaim.

It is specified as error that the court refused to permit the defendant to amend its answer at the trial so as to allege that it orally, and by the written contract, agreed to purchase all of the goods of the kinds mentioned in the offer of October 27, 1898, "that it might use or desire to use during the times mentioned in the contract"; but no argument is presented in support of this specification, and no plausible reason for its assignment is suggested. If the amendment had been allowed, the alleged contract would still have been void, because, under the agreement stated in the amendment, the defendant would not have been bound to desire to use, or to use, any of the articles mentioned in the price list, and there would still have been no mutuality in the contract. Moreover, the granting of the motion was discretionary with the court below, and it was made so late that it would have been no abuse of discretion to have denied it if the amendment had been material. It was properly denied because the amendment was immaterial, because if it had been allowed the answer would not have stated facts sufficient to constitute a legal counterclaim, and because its allowance was discretionary, and there was no abuse of that discretion.

In addition to the counterclaim which has been considered, the answer contained a denial of the allegations of the complaint, and an offset against the plaintiff's claim for the sum of $2,727.18, which the defendant alleged the plaintiff had charged it in excess of the prices specified in the offer of October 27, 1898, for goods delivered subsequent to June 1, 1899. But the statutes of Kansas provide that:

"In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Gen. St. Kan. 1897, c. 95, § 108.

The correctness of the account set forth in the plaintiff's petition was verified by affidavit. The denial in the answer and the offset which it pleads challenge the correctness of this account. But the answer was not verified. Consequently, under the express provisions

of the statute which has been quoted, the verified account must be taken as true, and neither the denial nor the offset can be considered under the pleadings.

The judgment below was right, and it is affirmed.

In re LESSER et al.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 124.

BANKRUPTS—DISCHARGE—CONCEALMENT OF ASSETS.

On an application by a bankrupt firm for its discharge, it appeared that the partner having charge of its financial affairs made a statement to a commercial agency on January 10th, showing a surplus of $153,000; that at the time of the failure in October the surplus had been used up and debts incurred to over $230,000, making an apparent loss for eight months of $383,000. Testimony was offered by the bankrupts accounting for the loss of all but about $100,000 of this sum. The partner in question admitted making the statement to the commercial agency, but stated that "the bookkeeper gave it to him, and he thought it was true"; that he did not know "whether as a fact it was $150,000 or not," because "the bookkeeper gave him the figures," etc. *Held* insufficient to show that the $100,000, not accounted for, ever existed, and it was error to refuse the bankrupt's discharge on the ground that such sum was concealed.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 108 Fed. 205.

Alexander Blumenstiel, for appellants.

Otto T. Hess, for respondents.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The specifications in opposition to the discharge of the bankrupts were 28 in number, some of them duplicating each other, and several presenting different phases of the same question. Except as to such as deal with an alleged concealment of $100,000, and the taking of a false oath as to the same, the full and careful report of the commissioner, to whom the issues raised by the specifications were referred, sufficiently disposes of these specifications adversely to the objectors. It will be sufficient to discuss the alleged concealment, as to the effect of which the commissioner and the district judge differed.

The firm consisted of three brothers, Tobias, Israel, and Simon, and up to 1896 had been engaged in business in New York City as manufacturers of clothing. On October 2, 1896, the firm failed, confessed judgment in favor of certain creditors, assigned certain book accounts to others, and secured the appointment by the state court of a receiver of the remaining assets. Proceedings were instituted by some of the creditors to set aside the receivership; such application was denied, but the court appointed an additional receiver. Since that time said receivers have been acting as such, and their appointment remains unrevoked and in full force, except that in a judgment creditors' action brought by one Metcalf and some others a final judg-

ment has been entered setting aside the transfers and the lien created by the appointment of the receivers as to such creditors, so as to enable them to obtain a priority of payment out of the firm assets. In May, 1899, the firm filed a voluntary petition in bankruptcy, were adjudicated on the same day, and trustee appointed June 7, 1899.

The referee finds that on January 10, 1896, Tobias Lesser, who had charge of the financial affairs of the firm, made a statement to Dun's Commercial Agency showing a surplus of $153,858.24 (a similar statement made the year before showed a surplus of $145,739.18); that at the time of the failure, however, in October, 1896, this surplus of $153,858.24, which was stated to exist in January, was entirely used up, and in addition an indebtedness for money loaned and merchandise purchased had been incurred, amounting to over $230,000, showing a loss for eight months of $383,000. Testimony was offered by the bankrupts to show in what ways heavy losses had been incurred during that period, but this testimony accounted only for some $285,000. The commissioner, therefore, reported that in his opinion "there has been a disappearance of assets amounting to at least the sum of $100,000, which is entirely unexplained, and consequently the bankrupts must be presumed to have the same in their possession or under their control." The commissioner, however, reached the conclusion that there was no concealment by the bankrupts from their trustee of any of the property belonging to their estate in bankruptcy (section 29b [1]), because the whole title to all the bankrupts' property owned by them in October, 1896, passed to the receivers in the state court action. He held that:

"The bankrupts at that time parted with the title to all their property, and, so far as they are concerned, they cannot recover it. The receivership still remains, it has never been set aside, and all the property of the bankrupt that existed in October, 1896, whether then or since reduced to possession by the receiver, belongs to the receivers for the purposes for which they were appointed, and, even if property should now be discovered, it would, in my opinion, belong to the receivers. If that be so, there has been no concealment from the trustee in bankruptcy. In the schedules this receivership was fully set forth, and all the necessary information given. There was no concealment of the fact of the receivership, and a general statement was made of the property in their hands. The bankrupts have withheld or concealed nothing from their trustee in bankruptcy for the reason that they had nothing to withhold, the title to all that they had in October, 1896, having passed to the receiver."

The district judge held that the testimony seemed to justify the finding as to an actual disappearance of $100,000, but further held that the proposition enunciated in the above-quoted paragraph is "a technicality which ought not to shield the bankrupts from the consequences of their fraudulent acts, or to defeat the intention of the bankrupt law"; and that, "after a trustee has been appointed in bankruptcy proceedings, a concealment of assets, which have not been turned over to a previous receiver, is equally a concealment from creditors, the actual beneficiaries, whether through a receiver or through a trustee."

We incline to the opinion expressed by the commissioner, in view of the plain language of the act defining the offense (section 29b [1]); but it is not necessary to enter into any discussion of that point, be-

cause examination of the record has satisfied us that the $100,000 is mythical, it never disappeared because it never existed, and never having existed it has never been concealed. That Tobias Lesser stated to the agent of Dun's Commercial Agency that the firm's surplus in January, 1896, was $153,858.24, is abundantly proved, but proof that the statement was made is not proof that it was correct. When subsequent investigation shows that $100,000 of the $153,858 is not to be found, the most natural conclusion is that the statement was false as to the amount of surplus. It cannot be assumed, in the absence of any testimony to that effect, that the statement was truthful, and the surplus actually as large as Tobias Lesser then represented it to be. And there is no testimony at all that the surplus in January, 1896, was actually $153,000. Tobias Lesser was examined at length as to the statement he made to Dun. He didn't dispute that he gave Dun a statement, nor that the statement testified to by the agent was the statement he made; but, as to the accuracy of the statement, the most he could be got to say was that "the bookkeeper gave it to him, and he thought it was true"; that "as far as he knew it was true"; that "it must have been true at the time he gave it"; that he "does not know how much surplus they had," nor "whether as a fact it was $150,000 or not," because "the bookkeeper gave him the figures," which he "didn't compare with the books." The record is so barren of competent evidence that the alleged concealed $100,000 ever existed that, in our opinion, the commissioner was clearly in error in finding that the "bankrupts must be presumed to have the same in their possession or under their control."

A second specification, which was sustained by the district court, that the bankrupts made a false oath in verifying their schedules, depends also for support on the existence of this alleged $100,000, and therefore need not be further considered.

The decree of the district court is reversed, and discharge ordered.

KIMBALL v. E. A. ROSENHAM CO.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,615.

1. BANKRUPTCY—PAYMENTS ON ACCOUNT CURRENT NO PREFERENCE WHERE SUBSEQUENT CREDITS EXCEED THEM.

   The receipt by a creditor of payments upon an account current in the usual course of business, which are followed by new credits for property delivered to the debtor which becomes a part of his estate, for which the creditor is not paid, and which equals or exceeds in amount and value the payments, does not constitute a preference, under section 60a, and does not require the creditor to surrender such payments as a condition of the allowance of his claim, under section 57g, of the bankrupt act of 1898.

2. SAME—CREDITOR'S CLAIM ON ACCOUNT CURRENT NOT DIVISIBLE.

   The claim of a creditor for a balance due upon an account current with the bankrupt is one single claim, and, in determining its allowance and the existence of alleged preferences arising out of the acts it evidences, it must be so considered. It may not be divided into its items or into separate claims for that purpose.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Eastern District of Arkansas.

Eben W. Kimball, for appellant.
E. B. Kinsworthy, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The E. A. Rosenham Company, a corporation, sold and delivered merchandise to the Max Elkan Company, another corporation, from time to time, on credit, in the usual course of business, and the Elkan Company paid the Rosenham Company, on account at different times, sums which aggregated $850. Of this sum payments amounting to $550 were made within four months of the date of the order which adjudged the Elkan Company a bankrupt, and payments to the amount of $300 were made more than four months before that adjudication. Some of the credits for the goods sold were evidenced by acceptances of the Elkan Company and others by the usual book account. When the Elkan Company was adjudged a bankrupt, it was indebted to the Rosenham Company in the sum of $3,384.13 on account of the goods which its creditor had sold to it on credit. $1,878.13 of this amount was owing by it when it paid the $850, and $1,506 of the amount consisted of new credits which the Rosenham Company had extended to it for goods actually sold to it, and which became a part of its estate after all the payments were made, and on account of which nothing has ever been paid to the creditor. In this state of the case, the Rosenham Company proved and asked the allowance of its claim of $3,384.13 against the estate of the bankrupt. It was met by the objection of the trustee that its claim should not be allowed unless it first surrendered, under section 57g of the bankrupt act, the alleged preference it received by its acceptance of the $850 which the debtor had paid on some of the acceptances it had given for some of the goods. The order of the district court was that the part of the claim of the creditor which arose out of the $1,506 of new credits which were extended after the $850 was paid should be allowed without the return of the money thus paid, but that the portion of its claim which was based on the amount owing before the $850 was paid should not be allowed unless the creditor paid the $850 back to the trustee. The trustee has appealed from this order, and he assigns as error the allowance of the portion of the creditor's claim founded on the new credits without requiring the surrender of the $850.

The order is erroneous, but not for the reason alleged by the appellant. The portions of the bankrupt act pertinent to this inquiry are:

"Sec. 57g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

"Sec. 60a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The term "transfer" in the last section includes a payment. This section gives the legal and controlling definition of the preference mentioned in section 57g and other parts of the bankrupt act. It declares that it is not every transfer of property or payment of money that will constitute a preference, but such transfers or payments only as enable the creditors receiving them to obtain greater percentages of their debts than other creditors of the same class. Is a creditor who, subsequent to the receipt of payment on an account current, extends to his debtor new credits in excess of the amount of the payments for merchandise which actually becomes a part of the debtor's estate, thereby "enabled to obtain a greater percentage of his debt" than other creditors of the same class? Take the case in hand. Before the $850 was paid the creditor had a claim for $1,878.13 still owing for goods sold before that time, and $850 more, in all $2,728.13. After the payments were made it extended new credits, and put into the estate of the debtor new goods, which amounted to $1,506, on account of which it has received nothing. Hence at the time of the adjudication in bankruptcy its claim was $3,384.13, while it was only $2,728.13 before the payments were made. The result is that by virtue of the payments and the subsequent credits the estate of the bankrupt has been increased to the amount of $656, the claim of the creditor has been enhanced by the same amount, and its loss in a proportionate sum. It has received no benefit, but, on the other hand, has incurred a positive loss by the transaction. If it had received no payments and extended no credits subsequent to the time of the payment, it would have lost that portion of $2,728.13 which will not be paid by the estate of the bankrupt, while it will now lose that portion of $3,384.13 which that estate will not pay. On the other hand, the other creditors receive their proportionate share of $656 more than they would have received if the payments had never been made and the new credits had never been extended because the estate of the bankrupt has goods of the Rosenham Company of the value of $656 more than it would have had in that event.

It may be said that before the $850 was paid the claim of the Rosenham Company was $2,728.13, that after its payment it was only $1,878.13, and that the moment the payment was made the creditor had secured thereby a preference. This would undoubtedly have been true if the account and the transaction had closed there. But it did not, and it is the actual account and the real transaction, and not those which might have been, but were not, that condition this case and its decision. It was not the purpose or the intention of the parties to this transaction to give the creditor a preference by the payment of this $850, and that payment never had that effect. Parties are presumed to intend the ordinary and natural consequences of their acts. The customary and natural effect of payments upon a live account current is the continuance of the account and the extension of new credits. Stop payments upon such an account, and new credits are not extended, and the account closes. Make payments, and the account continues and further credit is given. The payments upon the old credits constitute the inducement for the extension of new credits, without which those credits would not be made. If the $850 had not been paid

to the Rosenham Company on the then existing debt of $2,728.13, it is improbable that that corporation would have extended to its debtor the subsequent credits of $1,506 on account of which it has received no payments. These motives, purposes, and practices of parties to mutual running accounts are common knowledge, and courts cannot and ought not to be blind to them. The bankrupt act should be read and construed, and the transactions of the parties affected by it should be judged in the light of them.

If at the time when this debtor paid the $850 on the old credits it had bought goods of the value of $1,506 of its creditor, and had paid $850 therefor, leaving a balance of $656 owing for them, no one would have claimed that it had thereby given a preference. No more did the payment of the $850 on the old credits which induced the new credits of $1,506. The actual effects of the two transactions upon the claim of the creditor, upon the estate of the bankrupt, and upon the claims of the other creditors would have been identical, and their legal effects could not be different. In neither the partial payment which induces the supposed sale and immediate delivery of goods nor in the payment upon the old credits which induces new sales upon credit in excess of its amount is "the effect of the enforcement of" the payment "to enable" the creditor, in the words of the law, "to obtain a greater percentage of his debt than other of such creditors of the same class." In both the loss is the creditor's and the gain is the estate's. Nor can the payment of the money on the old credits which induces the new credits be either justly or lawfully segregated from the new credits it induces for the purpose of finding a preference that never in fact existed, and never was intended, any more than the partial payment for goods when bought can be segregated from that sale for such a purpose. The payments and the new credits they induce are parts of the same transaction, inseparable in the intent of the parties and in their actual and legal effect. The items of an account current do not constitute separate claims of the creditor who presents them in a court of bankruptcy. They constitute one single claim. They cannot be lawfully separated and adjudicated without considering their mutual interdependence and relation. Nor can the claim they constitute be legally divided into claims, and a lawful adjudication of these claims be made as though they were not affected by each other. The entire account is not only one single claim, but it is one single continuing transaction, and in determining the existence of the alleged preferences and allowing its proof it must be so considered. In re Richter's Estate, 20 Fed. Cas. 749,752 (No. 11,803); In re Dickson, 49 C. C. A. 574, 111 Fed. 726, 728. If, when the claim is thus considered, the payments made, and the new credits which follow them, decrease the amount owing upon the claim, they may constitute a preference to the creditor; but if they increase it, or leave it unaffected, it is impossible for them to work such a "preference" in his favor, within the true meaning of that term in the bankrupt law. Our conclusion is that the receipt by a creditor of payments upon an account current, in the usual course of business, which are followed by new credits for property delivered to the debtor, which becomes a part of his estate, for which the creditor has not been paid, and

which equals or exceeds in amount and value the payments, does not constitute a preference, under section 60a, and does not require the creditor to surrender such payments as a condition of the allowance of his claim, under section 57g of the bankrupt act of 1898.

The order below must accordingly be reversed, the appellant must pay the costs, the case must be remanded to the district court, with instructions to allow the claim of the appellee, without requiring it to surrender any of the payments it has received; and it is so ordered.

NICHOLSON et ux. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1902.)

No. 711.

PASSENGERS—INJURY WHILE ALIGHTING—EVIDENCE.

There is evidence to go to the jury on the question whether injury to the internal organs of a passenger was not caused by her fall, when thrown to the ground from the lower step of a car, by the negligent starting of the train, while she was alighting, though the distance to the ground was only two feet, she having been a woman 40 years old and of delicate health, the ground having been covered with stones, and she having struck in a sitting posture, and, in addition to the testimony of physicians that her condition might have been caused by a severe jar, she having testified that she received a severe jar, and that this was the cause of her injury.

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

W. W. Woods and J. H. Forney, for plaintiffs in error.

Stephens & Bunn, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error, Charles Nicholson and Mary E. Nicholson, his wife, brought an action against the Northern Pacific Railway Company, the defendant in error, to recover damages for injuries alleged to have been sustained by Mary E. Nicholson on January 28, 1899, through the negligence of the defendant in error in operating its railway train at the station of Manchester, in the state of Idaho. Mrs. Nicholson, at the time of the accident, was returning from Wallace to Manchester as a passenger on the train of the defendant in error. As the train approached Manchester, the conductor called out the name of the station, and the train then came to a standstill. Mrs. Nicholson proceeded to get out of the car and go down the car steps. While she was in the act of swinging herself to the ground, the train, without any warning or signal, started forward, causing her to fall upon the ground, whereby she received, as she alleges, internal injuries which have caused her great pain and suffering. It was shown that there was no platform at the station of Manchester, and no means of getting off the train other than by stepping or jumping from the car steps to the ground.

Testimony was introduced by the plaintiffs in error which tended to show that Mrs. Nicholson, while she had been a woman of delicate health and had been the subject of surgical operations, was, during the two years prior to the accident, in reasonably good health. She testified that when she fell she was "jarred dreadfully," and thought she had bones broken. She testified, further, and her evidence is corroborated, so far as such evidence can be corroborated, by that of her husband and others, that immediately after the accident she suffered very severe pains in the back and groins, and through the abdomen, and was so weak that she had to lie down, and was thereafter for two months under the treatment of a physician on account of the injury, and that she went to a hospital, where she remained 11 days, undergoing treatment, and that subsequently she was under the care of another physician, who performed an operation upon her, and that thereafter she submitted to another operation, all of which trouble, pain, and suffering she testifies was the result of the fall. Upon the close of the testimony, the court instructed the jury to find a verdict for the defendant in error. In so ruling, the court, according to the report of his oral instructions contained in the record, seems to have been moved by two considerations: First, that the evidence showed that Mrs. Nicholson had been in very delicate health for some years prior to the accident, and several years before had suffered miscarriages, and had submitted to surgical operations, concerning which and the nature of her ills the court remarked: "So it is to my mind utterly impossible that this distress that she may be in could have resulted from that accident." The second consideration was that the shock or injury which the plaintiff suffered could not, in the nature of things, have been severe, owing to the short distance which she fell. The court said: "She could not have had, when the car moved, more than one and a half to two feet at the outside to jump. Now, I cannot for a moment believe from my own observation and experience and from the testimony of physicians in cases like this that that kind of a fall could have injured her seriously. If so, four-fifths of the women in the United States would have the same trouble. * * * It could not have been possible that a little jump of that kind could have created the serious state of her health to which witnesses have testified." The court then referred to the testimony of physicians, and said: "They have said that a certain state of her organs testified to might have occurred from an accident, but they acknowledge that it would require a very severe accident."

We are unable to agree with the trial court that the case should have been taken from the jury. The negligence of the railway company was fully proven. It was shown that, after the train had come to a stop at Manchester, one of the passengers, a young lady who was acquainted with the conductor, called his attention to the fact that there was snow at the point where the train had stopped, and requested him to have the train moved further up, so that she might get out at a better place. The conductor, without looking to see whether other passengers were descending from the train, gave the signal to move the train forward, and it started, according to some

of the testimony, with quite a jerk, and proceeded a distance of 50 or 100 feet. Mrs. Nicholson, at the moment when the train started, was standing on the lowest step of the car. It is not disputed that she was thrown to the ground. The distance which she fell is not definitely shown. According to the evidence of the only witness who testified on the subject, the height of the lowest step from the ground was 25 or 30 inches; but, conceding that it was not more than 2 feet, as stated by the court, it is, in our judgment, quite conceivable that a woman over 40 years of age, falling that or even a less distance, and striking the earth in a sitting posture, as it has been testified Mrs. Nicholson fell, might receive a very severe shock. We do not think it would follow, as a conclusion to be deduced by a court, that a fall such as that might not have produced all the injuries of which Mrs. Nicholson complained. The testimony of the physicians was that the condition in which they found her internal organs might have been caused by a severe jar. The test of a carrier's liability in a case of this kind is not whether the accident, if it had occurred to one in robust health, would have resulted in a permanent or serious injury. The carrier is bound to carry, with due care, the weak, the blind, and the lame, and is responsible for the injuries which they sustain by reason of its negligence. It cannot wholly absolve itself from liability by proving that the injured passenger was in delicate health or diseased before the accident. It is true the plaintiff in such an accident must make out his case. He must show with reasonable certainty that the injury which he suffered resulted from the negligence complained of. Mrs. Nicholson testified that she received a severe jar, and that that was the cause of her injury. The physicians testified that the condition in which she was might have resulted from a severe jar. The photographs of the place where she fell show that the ground was considerably lower than the track, and that it was covered with stones and boulders. According to some of the witnesses there were from two to seven feet of snow on the ground, and according to others there were but a few inches. Wholly aside from the testimony of the physicians and the question whether the serious condition in which they found Mrs. Nicholson's organs was attributable to her fall, there was her own direct and positive testimony as to her acute and long-continued pain and suffering, which she declared was the result of the accident, and for which, if the jury found her evidence true, damages were recoverable under the pleadings. We think the court erred in ruling that there was no evidence to go to the jury.

The judgment will be reversed, and the cause remanded for a new trial.

GIVEN v. TIMES-REPUBLICAN PRINTING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1902.)

No. 1,608.

1. ESTOPPEL IN PAIS.
   One who, by his acts or representations, or by his silence when he ought to speak out, either 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 to interpose such denial.

2. SAME—VENDOR OF STOCK ASSERTING INDEBTEDNESS OF CORPORATION TO HIM.
   The vendor of stock may, by his representations or silence, estop himself from asserting against a purchaser an indebtedness of the corporation to him. The sole stockholder of a corporation, by his management thereof, by his treatment of his account with it, by his statement of its resources and liabilities, and by his silence regarding any liability of the corporation to him, induced a purchaser to buy his stock in the belief that the corporation was not indebted to him. *Held*, the vendor was estopped from asserting or enforcing any indebtedness of the corporation to him as against the purchaser of his stock.

3. EQUITY—STOCKHOLDER MAY MAINTAIN BILL TO ENJOIN ACTION AT LAW AGAINST CORPORATION.
   A stockholder of a corporation, who has been induced by the representations or culpable negligence of a vendor to buy his stock in the belief that the corporation is not indebted to him, may maintain a bill in equity to restrain the vendor from prosecuting an action of debt against the corporation.

(Syllabus by the Court.)

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

J. M. Parker, for appellant.

A. B. Cummins, James P. Hewitt, Craig T. Wright, and T. Binford, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree in favor of S. C. McFarland and the Times-Republican Printing Company, a corporation, to the effect that the defendant, Welker Given, is estopped from maintaining an action at law against the corporation, which he commenced on March 15, 1898, in the circuit court for the Southern district of Iowa, to recover the sum of $8,375 and interest. 106 Fed. 253. In the petition in that action Given alleged that the corporation was indebted to him (1) for $6,000, which he loaned to it on December 9, 1895, and on a promissory note which the corporation made and delivered to him for this $6,000; (2) for $2,000, which he loaned to the corporation on November 25, 1895, and on a promissory note which the corporation made and delivered to him for this $2,000; and (3) for $375 on account of his salary for the months of July, August, and September, 1895. The gravamen of the bill to restrain this action is that Given was the owner of all the capital stock of the printing company from February, 1893, until May, 1896, and that in the latter month, by representations, and by

silence when he ought to have spoken out, he induced the complainant, who did not know that the corporation was indebted to him, to buy all its stock, and to pay him $19,000 for it, in the belief that the printing company was not indebted to him in any amount whatever.

The decree which grants the relief sought by the bill is assailed upon two grounds,—that there was no equity in the bill, because the complainants had an adequate remedy at law, and that the proof did not sustain its allegations. In support of the first contention the rules that an estoppel is sometimes a complete defense at law, and that a bill to restrain an action at law cannot be maintained on grounds which would constitute a complete defense to it, are invoked. They have no application to this suit, however, because the estoppel pleaded in this bill would have been no defense to the action at law, which has been enjoined. That action was against the corporation. The printing company was the only defendant in it. But the printing company had not purchased any of its stock or of its property from Given, had not been misled into the belief that it owed him nothing, and had not acted on that belief to its injury. There was, therefore, no estoppel in its favor, and it could not successfully defend the action against it upon that ground. And yet, if it was true that McFarland had been induced by the deceitful representations or silence of Given to buy all the stock of this corporation for $19,000 in the belief that it owed him nothing, a judgment against the corporation for the $8,375 and interest, which Given claimed in his action at law, would inflict a great injury upon McFarland, against which he would be utterly remediless at law, because the judgment against the corporation would be conclusive evidence against him, its only stockholder, of its indebtedness to Given, and it would be paid out of his property, because the corporation was solvent, and all its assets were really the property of McFarland. In this way it appears that the estoppel which lies at the basis of this suit in equity constituted no defense to the action at law. It was no defense for the corporation, because no estoppel had arisen in its favor. It was no defense for McFarland, because he was not a party to that action, and therefore he could not interpose any defense to it. He was, therefore, remediless at law, and the bill well stated a perfect cause of action in equity in his behalf. Nor is the rule that a stockholder cannot maintain a suit unless he has first called upon the corporation to bring it, and been met by a refusal, which is cited by counsel, applicable to this case, because the estoppel which lies at the foundation of this suit did not arise in favor of the corporation, and it could not have maintained a bill to restrain the action at law upon that ground.

The second objection to the decree is that it is not sustained by the evidence. But the proof discloses these facts: Given owned all the stock of the printing company from 1893 until May, 1896. During a large portion of this time it was managed by McFarland, because Given was ill. At times its business was profitable, and at other times it was not so. Neither Given nor McFarland paid much attention to the corporate organization. No dividends were declared when profits were earned, and no corporate action was taken when losses

were incurred. The bookkeeper of the corporation kept an account with Given upon its books, in which the latter was charged with the moneys which he drew out and credited with those which he paid in. But none of the parties to this transaction treated this account as evidence of any indebtedness of Given to the corporation or of the corporation to Given. It stood as a mere memorandum of the amounts drawn out and paid in by the sole stockholder of the corporation. This is well exemplified by the fact that at the close of the year 1894 this account disclosed a balance due to Given from the corporation of $3,134.07, which was charged off to profit and loss, so that the account was balanced by direction of Given, because he was the sole stockholder; and if there were any profits he was entitled to them, and if there were any losses he must suffer them. In November and December, 1895, Given furnished to the corporation $6,000 and $2,000 to buy needed machinery, and these amounts were placed to his credit on his account in the books of the corporation. On May 13, 1896, when the sale to McFarland was consummated, there was, according to this account, a balance of $3,638.35 due from the corporation to Given. The account books of the printing company contained no reference to the promissory notes set forth in Given's petition in his action at law. In this state of the case Given, on May 4, 1896, wrote to McFarland:

"Mr. McFarland: An offer has come to me suddenly for the T–R,—or a large interest in it,—just at a time when I need money. But I wish first to make you an extraordinarily low offer & hope you can arrange to accept it at once, for others are urgent. Give me $7,500 cash and my note and assume my paper at Marshalltown Bank, and the T–R is yours. But it will be necessary to act at once."

The "T-R" was the Times-Republican Printing Company. The note referred to in this letter was a promissory note made by Given and held by McFarland, on which a balance of $4,000 was owing, Given's paper at the Marshalltown Bank, mentioned in the letter, consisted of his promissory notes for $7,500, which were held by that bank. Four days after this letter was delivered, Given directed McFarland, who was managing the business of the printing company, to have a statement of the resources and liabilities of the corporation made, which should exclude the account with him; and this statement was made, dated May 10, 1896, and delivered to Given by McFarland. Given procured this statement to use in a negotiation which was then pending for a sale by him of the Times-Republican to one Dotson. None of the notes or accounts on which Given based the action at law here in issue were mentioned in this statement. Given never informed McFarland of the existence of the promissory notes set forth in his petition, and never claimed or suggested to him at any time during the negotiation for the sale that the corporation was indebted to him for the $8,375, for which he has sued. McFarland did not know that any such promissory notes had been made, but he knew the condition of the account books of the company, and the manner in which the account with Given had been treated, and he knew the contents of the statement prepared by direction of Given for use in his negotiation with Dotson. The negotiation with

Dotson did not result in a sale, and on May 13, 1896, McFarland complied with the terms of Given's offer to him of May 4, 1896. Given assigned to him all the stock of the corporation, and he took possession of all its property. He testified that by the acts of Given which have been mentioned, by his treatment of his account with the corporation, by his exclusion of it from the statement of the resources and liabilities of the printing company which he caused to be prepared for use in his attempted trade with Dotson, by his failure to speak of the notes upon which he has now sued, of the existence of which McFarland was ignorant, and by his failure to claim or suggest that the corporation was indebted to him in the sum of $8,375, which he now claims from it, he was induced to believe, and did believe, that the corporation owed Given nothing. He further testified that this belief induced him to make the purchase of the stock, and to pay the sum of $19,000 for it, and that he would not have done either of these things if he had been notified of this indebtedness of the corporation to Given. There is much more evidence in this record, but none which materially affects the conclusion which the facts and the evidence which have been recited, compel.

No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself or more salutary in its effects, than 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 to interpose such denial. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong at the expense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and fraud. It rests on the solid foundation of our common sense of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed him. Paxson v. Brown, 61 Fed. 874, 882, 10 C. C. A. 135, 143, 27 U. S. App. 49, 60; Union Pac. R. Co. v. United States, 67 Fed. 975, 979, 15 C. C. A. 123, 127, 32 U. S. App. 311, 318; Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 271, 293, 22 C. C. A. 171, 192, 40 U. S. App. 257, 293, 34 L. R. A. 518; Cairncross v. Lorimer, 3 Macq. 828; Dickerson v. Colgrove, 100 U. S. 578, 582, 25 L. Ed. 618; Kirk v. Hamilton, 102 U. S. 68, 75, 26 L. Ed. 79; Evans v. Snyder, 64 Mo. 516; Pence v. Arbuckle, 22 Minn. 417; Crook v. Corporation of Seaford, L. R. 10 Eq. 678; Faxton v. Faxon, 28 Mich. 159. The case at bar falls far within this just and salutary rule of equity jurisprudence. The acts of Given in the management of the business of this corporation, in the treatment of his account with it, and in the preparation of the statement of its resources and liabilities for the purpose of making a sale, without including therein any statement of his account, and his silence concerning any indebtedness of the printing company to him during his negotiations with McFarland, when it was his duty to speak out and give warning of his unknown notes and his concealed claim, were

well calculated to lead a reasonably prudent man to believe that the corporation owed him no debt or obligation. The evidence is convincing that McFarland was induced by these acts and this silence to entertain this belief, that Given intended that his acts and silence should have this effect, and that, in the absence of this belief, McFarland would never have paid or agreed to pay the sum of $19,000 for this stock. Here is every element of an equitable estoppel. McFarland has acted on the belief which Given intentionally induced him to form, and he cannot now be permitted to deny its correctness, and to mulct him in the sum of more than $8,000, because he relied on his acts and his silence.

The decree below is affirmed.

CITY OF SEATTLE v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1902.)

No. 781.

APPEAL—CONSTITUTIONAL QUESTION—JURISDICTION.

Under Judiciary Act March 3, 1891, § 5, providing that appeal may be taken from the district or circuit courts directly to the supreme court, in any case that involves the construction of the constitution of the United States, the appellate jurisdiction of the supreme court is exclusive, where the record shows, from plaintiff's own statement, that the suit really and substantially involves a controversy as to a right depending on the construction or application of such constitution, and the jurisdiction of the circuit court is invoked on that ground alone.[1]

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

John W. Pratt and Pratt & Riddle, for appellant.

Frederick Bausman, for appellee.

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

GILBERT, Circuit Judge. The jurisdiction of the circuit court in this case was invoked, not upon the ground of the diverse citizenship of the parties, but upon the ground that the case directly involved the construction of the fifth and fourteenth amendments of the constitution of the United States, in that, as alleged in the bill, the appellant, the city of Seattle, in a proceeding to appropriate a part of an unplatted tract of land for use as a public street, without compensation to the owner, and creating a lien upon the owner's other land abutting on such street, deprived the appellee of his property without due process of law. It is now moved to dismiss the appeal upon the ground that this court has no jurisdiction thereof.

By the fifth section of the judiciary act of March 3, 1891, it is provided that appeals or writs of error may be taken from the district or circuit courts directly to the supreme court in any case that "involves

[1] Jurisdiction of supreme court on direct review of trial courts, see note to Lau Ow Bew v. U. S., 1 C. C. A. 9.

the construction or application of the constitution of the United States." In the case of American Sugar Refining Co. v. City of New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859, it is held that, where it appears on the record from the plaintiff's own statement that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends upon the construction or application of the constitution or some law or treaty of the United States, and the jurisdiction of the circuit court is invoked upon that ground alone, the case falls strictly within the terms of section 5, and the appellate jurisdiction of the supreme court in respect thereto is exclusive. Upon the authority of that decision the appeal in the present case must be dismissed.

PARRAMORE v. TAYLOR.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 31.

PATENTS—STOCKING SUPPORTER—INFRINGEMENT.

The Parramore patent, No. 629,391, for a new stocking supporter to be used in connection with corsets, and having as its main and novel feature a single connection with a stud or clasp of the corset, thus dispensing with all other means of attachment thereto, *held* infringed.

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

Appeal from decree of the circuit court for the district of Connecticut (105 Fed. 965), which dismissed a bill in equity for the infringement of letters patent 629,391, granted to the complainant July 25, 1899, for a new stocking supporter.

Edwin H. Brown, for appellant.

J. Edgar Bull, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The invention was a stocking supporter to be used in connection with corsets, and its main and novel feature was a single connection with a stud or clasp of the corset, thus dispensing with all other means of attachment thereto. Tapes or elastics at the end of two members, called "suspension elastics," engaged with the upper edges of stockings. The upper ends of these suspension elastics were connected to a "hanger," which was a device consisting of a fabric body and a metal hanger piece formed with an elongated loop or eye, and "adapted to be fitted to the lowermost stud of the series of studs forming a part of the clasp of an ordinary corset." Before the date of the invention, stocking supporters were in use which were fastened to the corset by buttons or hooks upon the corset engaging with buttonholes or other devices at the top of the elastics, but attached to two points on the corset. The Lennon supporter, patented June 21, 1898, had two supporters connected by a cross strap. The device was attached to the corset by two catches, which engaged

loops or rings upon the corset. The patented device was "the first to design a complete detachable device, which sustained both stockings from a single existing point of support on the corset," and, notwithstanding the apparent simplicity of the improvement, the record discloses the labor and experiments required to produce a patentable supporter fastened to the front of the corset by a single point of support on the corset, and the inventive character of the device is made apparent despite first impressions as to triviality. Its novelty and utility "in its limited field" are manifest.

The two claims which are said to have been infringed are as follows:

"(1) A stocking supporter consisting of the duplicate suspension tapes or elastics, and a single hanger to which the upper ends of the tapes or elastics are connected, said hanger being provided with an eye or loop adapted to be detachably engaged with the stud of a corset clasp, substantially as described. (2) A stocking supporter consisting of the duplicate stocking engaged members, and means for permanently uniting the two members at their upper ends, said means being in the form of a hanger piece, which is adapted to be engaged with the corset at the point where the sections of the corset meet, substantially as described."

The defendant's supporter is a substantial copy of the patented device, with the exception of the eye of the hanger. This hanger piece is in the form of an anchor, which is slipped over the top edges of the two parts of the corset clasp. The anchor is "inserted after the corset is fastened, between the abutting edges of the corset, with its two arms extending behind those edges. When drawn downward, there is thus formed a lock for the corset, which prevents its unfastening." It does not directly engage with the stud of the corset, but does engage indirectly, because the stud of the clasp holds the two parts together, and the anchor is anchored between the two abutting edges of the corset. A difference between the two structures is that in the defendant's clasp the hanger does not engage with the corset clasp until after the two parts of the clasp are fastened together, whereas by the patent the loop of the hanger piece engages with the stud before the corset is clasped.

The circuit court was of opinion that there was no infringement of either claim because the defendant's supporter had no eye or loop adapted to be detachably engaged with the stud of a corset clasp, and that his means for permanently uniting the two members of a duplicate stocking supporter were not the described means of the patent. It seems to us that the circuit court limited the claims too strictly to form, and that the defendant's anchor is a loop which performs the functions of the loop of the patent in substantially the same way, and is, in fact, detachably engaged with the stud of the corset clasp, and that the anchor is the equivalent of the described means of claim 2 for permanently uniting the two members of the supporter at their upper ends, and is in the substantial form of the patented hanger piece adapted to be engaged, and, in fact, engaged, with the corset at the point where the sections of the corset meet.

The decree of the circuit court is reversed, with costs of this court, and the cause is remanded to the circuit court, with instructions to enter a decree in accordance with the foregoing opinion.

SMITH v. YELLOW PINE CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 92.

REMOVAL OF VESSEL FROM WHARF—LIABILITY FOR INJURY.

A company at whose wharf a vessel is unloading cargo for it is liable for injury to her, through its superintendent, acting within the sphere of his authority, removing her, without knowledge of her owner, who was in command of her, to a place which her owner had told him was unsafe.

Appeal from the District Court of the United States for the Southern District of New York.

For opinion below, see 108 Fed. 881.

Otto Hess, for appellant.

Martin A. Ryan, for appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. The court below found, in substance, that the libelant's steam canal boat was moved from the end of the wharf of the Yellow Pine Company, where she was unloading cargo for that company, into the adjoining slip by the orders of the company's superintendent, the libelant who was in command of the boat being temporarily absent; that the libelant had previously been requested by the superintendent to move the vessel into the slip, but, having sounded the bottom and found it uneven and unsafe for his boat, so informed the superintendent, and refused to consent to have her moved there; that the vessel was moved at high water, and was strained and damaged when the water receded by grounding amidships with her stern afloat. These findings of fact, made upon conflicting testimony quite evenly balanced, and its weight depending upon the credibility of witnesses who were examined in the presence of the district judge, should not be disturbed by this court (The Jersey City, 2 C. C. A. 365, 51 Fed. 527; The City of New York, 4 C. C. A. 268, 54 Fed. 181), and are decisive of the case. The superintendent, having assumed upon his own responsibility to remove the boat to a place which her owner had told him was unsafe, acted at his own risk, and, as his act was within the sphere of his authority, the company became liable for its legitimate consequences. Different considerations would arise if the libelant had been present when the boat was moved, but as the grounding, as well as the removal, took place before he had returned to the dock, he was in no respect guilty of contributory fault.

The decree is affirmed, with interest and costs.

BRADY v. CHICAGO & G. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,543.

1. MASTER'S AND SERVANT'S DUTY IN OPERATION OF RAILROAD—NEGLIGENCE.
The duty of so operating a safely constructed and equipped railroad, subject to the rules and general supervision of the master, as to keep it reasonably safe for those employed upon it, is not a positive duty of the master, but a primary duty of the servant.

2. CARRIERS—LIABILITY TO PASSENGERS OF RAILWAY COMPANY OPERATING OVER ANOTHER RAILROAD.
A railroad company operating its trains over the railroad of another corporation by permission is liable to its passengers for the negligence of the servants of the licensing corporation.

3. MASTER AND SERVANT—LIABILITY TO SERVANTS OF RAILWAY COMPANY OPERATING OVER ANOTHER RAILROAD.
A railway company running its trains over another road by permission is liable to its employés for the negligence of the servants of the licensing corporation in the discharge of the absolute duties of the master.

4. SAME.
But such a railway company is not liable to its servants for the negligence of the employés of the licensing corporation in the discharge of their duties as servants.

5. SAME—RESPONDEAT SUPERIOR—POWER OF CONTROL TEST OF APPLICATION.
The power of the alleged master or principal to command or direct the alleged servant or agent is the test of the liability of the former for the acts of the latter, under the maxim respondeat superior. If the master or principal has no power to command or direct the alleged servant or agent, he is not responsible for his acts, because there is no superior to respond.

6. SAME—EMPLOYE OF RAILWAY COMPANY NOT FELLOW SERVANT OF EMPLOYE OF DEPOT COMPANY.
The G. W. Ry. Co. was operating a train through the yards of a depot corporation, under the customary contract for the use of the yards and depot jointly with other companies having like contracts, when one of its employés was killed by the alleged negligence of the servants of the depot company in failing to properly turn the switches, which were under the control of the latter company. *Held*, the switchmen of the depot company were not the fellow servants of the employés of the railway company, nor were they the agents or servants of that company, within the meaning of the fellow servant statute of Minnesota (St. 1894, § 2701).[1]

7. SAME—RESPONDEAT SUPERIOR—TERMINAL YARDS—CONTRACT FOR USE OF CREATES NO PARTNERSHIP OR AGENCY.
The ordinary contracts between a depot corporation and several railroad companies for the use of a depot and transfer yards do not establish a partnership relation between the companies, nor make the depot corporation the servant or agent of the railroad companies, so that they become liable for the negligence of its servants, under the maxim respondeat superior.

Caldwell, Circuit Judge, dissenting.

(Syllabus by the Court.)

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

[1] Who are fellow servants, see note 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.

Charles A. Clark (James W. Clark and William G. Clark, on the brief), for plaintiff in error.

Carroll Wright (A. B. Cummins and James P. Hewitt, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Elizabeth Brady, as administratrix of the estate of John J. Brady, brought an action against the Chicago & Great Western Railway Company for negligence resulting in the death of Brady, and at the close of the evidence produced on her behalf the court instructed the jury to return a verdict in favor of the defendant. The judgment, based upon this instruction, is challenged by this writ of error.

The facts established at the trial were these: John J. Brady was the foreman of a switch crew in the employment of the Chicago & Great Western Railway Company, engaged in discharging the customary duties of such crews at the city of St. Paul. In the early morning of November 1, 1896, while it was yet dark, it became Brady's duty to take his train, which consisted of an engine, tender, and caboose, from West St. Paul across the Mississippi river, and through the yards of the St. Paul Union Depot Company, to Mississippi street, a distance of two or three miles. He had exclusive charge of this train, and he directed the crew to couple the caboose on to the rear of the engine, and to back the train across the river and through the yards. He took his station on the forward end of the caboose as it was sent into the darkness. The only light he had at that end of the train was a lantern. As he was backing this train through the yards at a speed of about six miles an hour it collided with a refrigerator car on a portion of one of the transfer tracks of the depot company, called the "dead track," and so injured Brady that he died. This dead track was long enough to hold four or five cars. It was used by several railroad companies as a place of deposit of cars that were ready to be transferred from one railroad to another. It was provided with a switch at each end, by means of which trains could be sent around it when it was occupied by cars. When the switches were turned to send trains around it they displayed red switch lights, and when the dead track was clear, and was lined up with that on which Brady approached it, the switches displayed green lights. At such times it formed a part of the main track through the depot yards used by the defendant for the passage of its freight trains. At the time of the accident the switch lights were green, thus indicating that the dead track was clear. It was not the duty or the privilege of the servants of the Great Western Railway Company to operate these switches. The dead track, the switches connected with it, and all the railroads and switches in this yard were the property of the St. Paul Union Depot Company, a corporation of the state of Minnesota. This company had the exclusive management and control of all these tracks and switches, and the Great Western Railway Company had a contract with it for a transfer of its cars and engines and for permission to run its trains through

the yards. Six other railroad companies had similar agreements with the terminal company. The depot company employed three or four switchmen whose exclusive duty it was to throw the switches in the yards for those who were entitled to use them under these contracts. The dead track on which the accident happened was used largely in the daytime for the deposit of cars to be transferred from railroad to railroad, but it was used at night only for special work, such as perishable freight and stock. One of the plaintiff's witnesses said that from his experience it was lined up anywhere after 10 o'clock at night until 5 o'clock in the morning so that it was proper to proceed without delay or bothering a switch tender to be there; that there was liable to be some transferring at night, and the placing of cars upon this dead track; that all the trainmen and switching crews knew that this track was used for standing cars; and that the customary way of protecting these cars on this dead track was to set the switches so that they would display red lights, and send approaching trains around it. He also testified as follows:

"The crew of one railroad company would set cars there, to be afterwards received and taken by the crew of another company. But the cars were to be immediately afterwards taken or protected. To the best of my knowledge, they were always immediately taken or else protected. If they were protected, then they might remain there for some considerable length of time. It is a piece of track that is busily used for transfer work, and very seldom anything stands there long, but there may be some delay where they could not possibly get the car, and it would stay there for half an hour. They couldn't allow anything to stand there any longer, you know, to make a rule of it. It is true that this dead track was very much in use, and that cars were frequently stood there for a greater or less length of time,—freight cars which were not attached to an engine. At various times in the evening they wouldn't even allow you to cut your engine from the car there at all, and leave it there. You could stay right there and hold the car until the other engine was ready to take right hold of it; that is, at certain times. The Union Depot yards at the place in question are very thickly laid and covered with switches. The yards at that time consisted of almost a complete network of railway tracks running in all directions, used by the various railroad companies I have referred to and by the Union Depot Company for transferring, switching, and handling freight trains, and also passenger trains. * * * It was not defendant's custom to have any one at the dead track in question to watch or protect cars placed upon the dead track by other companies. It was the custom for the Union Depot switch tenders to protect those cars."

There was no evidence that the defendant or any of its servants placed the refrigerator car with which Brady's train collided upon the dead track.

Upon this state of facts counsel for the plaintiff in error insist that the direction of the court to the jury to return a verdict for the defendant was erroneous (1) because the railway company was liable for the negligence of the depot company in its discharge of the positive duty of the master to exercise ordinary care to provide a reasonably safe place for the servant to work, and there is some evidence of such negligence on the part of the terminal company; and, (2) because the servants of the depot company were the fellow servants of the employés of the railway company, there was some evidence that the servants of the former company were negligent in the discharge of their primary duties as servants, and under the statute of Minnesota

a railway company is liable to its employés for injuries inflicted upon them by the negligence of their fellow servants.

Before entering upon a discussion of these contentions, it will be well to fix clearly in mind the negligence and the nature of the negligence which was the cause of this deplorable accident. Was it negligence in the construction, repair, or maintenance of the road, its switches and appurtenances, or was it carelessness in their operation? for the line of demarkation which separates the absolute duty of the master from the primary duty of his servants lies here. It is the duty of the railroad company to use ordinary care to furnish a reasonably safe railroad machine; to exercise reasonable diligence to keep it in repair; to use ordinary care to employ a sufficient number of reasonably competent servants to operate it; to establish reasonable rules for, and to exercise proper supervision of, its operation. But when this duty is performed an equally positive duty rests upon the servants to keep the great machine from becoming dangerous by their operation of it and to work it with reasonable care. The railroad tracks, the switches, the engine, and the caboose were on November 1, 1896, well constructed and in good repair. If they had been operated with ordinary care, they would not have caused the death of Brady. If the servants who put the refrigerator car on the dead track had placed red lights upon it, if when it was placed there the switchmen of the depot company had turned the switches so as to display red lights and so as to send Brady's train around it, or if Brady had run his train through the yard in the dark with the engine and its blazing headlight foremost rather than the caboose (Southern Pac. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 436), the fatal result could not have followed. The failure to do these things was negligence, but it was not negligence in the discharge of any duty of the master. It was negligence in the discharge of the duties of the servants; negligence in the operation of the railroad machine, which had been safely constructed and maintained, and which was made dangerous by the negligent discharge of the duties of these servants in its operation. Railroad Co. v. Needham, 63 Fed. 107, 109, 11 C. C. A. 56, 58, 59, 27 U. S. App. 227, 231; Railroad Co. v. Mase's Adm'x, 63 Fed. 114, 115, 11 C. C. A. 63, 64, 27 U. S. App. 238, 240.

Bearing in mind the nature of the negligence which caused the accident, let us now consider the first position of counsel for the plaintiff in error. It is that the defendant was liable for the death of Brady because the depot company was negligent in the discharge of the positive duties of the master. The defendant was operating its trains in the yard and over the railroads of the depot company under a contract which excluded it from all management and control of this yard, its railroads and switches, and imposed upon the depot company exclusively all the positive duties of the master in this regard. The rules of law governing the liability of a railroad company while running its trains over the railroad of another corporation are too well settled to admit of discussion. Such a company is liable to passengers and shippers for the causal negligence of the licensing company and of its servants, whether this negligence occurs in the discharge of the positive duties of the master or in the performance of the primary

duties of the servant. Railroad Co. v. Barron, 5 Wall. 104, 18 L. Ed. 591; McElroy v. Railroad Corp., 4 Cush. 400, 402, 50 Am. Dec. 794; Central Trust Co. v. Denver R. G. R. Co., 97 Fed. 239, 38 C. C. A. 143; Murray v. Railroad Co. (Conn.) 34 Atl. 506, 508, 32 L. R. A. 539. The reason for this rule is that the carrier contracts with the passengers and shippers to carry them and their property with reasonable safety, and the failure so to do is equally a breach of this contract, whether it results from negligence in the discharge of the duties of the master or of those of the servants. There is, however, no such contract between the railroad company and its employés. Their relations and their liabilities are governed by the relative duties imposed upon them by the law. They join in a dangerous occupation. The servants know its dangers as well as the master. If they are operating over the railroad or in the yards of a corporation which does not employ them, they are aware of that fact and of the risk of accident from the negligence of the employés of that corporation. All these risks which they know, or which they might know by the exercise of reasonable prudence and diligence, excepting only those dangers which it is the positive duty of the master to protect them from, they assume as between themselves and their master when they enter upon and continue in the employment. They may undoubtedly recover of those who are guilty of the negligence which causes their injury just as they may recover of any stranger who commits a tortious act that inflicts injury upon them while they are operating their trains. This is all that the cases of Lockhart v. Railroad Co. (C. C.) 40 Fed. 631, and McMarshall v. Railway Co., 80 Iowa, 757, 45 N. W. 1065, 20 Am. St. Rep. 445, cited by plaintiff in error's counsel, decide.

But their master does not assume and is not liable to them for the negligence of the servants of the licensing company when the latter are not engaged in the discharge of the positive duties of the master. Clark v. Railroad Co., 92 Ill. 43; Byrne v. Railroad Co., 9 C. C. A. 666, 61 Fed. 605, 608, 24 L. R. A. 693; Miller v. Railway Co., 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258; Hilsdorf v. City of St. Louis, 45 Mo. 94, 98, 100 Am. Dec. 352.

On the other hand, the master cannot renounce his absolute duties to his servant, or so delegate them to another as to relieve himself from liability for their discharge, and a railroad company which operates its train over another's road remains liable to its servants for any failure of the employés of the latter in their discharge of the positive duties of the master. Stetler v. Railway Co., 46 Wis. 497, 1 N. W. 112; Harding v. Transfer Co. (Minn.) 83 N. W. 395; Railroad Co. v. Dorsey (Tex. Sup.) 18 S. W. 444.

The Great Western Railway Company, therefore, was liable to the plaintiff for any negligence of the servants of the depot company in the discharge of the absolute duties of the master which contributed to the death of Brady, and for that negligence only; and the first question presented to the court was whether or not the testimony presented any substantial evidence of such negligence which would warrant the jury in returning a verdict to that effect. There is always a preliminary question for the judge at the close of the evidence before a case can be submitted to the jury, and that question is not whether

or not there is any evidence, but whether or not there is any substantial evidence upon which the jury can properly render a verdict in favor of the party who produces it. Railway Co. v. Belliwith, 83 Fed. 437, 441, 28 C. C. A. 358, 362, 55 U. S. App. 113, 121; Association v. Wilson, 100 Fed. 368, 370, 40 C. C. A. 411, 413; Commissioners v. Clark, 94 U. S. 278, 284, 24 L. Ed. 59; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 8 Sup. Ct. 266, 31 L. Ed. 287; Railway Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; Laclede Fire-Brick Mfg. Co. v. Hartford Steam Boiler Inspection & Ins. Co., 60 Fed. 351, 354, 9 C. C. A. 1, 4, 19 U. S. App. 510, 515; Gowen v. Harley, 56 Fed. 973, 6 C. C. A. 190, 12 U. S. App. 574, 585; Motey v. Granite Co., 74 Fed. 155, 157, 20 C. C. A. 366, 368, 36 U. S. App. 682, 687.

It is not claimed that the railroad, the switches, or any of the apparatus of the Union Depot Company were defective, or that there was any negligence in their construction or maintenance. It is, however, urged that there was evidence that that company was negligent (1) in promulgating reasonable rules, (2) in failing to employ a sufficient number of switchmen, and (3) in exercising control and supervision of the operation of its yard. The argument in support of this position proceeds upon the assumption that there was evidence in this record from which the inference may properly be drawn that there was no rule or supervision of the depot company which required a switchman to be in attendance in the yards and to protect cars placed upon the dead track by turning the switches between 11 o'clock at night and 5 o'clock in the morning. But this assumption is unwarranted by the evidence. It rests on this statement of one of the witnesses: "From my experience these tracks were lined up anywhere after 11 o'clock at night until 5 o'clock in the morning, so that it was proper to proceed without delay or bothering a switch tender to be there." This testimony does not indicate that no switchman was required to be there or that no switchman was there during these hours. It tends to show that there was one in attendance, because it speaks of bothering him, and, if he had not been there, he could not have been bothered. If it shows anything, it proves that there were one or more switchmen in attendance, but that it was proper for Brady to proceed without bothering them, because at the hour when he passed through the yards the tracks were usually lined up and clear. Other portions of the testimony of this witness make it plain that it was the custom and practice of the depot company to have switchmen in the yards, to protect cars left on this dead track, at all hours of the day and night. He says:

"There was liable to be some transferring at night, and placing of cars on the dead track. * * * It was the duty of the switch tenders employed by the Union Depot Company to set the switches in this locality, including the switches that led to and from the transfer track referred to. * * * The crew of one railroad company would set cars there to be afterwards taken and received by the crew of another company, but the cars were to be immediately afterwards taken or protected. To the best of my knowledge, they were always immediately taken or else protected. * * * It was not the defendant's custom to have any one at the dead track in question to watch or protect cars placed upon the dead track by other companies. It was the custom for the Union Depot switchtenders to protect those cars."

The plain effect of this testimony is that, while it was not the duty or the custom of the defendant to protect these cars, it was the invariable custom and the practice of the switch tenders of the depot company to do so, both by night and by day.

Now, the burden was on the plaintiff to prove the negligence upon which its counsel relies. The legal presumption was that the depot company made and announced reasonable rules, and that it exercised reasonable supervision. Conceding that it should have made such rules, and should have exercised such supervision, that it would have been the duty and the practice of its switchmen to protect this refrigerator car on the dead track by turning the switches at night, the legal presumption is that it made such rules and exercised such supervision. There is no evidence to the contrary, and the necessary inference from the testimony is that this terminal company fully discharged its duty, for the evidence is that it was the duty and custom of all the switchmen to protect these cars, and the only conceivable way in which this duty could have been imposed and this custom established was by a rule and supervision which required it. Such a rule and supervision constitutes the discharge of the whole duty of the depot company in this regard. It was not required to go farther. The duty of supervision does not require a master to place a spy or a watchman by the side of each switchman or employé to see that he discharges his duty. It is enough that reasonable rules are established and made known to him, and that a supervision and control are exercised which establish the custom of compliance with them. The legal presumption is that the servant as well as the master will discharge his duty, and upon this presumption the master has the right to rely in the performance of his duty. There was no evidence in this case which would have sustained a finding of the jury that there was any negligence on the part of the depot company in promulgating rules for, or in exercising supervision over, the operation of its railroads and yards.

There is no claim that it did not employ competent servants, but it is said that it did not engage a sufficient number of them. The suggestion is without support in the evidence. The only testimony on the subject is that there were something like 100 switches in the yard, and three or four switchmen, who did nothing but throw them. There was no evidence that these switchmen were at any time insufficient in number to speedily and carefully work the switches, much less that they were so in the night when this accident happened and when the business in the yard was necessarily light. Nor was there any evidence that the accident was the effect of a lack of employés. The result is that there was not only no evidence from which the inference could have been fairly drawn that the depot company was guilty of negligence in the discharge of any of the positive duties of the master, but the legal presumptions and the testimony alike concur in establishing the conclusion that it completely discharged these duties, and that the sole cause of the accident was the negligence of one or more servants in the discharge of the primary duties imposed upon them. The defendant, therefore, was not liable on account of its

own negligence or on account of the negligence of the depot company in the discharge of the absolute duties of the master.

The second proposition of counsel for the plaintiff in error is that the depot company and its employés were fellow servants of Brady and the other employés of the defendant, and that the latter is liable for their negligence in failing to turn the switches and protect the refrigerator car under the Minnesota statute, which reads:

"Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part." St. Minn. 1894, § 2701.

Let it be borne in mind in the consideration of this contention that, if there was any act of negligence on the part of the servants of the depot company established in this case, it was the failure of its switchmen to throw the switches and protect the refrigerator car when placed on the dead track. The question, then, is whether at the time this car was set upon the track, and the switchmen of the depot company failed to turn the switches, they were the agents or servants, or their master was the agent or servant of the defendant, so that the latter may be held for their carelessness under the doctrine of respondeat superior. This question must be answered by a determination of the question whether or not the defendant had the power to command these switchmen, and to direct them what to do and where to do it, when that car was set upon the track. The power of control is the test of liability, under the maxim respondeat superior. If the master cannot command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal cannot control and direct the alleged agent, then he is not his agent, and the principal is not liable for his acts or his omissions. In such case the maxim respondeat superior has no application, because there is no superior to respond. In an action against an alleged master or principal for the act of his alleged servant or agent under the maxim respondeat superior, there can be no recovery in the absence of the right and power in the former to cominand or direct the latter in the performance of the act charged, because in such a case there is no superior to answer. Atwood v. Railway Co. (C. C.) 72 Fed. 447, 454, 455; Byrne v. Railroad Co., 9 C. C. A. 666, 61 Fed. 605, 608, 24 L. R. A. 693; Hilsdorf v. City of St. Louis, 45 Mo. 94, 98, 100 Am. Dec. 352; Town of Pawlet v. Rutland & W. R. Co., 28 Vt. 297, 300; Miller v. Railroad Co., 76 Iowa, 655, 659, 39 N. W. 188, 14 Am. St. Rep. 258; Wood, R. R. § 388; Donovan v. Construction Syndicate [1893] 1 Q. B. Div. 629; Rourke v. Colliery Co., 2 C. P. Div. 205.

Let us test the claim of the counsel for the plaintiff by this rule. The defendant was a railway corporation which owned and operated railroads from St. Paul to Chicago and from St. Paul to Kansas City. The depot company was a corporation of the state of Minnesota which owned and operated the union passenger depot and the transfer yard in the city of St. Paul. Its capital stock was $350,000, and this stock had been taken in equal amounts by seven railroad corporations, which used the yard and the depot. It had mortgaged its property for

$250,000. On January 15, 1894, it made a contract with the defendant in which the parties agreed that the railway company should have the use of the station and yard of the depot company with the other six railroad corporations until 1979, and that it would make this station its main passenger depot in St. Paul; that the depot company would maintain and operate with its own employés its station and its yard; that it would provide all necessary buildings and machinery and all needed mechanics and workmen; that the defendant would pay its proportionate share to be fixed by the board of directors of the depot company of the aggregate annual rental of the property of the latter company, which should consist of the current expenses of maintaining and operating the depot and yards, the interest on its mortgage debt, and a dividend of 6 per cent. on its capital stock, less the income derived from the rent of the use of the privileges in or on the property to others than the seven railroad companies; that the depot company should have the exclusive right and power to establish reasonable rules and regulations for the operation of the property used, and that the railway company should comply with them; that the depot company would permit the railway company to transfer to and receive from other companies passenger and freight cars, engines, and trains through its yard; that the depot company should have the general control, management, and supervision of the passenger depot, grounds, tracks, and railways constituting its property, and of the business conducted thereon; "that inasmuch as the officers, agents, and employés of the party of the first part (the depot company) are in fact employed for and in furtherance of the business of the companies using said grounds" the depot company shall not be liable to the railway company for any damage resulting to the latter from the negligence of the servants of the former, and the railway company will indemnify the depot company against any claims for damages caused by its engines or cars, or by the negligence of the employés of the depot company while acting for or in furtherance of the business of the railway company, or as the mutual servant of both.

Counsel seize upon the stipulation of this contract last quoted, and insist that by it the depot company and its servants are made the agents and the servants of the defendant, because it recites that they are employed for and in furtherance of the business of the companies using the grounds, and because it promises indemnity against their negligence when acting in furtherance of the business of the defendants or as mutual agents of both. But the relation of the parties to this contract is not to be determined by a single excerpt from it. It must be found by a careful perusal and interpretation of the entire agreement. When the entire contract is read, the true intent of the parties is ascertained, and the test of the power of the defendant to command and direct the switchmen in the performance of the fatal act of negligence is applied, there can remain little doubt that they were neither the servants nor agents of the defendant, and that it was not liable for their omission. The express provisions of the contract that the depot company should have the exclusive management and control of the station grounds and railroads and of the business thereon, the exclusive right and power to make rules and regulations for their operation,

and that it should furnish the employés to carry on this business, cannot fail to prevail over the mere recital on which counsel relies for success, and they demonstrate the fact that the defendant company was without any power or authority to control or direct the switchmen in the discharge of any of their duties. It had no right to turn a switch or to command any employé of its own or of any other company to throw one. The limit of its privilege was its right to demand that its cars and trains should be transferred under its agreement; but the exclusive power to determine and to direct its servants how, when, and where this transfer should be made was expressly reserved to the depot company.

The provision that the defendant will indemnify the terminal company against claims for damages arising out of the acts and omissions of the latter's servants while acting in furtherance of the business of the defendant or as the mutual agents of both cannot change the established relations of the parties. It is nothing but a contract of indemnity, and a contract of indemnity does not make the persons against whose acts the indemnity is promised the agents or servants of the indemnifier.

Nor is there anything inconsistent with this conclusion and with the express stipulations of the contract that the depot company shall have the exclusive control and management of its yards and servants in the recital that the latter are employed for and in furtherance of the business of the companies using the grounds. The servants of contractors for the construction of buildings, of railways, and of machinery are employed in furtherance of the business of the parties with whom such contracts are made. But the latter are not the superiors of such servants, within the meaning of the doctrine respondeat superior. In the same way the servants of the depot company were employed for, and in furtherance of the business of, the companies using the yards. Yet not one of those companies was their superior, within the true interpretation of the maxim here invoked, because no one of them had the right to control, direct, or command these servants how, when, or where they should discharge their duties. Their acts and omissions, therefore, were not the acts or omissions of the railway companies, and they cannot be charged with liability for them.

The next contention of counsel is that, if the switchmen were not the general agents of the defendant, yet in the omission to throw the switches when the refrigerator car was set upon the track they were acting in its business, and were its servants pro hac vice. This position is untenable for two reasons. In the first place, the act of negligence was not committed when the switchmen were acting for, or in the business of, the defendant. It was committed when they were acting for, and in the business of, one of the other companies using the grounds, viz., in the business of that company which deposited the car upon the dead track. The testimony is that it was the duty and the custom of these switchmen to protect every car deposited on the track at the time it was left there by then throwing the switches. It was in the transaction of the business of the company which left this car, and not in the transaction of the business of the defendant or of any other company, that this duty devolved upon the switch-

men. This is demonstrated by the fact that this duty never would have been imposed upon them at all if the car had not been left upon the track. Before it arrived there the switches and the track were in proper position for the passage of the defendant's train. If the car had not been placed there, no change of the switches, no act on their part, would have been required of the switchmen. The deposit of the car imposed upon them the duty to immediately throw the switches to protect it. This duty would have been as fully imposed and the negligence of these switchmen would have been as complete if the defendant had never run another engine or train upon the tracks after the car was deposited. The fatal act of negligence was not committed in furtherance of any business of the defendant, and it is only when the servant of another is engaged in transacting the business of the defendant that he can be held to be the latter's servant pro hac vice.

In the second place, if the switchmen had committed the act of negligence in furtherance of the business of the defendant, they would not have been the servants of the latter, because by the express terms of the contract between the two corporations and by the testimony these switchmen would not have been subject to the control or the direction of the defendant. The testimony is that they were employed and paid by the depot company, that they had exclusive control of the switches, and that no servant of the defendant was permitted to touch them. The contract is that the depot company has the exclusive management and control of the grounds, railways, business, and necessarily of the employés who do the business of that corporation. This stipulation vests this power of control and direction of the switchmen in the depot company just as absolutely, and deprives the defendant of it just as completely, when they are assisting to transact the business of the latter, as when they are acting in furtherance of the business of other railway companies or of the depot company. They could not, therefore, have been the servants pro hac vice of the defendant in the transaction of its business in this yard, because they could not have been subject to its command or direction, under the contract and the testimony. Railroad Co. v. Craft, 16 C. C. A. 175, 69 Fed. 124. 129; Railroad v. Stoermer, 2 C. C. A. 360, 51 Fed. 518, 520; Kastl v. Railroad Co., 114 Mich. 53, 55, 58, 72 N. W. 28; Phillips v. Railway Co., 64 Wis. 475, 486, 25 N. W. 544; Sawyer v. Railroad Co., 27 Vt. 370, 380; Zeigler v. Railroad Co., 52 Conn. 543, 555, 556; Railroad Co. v. Armstrong, 49 Pa. 186; Philadelphia, W. & B. R. Co. v. State, 58 Md. 372.

The cases cited by counsel for the plaintiff in error where, as in Rourke v. Colliery Co., 46 Law J. C. P. 283, an employer lends his men to another to perform services for him and under his direction; as in Johnson v. City of Boston, 118 Mass. 114, where he rents them to a city to work with its servants under its direction in constructing a sewer; or as in Ewan v. Lippincott, 47 N. J. Law, 192, 54 Am. Rep. 148, and Wiggett v. Fox, 11 Exch. 832, where he furnishes them to others to perform services for them under their control; or as in Railway Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705; Vary v. Railroad Co., 42 Iowa, 246; Taylor v. Railroad Co., 45 Cal. 323; Miller

v. Railroad Co., 154 Pa. 474, 26 Atl. 779; and Mills v. Railroad Co., 2 MacArthur, 314,—where, under the agreement between two individual companies, the employé of the one becomes subject to the control and direction of the other in the very matter wherein the negligence is committed,—are plainly distinguishable from the case before us by the fact that in each of these cases the power to command, direct, and control all the employés in respect to the negligent act was vested in the master of the servant injured. The case of Murray v. Railroad Co. (Conn.) 34 Atl. 508, 32 L. R. A. 539, is not in point, because the cause of action in that suit was based on a contract with a passenger; and the case of Railroad Co. v. Dorsey (Tex. Sup.) 18 S. W. 444, has no application to this issue, because the negligence there charged was a breach of one of the absolute duties of the master resulting in a defect of the cars and track.

In the case in hand Brady was employed, paid, and commanded by the defendant. The switchmen were employed, paid, and directed by the depot company. Neither corporation had any control over the men in the employment of the other; neither corporation could select, employ, or discharge them. The defendant never had any right or power to direct the switchmen of the depot company what to do or where or how they should discharge their duties. Their acts, therefore, were not its acts, it was not liable for their negligence, and they were not the fellow servants of Brady.

Finally, it is contended that the seven railroad companies which held the stock of the depot company were partners, and that each of them is therefore the co-employé of all the servants of the depot company and liable for all their torts. In the discussion of this proposition cases are cited wherein one corporation which held all the stock of another owned a part of its motive power, and employed and controlled its agents and servants, was held liable for its infringement of a patent (Railroad Co. v. Winans, 17 How. 30, 15 L. Ed. 27), and where three individual partners in operating a coach line were held liable for the negligence of the driver of one (Bostwick v. Champion, 11 Wend. 571). But these and similar authorities have little tendency to support the theory that this depot company is a partnership, and that each of its stockholders is liable for all of its torts. It acquired its charter from the state of Minnesota. The requisite acts have been done under the statutes of that state to make it a corporation. Those statutes declare that, those acts having been performed, it is a corporation. It has issued and sold its stock. It has made its mortgage and it has transacted the business for which it was chartered for many years. The laws of Minnesota prescribe the duties and fix the liabilities of its stockholders. These are not the duties and liabilities of partners. The stockholders, it is true, have made contracts with the corporation; but there is nothing in those contracts which dissolves the corporation, impairs its existence, or changes the legal relation of the holders of its stock to the legal entity which issued it from that of stockholders to that of partners. There is nothing illegal or inequitable in the contracts. The law of the land fixes the liability of the parties to them, and that liability is not that of partners. The

fact that under these agreements the stockholders share the prosperity and adversity of their corporation has no tendency to prove that they are partners, because the stockholders of all corporations share the same fate. The deeds of these stockholders will not convey the property of the corporation. Their only control of it is by the vote of its stock, and by the contracts it makes, and it has every attribute of a corporate entity, while they have every attribute of stockholders. Neither it nor its employés are subject to the command or control of any of its stockholders, within the maxim respondeat superior, and neither it nor its servants are either the agents or the servants of the defendant, under the fellow servant law of the state of Minnesota.

The result is that there was no substantial evidence in support of the alleged cause of action in this case, and the court's instruction to the jury to return a verdict for the defendant was right. That judgment is accordingly affirmed.

CALDWELL, Circuit Judge, dissents.

GREENE v. BENTLEY et al.

(Circuit Court of Appeals, Fifth Circuit. February 18, 1902.)

No. 1,068

CHATTEL MORTGAGES—REMOVAL OF PROPERTY BY MORTGAGOR—LACHES OF MORTGAGEE.

A mortgagee in a chattel mortgage taken under the laws of Texas, which require him, in case the property shall be removed into another county, to record his mortgage in such county within four months, under the penalty of rendering the mortgage void as against creditors of the mortgagor or purchasers without notice, is bound to exercise reasonable diligence to give notice of and protect his lien in case the property is removed into another state; and where a mortgagee had knowledge that property included in his mortgage had been taken by the mortgagor into an adjoining county in Louisiana, but permitted it to remain there three years without taking any steps to assert his claim or give notice of it, although it was long past due, he will be barred by laches from enforcing his lien after the property has been surreptitiously brought back into Texas by the mortgagor, as against one who purchased it for value and without notice under an execution sale in Louisiana; and this although he could not have recorded or enforced his mortgage under the laws of Louisiana, where he had ample time to have reduced his claim to judgment and sold the property on execution.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

F. H. Prendergast, for appellant.
Chas. S. Todd, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. On November 9, 1895, one L. C. Smith executed a chattel mortgage to W. S. Johnson, on 15 mules and other personal property, to secure said Johnson for his indorsement of the note of said Smith to the First National Bank of Atlanta, Tex., for

$875, and "also to secure the payment of an open account due E. M. Greene [appellant] amounting to $1,340, which stands charged to Smith & Johnson." The mortgage was executed and duly recorded in Cass county, Tex., and all the parties to it reside there; but it did not recite where the property was situated at the time, and it does not clearly appear from the evidence. At that time Smith was at work with the mules on the Kansas City, Pittsburg & Gulf Railroad, and hauling from Atlanta to said railroad. The railroad runs through Cass county, Tex., a short distance (about 10 miles), then crosses the state line, and continues southward through Caddo parish, in the state of Louisiana, for about 200 miles. Soon after the execution of the mortgage, Smith carried 10 of the mortgaged mules to Louisiana, and they were in Louisiana nearly all the time from the fall of 1895 until September, 1898. On June 21, 1897, Smith executed his note to I. L. Safferstone, at Shreveport, La., for $334.44, on which Safferstone brought suit in the First judicial district court of Caddo parish, La., on the 20th day of December, 1897. On February 7, 1898, I. L. Safferstone recovered judgment against Smith in said suit on said note. On February 24, 1898, a writ of fieri facias was issued on said judgment, and on February 28th it was levied on 10 of the mules in controversy, and they were duly advertised to be sold on April 2, 1898. On that day they were sold under said writ to Hunter Bros., of Shreveport, for $350. The 10 mules were immediately delivered to Hunter Bros., who permitted them to remain in Smith's apparent possession until September 20, 1898, when they sold them, with 4 others which they had bought from Manning or Prater, for $700, to appellees, W. J. Bentley & Co., for $1,200, taking three notes, at 30, 60, and 90 days, for $400 each, which notes were paid in due course by appellees. At the time Bentley & Co. purchased the mules they had no notice, actual or constructive, of any claim of appellant, Greene, and they bought in good faith, for value. Hunter Bros. delivered the mules to Bentley & Co., and they, being engaged in United States government levee work on Red river, put them on their work, and, at Smith's request, employed him to work them, which he did for their account until December 4, 1898. There is much evidence tending to show that the sale under execution on the Safferstone judgment, the purchase by Hunter Bros., and the subsequent sale by Hunter Bros. to W. J. Bentley & Co. were simulations, whereby Smith actually retained his ownership of the mules in question, as he certainly did the possession; but, on the whole case, we follow the trial judge in holding to the contrary. December 4, 1898, without the knowledge or consent of Bentley & Co., Smith took the mules off the work in Louisiana, and carried them to Atlanta, Cass county, Texas, and turned them over to appellant, Greene, to satisfy the mortgage debt Smith owed to Greene. Hedberg, of the firm of Bentley & Co., immediately followed, and found the mules in Greene's possession, and demanded them of him, but Greene refused to give them up; claiming them under his mortgage, and a sale by Smith to satisfy same. Bentley & Co. instituted a suit at law against Greene in the United States circuit court for the Eastern district of Texas to recover the mules, or their value, and for damages. Greene, defendant in that suit, pleaded

to the jurisdiction of the court, but the plea was overruled on hearing of testimony. Greene then filed this bill to stay the action at law, and for foreclosure of the mortgage. No injunction was granted, but, on full hearing of the evidence, the court rendered a decree in favor of the appellees, Bentley & Co., for title and possession of the mules, and also for $70 as damages, from which decree Greene has sued out and perfected this appeal.

The appellant contends in his first assignment of error that a valid lien in his favor having been fixed on the mules in Cass county, Tex., the lien could not be devested or destroyed by Smith's removing the mules into Louisiana. As against Smith, this proposition is probably correct; but as against Bentley & Co., who acquired the mules in Louisiana in good faith and without notice, and under the circumstances shown by the evidence, it is not necessarily correct. Chattel mortgages are unknown to the laws of Louisiana, and cannot be enforced in that state. Delop v. Windsor, 26 La. Ann. 185. It would seem, therefore, that when the mules in controversy were moved into Louisiana, with or without the consent of the appellant, they became subject to the laws of that state, and the lien of the Texas mortgage lapsed, or at least remained in abeyance, as long as the mules remained in Louisiana. It follows that the mules in Louisiana were subjected to seizure and sale under execution against Smith, the owner, the same as if no mortgage had ever been granted; and, if full faith and credit are to be given to the judicial proceedings in Louisiana (as to which see Green v. Van Buskirk, 5 Wall. 307, 18 L. Ed. 599; Id., 7 Wall. 139, 19 L. Ed. 109), the purchaser in good faith at such execution sale took title to the property. But it is not necessary in this case to go to this extent to negative appellant's right to recover. The mules in question were removed to a parish in Louisiana adjoining Cass county, Tex., where the appellant and his debtor both lived, and were allowed to remain in Louisiana for nearly three years without any assertion or notice whatever of appellant's mortgage rights; and this, taken in connection with the fact that Smith's debt to appellant was long past due, was such laches as, in our judgment, precludes the appellant from now asserting his title on the unlawful and surreptitious return of the mules by Smith to Cass county, Tex. The Texas statute under which appellant claims his lien reads as follows:

"Every deed, mortgage, or other writing respecting the title of personal property hereafter executed, which by law ought to be recorded, shall be recorded in the clerk's office of the county court of that county in which the property shall remain; and if afterwards the person claiming title under such deed, mortgage or other writing shall permit any person in whose possession such property may be, to remove the same or any part thereof out of the county in which the same shall be recorded, and shall not, within four months after such removal, cause the same to be recorded in the county to which such property shall be removed, such deed, mortgage, or other writing, for so long as it shall not be recorded in such last mentioned county, and for so much of the property aforesaid as shall have been removed, shall be void as to all creditors and purchasers thereof for valuable consideration without notice." 2 Sayles' Ann. Civ. St. art. 4651.

If the mules had been removed to an adjoining county in Texas, and the appellant had remained quiet for four months, he would undoubtedly, under the above statute, have lost his lien, as against purchasers

for a valuable consideration, without notice. While it is very true that appellant could not have made a valid record of his lien in Louisiana, yet with diligence he could have there asserted his claim by otherwise giving notice; and, as his claim was long past due, he could have brought a suit in the Louisiana courts, and, if his claim was valid, have obtained judgment, and, on execution, could have subjected the mules to the satisfaction of his claim long before the appellees' rights attached. In his evidence, appellant admits that he had learned that Smith had taken the mules to Louisiana, but he does not say when he learned the fact; nor does he testify to any diligence whatever in regard to asserting his lien. If, in order to preserve his lien when the mortgaged property is removed to an adjoining county in the same state, diligence on the part of the mortgagee in the assertion of his rights is required, a fortiori diligence in the assertion of his right is required when the mortgaged property is removed to an adjoining parish in another state, where such mortgages are not enforced. This disposes of the first assignment of error, and also of the second, which asserts the same contention in another form.

The third and fourth assignments of error, which assert the proposition that Bentley & Co. had only a lien on the mules in controversy to secure a debt, which lien was void under the law of Louisiana, and the fifth and sixth assignments of error, which deny title of Bentley & Co. to two of the mules in controversy, are none of them well taken, because they are not supported by the facts as shown by the evidence, and hereinbefore recited.

The seventh assignment of error, to the effect that the court erred in granting to W. J. Bentley & Co. affirmative relief to the extent of awarding them a judgment for $70 damages, is well taken, because there are neither pleadings nor evidence to warrant such judgment.

This disposes of all errors assigned, and our conclusion on the whole case is that the decree appealed from should be amended by striking out the judgment for $70 damages, and, as so amended, the same should be affirmed, at costs of the appellees, and it is so ordered.

THE NO. 6.

THE NO. 7.

(Circuit Court of Appeals, Second Circuit. March 18, 1902.)

Nos. 55, 56.

MARITIME LIEN—REPAIRS.

Where libelant was asked by the captain of certain scows of which he was in charge to repair the same, and the repairs were necessary, and were made in a foreign port at the direction of such captain, who was without funds of the owner, the libelant is entitled to a lien therefor on the scows, which were the only means of credit for the bills incurred.

Appeals from the District Court of the United States for the District of Connecticut.

This cause comes here upon appeals from decrees of the district court for the district of Connecticut in favor of libelants, to sustain a lien against proceeds of the vessels for certain repairs.

Le Roy S. Gove, for appellant.
Henry A. Hull, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The Providence Dry Dock & Marine Railway, libelant, a corporation, in the city of Providence, furnished in June, 1899, indispensable repairs to the scows No. 6 and No. 7 to the amount of about $1,000. The scows had no indiciæ of ownership upon them, and were without record of temporary title, and Providence was not their home port. One Capt. Ferret was in possession and charge of the scows when they were taken to the shop of the libelant. He ordered the repairs, and oversaw and directed them. At this time the libelant was repairing the scows of the Kershaw plant,—a plant which was not owned by Brainard, who was the apparent owner of the scows, but which he seems to have been using. The libelant at first thought that scows 6 and 7 belonged to this plant, and charged the repairs accordingly; but discovered the mistake, and subsequently kept the accounts with the scows 6 and 7; each scow being charged for its own repairs. During the repairs, Ferret had entire control of the scows. The repairs were made by his direction, who was acting as their captain, and who was directing the repairs in the interest of the company. Brainard was without credit. These repairs were necessary, were made in a foreign port at the direction of the acting captain, who was without funds of the owner, and were made upon the credit of the scows, which were the only means of credit for the bills which were incurred. The Grapeshot, 9 Wall. 129, 19 L. Ed. 651.

The decrees are affirmed, with interest and costs.

MELLOR v. SMITHER.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

1. EQUITY—PLEADING—AMENDED AND SUPPLEMENTAL BILLS.
A plaintiff who had no cause of action at the time of the filing of his bill cannot, by amendment or a supplemental bill, introduce one which accrues thereafter; but where the original bill states a cause of action, although defectively, the defects may be cured by amendment, and material facts occurring after the bill was filed may be brought in by a supplemental bill.

2. SAME.
Where leave is given to file a supplemental bill to introduce matters arising subsequent to the filing of the original bill, the court will permit other matters to be incorporated therein which might have been brought into the original bill by amendment.

3. PARTNERSHIP—ACCOUNTING BETWEEN PARTNERS—RIGHT OF ACTION.
Plaintiff was surviving member of a firm which had been engaged in business transactions with defendant relating to the purchase and sale of cotton. The firm had rendered defendant accounts covering such transactions, which had been received without objection, and it subsequently made a written assignment to another of its "claim and cause of action" against defendant "for a balance due upon an account stated," specifying two accounts which had been rendered, together covering all of such transactions. The assignee brought an action at law on the

accounts, against which defendant successfully defended, on the ground that the relations between him and the firm in respect to the transactions in question were those of partners, and that there had been no accounting between them. *Held*, that plaintiff, as surviving partner of his firm, had the right to maintain a suit in equity against defendant for an accounting, notwithstanding the assignment.

4. EQUITY—PLEADING—SUPPLEMENTAL BILL.
Having instituted such a suit, an amended and supplemental bill, filed by leave of court, setting out that since the filing of the original bill the assignee of the account stated, who had been made a party defendant, had died, but had previously disclaimed any right, title, or interest in the cause of action, and that his executors had executed a release of the same to plaintiff, did not state a new cause of action, but supplied pertinent facts showing that plaintiff was entitled to receive whatever sum should be shown to be due from defendant on the accounting.

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

This is an appeal from a decree sustaining a demurrer to the amended and supplemental bill of complaint in the cause. The plaintiff, Mellor, filed his original bill of complaint in the case May 30, 1898, as surviving partner of the commercial firm of Mellor & Fenton, of Liverpool, his copartner having died in 1895. The bill shows an agreement between plaintiff's firm and the defendant John T. Smither for the purchase of cotton in the state of Texas and the sales of cotton for future delivery, and certain purchases and sales in accordance with such agreement, and certain losses in such business, and purchases and sales of cotton and futures for the individual account of Smither, and certain losses in such business. It is averred that in conducting the business on joint account, and attending to the individual transactions of the defendant Smither from September 15, 1892, to September 15, 1893, the plaintiff's firm paid out various sums for charges and expenses, and sustained certain losses, whereby, upon an accounting between the parties, there became due to the plaintiff's firm from defendant Smither the sum of £1,424. 19s. 10d.; that on or about January 26, 1894, the plaintiff's firm sent to Smither an account of all the transactions on joint account between them and Smither, and also on the individual account of Smither, showing the balance above stated to be due to plaintiff's firm, which balance represented one-half the loss on transactions on joint account and the entire loss on individual transactions of Smither, and the expense and charge of conducting said joint and individual business; and it was further averred that on or about the 30th day of March, 1894, the defendant Smither paid on account of said indebtedness the sum of £711. 12s. 11d. The bill further averred other transactions of a similar character between September 15, 1893, and January 12, 1895, in consequence of which, and of certain errors made by Smither in the deduction of profits and drawing of drafts, whereby Smither became further indebted to plaintiff's firm in the amount of £3,851. 5s. 9d.; and that the total amount due to the plaintiff's firm for the transaction of both seasons, from September 15, 1892, to September 15, 1893, and from September 15, 1893, to January 12, 1895, was the sum of £4,505. 10s. 1d., which, in the currency of the United States of America, amounted, on the 12th day of January, 1895, to the sum of $21,982.50. The bill further averred that on or about the 27th day of March, 1895, plaintiff's firm assigned in writing to the defendant William H. T. Hughes all its claim and demand based upon the accounts rendered and stated by plaintiff's said firm to the defendant Smither for the individual and joint transactions of the two separate periods from September 15, 1892, to September 15, 1893, and from September 15, 1892, to January 12, 1895; that in April, 1895, Hughes commenced an action at law in the supreme court of the state of New York, for the county of New York, against the defendant Smither, to recover upon said account stated and rendered the amount thereof, namely, the sum of $21,982.50, with interest, said action being based upon the

said account stated and the acceptance thereof by John T. Smither, on the theory that the original parties, Mellor & Fenton, on the one hand, and John T. Smither, on the other, bore the relation to each other of consignor and consignee, or principal and agent, and that the account should be settled between them as in ordinary cases between merchants, and not as between partners; that Smither defended the action upon the theory that the original partners were co-partners, and that the action on the account stated would not lie, and that the issues in this action in New York were duly brought to trial, and resulted in a judgment in favor of the defendant Smither, dismissing the complaint upon the merits, but expressly without prejudice to an action or suit in any court having jurisdiction thereof and of the parties for a settlement of the account of said partnership transaction. It was further averred that an appeal was taken from the above judgment to the appellate division of the supreme court for the First department in New York, where the judgment was affirmed, expressly on the ground that the action was brought by the assignee of the claim for an account stated as between principal and agent, and that, the relation between the parties being that of partners, there could be no settlement of the partnership transactions in the suit. It was further averred that Hughes had appealed from the adverse judgment of the appellate division of the supreme court of New York to the court of appeals of that state, and that such appeal was pending and undetermined; but the plaintiff, desiring to avail himself of the privilege of a suit for an accounting as between himself as surviving partner and the defendant Smither, brings this suit, and also joins Hughes as a defendant. The bill further averred that by the judgment of the supreme court of New York the actions in respect to the above-mentioned transactions and dealings between plaintiff's firm and Smither were still open and unsettled, and that, if the accounts between the plaintiff and the defendant Smither should be properly taken, a considerable balance would be due to the plaintiff from said Smither, and that such an accounting could not be properly taken except in a court of equity. The plaintiff, therefore, prayed that the defendant Smither might make a full and true discovery and disclosure of and concerning all and singular the transactions and matters set forth in the bill, and that an account might be taken, by and under the direction of the court, of all dealings and transactions between the plaintiff as surviving partner and the defendant Smither; that in taking such account the defendant Smither might be charged with overpayments made to him by plaintiff's firm on account of fictitious profit, and also with such sums of money as were paid, laid out, and expended by plaintiff's firm for and on account of the individual transactions of the defendant Smither during the periods referred to in the bill of complaint; that the rights of the defendant Hughes might be determined; that the balance which might be found upon the taking of such account to be due by Smither to the plaintiff's firm might be paid by the defendant Smither to the plaintiff; and that such other and further relief might be granted as might seem just.

The defendant Smither demurred to the bill for want of equity, and because it was claimed that the demand of plaintiff had been assigned to Hughes, and there was no explanation in the bill under which such assignment could be ignored; that no estoppel was set up against Smither as to errors and omissions; and, finally, that the bill does not set forth itemized accounts in a proper manner.

On October 22, 1900, the case came on to be heard upon demurrer, and the demurrer was sustained, but no order was made to dismiss, and, on motion of plaintiff, leave was granted to amend the bill. Thereupon, on December 3, 1900, the plaintiff, Mellor, filed his amended and supplemental bill of complaint. This amended and supplemental bill in some respects amended the allegations of the original bill, and in other respects it stated matters occurring since the filing of the original bill by way of supplement. It sets forth more particularly and at large the various transactions between complainant's firm and John T. Smither, both on joint account and on the individual account of Smither, and claims Smither to be indebted to plaintiff, as surviving partner, in the same sum of $21,982.50. It further avers that the dealings and transactions between the plaintiff's firm and Smither, in which

they were interested together, in accordance with and pursuant to the agreement between them entered into on or about September 30, 1892, for the purchase of cotton and the sales of cotton futures and spot cotton, did not cease until January 12, 1895, when the final account between the parties was sent by plaintiff's firm to Smither. It further shows that on or about the 26th day of January, 1894, plaintiff's firm sent to Smither an account of the transactions relating both to the joint account business and the individual transactions of Smither, covering the period of the first cotton season from September, 1892, to the close of the year 1893, claiming a balance due in United States currency of $3,188.32, and that on or about January 12, 1895, plaintiff's firm sent to Smither an account of the firm's transactions, and the individual transactions of Smither, for the second cotton season, from September, 1893, to the close of the year 1894, claiming a balance of $18,794.18. It is further alleged that about March 27, 1895, the plaintiff's firm, assuming that these accounts had become accounts stated and that Smither had admitted his liability, duly assigned to one William H. T. Hughes, by an assignment in writing and under seal, all its claim and cause of action against Smither for the balance, $21,982.50; and it was alleged that Hughes, who had been named as a party in the original bill, was now deceased. The assignment to Hughes was annexed as an exhibit to the amended and supplemental bill. The amended and supplemental bill further set forth the action that had been brought by Hughes in the supreme court of the state of New York; the method of defense adopted there by Smither; the dismissal of the suit without prejudice to an action or suit for a settlement of the account of partnership transactions; the appeal to the appellate division of the supreme court of New York; the affirmance of the judgment dismissing the suit on the ground that the action was brought by the assignee of a claim for an account stated as between principal and agent; and that, the relation between the parties being that of partners, there could be no settlement of the partnership transactions in that suit. The affirmance of this judgment by the court of appeals of New York, in May, 1900, is further alleged. It is also averred that Hughes had died, and that Hall and Dunham were duly qualified as his executors, and that prior to his death Hughes had disclaimed any right, title, or interest in the cause of action embraced in the original bill of complaint, and, although named as a party, had not appeared or filed any pleading. It is averred that the executors, on or about November 23, 1900, had executed and delivered to the plaintiff an instrument transferring or releasing to the plaintiff all right, title, and interest in and to the cause of action embraced in this case, and disclaiming any right, title, and interest in any cause of action whatsoever against the defendant Smither, arising out of the partnership transactions between Mellor & Fenton and Smither, at law or in equity, of any kind, nature, or description, and also all right to an accounting of Smither, and all right to participate in the result or proceeds of any accounting in this suit. It is averred that the executors had surrendered and delivered up to the plaintiff the original assignment, and had executed the instrument of release and disclaimer. It was further averred that the accounts in respect to the above-mentioned transactions and dealings between plaintiff's firm and Smither are still open and unsettled, and that upon an accounting in this suit a balance of at least $21,982.50, with interest from January 12, 1895, will be found due the plaintiff's firm from Smither, and that an accounting can be properly had only in a court of equity. There was a prayer for an accounting between plaintiff and defendant, for discovery, for general relief, and for a decree for the amount found due to the plaintiff.

To this amended and supplemental bill Smither filed a demurrer upon the grounds, substantially, that the bill was not properly entitled; that it set up a new cause of action; that, if it be a supplemental bill, then it appears that plaintiff had no cause of action at the time of filing the original bill; that, if it be construed as an amended or supplemental bill, the plaintiff shows that he had no interest when he filed his original bill; that, as appears on the face of the amended and supplemental bill, the cause of action sued upon was transferred to Hughes, and sued upon by him in New York, and has never passed to plaintiff in manner and form as required by law;

that the amended and supplemental bill fails to set forth items of the account, and fails to allege and show that plaintiff is not already in possession of full itemized accounts; that the individual transactions between plaintiff's firm and respondent cannot be embraced in the bill; and, finally, that the plaintiff has a plain, adequate, and complete remedy at law.

The cause came on to be heard upon the demurrer of defendant, and it was sustained by the court. The plaintiff having refused to amend his bill of complaint, it was dismissed, and thereupon an appeal was taken by plaintiff to this court. It is assigned that the court erred in sustaining the demurrer and dismissing the bill.

William Wirt Howe (Hatch & Wickes, W. B. Spencer, C. P. Cocke, and J. W. Davis, on the brief), for appellant.

W. S. Banks, Geo. Clark, and D. C. Bollinger, 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 correct decision of this case turns on the question whether or not the plaintiff at the time he filed his bill had a cause of action. If he had no cause of action then, he cannot, by amendment or supplemental bill, introduce a cause of action that accrued thereafter, even though it arose out of the same transaction that was the subject of the original bill. 1 Beach, Mod. Eq. Prac. § 496; Straughan v. Hallwood, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29; Hill v. Hill, 10 Ala. 527. But where a cause of action exists at the filing of the bill which is defectively presented by the bill, the defects may be remedied by amendment (Equity Rules 28, 29), and matters occurring after the filing of the bill may be presented by supplemental bill (Equity Rule 57; Jenkins v. Bank, 127 U. S. 484, 486, 8 Sup. Ct. 1196, 32 L. Ed. 189; Hoxie v. Carr, 1 Sumn. 173, Fed. Cas. No. 6,802). Where material facts have occurred subsequent to the beginning of the suit, the court may give the plaintiff leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill which might have been incorporated in the original bill by way of amendment. Stafford v. Howlett, 1 Paige, Ch. 200. But, in cases where the plaintiff had no cause of action when the bill was filed, neither amendment nor supplemental bill presenting occurrences subsequent to the filing of the bill can prevent its dismissal.

The application of these principles to this case presents this question: Did the assignment by Mellor & Fenton to William H. T. Hughes deprive the former of the right to file a bill to have an accounting of the partnership transactions between themselves and John T. Smither? The assignment in question is as follows:

"Know all men by these presents that, for and in consideration of the sum of one dollar and other valuable consideration, we, William Moseley Mellor and Edward Kentish Barnes, composing the firm of Mellor & Fenton, of Liverpool, England, do hereby assign, transfer, and set over to William H. T. Hughes, of the city of New York, all our claim and cause of action against John T. Smither, of Temple, Texas, for a balance due upon an account stated and rendered to said Smither on the 5th day of February, 1894, of transactions between June 10, 1892, and September 30, 1893, and also a certain other account rendered and stated to said Smither on January 12,

1895, with respect to transactions betwen September 30, 1893, and January 12, 1895. In witness whereof we have hereunto set our hands and seals this 27th day of March, 1895. Mellor & Fenton.
"E. Kentish Barnes."

The bill alleges that a partnership existed between the firm of Mellor & Fenton and John T. Smither for the purpose of dealing in cotton. Mellor & Fenton had prepared an account of their partnership dealings during certain periods, and sent it to Smither. He having made no objection to the account, they transferred it to Hughes, who sued on it at law as a stated account. Smither defended on the ground that the account between him and Mellor & Fenton had not been stated. It was decided that the action at law on the account would not lie, and the suit was dismissed without prejudice to the right to sue for an accounting. Hughes v. Smither, 23 App. Div. 590, 49 N. Y. Supp. 115, 163 N. Y. 553, 57 N. E. 1112. After the dismissal of the action at law by the supreme court of New York, and pending an appeal, this suit was begun by Mellor, surviving partner of Mellor & Fenton, against Smither, making Hughes also a party, for an accounting of the partnership transactions. Smither demurred to the bill, claiming that the assignment of the stated account to Hughes left no right of action in Mellor for an accounting. The demurrer was sustained, but leave given to file a supplemental bill. An amended and supplemental bill was then filed, to which the defendant renewed his demurrers, as shown in the statement of the case.

It is a general rule that when a partnership is ended, or where grounds for its dissolution exist, the right of a partner to maintain a bill is undoubted. As said by the text writers: "The right of every partner to have an account from his copartners of their dealings and transactions is too obvious to require comment." George, Partn. § 142. Smither contended in the litigation at law in New York that the account had not been stated between him and Mellor and Fenton. The accounts not having been settled, the right to have them stated certainly existed after the assignment either in Mellor & Fenton, or in Hughes, or in both. Smither could not successfully contend that the assignment transferred no account stated, and yet that it had the effect of destroying the right as against him to secure a statement of the account. Whether or not the assignment conferred such rights on Hughes that he could have sued in equity for an accounting we need not consider. We have here to deal only with the question of Mellor's right to have an accounting, notwithstanding the assignment. It is stated by more than one learned author that a partner, after he had parted with his entire interest in the partnership, was entitled to an accounting. Lindley says: "If a partner's share is taken in execution, the purchaser from the sheriff is entitled to an account from the solvent partners, as is also the execution debtor himself." 2 Lindl. Partn. § 493. This is quoted with approval in George, Partn. § 142. Bates, also, maintains the right of the partner whose interest in the firm has been sold under execution to have an accounting, but he says this is true, "for he may still have an interest, inasmuch as the sheriff cannot sell book debts." 2 Bates, Partn. § 928.

In Habershon v. Blurton, 1 De Gex & S. 121, a case very often quoted by text writers, the sheriff under execution took possession of and sold "all the share and interest of the said Charles Habershon, as partner, with one John Blurton, of and in," etc.; describing the partnership property. Habershon after this sale by the sheriff filed a bill against his former partner, Blurton, for an accounting, and the point was made against the bill that he had no interest, his share having been sold by the sheriff. The vice chancellor sustained the bill, and allowed the accounting "notwithstanding * * * the seizure by the sheriff and the language of the assignment by him."

In Ketchum v. Durkee, 1 Hoff. Ch. 538, the court said that "a partner has a right to file a bill for a settlement of the affairs of the firm and a due application of the assets, even after an absolute transfer by himself to his copartner of the property charged with the debts."

We do not find that the supreme court has ever decided this question. The case of Fourth Nat. Bank of New York v. New Orleans & C. R. Co., 11 Wall. 624, 20 L. Ed. 82, is, however, very instructive, as discussing principles necessarily involved in this suit. One Graham in that case made an assignment of an interest held by him in a partnership. The court said that "the words of the assignment were very broad." It purported to transfer all of the estate, right, title, and interest which Graham had in a certain lease, and also all his right, title, and interest in any property and effects of the partnership, and all debts due to him from the partnership or any member thereof. In a bill filed by the assignee of Graham's right, which involved a settlement of a partnership, the court held that Graham, the assignor, was a necessary party; that the only effect of the assignment was to transfer any interest that Graham might have after a proper settlement of the partnership. The case could not proceed without Graham as a party, although he had assigned his interest in the partnership. This case, and others that we have cited, strongly indicate that a partner, even after he has transferred all of his interest in a partnership, would not lose the right to have a settlement in equity of the partnership accounts. See, also, Hoxie v. Carr, supra.

The assignment under consideration here, however, does not purport to transfer all the right, title, and interest of Mellor & Fenton in the partnership with Smither. It purports only to transfer a stated account relating to certain periods embraced within the partnership. Smither has successfully contended that the account was not stated, and that no right of action on it as a stated account passed to the assignee. The amended and supplemental bill shows that Hughes prior to his death disclaimed any right or interest in the claim for an accounting asserted here, and that since his death his executors (after the original bill was filed) have formally released and transferred to the plaintiff the alleged stated account against the defendant. If the averments of the bill are true,—and they are so considered on demurrer,—the defendant on settlement owes the plaintiff $21,982.50. The claim for this sum cannot be asserted at law. The partnership accounts must be adjusted in equity. Hughes' representatives (like Hughes in his lifetime) disclaim any right to proceed to have the account stated. We cannot think that an ineffectual effort of one part-

ner to state and assign an account against the other partner defeats the right of the former to have an accounting. The right to have an accounting of the partnership transaction remained in the plaintiff's firm, notwithstanding the assignment to Hughes. The disclaimer of Hughes, his death, and the formal release by his executors of his apparent interest, though not necessary to show a right of action in the plaintiff, are properly brought before the court in the amended and supplemental bill. These facts show that the defendant will not be called on to settle with Hughes' representatives after his settlement with the plaintiff; that any sum which he may owe, if it be found that he owes anything, is due to the plaintiff.

The demurrer to the amended and supplemental bill should have been overruled.

The decree of the circuit court is reversed, and the cause remanded, with instructions to overrule the demurrer and to allow the defendant to answer. Reversed.

PURPLE v. UNION PAC. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,591.

1. CARRIERS—ONE ENTERING TRAIN WITH UNDERSTANDING WITH CONDUCTOR NOT TO PAY FARE A TRESPASSER—DUTY OF CARRIER.
   One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with the deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from willful or reckless injury.

2. SAME.
   One who enters and rides upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him.

3. SAME—ALLEGED PASSENGER ON FREIGHT TRAIN PRESUMPTIVELY A TRESPASSER.
   In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier not designed for the transportation of passengers, is unlawfully there, and is a trespasser.

4. SAME—FREIGHT TRAINS—PASSENGER—KNOWLEDGE OF FACTS SUGGESTING INQUIRY.
   One about to board a train who has knowledge of facts which would put a person of ordinary prudence and diligence upon inquiry to ascertain whether or not the train is permitted to carry passengers is charged with a knowledge of all the facts which a reasonably diligent inquiry would discover.

5. NEGLIGENCE—NO SUCH DEGREE AS "GROSS."
   It is not error to refuse to instruct the jury that a defendant is guilty of gross negligence as distinguished from ordinary negligence on the one hand, and willful or reckless negligence on the other, because there is no such legal degree of negligence as "gross" negligence. The word "gross" in this connection is a mere epithet used to characterize one of the two legal classes of negligence mentioned.

6. BILL OF EXCEPTIONS — STATEMENTS IN, CONCLUSIVE UNLESS EXCEPTED TO WHEN BILL IS SETTLED.

The statement of facts in a bill of exceptions is conclusive in an appellate court unless it is excepted to and the exceptions are recorded in the bill when it is settled.

(Syllabus by the Court.)

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

On the 9th of January, 1900, Cassandra Purple, who is the widow of Harry G. Purple, brought an action against the Union Pacific Railroad Company for negligence causing his death. She alleged that on October 16, 1899, between Laramie and Cheyenne, in the state of Wyoming, he was a passenger upon a train of the railroad company, and was killed through the negligence of the latter by another train which ran into the rear of that upon which Purple was riding. The railroad company denied these allegations, and averred that Purple was riding upon an extra freight train, which was prohibited from carrying passengers, that he knew that this train was not authorized to carry passengers, and that he was riding without pass or other free transportation, with the intention of paying no fare. The issues presented by these pleadings were submitted to a jury, which returned a verdict for the defendant, and a writ of error has been sued out to reverse the judgment founded upon this verdict. The case is presented upon a bill of exceptions which contains but a portion of the evidence. It discloses these facts: The train upon which Purple was riding was an extra freight train running east from Laramie to Cheyenne. It was prohibited from carrying passengers by the rules of the company, but those rules permitted regular freight trains to take passengers. At Sherman, on its way from Laramie to Cheyenne, it became a section of passenger train No. 6. The sectionizing of a train is the act of the train dispatcher. It is an act of temporary application, and may be discontinued at any suitable point. Its sole purpose is to give certain track rights that a train does not possess before the order is issued. The order at Sherman which made this train a section of regular passenger No. 6 directed a freight train ahead of this one, this train, regular passenger No. 6, another passenger train, and another freight train to run as sections 1, 2, 3, 4, and 5 of the regular passenger No. 6. These sections were running in this way when the accident occurred. The evidence of the defendant tended to show that an extra freight train did not lose its distinctive character as such by being made a section of a passenger train, but that it still remained an extra freight train. One of the rules of the company was that, where "freight trains on which passengers are allowed to be carried are run in sections, the last section of the train only" will be permitted to carry passengers, and another was that "conductors will collect fare from all persons traveling without a ticket or pass, and will be allowed no discretion in the matter."

Harry G. Purple was an employé on the Union Pacific Railroad from 1884 until 1893, and a part of the time was a conductor. The rules for the operation of this road in force at the time of his death were the same as those in force when he was employed upon the road, and at that time he was thoroughly familiar with them. The train upon which Purple rode left Laramie at 8.15 p. m. on October 15, 1899. Its conductor was an old friend and acquaintance of Purple. The train consisted of 27 or 28 freight cars and a caboose. Purple had been visiting at Laramie for two or three days, and he had in his pocket on this day a time card which disclosed the fact that this train which he boarded was not a regular freight train, and therefore was not entitled to carry passengers. He was in the train dispatcher's office before the departure of the train, and that dispatcher could have informed him that this was not a regular freight train. The evidence of the defendant tended to prove that he had no intention of paying his fare, and that there was a tacit understanding between him and Davis, the conductor of the freight train, that he was to be permitted to ride on this train from Laramie to Cheyenne without the payment of any fare. He did not

pay or offer to pay fare, nor did the conductor or any one else ask him to do so.

The bill of exceptions contains a statement that all evidence tending to show the fact or character of the defendant's negligence is found in it, and that there was no evidence in the case tending to show wanton, willful, or reckless disregard on the part of the company of the safety of the deceased. These are the principal facts disclosed by the record which condition the determination of the questions presented by the alleged errors specified in this case, which all relate to the charge of the court and to its refusal to give certain requested instructions.

L. W. Keplinger (C. F. Hutchings, on the brief), for plaintiff in error.

N. H. Loomis (A. L. Williams and R. W. Blair, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The court refused to instruct the jury that the deceased was a passenger on the freight train of the defendant at the time he was injured, and that if he was killed by the negligence of the company the plaintiff was entitled to recover. This ruling is the first and the chief complaint of counsel for the plaintiff in error. There are, however, two reasons why this specification of error cannot be sustained.

In the first place, Purple had no pass, ticket, or permit to ride free upon this train, he paid no fare, and there was evidence tending to prove that he did not intend to pay fare, and that there was a tacit understanding between him and the conductor, Davis, that he should ride free. He was a man of years, intelligence, and experience. He had been employed upon this railroad for about nine years. He knew that he had no right to ride, and that the conductor of this train had no authority to permit him to ride without the payment of his fare. The rules governing the operation of this railroad during the nine years when he was employed upon it prohibited this course of action, and they forbade it when he was killed. He had been familiar with these rules during the nine years of his employment upon this railroad, from 1884 to 1893, and in the seven years which followed, from 1893 to 1899, before he was injured, it is hardly possible that he could have forgotten or could have become ignorant of the specific fact that conductors were not empowered to grant free transportation upon this railroad, or of the general and universally known fact that it is not the custom to permit them to do so upon any railroad. If, knowing this fact, he entered and rode upon this train with the deliberate intention not to pay his fare, under the tacit understanding between himself and the conductor that he should not pay it, the entire transaction was a fraud upon the railroad company, and a deliberate attempt to appropriate tarnsportation without compensation, in violation not only of the rules of the company, but also of the civil and the moral law. If he entered and continued upon this train under this under-

standing with the settled intention not to pay his fare, the relation of passenger and carrier was never created between him and the company, but he was a mere trespasser upon its property, fraudulently appropriating his ride, and the only duty which the company owed to him was to abstain from willfully or recklessly inflicting injury upon him. One who, knowing that a conductor has no authority to grant free transportation, enters and rides upon his train with the deliberate intention not to pay his fare, under an agreement or under a tacit understanding with the conductor that he shall ride free, commits a fraud upon the railroad company, and is not a passenger, but is a mere trespasser, to whom the only duty of the company is to abstain from willful or reckless injury. Condran v. Railroad Co., 67 Fed. 522, 523, 14 C. C. A. 506, 507, 508, 32 U. S. App. 182, 185, 28 L. R. A. 749; Railway Co. v. Brooks, 81 Ill. 250; Railroad Co. v. Michie, 83 Ill. 431; Railway Co. v. Beggs, 85 Ill. 84, 28 Am. Rep. 613; Railroad Co. v. Mehlsack, 131 Ill. 64, 22 N. E. 812, 19 Am. St. Rep. 17; McVeety v. Railway Co., 45 Minn. 269, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728; Robertson v. Railroad Co., 22 Barb. 91; Railway Co. v. Nichols, 8 Kan. 505, 12 Am. Rep. 475; Prince v. Railway Co., 64 Tex. 146; Railway Co. v. Campbell, 76 Tex. 175, 13 S. W. 19; Way v. Railway Co., 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431; Same v. Same, 73 Iowa, 463, 35 N. W. 525; Hendryx v. Railroad Co., 45 Kan. 377, 25 Pac. 893; Railway Co. v. Whipple, 39 Kan. 531, 18 Pac. 730; Railway Co. v. Gants, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780. A contract is indispensable to the relation of carrier and passenger. The minds of the parties must meet upon the agreement that the carrier will transport and the passenger will pay for the transportation, in the absence of a specific agreement or permission by the proper officer of the transportation company that the latter will carry the passenger without compensation. This contract of carriage may, it is true, be express or implied, but if it does not exist in either form the relation of carrier and passenger cannot have been created. An implied agreement to pay fare, and hence the relation of carrier and passenger, undoutedly arises where one enters a passenger car and rides towards his destination. But it is equally true that if one enters and rides under an express or implied agreement with a conductor, whom he knows or has reasonable cause to believe has no authority to make such a contract, that he shall not pay his fare, but shall cheat the company out of the transportation, no contract of carriage is created, but the existence of such an agreement is conclusively negatived by the actual fraudulent contract so that it cannot exist. Therefore, if the deceased entered and rode under the fraudulent understanding with the conductor that he should pay no fare and with the deliberate intention to pay none, there was neither an express nor an implied agreement that he should pay for his transportation, and no relation of carrier and passenger arose, because the minds of Purple and the conductor never met upon any such contract, but came together upon the contrary understanding that Purple should pay no fare and should not be a passenger, but should fraudulently ap-

propriate his transportation. The bill of exceptions instructs us that there was evidence tending to establish this state of facts, and in the presence of it the court properly refused to instruct the jury that Purple was a passenger, and that the plaintiff was entitled to recover if he was killed by the negligence of the defendant, because if this state of facts existed he was not a passenger, and the limit of the duty of the defendant toward him was to refrain from willful and reckless injury to him.

In the second place, Purple was riding on a train which was prohibited from carrying passengers by the rules of the company, and there was evidence tending to prove that he either knew this fact, or had notice of such facts as would have led a person of ordinary prudence and diligence to an inquiry which would have disclosed its existence. The record is clear that at the time Purple boarded the train on which he rode to his death that train was an extra freight train, which was forbidden to take or carry passengers. After he started upon his ride and at Sherman it was made the second section of regular passenger train No. 6 by the orders of the train dispatcher, but the character of the train and the number of the cars remained unchanged. It still contained the 27 or 28 freight cars and caboose with which it started from Laramie, and it contained no passenger cars. The orders of the dispatcher made this the second of five sections running on the time of regular passenger train No. 6. The first section which preceded it was a freight train, the two sections which followed it were passenger trains, and the fifth or last section was a freight train. Thus, this passenger train No. 6 consisted of five sections, the first, second, and fifth of which were composed exclusively of freight cars and cabooses, and were in fact freight trains.

It will be convenient to notice here the earnest argument of counsel for the plaintiff presented in the discussion of another specification of error to establish the proposition that, if the extra freight train on which Purple was riding was prohibited from carrying passengers before it reached Sherman, it was permitted to do so after it passed that point, so that at the time Purple was killed it was not under this ban. Stated in syllogistic form, this is the contention: The rules permitted regular freight trains to carry passengers and forbade extra freight trains to do so. They declared that regular freight trains were those running on schedule time, while extra freight trains were those which did not run upon such time. Prior to its arrival at Sherman the train on which Purple rode was not running on the schedule time of any train. After it passed Sherman it ran on the schedule time of regular passenger train No. 6. It therefore became from that time a regular train, because it was running on the schedule time of the regular passenger train, and hence it became authorized to carry passengers before the fatal injury was inflicted. This argument is not persuasive or convincing, because the composition, character, and function of the train on which Purple rode remained the same after it became a section of the passenger train that it was before that time, and because after it passed Sherman it was not running on any schedule time prescribed for it upon the time card, but upon the time of a passenger train, under the special and temporary orders of

the train dispatcher. It is, however, unnecessary to discuss this question, because the right of the conductor of this train to carry passengers upon it after it passed Sherman is conclusively negatived by another admitted rule of the company. That rule is that, where freight trains on which passengers are allowed to be carried are run in sections, the last section of the train only will be permitted to carry the passengers. If, therefore, this became a regular freight train authorized to carry passengers when it passed Sherman, it was only the fifth section of this freight train which was permitted to do so, while the conductor of the second section, on which Purple was riding, was expressly prohibited from exercising this privilege. The train upon which Purple rode, therefore, was when he boarded it, and continued to be until the fatal collision, a train which was forbidden by the rules of the company to accept or carry him as a passenger.

Purple had worked on this railroad for nine years from 1884 to 1893. During a part of this time he had been a conductor upon the railroad. The rules for the operation of the railroad were the same in 1899, when he was injured, that they were in 1893, when he left his employment. At and before that time he was familiar with them. It is difficult to believe that in 1899 he could have forgotten that these rules permitted some freight trains to carry passengers and prohibited others from doing so. For a day or two before he started on his fatal ride he had been visiting at Laramie, where he boarded the train. On the day upon which he started he had been in the office of the train dispatcher, where he could have readily learned by a simple inquiry whether or not the train upon which he entered was permitted to carry passengers. Beyond all question, these facts charged Purple with notice sufficient to put any man of ordinary prudence and diligence upon inquiry for the answer to the question whether or not this train was authorized to carry passengers, and brought him far within the established rule that notice sufficient to put one on inquiry for a fact is notice of all the facts relative to the matter in question that a reasonably diligent investigation and inquiry will disclose. In this state of the evidence the court below rightly charged the jury: "It was the duty of the deceased to inquire whether this train was such as was authorized to carry passengers. It does not appear that he did so; consequently he was charged with such knowledge and information as reasonable inquiry would have elicited." No exception was taken to this portion of the instructions of the court, and it comes here the established law of this case. If, therefore, Purple knew, or by a reasonably diligent inquiry he could have learned, that the train which he boarded was not permitted to carry passengers, he was not a passenger upon it, but was a mere trespasser on that train, because in the eyes of the law he was there knowingly violating the rules of the company. There was evidence tending to show this state of facts, and in the presence of it the court could not have lawfully instructed the jury that Purple was a passenger, and that the defendant was liable for his death if it was caused by its negligence, because, if this state of facts existed, Purple was a trespasser, and not a passenger, and the only duty of the defendant to him was to abstain from wantonly or recklessly inflicting injury upon him. One who enters and rides

upon a car or train which he knows, or by the exercise of reasonable diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger, and the only duty of the railroad company toward him is to abstain from wanton or reckless injury to him. Railway Co. v. Roach (Va.) 5 S. E. 175; Robertson v. Railroad Co., 22 Barb. 91; Eaton v. Railroad Co., 57 N. Y. 382, 384, 15 Am. Rep. 513; Pennsylvania R. Co. v. Langdon, 1 Am. & Eng. R. Cas. 87; Powers v. Railroad Co., 153 Mass. 188, 191, 192, 26 N. E. 446; Flower v. Railroad Co., 69 Pa. 210, 8 Am. Rep. 251; Ecliff v. Railway Co., 64 Mich. 196, 31 N. W. 180.

The conclusions which have now been announced have not been reached without a careful perusal and consideration of the authorities cited by counsel for the plaintiff in error, such as Dunn v. Railway Co., 58 Me. 187, 4 Am. Rep. 267; Lucas v. Railway Co., 33 Wis. 41, 54, 14 Am. Rep. 735; Railroad Co. v. Derby, 14 How. 468, 484, 14 L. Ed. 502; Gradin v. Railroad Co., 30 Minn. 217, 220, 14 N. W. 881; Railroad Co. v. Wheeler, 35 Kan. 185, 10 Pac. 461; and Whitehead v. Railway Co., 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409,—in which boys and men who had never been employed upon the railroad, or who had no notice of facts sufficient to put them upon inquiry as to the power of the conductor or officer in charge of the train to permit them to ride upon it as passengers, were held, under the circumstances of these particular cases, to stand in this relation to the companies. The rules and principles announced in those cases are inapplicable to the facts of the case in hand, because the evidence here conclusively establishes the fact, which did not exist in those cases, that before the alleged passenger boarded the extra freight train he knew facts which would put any man of reasonable prudence upon inquiry to ascertain—First, whether or not that train was permitted to carry passengers; and, second, whether or not the conductor had any authority to allow him to ride upon it, and because there was evidence in this case, which was not presented in any of those cases, tending to show that the alleged passenger entered and rode upon the train with the deliberate intention not to pay his fare, under a tacit understanding with the conductor that he should ride free. Purple did not approach this train in the relation to the company of a boy or of an ordinary individual honestly seeking transportation without knowledge of the rules or practices of the company. The conceded facts that he had been employed upon the railroad for nine years, had been familiar with the rules and practices upon the road and the evidence of his intention not to pay, and tacit understanding with the conductor that he should not pay fare, gave him notice of facts, and suggested inquiry which the ordinary applicant for passage upon the train of a railroad company does not have. This case is not governed by the authorities cited by the plaintiff in error, which declared the liabilities of railroad companies upon very different states of facts, but is controlled by the rules and the decisions to which reference has been made in the earlier portion of this opinion.

It will be convenient to notice here another contention of counsel for plaintiff in error allied to those which have already been considered. It is that although Purple was not a passenger he was

not a trespasser, and the court should have instructed the jury that the defendant was liable to him for gross negligence. In support of this proposition cases are cited like Railroad Co. v. Derby, 14 How. 483, 14 L. Ed. 502, where a passenger who was riding free upon the railroad by the invitation of the president of the company was carelessly injured, and Farmers' Loan & Trust Co. v. Baltimore & O. S. W. R. Co. (C. C.) 102 Fed. 17, where one riding in a passenger car upon a pass sustained injury through the negligence of the company, and it was held that the defendant was liable to these persons for the exercise of ordinary care and diligence, and that any failure to exercise such care might well be characterized as gross. These authorities, and the rules of law upon which they rest and which they announce, have no application to the case in hand. Purple was not traveling on a free pass. He was not a licensee. He was either a passenger without knowledge and without notice of facts suggesting an inquiry which would have led a prudent man to knowledge of the fact that the conductor of this train was not authorized to permit him to ride upon it as a passenger, or he was a trespasser with knowledge, or with notice charging him with knowledge, of this fact, engaged in executing a deliberate intention to ride upon the train in violation of the rules of the company. He was not a licensee, and he could occupy no middle position. There was therefore no error in the refusal of the court to charge that if he was not a passenger the railroad company was liable to him for gross negligence. The term "gross" in this connection is nothing but an epithet. It means no more than the failure to exercise ordinary diligence in the circumstances of the particular case. It distinguishes no legal degree of negligence, and it is not error to refuse to apply it to the negligence for which a defendant may be liable, because its use merely tends to create doubt and to increase confusion. Wilson v. Brett, 11 Mees. & W. 113; The New World v. King, 16 How. 474, 14 L. Ed. 1019; Milwaukee Railroad Co. v. Arms, 91 U. S. 489, 494, 23 L. Ed. 374; Beal v. Railway, 3 Hurl. & C. 337; Grill v. Collier Co. [1865-66] L. R. C. P. 600; Perkins v. Railroad Co., 24 N. Y. 196, 207, 82 Am. Dec. 281.

Another complaint of the plaintiff in error is that the court instructed the jury that there was no evidence in the case sufficient to warrant them in finding that there was any wanton, willful, or reckless disregard by the company of the safety of the deceased. But the bill of exceptions contains these two statements: "All evidence tending to show the fact or character of defendant's negligence is contained in this bill of exceptions;" and "there was no evidence in the case tending to show wanton, willful, or reckless disregard on the part of the company of the safety of the deceased." Counsel review the evidence contained in the bill of exceptions, and ask a holding that there was evidence tending to show willful and reckless injury. But this question is not here for our consideration. The only way in which it could have been presented in the present state of the record was by an exception to the statement in the bill of exceptions that there was no such evidence in the case taken

and recorded in the bill itself. No such objection or exception was taken, so that the question whether or not there was such evidence was not presented to the court below when it certified the record, and as, in an action at law, this is a court for the correction of errors exclusively, there could have been no error in the court below, because that question was not presented to or ruled upon by that court when the bill of exceptions was made. In this court the record presented by that bill, in the absence of objection or exception thereto, is conclusive.

It is assigned as error that the court refused to instruct the jury that, although the conductor did not intend to demand transportation, the fact that he had such intention could not in any way affect the right of the plaintiff to recover, in the absence of evidence to show that Purple in some way induced the conductor to form such intention. But there was evidence tending to show that Purple did induce him to form this intention by presenting himself for transportation, by forming with him the tacit understanding that he should ride free, and by entering and riding upon the train without the payment or the offer to pay fare, in pursuance of his deliberate intention and tacit understanding that he should ride without the payment of any. The instruction requested was therefore inapplicable to the facts of this case, and there was no error in its refusal. It is not the duty of a trial court to instruct the jury what the law would be in the absence of material evidence which has been presented and submitted to the jury upon the crucial issues in the case. It completely discharges its duty when it gives the law applicable to the evidence before the jury.

For the same reason there was no error in the refusal of the court to charge the jury that some of the defendant's freight trains carried passengers, that Purple was riding on one of them with the knowledge and assent of the conductor in charge, and that under these circumstances, in the absence of evidence to the contrary, it would be presumed that he was a passenger. This instruction ignored all the material evidence in the case upon which the jury based its finding that he was not a passenger, the evidence of his deliberate intention not to pay fare, of the tacit understanding that he should ride free, of his employment upon the road for nine years, and his familiarity with the rules, and of his presence and opportunity to learn the facts at Laramie before he started upon his fatal ride.

It is said that it was error for the court to refuse to charge that the payment of fare is not necessary to give rise to the liability to pay it, and that if the carrier permits the passenger to take his seat without requiring payment the obligation to pay will stand for actual payment. But the rule of law embodied in this request was fairly given to the jury in the general charge of the court. Although the evidence was conclusive that Purple never paid any fare, and never was asked to pay any, the court instructed the jury that if he was invited onto a train authorized to carry passengers, either by express words or by a tacit understanding between him and the conductor, he became a passenger, and it was the duty of the com-

pany to exercise the highest degree of practicable care for his safe transportation.

It is contended that the court erred because it failed to submit instructions (1) that if the car on which Purple was riding was of the same general appearance of other trains on which passengers were carried on that division of the railroad, but by reason of other facts, unknown to Purple, the train was not permitted to carry passengers, and if the failure of the conductor to demand fare was not procured by Purple, he was a passenger; and (2) that a person riding by the unauthorized permission of the conductor on a train not intended for the carriage of passengers is not a trespasser, unless it was known to him that the conductor exceeded his authority. It may be conceded for the purpose of this discussion, although the proposition is not considered or decided, that one without any knowledge and without any notice of facts sufficient to put him upon inquiry which would lead to knowledge of the lack of the authority of a conductor upon or of the character of a train which was not permitted to carry passengers might become a passenger upon that train under the circumstances stated in these propositions. The difficulty with the instructions is that Purple was in no such situation. He was an old employé on the road. In its practical operation he had known and had experienced the fact for nine years that regular freight trains might carry passengers and that extra freights might not. It is certainly probable that he knew this fact when he boarded the train, seven years later. Whether he did or not, the record clearly shows that he had ample knowledge of facts to put him upon an inquiry which would have led to an acquaintance with this fact. Under these circumstances, he could not escape this duty of inquiry. He was in this situation: If he had forgotten the rules and the practices, then he did not know that any freight trains on that railroad carried passengers, and the fact that he placed himself upon a freight train was notice to him that he was wrongfully there, because the presumption is that freight trains are for freight and passenger trains for passengers. In the absence of any rule or practice permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on a freight train, an engine, a hand car, or any other carriage of a common carrier that is evidently not designed for the transportation of passengers, is unlawfully there and is a trespasser. Bryant v. Railroad Co., 53 Fed. 997, 998, 4 C. C. A. 146, 147, 12 U. S. App. 115, 123; Powers v. Railroad Co., 153 Mass. 188, 190, 26 N. E. 446; Eaton v. Railroad Co., 57 N. Y. 382, 15 Am. Rep. 513; Files v. Railroad Co., 149 Mass. 204, 21 N. E. 311, 14 Am. St. Rep. 411; Hoar v. Railroad Co., 70 Me. 65, 72, 73, 35 Am. Rep. 299; Gardner v. New Haven & N. Co., 51 Conn. 143, 50 Am. Rep. 12; Graham v. Railway Co., 23 U. C. C. P. 541; Sheerman v. Railway Co., 34 U. C. Q. B. 451; Railroad Co. v. Michie, 83 Ill. 427.

If, on the other hand, Purple knew the rules and the practice of the railroad company, then he knew that conductors were forbidden to carry passengers, and passengers were prohibited from riding,

on extra freight trains. So that, whether he knew the rules or not, the duty was imposed upon him to inquire and to ascertain whether or not the train upon which he entered was a regular or an extra freight train. The instructions under consideration ignore this duty of inquiry which the situation and knowledge of Purple imposed upon him, and for that reason they were properly refused. He was a trespasser, not only if he knew that the train on which he rode was not permitted to carry passengers and that the conductor was not authorized to allow him to ride upon it, but also if he knew such facts relative to this matter as would have put a man of ordinary prudence and diligence upon an inquiry which would have led to a knowledge of these facts.

The specifications of error in this case are numerous. They have not all been specifically set forth, but the rules and principles of the law and the facts, by which they must be judged, have now been carefully considered and declared. Our conclusion is that the material issues in this case were fairly and impartially tried, that the charge of the court tersely and correctly presented to the jury the rules of law applicable to the evidence, and that there was no error in the refusal of the court to submit the requested instructions of counsel for the plaintiff.

The judgment below is accordingly affirmed.

LESSER COTTON CO. et al. v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,582.

1. RAILROADS—EVIDENCE—SETTING FIRES—FIRES SET BY OTHER ENGINES.
   Where the engine which alone could have set the fire is identified, testimony that other engines of the defendant set fires or threw sparks at other times is incompetent in the absence of proof of similar condition and operation.

2. SAME—HABIT OF PUNCHING SPARK ARRESTERS IMMATERIAL WHERE ENGINE IS IDENTIFIED.
   Where the engine which alone could have set the fire is identified, and its spark arrester is shown to have been without holes punched in it at the time of the fire, it is incompetent to show a habit of the engineers of the defendant to punch such holes in the spark arresters of their engines.

3. SAME—TESTIMONY AS TO FIRES SET BY OTHER ENGINES.
   Where the engine which might have set the fire is not identified, and the issue is either whether or not some unknown engine set the fire, or whether or not sparks could have flown from the engine to the burned building, testimony that other engines of the defendant at other near times and places set fires or threw sparks the requisite distance may be competent.

4. SAME—DUTY OF RAILWAY COMPANY AS TO PREVENTIVE MACHINERY.
   It is the duty of a railway company to exercise reasonable care to provide itself with the most effective mechanical contrivances in known practical use to prevent the escape of sparks and coals from its engines, but the law does not impose upon it the duty to absolutely provide such contrivances, or make it the insurer of their completeness or perfection.

5. APPEALS—OBJECTIONS NOT PRESENTED BELOW UNAVAILING IN APPELLATE COURT.
The federal appellate courts are courts for the correction of errors, only, in actions at law; and questions which were not presented to the court below may not be reviewed there, because the trial courts cannot be guilty of errors in rulings they have never made upon issues that never were presented to them.

6. APPEAL—MISTAKES OF FACT IN CHARGE NOT REVIEWABLE.
The opinion of a federal court upon the facts, expressed in a charge to a jury, is not reviewable on error, so long as no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury.

7. SAME—TRIAL ON ONE THEORY WAIVES RIGHT TO REVERSE ON INCONSISTENT THEORY.
One who tries his case upon one theory may not reverse the judgment against him upon an inconsistent theory which was not presented or urged at the trial.

8. SAME—ALL RELEVANT EVIDENCE NECESSARY TO REVIEW SUFFICIENCY THEREOF TO WARRANT CHARGE.
The legal presumption is that the evidence warranted the charge of the court, and, if the plaintiff in error would attack it for the insufficiency of the evidence, he must either present all the evidence before the trial court, or all the evidence relative to the subjects treated in that part of the charge challenged, together with the certificate of the trial judge that the bill of exceptions contains such evidence.

9. RAILROADS—SETTING FIRES—REASONABLE CARE IN DRY AND WINDY TIME.
It is not error to refuse to give or to give a charge that greater care is required to protect against fires from operating engines in the presence of inflammable materials in a dry and windy time than on ordinary occasions, because it is not error to refuse to insert in a charge truisms which are a part of the common knowledge and experience of all men who have arrived at years of discretion, although it is not error to insert such statements.

10. CHARGE—NOT ERROR TO REFUSE TO REPEAT RULE SUBMITTED IN WORDS OF COUNSEL.
Where a rule of law has been fairly submitted to the jury in the general charge, it is not error to refuse to repeat it in the words of counsel's request.

(Syllabus by the Court.)

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

About 10 o'clock at night on Sunday, the 1st day of April, 1900, a fire broke out in the barn of one Best, in the town of Newport, in the state of Arkansas, which spread to a quantity of cotton near by, owned by the Lesser Cotton Company, and insured against fire by 14 insurance companies. The cotton was burned. The insurance companies paid the Lesser Cotton Company $195,000 on account of its loss, and then joined with that corporation in an action against the St. Louis, Iron Mountain & Southern Railway Company to recover the amount which they had paid, on the ground that the fire was set by the negligence of the railway company, and that they had been subrogated to the rights of the cotton company. The railway company denied its liability, and at the trial there was testimony on the part of the plaintiffs tending to show that the fire was set upon the roof of the barn by sparks which the railway company permitted to escape from its engine No. 577 while the testimony for the defendant was to the effect that this engine was perfect in construction and condition, and was skillfully handled, and that the fire was set on the inside of the barn either by tramps, smokers, or a camp fire which was burning in the yard within 75 feet of the building. The court submitted to the jury the issues whether or not the fire was set by the sparks from the engine, and whether or not the railway company was guilty of any negligence in the construction, repair, or management of its

locomotive. They returned a verdict for the defendant, and judgment was entered accordingly. This writ of error has been sued out to reverse this conclusion.

Ashley Cockrill and Joseph M. Stayton, for plaintiffs in error.
George E. Dodge and B. S. Johnson, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The trial of this case occupied 12 days. The bill of exceptions is a statement of the issues, the tendency of the evidence of the respective parties, the rulings of the court upon the exclusion of evidence and its charge to the jury. It is a model of clearness and brevity. A large number of errors are assigned, and the logical and facile method of treating them will be to consider them in three groups: First, those relating to the exclusion of testimony; second, those relating to the charge of the court; and, third, those relating to its refusal to give requested instructions.

1. It is assigned as error that the court refused to permit witnesses produced by the plaintiffs to testify that other engines of the defendant than the one which alone could have set the fire, under the evidence, "threw sparks a considerable distance, sufficiently large and live to set inflammable material on fire"; that it was the habit of operatives of engines on the defendant's road to punch large holes in the spark arresters of those engines, so that large cinders would be thrown through those holes; and that other engines of the defendant than the one which alone could have set the fire, under the evidence, contained defects, and were negligently handled, although they were similarly constructed. The bill of exceptions contains no record of the offer and rejection of any other evidence of negligence in the operation of, or of defects in, other engines than No. 577, except that relating to their scattering of sparks, and to the habit of punching holes in their spark arresters, so that the only question to be considered under this assignment is whether or not the latter testimony was improperly excluded. The record discloses the fact that the court refused to admit it because it was conceded in the case that, if the fire was caused by sparks from any of the defendant's engines, they came from engine No. 577, and the spark arrester of that engine had been produced in evidence in the court, and had been shown to be in the same condition as on the night of the fire, and no holes had been punched in it. It is insisted that these rulings were erroneous, because (1) there is evidence tending to show that the fire might have been caused by some other engine; and (2) because, even if the engine and spark arrester were identified, the testimony was competent to show a habit of negligence in operating and caring for the engines of the defendant. The first reason presents a question of fact, and it challenges a portion of the charge of the court; for the court instructed the jury, in effect, that, if the barn was set on fire by

sparks from one of the defendant's engines, it was done by engine No. 577. The consideration of this question of fact is, however, foreclosed by the bill of exceptions, which in one place states that the defendant introduced evidence tending to show "that there was no other engine there, and that, if the fire was set out, it was set out by a spark from engine No. 577. This fact was not controverted by the evidence, nor denied,"—and in another place, where the evidence under consideration was offered, recites that this "evidence was excluded by the court upon the ground that it being conceded in this case that, if the fire was caused by sparks from one of defendant's engines, it was caused by engine No. 577, such evidence as is offered would only be admissible if it could be shown that these engines were of a like kind, and had the same kind of a spark arrester, and were in the same condition that engine 577 was at the time of the fire." The evidence upon this subject is not before us for consideration. This issue is concluded by these recitals, and this case must be considered and decided upon the recorded fact that engine No. 577 was the only one which could have set the fire of which the plaintiffs complain.

This brings us to the question whether or not after it was established that the only engine which could have set the fire was engine No. 577, and after its spark arrester, in the same condition as when the fire was set, and without holes punched in it, was in evidence, it was competent to introduce testimony that other engines of the defendant threw igniting sparks at other times and places, and that their engineers were in the habit of making holes in their spark arresters. In support of the position that this evidence should have been received, counsel cite a large number of cases which recite the remark of the supreme court in Railroad Co. v. Richardson, 91 U. S. 478, 23 L. Ed. 356, that "such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the roailroad company." But we are not concerned in this case with the rule announced in the Richardson Case. That rule is that, where the engine which could have set the fire is unknown, it is competent to show, not that other engines of the defendant sometimes set fires, but that some of the engines of the defendant set such fires. The reason of this rule is that, when it is uncertain which engine caused the fire, evidence generally that the engines of the defendant set other fires before and after that which is the subject of the litigation has some tendency to prove that the latter fire was set by some unknown engine of the company, and that its servants are habitually negligent in caring for or operating their locomotives. There is plausibility in this theory, because, where the engine charged is unknown, it may be that this unknown engine was one of those which set fires at other places and times; and the fact that the engines of the defendant set out such fires becomes in this way testimony from which the jury may reasonably infer that the fire under consideration was set by some engine of the defendant. When, however, it is conceded or established beyond dispute, as in this case, that there was only one engine which could possibly have set the fire,

and its spark arrester is produced, without any holes punched in it, and proved to be in the same condition in which it was at the time of the fire, it is difficult to perceive how the testimony that other engines threw sparks, or that the engineers of the defendant were in the habit of punching holes in the spark arresters of engines, could have had any tendency to show that the fire in question was set out by the identified engine. The only question at issue was whether or not engine No. 577 set the fire. If the offer of counsel had been to show that some of the engines of the defendant set fires at other times and places, it mght have formed the basis for a more plausible argument, because it might have been said that engine No. 577 might have been one of the engines which set fires at other times. This, however, was not their offer. Their proposal was to prove that other engines threw sparks sufficiently large and live to set fires. They did not offer to show that such engines were constructed in the same way or were in the same condition as the locomotive which alone could have set the fire. How this testimony could have had any tendency to lead a rational mind to the belief that engine No. 577 was the cause of this fire, passes our understanding. Neither the fact that other engines set fires, nor the fact that they threw sparks, nor the fact that their operators were in the habit of negligently constructing, repairing, or caring for them, had any logical or rational tendency to show that the engine here in question either set the fire, threw the sparks, or was negligently cared for or operated, because there was better and conclusive evidence upon all these questions,—the evidence of its actual construction and condition, and of the method in which it was actually operated at the time when the fire occurred. Nor was the testimony that it was the habit of the servants of the defendant to punch holes in the spark arresters more competent or persuasive. The spark arrester of engine No. 577, according to the recital of the bill of exceptions, was before the court in the same condition in which it existed when the fire was set, and no holes had been punched in it. In the presence of this evidence, proof of the habit of engineers to punch holes had no tendency to show that such holes were made in the spark arrester of this engine, because higher and better evidence had demonstrated the fact that no such holes had been made. The true rule upon this subject is that, in an action against a railway company for setting a fire by means of defects in the condition or operation of an engine, it is competent, where the engine that might have set the fire is unknown or unidentified, to introduce testimony that some of the defendant's engines set fires or threw igniting sparks at other times, within a few weeks, and at other places in the vicinity. Railroad Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356; Railroad Co. v. Gilbert, 52 Fed. 711, 3 C. C. A. 264, 10 U. S. App. 375; Railroad Co. v. Lewis, 2 C. C. A. 446, 51 Fed. 658, 664; Campbell v. Railroad Co., 121 Mo. 340, 351, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; Piggot v. Railway Co., 3 Man. G. & S. 229; Webb v. Railroad Co., 49 N. Y. 420, 10 Am. Rep. 389; Sheldon v. Railroad Co., 14 N. Y. 218, 67 Am. Dec. 155; Cleaveland v. Railway Co., 42 Vt. 449; Railroad Co. v. McClelland, 42 Ill. 355, 358; Smith v. Railroad Co., 10 R. I. 22; Hoover v. Railway Co. (Mo.) 16 S. W. 480.

But where the engine which alone could have caused the fire is identified, and its spark arrester is produced, testimony that other engines of the defendant at other times and places set fires or threw igniting sparks is neither competent nor relevant to the issue, without proof that they were in the same condition and operated in the same way as was the engine charged when the fire occurred. Gibbons v. Railroad Co., 58 Wis. 335, 17 N. W. 132, 134; Boyce v. Railroad Co., 42 N. H. 97; Phelps v. Conant, 30 Vt. 277; Malton v. Nesbit, 1 Car. & P. 70; Hubbard v. Railroad Co., 39 Me. 506; Standish v. Washburn, 21 Pick. 237; Collins v. Inhabitants of Dorchester, 6 Cush. 306; Robinson v. Railroad Co., 7 Gray, 92; Jordan v. Osgood, 109 Mass. 457, 12 Am. Rep. 731; Smith v. Railroad Co., 37 Mo. 287; Coale v. Railroad Co., 60 Mo. 227, 233; Railroad Co. v. Doak, 52 Pa. 379, 91 Am. Dec. 166; Allard v. Railroad Co. (Wis.) 40 N. W. 685; Ireland v. Railroad Co. (Mich.) 44 N. W. 426; Railroad Co. v. Woodruff, 4 Md. 242, 59 Am. Dec. 72. The distinction between these two lines of authorities is plain upon principle, and is clearly marked in the opinions in the cases upon which counsel for the plaintiffs chiefly rely. In the case at bar and in the cases last cited the crucial issue is whether or not the identified engine set the fire, and the only competent evidence on that issue is the construction, condition, and operation of that engine, and of those similarly constructed, repaired, and operated. In the cases first cited this issue is not presented, but the crucial questions are whether any of the unidentified engines of the defendant set the fire, or, as in Matthews v. Railroad Co., 142 Mo. 645, 44 S. W. 802, whether or not a spark could be thrown as far as from the railroad to the site of the building burned. These issues do not arise in the case at bar, and for that reason the evidence competent in cases where they do arise is not relevant to the issue here. Thus, in Railroad Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356, the engine which caused the fire was unidentified. The evidence tended to show that it was one of two locomotive engines belonging to the railroad company, but there is nothing in the case to indicate either that these engines were pointed out so as to separate them from the other engines of the defendant, or that the condition or the method of operation of either of them was in any way shown. The only question in that case was whether the fire was set by some unknown engine of the defendant, or by a conflagration which the plaintiff maintained in the vicinity. In Railroad Co. v. Gilbert, 52 Fed. 711, 713, 3 C. C. A. 264, 265, 10 U. S. App. 375, 378, the court well said, after citing the authorities which sustain the rule that governs the case at bar:

"We must not, in the consideration of this question, lose sight of the issues involved. In the case at bar it was not admitted by the company that the fire was caused by sparks escaping from a particular engine, in which event the query would be as to the condition of that particular engine, and the mode in which it was handled."

In the case at bar it was conceded that, if the fire was set by any engine, it was set by engine No. 577. In Campbell v. Railway Co., 121 Mo. 340, 25 S. W. 936, the court says:

"If the issue had been of negligence in the construction and management of the engine only, and the engine which could only have caused the fire had

been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible, under the decisions of this court. Coale v. Railroad Co., 60 Mo. 227; Patton v. Railroad Co., 87 Mo. 117, 56 Am. Rep. 446."

These are the cases upon which counsel for the plaintiffs seem to place their chief reliance. They do not sustain their contention, but concede the existence and reason of the rule that, where the engine charged with the injury is known, testimony of defects in the condition or negligence in the operation of other engines at other times and places is neither competent to prove, nor relevant to establish, the real issue in controversy. There was no error in the rejection of the testimony of this character, or of that relative to the habit of the engineers to punch holes in the spark arresters of the defendant. The evidence offered upon these subjects was properly excluded.

2. Complaint is made that the court charged the jury in this way:

"In order to entitle the plaintiffs to recover in this action, you must find from the evidence—First, that the fire which destroyed the cotton, for which the suit is instituted, was caused by the defendant railroad company; second, that it was caused through the negligence of the railroad company. Unless both of these facts are found in favor of the plaintiffs, they cannot recover in this action."

But in another part of the charge it told the jury:

"If you determine that the fire which destroyed the cotton of the Lesser Cotton Company was caused from sparks or cinders communicated from the defendant's engine, then the burden of proof is shifted upon the defendant, and it must overcome the presumption of negligence arising from this finding. It must show that there was no defect in the engine, that there was no negligence in the manner of its operation by its employés, and that they were skillful men. In other words, it must prove by a preponderance of evidence that there was no negligence, within the definition of the term as I have described it to you. It must show that it has used all reasonable and proper care, caution, diligence, and skill in the construction of the locomotive which caused the fire, and that at the time of the fire it was skillfully operated. That is all the railroad company would be required to do,—to use all due and reasonable care and caution in providing appliances for the prevention of the emission of sparks and cinders from the locomotive, and skill in the management of it by its operatives at the time."

All of the charge upon the burden of proof, and relative to the rules of law, challenged by this specification of error, must be read and construed together. When it is thus read it will be found to state the established rules of law relative to the subjects under consideration in that part of the charge assailed as favorably to the plaintiffs as controlling authorities will warrant. The burden of proof was upon the plaintiffs to establish the causal negligence of the defendant. When they proved, if they did, that the fire was caused by sparks emitted by the defendant's engine, that burden shifted to the defendant, and required it to establish by a fair preponderance of evidence that it had exercised reasonable care to provide the most effective mechanical contrivances in known practical use to prevent the burning of private property by the escape of fire from its engines. Rosen v. Railroad Co., 83 Fed. 300, 305, 27 C. C. A. 534, 539, 49 U. S. App. 647, 656; Railroad Co. v. Schultz, 93 Pa. 341, 344; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (C. C.) 89 Fed. 637, 638; Thomas v. Railroad Co. (C. C.)

91 Fed. 206, 208; Railroad Co. v. Fox, 34 C. C. A. 497, 92 Fed. 494, 497; Fletcher v. Railroad Co., 168 U. S. 135, 18 Sup. Ct. 35, 42 L. Ed. 411; Bevier v. Canal Co., 13 Hun, 254; Collins v. Railroad Co., 5 Hun, 503, 506; Railroad Co. v. Larmon, 67 Ill. 68, 71. Those portions of the charge which have been quoted fairly gave these rules to the jury for their guidance, and no just exception to them can be sustained.

Another objection to the portion of the charge here challenged now urged is that the defendant was operating its engine and freight train on Sunday; that this act was in violation of the law of Arkansas, which forbids work of this character on that day (Sand. & H. Dig. § 1887); and that the defendant is consequently liable for the damages resulting from its violation of the law, without regard to the question of negligence. But under the record presented by the bill of exceptions this court has no power or jurisdiction to consider or determine this question in this case. It was not presented to the court below, and no ruling was made upon it in that court. Counsel for the plaintiffs presented to the court nine requests for instructions. They were all based upon the theory that the issue to be tried was whether or not the defendant was guilty of negligence in setting out the fire. They contained no request or suggestion that the court ought to instruct the jury that they were entitled to recover in the absence of negligence, because the defendant had violated the Sunday law. The portion of the charge now challenged was excepted to at the close of the trial, but the exception was general, and contained no statement that this excerpt was erroneous because the plaintiffs were entitled to recover on account of a violation of the Arkansas statute prohibiting labor on Sunday. Thus it appears that the issue of law here urged upon our consideration was not presented to, considered, or ruled by, the court below. It is not, therefore, here for our consideration, and we must decline to enter upon its discussion. In an action at law, this is a court for the correction of the errors of the court below, exclusively. Questions which were not presented to nor decided by that court are not open for review here, because the trial court cannot be guilty of any error in a ruling it has never made upon an issue to which its attention has never been called. Association v. Wilson, 100 Fed. 368, 373, 40 C. C. A. 411, 416; Railway Co. v. Henson, 58 Fed. 531, 532, 7 C. C. A. 349, 351, 19 U. S. App. 169, 171; Schneider Brewing Co. v. American Ice Mach. Co., 77 Fed. 138, 149, 23 C. C. A. 89, 100, 40 U. S. App. 382, 403; Board v. Sutliff, 97 Fed. 270, 38 C. C. A. 167; Railroad Co. v. Krohne, 29 C. C. A. 674, 86 Fed. 230, 235; Davis v. Town of Fulton, 52 Wis. 657, 9 N. W. 809.

In the portion of the argument addressed to the refusal of the court to give certain instructions requested, that portion of the charge of the court relative to the degree of diligence required of the railway company, which has been quoted, is assailed on the ground that the court should have instructed the jury that it was its duty to provide the best machinery in known practical use to prevent the emission of sparks, and not simply to exercise reason-

able care to make this provision. As the quotation assailed has been recited, it will be more convenient to treat this objection here. The railway company had a charter from the state, and a vested right to operate its railroad by the use of steam produced by fire. On the other hand, the owner of buildings and property along the line of its railroad had a right to construct and maintain them. The action against the railroad company for damages for destroying them is not based upon any contract of insurance. It arises out of a breach of a legal duty. That duty is not to insure the property of the plaintiff, nor is it to insure the safety or the perfection of the devices and appliances which it adopts to prevent fires. The limit of that duty is the exercise of ordinary and reasonable care to avail itself of the best mechanical contrivances in known practical use for the purpose. The essence of this action for damages is the breach of this duty. Negligence in the discharge of it is the basis of the cause of action, and the true rule is that, where the defendant has exercised reasonable care to provide the most effective machinery in known practical use to prevent the burning of private property, it has fully discharged its duty in that regard. Rosen v. Railroad Co., 83 Fed. 300, 304, 305, 27 C. C. A. 534, 539, 49 U. S. App. 647, 656, and cases cited supra. If there was any error in the charge of the court below upon this subject, it was not against the plaintiffs. While the court charged that the railway company must exercise reasonable care and diligence in this regard, it also charged that:

"It must have the apparatus complete, as far as the appliances used for the prevention of the escape of sparks and cinders from its smokestacks are concerned. * * * Everything, as I have stated to you before, must be properly constructed, and the appliances must be the best in known practical use, and perfect in form."

This portion of the charge is subject to the criticism that it does not limit, as it should, the duty of the railway company to the exercise of reasonable care to provide the most effective appliances in known practical use, but places upon it the absolute duty to attain perfection in this regard,—a duty which the law does not impose. This, however, is an error of which the plaintiffs do not and cannot complain.

The theory on which the plaintiffs tried this case was that the sparks from the defendant's engine set a fire on the roof of the barn, and the theory on which the defendant tried it was that tramps or smokers or a camp fire set fire to hay inside the barn. This barn was about 10 feet high. The roadbed was elevated so that the roof of the barn was about on a level with the track. The walls of the barn were constructed of 12-inch perpendicular boards, with cracks between them about an inch wide; and there was hay on the floor of the barn, on the side toward the railroad, in a pen about 25 feet from the north end. The court charged the jury: That the plaintiffs had introduced evidence tending to show various facts, indicating that the fire was first discovered on the top of the roof; that it burned a hole through the roof; and that the sparks dropped into the hay from that point. That the defendant, on the other hand, had introduced evidence to the effect that the fire was set in the hay inside the barn, either by

a camp fire in the yard or by smokers; that the engine was so constructed that it could not have set the fire. And that it was for the jury to determine from all the evidence whether the fire was caused by sparks from the defendant's locomotive, or from some other cause. It then added, "Of course, if the fire started inside the barn, it would have been impossible for it to have been caused by sparks emitted from the defendant's locomotive." This statement is assigned as error, because there was evidence of the cracks in the side of the barn, through which sparks from the engine might have flown into the hay, and thus have set the fire within the barn. But all the questions of fact, including this one, were submitted to the jury by the charge. The declaration of the court here challenged was nothing more than its expression of opinion upon a question of fact which the jury was permitted to determine. No rule of law was incorrectly stated, or stated at all, in this portion of the instructions. And the opinion of the trial court upon matters of fact which are ultimately submitted to the jury is not reviewable on error, so long as no rule of law is incorrectly stated therein. Lovejoy v. U. S., 128 U. S. 171, 173, 9 Sup. Ct. 57, 32 L. Ed. 389; Rucker v. Wheeler, 127 U. S. 85, 93, 8 Sup. Ct. 1142, 32 L. Ed. 102; Railroad Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; Railroad Co. v. Vickers, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161; United States v. Philadelphia & R. R. Co., 123 U. S. 113, 114, 8 Sup. Ct. 77, 31 L. Ed. 138.

There is another reason why this judgment ought not to be reversed upon this specification of error. It is that this objection rests upon a different theory from that upon which the plaintiffs evidently tried their case. The court charged the jury that their evidence tended to show that the fire was set on the roof of the barn, and that the defendant's evidence tended to show that it was set inside the barn. No exception was taken to this portion of the charge. That part of the evidence which appears in the bill of exceptions sustains it. In this way it becomes plain that at the trial one of the main issues between the parties, if not the crucial issue, was whether the fire was set on the outside or in the inside of the barn. It is evident that both parties tried the case on the theory that, if the fire was set on the roof of the barn, the defendant might be liable for it, while, if it was set within the barn, it was exempt from responsibility. The court charged the jury in accordance with this theory, and it undoubtedly made the remark that, if the fire started inside the barn, it could not have been set by sparks from the locomotive, because it was imbued with the contentions of the parties that the defendant was liable for the fire if set on the outside, and that it was not responsible for the fire if set on the inside of the barn. It is too late for the plaintiffs, after the trial of the case upon this theory, to challenge in the appellate court the ground upon which they sought a recovery, and to insist that the defendant was liable for a fire set within the barn, because in the trial of the real issue which they presented some testimony crept into the record, upon which they asked no instruction, and to which they do not seem to have called the attention of the court at the trial, which might have warranted a recovery on account of a fire set within the barn. One may not try a case upon one theory, and then reverse the

judgment against him in the appellate court upon another and inconsistent theory, which was not presented, urged, or tried in the court below. Insurance Co. v. Frederick, 58 Fed. 144, 149, 7 C. C. A. 122, 127, 128, 19 U. S. App. 24, 34; Walker v. Collins, 59 Fed. 70, 72, 8 C. C. A. 1, 3, 4, 19 U. S. App. 307, 311, 312; Speer v. Board, 32 C. C. A. 101, 88 Fed. 749, 753; Burbank v. Bigelow, 154 U. S. 558, 14 Sup. Ct. 1163, 19 L. Ed. 51; Railroad Co. v. Estill, 147 U. S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292; Horne v. George H. Hammond Co., 18 C. C. A. 54, 71 Fed. 314.

Complaint is also made of these portions of the charge:

"There was also evidence introduced tending to show that young man Best, who was in charge of the stable, smoked a cigar, which is claimed to have been thrown away by him carelessly, and caused the fire which burned the stable, and afterwards the cotton. * * * There was also evidence tending to show that a young man by the name of Davidson spent the night with young man Best at the stable, and that he smoked cigarettes there, which might have caused the fire."

There was testimony that Best smoked a cigar, and that Davidson smoked cigarettes. But it is claimed that these portions of the charge were erroneous, because that testimony was insufficient to warrant the conclusion that the fire could have resulted from these acts. The question of law, whether or not this testimony was sufficient to warrant a finding that the fire was set by the cigar or cigarettes, was not presented to the court below by any request to withdraw this testimony from the jury. Consequently it is not here for our consideration. The portions of the charge of the court excepted to are mere statements of fact, which are not reviewable in this court, for the reasons which have already been stated.

There is another reason why these portions of the charge cannot be considered in this case, and that is that the bill of exceptions does not show that all the testimony relative to the smoking of the cigars and cigarettes is presented in the record. The legal presumption is that there was evidence sufficient to warrant the submission of the questions which the court presented to the jury. The only way the plaintiffs could have overcome this presumption was to present all the evidence relating to this matter, with a certificate of the judge below to the effect that the bill of exceptions contained all the testimony upon this subject. This they have not done, and consequently they have failed to overcome the presumption that the charge of the court was right. U. S. v. Patrick, 73 Fed. 800, 806, 20 C. C. A. 11, 17, 36 U. S. App. 645, 656; Railroad Co. v. Price, 97 Fed. 423, 434, 38 C. C. A. 239, 250.

3. It is assigned as error that the court refused to charge that when the wind blew in a dry time in such a way as to carry sparks emitted from a smokestack away from the railroad, toward an inflammable building, greater diligence was required of the railway company than would be required on ordinary occasions. The statement contained in this request is the truth, and there would have been no error in stating it to the jury. Railroad Co. v. Richardson, 91 U. S. 454, 470, 23 L. Ed. 356; Railway Co. v. Kellogg, 94 U. S. 469, 472, 24 L. Ed. 256. But it was not reversible error to

refuse to submit it. Instructions to the jury are for the purpose of informing them upon subjects with which they are not perfectly familiar. No rational man is ignorant of the fact that greater care is required in handling fire on a windy day, in the presence of inflammable material, than in a quiet time, in a moist place, or on ordinary occasions. The court charged the jury that they might, in their discretion, allow interest upon the amount paid by the insurance companies for this loss if they found in their favor. It would not have been error for the judge to have submitted to them the multiplication table, to enable them to compute this interest. Nor would it have been error to refuse to submit that table, because the legal presumption is that the jury was not ignorant of it. The court instructed the jury that it was the duty of the railway company to exercise reasonable care in the operation of its railroad and engines. The legal presumption was that every juror knew that it was reasonable to use more care in a dry time, in the presence of inflammable materials, than on ordinary occasions. This fact was a part of the common knowledge and experience of mankind, and it is not error to refuse to insert in a charge to a jury truisms which are a part of the common knowledge and experience of all men who have arrived at years of discretion.

Complaint is also made of the refusal to charge that where an engine emits sparks of a large and unusual size, or where sparks are thrown to a great height or far from the track, it may be inferred that the engine is not provided with a proper spark arrester. There was, however, no error in the refusal to give this instruction, because it was fairly covered by the general charge. There was evidence in the case that sparks escaped from this engine of sufficient size and life to ignite the barn. There was testimony that, if the spark arrester was in proper condition, no such sparks could have escaped. There was testimony that it was in this condition on the night of the fire. The court stated the tendency of all this evidence to the jury, and then told them that it was a question for them to determine whether or not sparks escaped from this engine, which set the barn on fire. The logical and inevitable conclusion which every judge who has read, and every juror who heard, this charge, must have reached, is that the emission of sparks of a large and unusual size from the engine warranted the inference that it was not provided with a proper spark arrester. Where a rule of law stated in a requested instruction is fairly submitted to the jury in the general charge, it is not error to refuse to repeat it in the very words of counsel's request, and there was no error in refusing to submit this instruction.

The fifth, sixth, seventh, and eighth specifications of error challenge the refusal of the court to give requests of the plaintiffs relative to the burden of proof, and the care required of the defendant in providing and using appliances to prevent fire. This opinion already discloses the fact that the general charge of the court carefully treated all these subjects. The plaintiffs' complaint is that this charge does not clearly state (1) that, if the jury found that the fire was set by the railway company, the burden of proof shifted

upon the defendant; (2) that the defendant was absolutely bound to provide the best preventive appliances; and (3) that the engine must have been in suitable order and repair at the time of the fire. The first two grounds of objection to this charge have already been considered and overruled. The third is equally untenable. When the entire charge is carefully read, it is plain that no juror could have misunderstood that it was the condition of the engine at the time of the fire, and at no other time, that was involved in this trial. There was therefore no error in the refusal to submit to the jury the requests of counsel upon these subjects, because the proper rules of law upon them were delivered to them in the general charge.

The consideration and discussion of the numerous questions presented in this case have now been concluded. The result is that there was no reversible error in the exclusion of evidence, in the charge of the court, or in its refusal to submit to the jury the various requests for instructions which the plaintiffs presented; but the real issue in the case—the issue of fact, whether or not this destructive fire was the consequence of the negligence of the defendant, or of some other cause—was fairly tried by the jury, under correct and impartial rulings of the court, and was found in favor of the defendant. The judgment which is based upon this finding must accordingly be affirmed, and it is so ordered.

FOSTER et al. v. McALESTER et al.

(Circuit Court of Appeals, Eighth Circuit. February 19, 1902.)

No. 1,583.

1. CHATTEL MORTGAGES—IMPEACHMENT FOR FRAUD.

Plaintiffs, who held a chattel mortgage on two stocks of goods in Arkansas, permitted the mortgagor to remove the goods to the Indian Territory, and transfer them to a firm of which he became a member, under an agreement that the firm should assume the debt, and would give plaintiffs a mortgage on its stock at any time when requested. Some 18 months later such mortgage was given to secure the amount then remaining due on the old debt and a subsequent indebtedness, and plaintiffs took possession of the stock thereunder. *Held*, that an instruction in an action by plaintiffs against attaching creditors of the mortgagors, who had seized the goods, that the failure of plaintiffs to record their Arkansas mortgage in the Indian Territory was a badge of fraud, which, if unexplained, entitled defendants to a verdict, was erroneous, since plaintiffs made no claim under such mortgage, and, as its recording in the Indian Territory would have been a useless act, they were under no duty to so record it.

2. SAME—EVIDENCE.

Under an allegation of the answer in an action by a chattel mortgagee against attaching creditors charging a secret agreement between plaintiff and the mortgagors to conceal the indebtedness to plaintiff for the purpose of enabling the mortgagors to purchase on credit the goods which were afterward included in the mortgage, evidence that the mortgagors made false statements to some of their creditors in regard to their financial condition is admissible; but it cannot affect the rights of plaintiff, in the absence of evidence that he had knowledge of such statements, and was in some manner connected with them for the fraudulent purpose alleged.

3. SAME.
A wholesale mercantile firm, in answer to a general inquiry from another house for information "regarding the credit, promptness, and financial standing" of a customer, is not bound to disclose its own business relations or the state of its account with such customer; and, where such an inquiry was answered in good faith and truthfully so far as the firm inquired of then had knowledge, it is not chargeable with fraud because it did not state the fact that it had an agreement with the customer to give it a mortgage to secure its account whenever demanded, which will affect the validity of such a mortgage taken over a year afterward.

4. SAME—PRIOR AGREEMENT TO GIVE MORTGAGE.
An agreement between a wholesale mercantile firm and a customer that the latter will give a mortgage on his stock, when demanded, to secure his indebtedness to the firm, is entirely legal; and, unless fraudulent in fact, such an agreement cannot be held to constitute a fraud in law, or a badge of fraud, to affect the validity of a mortgage subsequently requested, and voluntarily given by the debtor.

5. FRAUD—WHEN QUESTION FOR JURY—PRESUMPTIONS.
The law will not deduce fraud from any number of acts, each of which is lawful and innocent in itself; but one who seeks to attach a fraudulent character to such acts must go further, and show that they were in fact done with a fraudulent intent and for a fraudulent purpose; and whether they were so done or not is a question of fact, which must be submitted to the jury when there is evidence justifying its submission.

6. SAME—EVIDENCE TO ESTABLISH.
Slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud; but they must not be, when taken together and aggregated,—when interlinked and put in proper relation to each other,—consistent with an honest intent. If they are, the proof of fraud is wanting.

7. CHATTEL MORTGAGES—VALIDITY—PREFERENCE OF CREDITORS.
A chattel mortgage, valid on its face, taken by a bona fide creditor for the purpose of securing his debt, and not for the purpose or with the intent of shielding his debtor and assisting him to hinder and delay his other creditors, is valid, and impervious to attack from any quarter, in the absence of a bankruptcy law which renders it invalid as a preference.

8. SAME—ACTION BETWEEN MORTGAGEE AND CREDITORS—INSTRUCTIONS.
Instructions which convey to a jury the impression that secrecy or haste in a transaction by which a debtor secures one of his creditors, or the fact that the giving of such security operates to hinder and delay other creditors, are badges of fraud, which place the burden on the secured creditor to sustain the validity of his security, are misleading and erroneous, without a full explanation of the legal right of a bona fide creditor to obtain security for his debt to the exclusion of others, if done in good faith; and such instructions are not warranted in any case unless there is other evidence tending to impeach the good faith of the transaction, since such facts are entirely consistent with the exercise by the creditor of his legal rights.

In Error to the United States Court of Appeals in the Indian Territory.

This action was brought by J. Foster & Co., the plaintiffs in error, in the United States court for the Northern district of the Indian Territory, at Muskogee, against James J. McAlester and others, the defendants in error, to recover the value of a stock of general merchandise. The plaintiffs acquired their right to the goods under a chattel mortgage thereon executed by John G. Terrell, Elmer Terrell, and J. C. Terrell, composing the firm of E. Terrell & Co., retail merchants doing business at Wagoner, in the Indian Territory,

to secure the payment of a note executed by the mortgagors to the mortgagees for the sum of $3,971.56, and for another purpose not necessary to be mentioned. The mortgage was duly executed and acknowledged on the 28th day of January, 1895, and duly recorded on the next day. In pursuance of a stipulation contained in the mortgage, the mortgagees, through their agent, took immediate possession of the mortgaged property, and, in conjunction with the mortgagors, proceeded to sell the goods in the usual course of business, applying the proceeds of the sale daily to the mortgage debt. In the month of March following the execution of the mortgage, Tootle, Wheeler & Motter and Tennent-Stribling Shoe Company severally brought their actions against E. Terrell & Co., and sued out writs of attachment, which were placed in the hands of the defendant McAlester, as United States marshal for the Indian Territory, who, with the other defendants, his deputies, levied the writs on the stock of goods covered by the plaintiffs' mortgage, took them out of the plaintiffs' possession, and sold them. In their answer the defendants alleged they had good right to seize the goods on the writs of attachment, because they say, in substance, that the plaintiffs' mortgage was fraudulent and void for the following reasons: That John G. Terrell was during the year 1893 engaged in the mercantile business in the town of Waldron, in Scott county, and in the town of Mansfield, in Sebastian county, Ark., and that on the 11th day of February, 1893, he executed a chattel mortgage to the plaintiffs on his stocks of goods at each of these places to secure an indebtedness of $4,300; that this mortgage was duly recorded in the counties in Arkansas, where the goods then were; that afterwards, about July 5, 1893, the plaintiffs permitted Terrell to remove both stocks of goods from Arkansas to Wagoner, in the Indian Territory, while the Arkansas mortgage thereon was in full force and effect; that it was understood and agreed that upon the removal of the goods to Wagoner the firm of E. Terrell & Co. was to be formed, consisting of John G. Terrell, Elmer Terrell, and J. C. Terrell, which firm was to be the successor of John G. Terrell, and assume the payment of his debts, including his indebtedness to the plaintiffs, and that it was also agreed after the goods were removed from Arkansas to the Indian Territory the firm of E. Terrell & Co. was to give the plaintiffs a chattel mortgage on the goods whenever they deemed it necessary for their protection, and the same should be demanded; that it was agreed that the indebtedness of Terrell & Co. to the plaintiffs should be kept concealed from the attaching creditors and other creditors of Terrell & Co. for the purpose of enabling Terrell & Co. to purchase goods on credit, in order that the plaintiffs might secure the benefit of such purchase, by demanding the mortgage; that, in furtherance of this alleged fraudulent scheme, E. Terrell & Co. made in writing, and mailed to the attaching creditors, false and fraudulent statements of their financial condition; and that the plaintiffs made to Tootle, Wheeler & Motter, one of the attaching creditors, a false and fraudulent statement of the financial condition, promptness, and ability to meet their obligations, of E. Terrell & Co.

Charles E. Warner, for plaintiffs in error.

Harrison O. Shepard, Richard B. Shepard, Charles B. Stuart, and J. H. Gordon, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

Indisputably, on the record before us, the chattel mortgage executed by E. Terrell & Co. to the plaintiffs on the 28th day of January, 1895, was on its face a valid instrument; and the debt it was given to secure, a bona fide debt. There is, indeed, no pretense that Terrell & Co. did not honestly owe the plaintiffs the debt the mortgage was given to secure. This being so, we proceed to a

consideration of the grounds upon which the defendants seek to avoid it. The only testimony in the record relating to the removal of the goods from Arkansas to the Indian Territory—and it is certified in the bill of exceptions that it contains all the testimony—is:

"That shortly prior to July 5, 1893, the said Terrell went to see the said Josiah Foster, and told him that they had just had three successive crop failures in his section, and it was useless for him to continue business at Waldron, and hope to pay his debts, and that he wanted to find a good business location in the Indian Territory, and locate there, moving his goods and merchandise over there, but that he could not do so unless Foster would consent; that he selected Wagoner as the place, and wanted to take his two sons in with him, move the merchandise over there, and begin business at that place; that, if Foster would agree for him to move the merchandise, the new concern would assume all indebtedness to plaintiffs, and would make a new mortgage upon the stock of merchandise at Wagoner to secure their indebtedness to plaintiffs whenever Foster called upon them for same. That, upon these statements and agreements on the part of Terrell, Foster consented for him to carry his stock of merchandise from Waldron and Mansfield, Arkansas, to Wagoner, in the Indian Territory. That Terrell moved the said stock of merchandise to Wagoner, and opened up the store at Wagoner in the firm name of E. Terrell & Co. about July 5, 1893. That at the time of removing to Wagoner said Terrell had not paid any part of the indebtedness to plaintiffs, and that they moved about $10,000 worth of merchandise to Wagoner. That the plaintiffs' debt was embraced in one note for $1,500, and two notes each for $1,400; and in the fall of 1893 and part of 1894 one of the $1,400 notes was paid off, and about $600 or $700 was paid on the other two notes out of the proceeds of sales of merchandise brought from Waldron, Arkansas, and subsequent purchases. That after the said business was begun at Wagoner the plaintiffs continued to sell the said E. Terrell & Co. goods in the regular course of trade, and received payment from them on account from time to time, until January 28, 1895, at which time there was due the plaintiffs from said firm of E. Terrell & Co., for balance on merchandise sold them at Wagoner, the sum of $1,175.41, and upon the two unpaid notes the sum of $2,796.15, making a total indebtedness then due of $3,971.56."

Upon this evidence the court charged the jury as follows:

"The omission of J. Foster & Co. to file in the Indian Territory their mortgage executed in Arkansas, when they consented that Terrell might remove the merchandise covered by such mortgage from Arkansas to the Indian Territory, is a badge of fraud, which, if unexplained, would authorize you to find that the mortgage executed on January 28, 1895, by E. Terrell & Co., was fraudulent, and to render your verdict for the defendant."

This charge is erroneous, for several reasons. The omission of the plaintiffs to file in the Indian Territory the mortgage executed on the goods while they were in Arkansas, and duly recorded in that state, was not of itself a fraud, or a badge of fraud, which would authorize the jury to render a verdict for the defendants. The plaintiffs had a perfect right to permit J. G. Terrell to remove his goods from Arkansas into the Indian Territory. The Arkansas mortgage was on stocks of goods owned by J. G. Terrell, and described as being in storehouses in Waldron and Mansfield, in Arkansas; and its record in the Indian Territory would not have operated as a mortgage on a stock of goods belonging to E. Terrell & Co., or as a security for the plaintiffs' debt, and would therefore have been a useless and vain act. It is said that the plaintiffs, by not putting the mortgage on record in the Indian Territory, thereby

concealed the same, and enabled Terrell & Co. to contract debts upon the presumption that the goods were unincumbered. But there was no concealment of an incumbrance on the goods in the Indian Territory, because there was no incumbrance on the goods in that territory prior to the execution of the mortgage under which the plaintiffs claim, which was placed on record the day following its execution. As the plaintiffs could gain nothing by recording the Arkansas mortgage in the Indian Territory, and as they could not and do not claim the goods under that mortgage, we do not think there was any legal or moral obligation resting on them to have that mortgage recorded in the Indian Territory merely for the information of Terrell & Co.'s other creditors. That mortgage remained of record in Arkansas unsatisfied, and thus the defendants and all other persons had legal constructive notice of its existence all the time at the only place its record could have any legal effect. By the use of the words "if unexplained" in this instruction, the jury were told, in effect, that the burden of proof rested on the plaintiffs to show that an act which in itself was perfectly lawful and innocent was not done for a fraudulent purpose, or in furtherance of a fraudulent scheme. But an act which in itself is lawful and innocent is never presumed to be fraudulent, and the burden rests on the party assailing it as fraudulent to prove it. Moreover, there is no evidence in the record tending in the slightest degree to show that the plaintiffs omitted to record the Arkansas mortgage in the Indian Territory for any fraudulent purpose, and any instruction based on the assumption that there was such evidence would have been erroneous.

The defendants offered, and the court, over the objection of the plaintiffs, admitted in evidence, statements made by Terrell & Co. to some of their creditors touching their financial condition. There was no error in admitting these statements. They were competent evidence against Terrell & Co. for whatever they tended to prove, but they were not evidence against the plaintiffs, and could not affect their rights, unless it was shown they had knowledge of them, and were in some manner connected with them for the fraudulent purpose alleged. Brittain v. Crowther, 4 C. C. A. 341, 54 Fed. 295. No such showing was made. There is not a syllable of evidence or a single circumstance in the case tending in the remotest degree to show the plaintiffs knew that any such statements had ever been made, or that they had any connection whatever with them. The plaintiffs requested the court to instruct the jury that if the plaintiffs were in no manner parties to or connected with these statements, and had no knowledge of them, their rights were not affected thereby. The court gave the instruction, with this qualification:

"Unless you should further find from the evidence that there was a secret or tacit agreement between them to conceal the true condition of E. Terrell & Co., and thus enable them to procure a greater amount of credit than they could otherwise procure."

As there was a total lack of evidence tending to show, or from which the jury could rightfully infer, any such "secret or tacit" agreement, it was error to qualify the plaintiffs' request as was done.

The defendants introduced in evidence the following correspondence:

"St. Joseph, Mo., Feb. 1, 1894.

"J. Foster & Co., Fort Smith, Ark.—Dear Sir: Will you kindly give us, in confidence, such information as you may have regarding the credit, promptness, and financial standing of E. Terrell & Co., Wagoner, Indian Territory? Please answer upon this sheet, and oblige,

"Yours truly, Tootle, Wheeler & Motter,
"Successors to Tootle, Hosea & Co."

"Gentlemen: We are selling Messrs. E. Terrell & Co., and find them reasonably prompt. Think they are good for what they want.

"Truly, J. Foster & Co."

The court gave the following instruction relating to this correspondence:

"The failure of J. Foster & Co. to disclose to Tootle, Wheeler & Motter, when they made inquiry as to the financial standing of E. Terrell & Co., that they held a mortgage, recorded in Arkansas, upon the property in the Indian Territory, with an agreement from E. Terrell & Co. to give a mortgage in the Indian Territory upon this property whenever demanded by them, is a badge of fraud, and, unless it has been explained to your satisfaction by the evidence in this case, would justify you in finding for the defendants."

And after 24 hours' deliberation the jury were brought into court and instructed as follows:

"If you find from the evidence that J. Foster had of record in Arkansas a mortgage upon the stock of goods and merchandise of J. G. Terrell; and if you further find that the said J. Foster & Co. agreed that the said J. G. Terrell might carry said stock of goods and merchandise to the Indian Territory, and expose them for sale under the firm name of E. Terrell & Co., and that the said J. G. Terrell and E. Terrell & Co. agreed with the said J. Foster & Co. that, whenever demanded by said J. Foster & Co., the firm of E. Terrell & Co. would give to them a mortgage covering the stock of goods in the Indian Territory; and if you further find that, when J. Foster & Co. made reply to the inquiry of Tootle, Wheeler & Motter as to the financial standing of E. Terrell & Co., the said J. Foster & Co. did not disclose that they held the mortgage recorded in Arkansas, and an agreement for a new mortgage from E. Terrell & Co. whenever demanded; and if you find that, had J. Foster & Co. made disclosure of these facts to Tootle, Wheeler & Motter, the firm of Tootle, Wheeler & Motter would not have sold the goods which they did sell to E. Terrell & Co.,—then you should find for the defendant."

As these instructions cover in part the same ground, they will be considered together. It will conduce to a clearer understanding of so much of these instructions as relate to the plaintiffs' answer to Tootle, Wheeler & Motter's letter of inquiry to set out all the testimony relating to that subject, as it is brief:

"Defendants proved by Tootle, Wheeler & Motter that, had they been advised that E. Terrell had a chattel mortgage on their stock of goods, they could not have gotten any goods from them on credit, and that Tootle, Wheeler & Motter relied greatly on the information furnished them by J. Foster & Co. in extending the line of credit to E. Terrell & Co. which they did;" and the plaintiffs proved "that about the 1st of February, 1894 [the date of the letters], E. Terrell & Co. were solvent and sufficient to pay all of their debts, and that after that time they lost about $5,000 in cotton speculations, and that a few days before they made the mortgage of January 28, 1895, to plaintiffs, they paid Tootle, Wheeler & Motter on account the sum of $300."

The instructions must be considered in the light of this testimony. The matters embraced in these charges will be considered in their order.

The plaintiffs were under no obligation, in answering the letter of Tootle, Wheeler & Motter, to disclose the fact of the existence of the Arkansas mortgage. That mortgage was duly recorded in the proper recorder's office of that state, and Tootle, Wheeler & Motter and all other persons were bound to take notice of its existence; and, in contemplation of law, they had such notice. Moreover, it will be observed that this letter was written more than six months after the goods had been removed into the Indian Territory, and the Arkansas mortgage abandoned as a security. Nor were the plaintiffs bound to disclose the fact that Terrell & Co. had promised to give them a mortgage to secure their debt whenever demanded. Merchants and business men are not required, in answering general letters of inquiry "regarding the credit, promptness, and financial standing" of a named person, to disclose their business relations or the state of their accounts with such person. No such information was called for by the letter of Tootle, Wheeler & Motter, and they had no right or reason to expect it. The supreme court of Michigan, in First Nat. Bank v. Marshall & Ilsley Bank, 65 N. W. 604, said:

"It is insisted that it was the duty of the plaintiffs, in replying to the letter of the defendant inquiring as to the character and financial standing of Mr. Hale, to state the indebtedness of Mr. Hale to it. No statement of liabilities was called for, but only his character and financial standing as a business man. Banks, as well as individuals, frequently write for information of this character. When an inquiry comes to such bank asking simply for the character and financial standing of the merchant, the bank is not bound, at its peril, to report any loans which said merchant may have at its bank."

It will be observed that, by the terms of the instructions we are considering, the plaintiffs are held responsible, not for what they did say in their letter, but for not saying something the court erroneously held they should have said. If the statements contained in the plaintiffs' answer to Tootle, Wheeler & Motter's letter were made in good faith, and true so far as they then knew and believed, they imposed no liability on the plaintiffs, and cannot affect the validity of the mortgage taken months afterwards. Confessedly, the testimony, all of which we have set out, would not support a finding that the plaintiffs purposely and intentionally misrepresented the business standing and credit of Terrell & Co., with the view and intention of inducing Tootle, Wheeler & Motter to sell them goods, in the hope and expectation that they might profit thereby. But however this may be, the court did not leave that question to the jury, as it should have done if there had been any testimony justifying its submission.

The understanding that Terrell & Co., when required to do so, would give the plaintiffs a mortgage on the goods in the Indian Territory, did not, of itself, render the mortgage fraudulent and void in law. Smith v. Kraft, 123 U. S. 436. As bona fide creditors of Terrell & Co., they had a right at all times, independent of any previous understanding to that effect, to demand of Terrell & Co. such security for their debt, and Terrell & Co. had an undoubted right to give it.

These being the unquestioned legal rights of the parties, upon what principle can it be said to be a legal fraud, or a badge of fraud, for the parties to stipulate in advance for doing that which they would be perfectly free to do, and which it would be perfectly legal for them to do, independent of such stipulation? Why should a mortgage which the creditors had a legal right to demand, and the debtor good right to give, be held void because the parties had previously agreed that such security should be given when demanded? There is no such rule of law. It is everyday practice for debtors to promise to give their creditors security when demanded, and while such a promise affords slight protection to the creditor, and cannot be specifically enforced, when it is voluntarily complied with the security is not thereby invalidated. Bank v. Whitmore, 104 N. Y. 297, 10 N. E. 524; Day v. Goodbar, 69 Miss. 689, 12 South. 30; Teitig v. Boesman, 12 Mont. 450, 31 Pac. 371, 384; Blanks v. Klein, 3 C. C. A. 588, 53 Fed. 436; Anderson v. Lachs, 59 Miss. 115. Such an agreement, like all agreements that men are capable of entering into, may be made under circumstances and for purposes that will render it fraudulent in fact. But the court did not submit to the jury the question whether this agreement was entered into for a fraudulent purpose, and was fraudulent in fact. Presumably, this was not done because the court took the view that the understanding or agreement was fraudulent in law; and, besides, it would have been error to submit the question of fact to the jury, for the reason that there was a total absence of testimony tending in the slightest degree to show that this understanding was had with the view of deceiving or defrauding the other creditors of Terrell & Co., or for any purpose other than the protection of the plaintiffs by giving them the same security for their debt which they had while the property remained in Arkansas.

We have seen that the law did not impose on the plaintiffs, in answering Tootle, Wheeler & Motter's letter, the obligation to disclose the facts enumerated in the court's final charge. This being so, it was clearly erroneous to tell the jury that if they found Tootle, Wheeler & Motter would not have sold the goods they did sell to Terrell & Co., had they known all these facts, they would find for the defendant. What Tootle, Wheeler & Motter would or would not have done, had they known all about the financial condition and prospects of Terrell & Co., cannot be admitted to prejudice the plaintiffs, if they had done no wrong and committed no fraud. It will be observed that in this, as in the other instructions, no mention is made of the motive or intent with which these acts were done, but the acts are treated as fraudulent in law, irrespective of the intent with which they were done. Many innocent and lawful or indifferent acts are linked together, apparently on the assumption that their aggregation would impart to them an odious quality, which separately they did not possess. But the law will not deduce fraud from any number of lawful and innocent acts. One who seeks to attach a fraudulent character to such acts must go further, and show they were in fact done with a fraudulent intent and for a fraudulent purpose; and whether they are so done or not is a question

of fact, which must be submitted to the jury when there is evidence justifying its submission. The transaction between the plaintiffs and Terrell & Co. which is assailed was perfectly consistent with honesty and good intentions, and, in the absence of proof to the contrary, the law presumes it was of that character. Mere suspicion, unsupported by evidence, cannot be allowed to deprive a creditor of his legal rights; and fraud cannot be inferred either by the court or jury from acts legal in themselves, and consistent with an honest purpose. The settled rule on this subject is that slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion, leading to no certain results, are not sufficient to establish fraud. They must not be, when taken together and aggregated,—when interlinked and put in proper relation to each other,—consistent with an honest intent. If they are, the proof of fraud is wanting. Bank v. Frank, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65; Shultz v. Hoagland, 85 N. Y. 464.

Several requests preferred by the defendants and given by the court are prefaced with the statement that "a secret trust between parties is a badge of fraud," and "secrecy is a badge of fraud." These opening statements are followed by a recital of what the parties did, and conclude with the declaration that if these actions have not "been explained," or have not been explained to the satisfaction of the jury, they would find for the defendant. The frame of these charges is extremely objectionable, because of their misleading tendency under the proof in the case. There was no evidence of "a secret trust," or that the plaintiffs concealed any fact they were under legal obligations to make public. These instructions are infected with the same vice as those we have considered. They declare innocent acts to be badges of fraud, which, if unexplained by the plaintiffs, would authorize the jury to find a verdict for the defendants. Secrecy or haste in a business transaction, or the fact that it took place out of business hours, are spoken of in the books as badges of fraud; and these so-called badges of fraud are sometimes brought to the attention of the jury in cases where they have, under the proof, no application, or in a manner that conveys to the jury an entirely erroneous notion of the law applicable to the rights of bona fide creditors; and the same may be said of the statement that a transaction between a debtor and one of his creditors which has the effect to hinder and delay the other creditors of the debtor is a fraudulent and void act as to such other creditors. The statement of these propositions to a jury without the full explanation of the legal rights of a bona fide creditor is necessarily misleading and erroneous. A bona fide creditor has a legal right to demand of his debtor that he pay or secure his debt, and, in the absence of a bankrupt law, a debtor may lawfully pay or secure one of his creditors to the exclusion of all others. The necessary effect of one creditor taking a mortgage on all his debtor's property to secure the payment of his debt is to hinder and delay the other creditors of the debtor in the collection of their debts, because it leaves them nothing out of which to make their debts but the debtor's equity of redemption in the mortgaged property, which is valueless,

except in so far as the property exceeds in value the mortgage debt. But this is not hindering or delaying the debtor's other creditors, in a legal sense; and it is not fraudulent as to them, because the creditor had the legal right to demand security for his debt, and the debtor a legal right to give it, regardless of how other creditors might be affected thereby. It is just what every other creditor would have done if he had been equally diligent, and had had the good fortune to be in like favor with the debtor. The questions in such cases are: Is the mortgage a valid instrument on its face, and was it executed in good faith to secure the payment of a bona fide debt, with no reservation or secret trust for the benefit of the debtor? When these questions can be answered in the affirmative, the mortgage is impervious to attack from any quarter. These are the essential facts to constitute a valid mortgage of property to secure the payment of a bona fide debt, and when they are established it is wholly immaterial whether the transaction was consummated in haste and secretly, or openly and leisurely, or in daylight or in the nighttime. Lawful contracts made in good faith for a lawful purpose may be made at any hour of the day or night, and publicly or secretly, and leisurely or hastily, as best suits the convenience and interest of the parties to them. When a creditor is seeking payment or security for his debt from an insolvent debtor, it is commonly to his interest to act with celerity and secretly. If he made open proclamation of his intended action, it would probably result in some other creditor obtaining the preference. Rice v. Commission Co., 18 C. C. A. 15, 71 Fed. 151; Williams v. Simons, 16 C. C. A. 628, 70 Fed. 40; Repauno Chemical Co. v. Victor Hardware Co., 42 C. C. A. 106, 101 Fed. 948. In Huiskamp v. Wagon Co., 121 U. S. 310, 319, 7 Sup. Ct. 899, 902, 30 L. Ed. 971, the supreme court of the United States say:

"In order to invalidate the mortgage of Rummel to Huiskamp Bros., it must have been made with the intent on the part of Rummel to hinder and delay his other creditors, and Huiskamp Bros. must have accepted it with the intent of assisting Rummel to hinder and delay his other creditors. A debtor being in failing circumstances and having the right to prefer a creditor, if the preferred creditor has a bona fide debt, and takes a mortgage with the intent of securing such debt, and not with the purpose of aiding the debtor to hinder and delay other creditors, the mortgage is valid, even though the mortgagee knows that the debtor is insolvent, and that the debtor's intention is to hinder and delay other creditors."

In a word, the law is that when a mortgage is taken by a bona fide creditor for the purpose of securing his debt, and not for the purpose or with the intent of shielding his debtor and assisting him to hinder and delay his other creditors, the mortgage is valid, although its necessary effect is to hinder and delay other creditors, and to deprive them of all remedy against their debtor's property.

The judgment of the United States court of appeals for the Indian Territory and the judgment of the United States court for the Northern district of the Indian Territory are reversed, and this cause is remanded to the latter court, with instructions to grant a new trial.

DELAWARE, L. & W. R. CO. v. DEVORE.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 70.

1. POSITIVE AND NEGATIVE TESTIMONY—WEIGHT—INSTRUCTIONS.
   A requested instruction that positive testimony of witnesses that a whistle was blown and a bell rung is entitled to more weight than testimony of other witnesses that they did not hear the one or the other is too broad, without reference to the credibility of the witnesses in other respects.
2. NEGLIGENCE OF PARENTS—IMPUTING IT TO CHILD—DRIVERS.
   Negligence of the father, as well as of the mother, in not discovering a train, is imputable to a child, held in the arms of his mother, who was sitting by the side of the father, who was driving, as the father is not acting as a driver merely.[1]
3. PERSONAL INJURIES TO CHILD—DAMAGES.
   A child made a mental and physical wreck may recover of the one by whose negligence it was caused, not only for physical suffering, but for loss of earning capacity.

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

Writ of error to review a judgment rendered by the circuit court for the Southern district of New York upon a verdict against the Delaware, Lackawanna & Western Railroad Company for the sum of $10,000 in favor of the plaintiff in an action to recover damages for personal injuries sustained by him at a grade crossing known as "Hope Crossing," on the line of the defendant's railroad in New Jersey, on the evening of November 22, 1892.

Hamilton O'Dell, for plaintiff in error.

Walter K. Barton, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. At the time of the injury the plaintiff was about one year and four months old. His parents had been living at Wallpack, N. J. On the morning of November 22, 1892, they drove from their home with this child to Belvidere, N. J., a distance of about 26 miles from Wallpack, and about 6 o'clock in the evening started to return home. On their way to Belvidere they had crossed the railroad track at Hope crossing, but Mrs. Devore (now Mrs. Heater) had never driven on that road before, and did not know that her husband had, and did not know the name of the railroad which they crossed. They were in a smoothly running top buggy, and had an old and gentle horse. The father drove the horse, and was seated on the right side of the buggy. The mother sat on the left side with the child in her arms. The evening was very dark and cloudy. "It was storming some,—a sort of hail, sleeting." The wind was on the right side of the buggy, and was blowing hard. The top part of the buggy was put down so as to prevent the wind from striking the baby. Hope crossing is about 2½ miles from Belvidere, and as they ap-

[1] Negligence imputed to infants, see note to Railway Co. v. Kowalski, 34 C. C. A. 4.

proached it Mrs. Devore asked her husband if they were not near the crossing which they had crossed in the morning. He replied, "A ways ahead," and pulled the horse down to a walk. The horse continued to walk until the crossing was reached. Mrs. Devore, from the time the horse began to walk, looked both ways and listened for the noise of a train, and testified that her husband did the same, but that she neither saw nor heard anything; heard neither bell nor whistle, and saw nothing, until, "just as we got on the tracks, I saw the glittering of the rail, and that is all I saw." Mr. Devore was injured, and has since died, and the child was terribly injured, so that he is now, and will be permanently, a mental and physical wreck. He was previously a strong, healthy child. The train had left Bridgeville Depot, about a third of a mile to the right from Hope crossing, somewhat after 7 o'clock, and at the time of the disaster was going at the rate of 40 miles an hour. It does not appear that Mrs. Devore knew of the existence of this depot or of the time when trains might be expected to pass the crossing.

The issues were as to the negligence of the defendant in disobeying the statutory requirements as to bell or whistle; as to the contributory negligence of the parents of the child in omitting to take proper precautions when approaching a railroad crossing; and, in connection with the question of contributory negligence, the question was examined whether upon a very dark and stormy evening an approaching train could be seen or heard by the occupants of a buggy as it approached the crossing. A further issue was made in the pleadings and the testimony as to the especially dangerous character of the crossing, which should have compelled the defendant to take especial precautions, other than those provided by statute, to prevent casualties of the character encountered by the Devores.

Upon the question of obedience to the statute of New Jersey, which requires the ringing of a bell or the blowing of a whistle before and until the engine of a railroad train has crossed a grade crossing, the witnesses differed; the majority in number being in favor of the defendant's compliance with the statute on the evening of the accident. The court did not charge, as requested by the defendant, as follows: "Upon the question whether the bell was rung and the whistle blown, positive testimony of witnesses that the one was blown and the other was rung is entitled to more weight than testimony of other witnesses that they did not hear the one or the other,"—and to this omission an exception was taken. The request asserts the proposition that positive testimony of witnesses is entitled to more weight than the negative testimony of other witnesses, and makes no discrimination in regard to the credibility in other respects of the two classes of witnesses. The positive class may impress the triers with lack of confidence in their trustworthiness, their disinterestedness, their accuracy; but the request establishes as a rule of law that positive testimony is entitled to superior credit whether other things are equal or not, and is, we think, a broader rule than a court should be called upon to give to a jury, without reference to the credibility of the witnesses in other respects. In reply to the following question put by the foreman

of the jury: "Supposing the jury believe that the bell was rung and the whistle sounded, and suppose, at the same time, that Mrs. Heater used her best diligence in trying to see whether the train was coming or not, does that relieve the railroad from responsibility?" the court said: "If they rang the bell and sounded the whistle they are relieved from responsibility, unless you reach the conclusion that the crossing there was such a peculiarly hazardous one that it was necessary to adopt further precautions, for the reason that the sounding of bells and whistles could not be heard by travelers on the highway."

To that part of the instruction commencing "unless you reach" the defendant excepted for the reason that there was no proof before the jury showing, or tending to show, that the crossing was "a peculiarly hazardous one," or that "it was necessary to adopt further precautions, for the reason that the sounding of bells and whistles could not be heard by travelers on the highway." Much of the argument of the plaintiff in error is directed to an alleged entire or substantial absence of proof that the crossing was a peculiarly hazardous one. If peculiarly hazardous, the fact bore upon the question of the defendant's negligence. Railroad Co. v. Ives, 144 U. S. 421, 12 Sup. Ct. 679, 36 L. Ed. 485; Railroad Co. v. Moore, 45 C. C. A. 21, 105 Fed. 725. The traveled road from Belvidere as it approaches Hope crossing is a gradual ascent until the top of a hill or "rise" in the ground is reached. As the road descends there is a homestead on the right occupied by Mr. Emery, consisting of a house, barn, and other outbuildings. A few trees are in the yard. The view towards Bridgeville Depot is to some extent interfered with by these buildings. The corner of the Emery fence nearest the crossing is about 70 feet from the first rail of the north-bound railroad track. The corner of the Emery house is 127 feet distant from that rail. At 735 feet from the crossing towards Bridgeville the railroad track enters a cut, which at 855 feet from the crossing is about 5 feet above the top of the rail, and at its extreme height is about 12 or 12½ feet above the top of the rail. A defendant's witness testified that in the daytime, from a point in the highway 47 feet from the crossing towards Belvidere, the whistling post, 1,460 feet away towards Bridgeville, could be seen through the cut. A civil engineer in the defendant's employment testified that "at a point 56½ feet from the center of the north-bound track I saw an engine 550 feet. Just an engine happened to come along there, and I made those measurements. I could see the whole engine. At a point 40 feet from the track I could see the Bridgeville depot very plainly, from the intervening road. At that same point, 56½ feet, I could see part of the depot."

This testimony was not contradicted by measurements made by the plaintiff's witnesses, who relied on the testimony of one McConnell and of Mrs. Heater. McConnell's testimony was of the most importance. He testified in chief as follows:

"I have often driven and walked over this wagon road at the crossing. I have driven from Belvidere to the crossing several times. It is a crooked and winding road all the way through, up and down hill. It is crooked and winding and up and down near the crossing." "Q. What view have you got

of the railroad to the right, standing two or three hundred yards back from Hope crossing towards Belvidere? A. You can see the track at this end of the cut. Q. How much can you see? A. Just a little. You cannot see the crossing when you stand back a quarter of a mile or three hundred yards. Q. When you stand back 165 or 170 feet from the crossing, passing the Emery house towards Belvidere, at the top of the rise that exists there, can you see the crossing there? A. No. Q. How near must you be to the crossing to see? Where would you stand with reference to this house? There is a house in the angle formed by the railway and the highway, is there not? A. Yes, sir. Mr. Emery lives there in that house. He lived there at the time of the accident. Q. Where would you stand with reference to that house to see this crossing? A. About the end of his fence,—the dooryard fence. To the Court: The end towards the railroad. By Mr. Tyndall: Q. What is the reason the crossing cannot be seen before getting so close as that? A. There is a sort of a wind in the road. There are some grades too. When you stand in front of the Emery house,—directly in front of it, in the road,—or if you are seated in a buggy directly in front of the Emery house, nothing can be seen of this railroad track to the right. Mr. Emery's house and trees prevent. There are buildings in his plot of ground there besides the house. He has a barn and chicken coop down below the house. When you get to the corner of the fence towards the railroad you can see the whole of the railroad there. By the Court: Q. Where is this place? Mr. Tyndall: At the corner of the fence nearest the railroad. The Witness: I mean by that 'see the whole of it' straight ahead. You can see the crossing,—nothing else. Q. Can't you see up and down the track a little ways? A. It might be a trifle; I couldn't say exactly as to that. To the Court: You could see a trifle towards the right. By Plaintiff's Counsel: Q. Can you see the cut from that point? Suppose you just got clear of the fence, and you are seated in a buggy or walking, how far down the track towards the Bridgeville Station can you see? A. I couldn't say exactly as to that. I never took particular notice how far I could see down. I could see down a ways,—a small distance. Q. Do you think you could see to the cut? A. I would not say as to that. When you are on the crest of the hill, on the Belvidere side of the house, you can see nothing of this railroad. Q. You can see nothing of the crossing, but can you see anything of the tracks in the distance? A. You can see just a little of the track next to the cut. What I have said in regard to seeing this railroad is said with reference to the daytime. You can't see anything if it is dark. If you stopped on the top of the hill back of the Emery house, you could not see anything at night, on a dark, cloudy night. You would have to be right on the track to see anything of them on a dark, cloudy night. I have been a railroad man, and I am familiar with the lights used on the locomotive as a headlight. These headlights throw their light straight ahead. It does not give much, if any, light to the side. I do not think that on a dark night approaching this crossing from Belvidere, and looking towards Bridgeville Station in a position of safety, say about the corner of the fence, that any headlight could be seen on a locomotive coming through the cut. I do not think I could see anything in the way of a light."

This testimony could not be ignored by the trial judge, and he could not properly have prevented an inquiry by the jury as to the credibility of Mrs. Devore's testimony that she did not see or hear an approaching train, though in the active exercise of attempts to discover whether she was in danger. Neither could he have properly prevented an inquiry as to the practicability of the sight of a moving train in a dark and rainy night by a stranger to the locality, who did not know of the existence of the cut, or the Bridgeville Depot, or of the Emery house, or of her distance from the crossing. A person familiar with a locality and its surroundings may be able to take a position in the highway in the daytime from which objects can be seen which

would not be discovered in the dark by a stranger who knew nothing of the peculiarities of the road or of any obstructions to sight.

The defendant requested the court to charge as follows:

"Even if the defendant's servants failed to blow the whistle or ring the bell as the train approached the crossing, the plaintiff's mother was not thereby relieved from the necessity of exercising proper care for her own safety and the safety of the plaintiff. She was bound to look and listen before attempting to cross the track. A railroad track is a place of danger. It can never be assumed that cars are not approaching on the track or that no danger is to be apprehended therefrom."

The court charged as follows:

"Should, however, you reach the conclusion that there was negligence on the part of the railroad in running its train silently and without proper warning down on the crossing, you then come to the second aspect of the case, was there any negligence on the part of the plaintiff contributing to the happening of the accident? * * * For an infant of tender age, in the custody and care of his mother at the time, there is to be imputed to him, when he asks damages from somebody else at whose hands he has been injured, whatever negligence may have been shown by his mother, who at that time had him in custody. So the next question for you to determine is whether Mrs. Heater was or was not negligent, and whether her negligence contributed in any way to the happening of the accident. The negligence, of course, with which she is charged, is negligence in failing to watch for or to discover the presence of this train in time to warn her husband (with whom conjointly, she says, she was looking out) to stop the horse, which she says was on a walk, and might easily have been stopped within five or ten or fifteen feet of the railroad track, if either of them had seen the train. * * * It will be for you, taking all the testimony and all the assistance you have from photographs and maps, to determine, in the first place, whether it was practicable for a person approaching that road on a walk, and keeping a careful lookout, to see that train coming in the nighttime, when a sufficient distance away from the track to avoid it by stopping. And, if you reach that conclusion, then it will be for you to determine whether, in view of that fact, despite her testimony here, Mrs. Heater, the guardian of the child, at the time was exercising reasonable care and prudence in approaching that crossing; because, of course, you all know that it is a rule of law that a railroad crossing—a grade crossing—is necessarily a place of danger, and persons approaching it are required to exercise a greater degree of care and caution than if they are walking or driving along a roadway, where there are no railroad trains to be met with."

The position of the defendant was properly and clearly presented to the jury.

It will be recollected that, on the return trip to Hope crossing, Devore, the father of the plaintiff, was driving, and the mother was holding the child in her lap. The court charged that, while any negligence on the part of the mother which contributed to the accident was imputable to the child, for any negligence on the part of the father, who for the moment was not so much his father as he was the mere driver of the vehicle, the child was not responsible, and he was not chargeable with the negligence of the driver. To this charge the defendant excepted. The rule of law that the negligence of the parent of a minor who is suing a third person to recover damages for an injury caused by negligence at the time of and which contributed to the injury, and while the minor was under the protection and control of the parent, is imputable to the minor, is now well settled. Lapsley

v. Railroad Co. (C. C.) 50 Fed. 181; Id., 2 C. C. A. 149, 51 Fed. 174, 16 L. R. A. 800; Morris v. Railroad Co. (C. C.) 26 Fed. 22; Holly v. Gaslight Co., 8 Gray, 132, 69 Am. Dec. 233; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

The history of the general rule with respect to the effect of the negligence of a driver upon the right of a passenger to recover for an injury occasioned by the negligence of a third person is given by Judge Sanborn in the second Lapsley decision. In the present case the father was driving, and the mother was holding the child in her arms, and the court made a distinction which had been previously approved by the supreme court of the state of New York (Hennessey v. Railroad Co., 6 App. Div. 206, 39 N. Y. Supp. 805; Lewin v. Railroad Co., 52 App. Div. 72, 65 N. Y. Supp. 49), but has not as yet been considered by the New York court of appeals (165 N. Y. 667, 59 N. E. 301). We do not see any adequate reason for the distinction. The father was the natural protector of the child, and was bound to the exercise of prudence and care for his welfare. The child was also, if he could exercise thought on the subject, bound to yield himself to the protecting care and control of the father, whose care was his care and whose negligence was his negligence. The father was not acting as driver merely, but was also acting as father and caretaker of his child, and his negligence, if it existed, was as imputable as the mother's to the child. There is no evidence on the subject of the father's conduct except that which was given by the mother, but the exception was of importance, and for the error, though perhaps inconsequential, the judgment must be set aside.

Upon the subject of damages the court charged as follows:

"The child would be entitled, in the event of recovery, to compensation for the pain and suffering that it has endured, and to such reasonable and proper compensation as may make up to it the loss of earning capacity which it has sustained in consequence of the accident, if you reach the conclusion that the accident was the cause of the present condition of affairs. With regard to that, it is not a matter as to which any calculation of dollars and cents can be given to you. It has got to be intrusted to your discretion, and in such a matter you are required to be reasonable and just."

To this part of the charge the defendant excepted.

The complaint had alleged that by reason of the injury caused by the act of the defendant the plaintiff's life and prospects were ruined. If the collision was caused by the negligence of the defendant, there is no doubt of the truth of the averment. At the time of the trial he was about 10 years old, and it was apparent that his mental and physical capacity had been permanently ruined. We see no adequate reason why the loss of his earning capacity should not have been taken into account by the jury as well as his physical suffering.

The judgment is reversed, with costs, and a new trial is directed.

TEXAS & P. RY. CO. v. PARKS et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,100.

MASTER AND SERVANT—ACTION FOR INJURY OF SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action by a servant against the master to recover for an injury, where the negligence of the master is established, evidence of contributory negligence must be undisputed and conclusive to warrant the court in directing a verdict for defendant.

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

Geo. Thompson and T. J. Freeman, for plaintiff in error.

R. L. Carlock, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This is a suit brought by Sabina Parks, for herself and her minor son, Frank, to recover damages for the death of John B. Parks, husband of the said Sabina and father of the said Frank. It is alleged that on the 13th day of January, 1900, the said J. B. Parks, while in the employ of the Texas & Pacific Railway Company, was killed in the yards of the said company at Ft. Worth, Tex., while working with a crew to unload certain cars of dirt by the use of a large plow. Negligence of the railway company was charged: First, in not furnishing safe appliances; and, second, in that the conductor in charge of the work was negligent in starting the engine without giving sufficient notice and time to said Parks to put himself in a place of safety. On the trial a verdict was rendered against the railway company, which sues out this writ of error, contending that the court below erred in refusing certain special charges instructing the jury to find a verdict for the defendant on the ground of contributory negligence.

On the evidence submitted to the jury, the negligence of the railway company in not furnishing proper appliances was well established, but the evidence to show that the deceased, Parks, was guilty of contributory negligence, while perhaps strong enough to have warranted the jury in finding for the railway company, was not sufficiently undisputed and conclusive to warrant the court in taking the case from the jury. While the evidence shows that, after the cable was attached to the unloader plow, and before the locomotive was started, there was sufficient time and notice for Parks to have sought a place of safety, there is evidence to the effect that the conductor had instructed Parks and others to go back by the cars to the rear end of the train as a place of safety, and to watch the operation of the unloader plow, and that Parks was proceeding with due diligence, and had nearly attained the rear of the train, when the accident happened.

The case was properly submitted to the jury, and, as we find no reversible error in the record, the judgment of the circuit court is affirmed.

CITY OF COLUMBUS v. WOONSOCKET INSTITUTION OF SAVINGS.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,055.

1. MUNICIPAL CORPORATIONS—VALIDITY OF BONDS—TEXAS CONSTITUTION AND STATUTES.

The constitution of Texas (article 11, §§ 5, 7) provides that no debt shall ever be created by any city or town unless provision is made at the time of creating the same for levying and collecting annually a sufficient tax to pay the interest thereon, and create a sinking fund of at least 2 per cent. Rev. St. Tex. 1879, art. 370 et seq., vests in city councils the power to levy and collect ad valorem, poll, and license or occupation taxes, to make all appropriations, create special funds, and to have, in general, the management and control of the finances of the city. The council of a city passed an ordinance authorizing the issuance of waterworks bonds, and appropriating $3,000 per annum out of the general revenues of the city for the payment of the interest on such bonds, and the creation of a sinking fund of 4 per cent. It directed the treasurer to open a special account for the purpose, and to place therein each year all revenues of the city, from whatever source, until he should have yearly to the credit of such fund the sum of $3,000. At the same time it passed an ordinance declaring that all taxes theretofore levied, whether ad valorem, poll, occupation, or otherwise, were levied for the purpose of paying the interest, and providing a sinking fund for payment of the principal, of such bonds, and another making an annual levy of an ad valorem tax to the constitutional limit. No levy of other taxes was made at that time. *Held* that, under the constitutional provisions cited, the bonds were valid to the amount, and only to the amount, that the tax contemporaneously levied would provide for, by paying the interest and creating a sinking fund of 2 per cent. per annum; the same to be determined by the last preceding assessment.

2. SAME—PARTIAL INVALIDITY OF BOND ISSUE—APPORTIONMENT.

Where a city has issued bonds to an amount in excess of its constitutional authority, all of which were created by the same ordinance, and sold at the same time, each bond is valid to the extent of its proportionate share of the debt lawfully contracted.

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

This is a suit against the city of Columbus, a municipal corporation of the county of Colorado, state of Texas, to recover on municipal bonds issued by said corporation in the year 1883 for the purpose of erecting waterworks. The issue was $25,000 in coupon bonds, of $500 each, bearing interest at 8 per cent. per annum, payable semiannually; one-half falling due in 15 years; the other half, in 25 years. Interest was paid on the whole issue up to December 8, 1893, after which the city neglected and refused to pay. The present suit is to recover interest on the whole issue in default, and the one-half of the principal now due. In the circuit court, trial by jury was waived, and the case submitted to the court, which made a finding of facts, and thereon rendered judgment for the full amount of the interest due, and one half the principal; reserving the right of the bondholders to hereafter recover principal and interest on the other half of the issue. The city of Columbus sues out this writ of error, contending in this court, as in the court below, that the city of Columbus had no power to issue the bonds sued upon, and that the said bonds were void, having been issued in violation of the constitution of the state of Texas in force at the time of their issuance.

M. E. Kleberg, for plaintiff in error.

J. W. Terry, Rudolph Hatfield, and C. C. Everett, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). From the facts as found by the trial judge, it appears that the city of Columbus, a municipal corporation in Colorado county, state of Texas, was in the year 1883 a city of less than 10,000, and about 3,000, inhabitants, with taxable property within its limits of the assessed value of $600,000, upon which was levied a tax of one-fourth of 1 per cent., and for that year there was levied and collected as occupation taxes the sum of $1,350, and as poll taxes the sum of $150, and during the same year the revenues of the city, collected and received in the shape of fines, amounted to $225; making a total revenue for the year 1883 of the said city of $3,225. It further appears that the current expenses of the city for the year for salaries and fees of its marshal and collector, per diem, of the council, etc., did not exceed the sum of $1,100, which would leave as net revenues for the year 1883 the sum of $2,115. On the 8th day of June of that year the city council of said city adopted an ordinance providing for the issuance by the city of coupon bonds to the amount of $25,000, to provide means for the erection of waterworks, and on June 15th following the said city council adopted an ordinance levying an ad valorem tax as follows:

"There shall be levied and collected, an annual ad valorem city tax of ¼ of 1 per centum of the cash value thereof, estimated in lawful money of the United States, on all the movable property and all the real property situated and owned in this city, on the first day of January of each and every year, except so much thereof as may be exempted by the constitution and laws of the state of Texas, and by ordinances of this city."

On July 30, 1883, the city council of said city, by ordinance duly passed, repealed the aforementioned ordinance of June 8th, and at the same time passed a new ordinance whereby the said city of Columbus created a debt for the purpose of providing waterworks for the said city in the sum of $25,000, and authorized to be issued, to represent the same, coupon bonds for the said amount, bearing 8 per cent. interest per annum from the 8th day of June, 1883, payable semi-annually,—one half to fall due in 15 years, and the other half to fall due in 25 years, from June 8, 1883. At that time the constitution of the state contained provisions as follows:

"Sec. 9. The state tax on property, exclusive of the tax necessary to pay the public debt, shall never exceed fifty cents on the one hundred dollars valuation, and no county, city or town shall levy more than one-half of said state tax, except for the payment of debts already incurred, and for the erection of public buildings, not to exceed fifty cents on the one hundred dollars in any one year, and except as in this constitution is otherwise provided." Article 8.

"Sec. 4. Cities and towns having a population of ten thousand inhabitants or less, may be chartered alone by general law. They may levy, assess and collect an annual tax to defray the current expenses of their local government, but such tax shall never exceed, for any one year, one-fourth of one per cent., and shall be collectible only in current money. And all license and occupation tax levied, and all fines, forfeitures, penalties and other dues accruing to cities and towns, shall be collectible only in current money." Article 11.

"Sec. 5. Cities having more than ten thousand inhabitants may have their charters granted or amended by special act of the legislature, and may levy, assess and collect such taxes as may be authorized by law, but no tax for any purpose shall ever be lawful, for any one year, which shall exceed two

and one-half per cent. of the taxable property of such city; and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent. thereon." Article 11.

"Sec. 7. * * * But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent. as a sinking fund. * * *" Article 11.

Statutory provisions of the state in 1883 granting and regulating the powers of cities and towns suggested as pertinent to the questions in hand, and as shown by Rev. St. 1879, were as follows:

"Art. 370. The city council shall have the management and control of the finances and other property, real, personal and mixed, belonging to the corporation.

"Art. 371. The city council shall have power to appropriate money, and provide for the payment of debts and expenses of the city.

"Art. 372. To provide by ordinance special funds for special purposes, and to make the same disbursable only for the purpose for which the fund was created; and any officer of the city misappropriating said special fund shall be deemed guilty of malfeasance in office, and shall, on complaint of any one interested in said funds misappropriated, be removed from office, and be incapable thereafter to hold any office in said city."

"Art. 374. To provide, or cause to be provided, the city with water, to make, regulate and establish public wells, pumps and cisterns, hydrants and reservoirs, in the streets or elsewhere within said city, or beyond the limits thereof, for the extinguishment of fires and the convenience of the inhabitants, and to prevent the unnecessary waste of water."

"Art. 419. To pass all necessary ordinances to provide for funding the whole or any part of the existing debt of the city or of any future debt, by canceling the evidences thereof, and issuing to the holders or creditors notes, bonds or treasury warrants, with or without coupons, bearing interest at any annual rate not to exceed ten per cent. The council shall also provide by ordinance for issuing the bonds of the city in such sums as may be agreed upon for railroad subsidies heretofore voted, or that may be hereafter voted in accordance with the laws of this state.

"Art. 420. To appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city, and for the purpose of improving the public markets and streets, erecting and conducting city hospitals, city hall, water works, and so forth, as they may from time to time deem expedient; and in furtherance of these objects they shall have power to borrow money upon the credit of the city, and issue coupon bonds of the city therefor in such sum or sums as they may deem expedient to bear interest not exceeding ten per cent. per annum, payable semi-annually at such place as may be fixed by city ordinance: provided, that the aggregate amount of bonds issued by the city council shall, at no time, exceed six per cent. of the value of the property within said city subject to ad valorem tax."

"Art. 428. The city council shall have power to levy and collect an annual poll tax, not to exceed one dollar, of every male inhabitant of said city over the age of twenty-one years (idiots and lunatics excepted), who is a resident thereof at the time of such annual assessment.

"Art. 429. The city council shall have power to levy and collect taxes commonly known as licenses, upon trades, professions, callings and other business carried on; and upon carriages, hacks, coaches, buggies, drays, carts, wagons and other vehicles used in said city, when the same are for public use; and each and every person and firm engaging in the following trades, professions, callings and business, among others, shall be liable to pay such license tax; but this enumeration shall not be construed to deprive the city council of the right and power to levy and collect other license taxes, and from other persons and firms, under the general authority herein granted."

At the same time that the ordinance authorizing the issuance of the bonds aforesaid was passed, the city council also passed an ordinance wherein it was provided:

"That all taxes for the purpose of raising revenues for the city of Columbus, ad valorem, poll, occupation, or otherwise, heretofore levied, are hereby declared to be levied for the purpose of paying the interest and providing a sinking fund of four per cent. for the payment of the water works bonds, provided for by ordinance adopted on the 30th day of July, 1883, and the city clerk is hereby ordered to furnish the mayor a certified statement of the income of the city from all sources of revenue."

The ordinance authorizing the issuance of the bonds, among other things, provided:

"Sec. 5. That three thousand dollars per annum is hereby appropriated out of the general revenues of the city for the payment of the interest on said bonds, and the creating of a sinking fund of four per cent. for the payment of the principal as in this ordinance provided.

"Sec. 6. The city treasurer shall immediately open in his books an account to be known as the 'Waterworks Fund Account,' and he shall place, each year, to the credit of said account, all revenues of the city, from whatever source, received by him, until he shall have yearly to the credit of said account the aforesaid sum of three thousand dollars, which fund shall not be drawn upon for any other purpose than the payment of the interest, semi-annually, upon said bonds and the payment of the said bonds at maturity, provided, that after the redemption of twelve thousand and five hundred dollars of said bonds, the treasurer shall set only aside and credit to the said fund fifteen hundred dollars per annum until the final payment of all of said bonds.

"Sec. 7. The fund herein created is set apart exclusively for the payment of the principal and interest of the bonds herein authorized and required to be issued, and no part of the same shall ever be diverted to any other purpose."

The constitution of the state of Texas (sections 5, 7, art. 11, above quoted) forbids the creation of any debt by any city or town, unless, at the same time the debt is created, provision be made to assess and collect annually a sufficient sum or tax to pay the interest thereon, and create or provide a sinking fund of at least 2 per cent. These two provisions of the constitution apply to all cities and towns alike, without regard to the number of their inhabitants. City of Terrell v. Dessaint, 71 Tex. 770, 9 S. W. 593. It is well settled that the creation of a debt by any city or town in the state of Texas, and the bonds issued to evidence such debt, without a compliance with the said provisions of the constitution, are wholly void. See Millsaps v. City of Terrell, 8 C. C. A. 554, 60 Fed. 193; Gould v. City of Paris, 68 Tex. 517, 4 S. W. 650; City of Terrell v. Dessaint, supra; Citizens' Bank v. City of Terrell, 78 Tex. 450, 14 S. W. 1003; Nolan Co. v. State, 83 Tex. 182, 195, 17 S. W. 823. As recited above, the provision made at the time for payment of the interest, and to create a sinking fund for the payment of the bonds in suit, consisted of the declaration by ordinance that all taxes for the purpose of raising revenues for the city of Columbus—ad valorem, poll, occupation, or otherwise—theretofore levied were levied for the purpose of paying the interest and providing a sinking fund for the payment of the waterworks bonds, and an appropriation of $3,000 out of the general revenues of the city for the same purpose. The ad valorem tax of one-

quarter of 1 per cent. upon the assessed value of all the movable and immovable property within the limits of the city, levied on June 8, 1883 (the same being the date given to the bonds in suit), appears to have been levied about the time of, and in connection with, the first ordinance providing for the issuance of waterworks bonds; and as that ordinance was repealed in the second ordinance to the same intent and purpose, so far as the levy of that tax goes and is concerned, it may be considered that it was contemporaneous with the creation of the debt, and was so much towards making provision for the waterworks bonds at the time of their issuance, by levying a tax for the payment of interest and to create a sinking fund, as required by the constitution. As to the poll and occupation taxes theretofore levied, the case does not show when, nor at what rate, nor for what amount, nor for what time, the same were levied, and, so far as the said taxes are declared levied for and appropriated to the payment of interest and sinking fund of the waterworks bonds, it is difficult to see how therein was any compliance with the constitutional requirements. Under the statutes in force at the time these waterworks bonds were issued, and as hereinbefore quoted, the city council of the city of Columbus had the management and control of the finances and other property belonging to the corporation; had the power to appropriate money providing for the payment of debts and expenses of the city; to provide by ordinance special funds for special purposes to protect the same; to provide, or cause to be provided for the city, water and waterworks; to provide for funding existing or future debts of the city, issuing therefor certain notes, creditors' notes, bonds, and treasury warrants; to levy and collect an annual poll tax, not to exceed $1 for every male inhabitant of over 21 years; to levy and collect taxes commonly known as "occupation taxes"; and, specially, under article 420, had the power to appropriate the revenues of the city, emanating from whatever source, for general purposes, including erecting waterworks; and, in furtherance thereof, the power to borrow money upon the credit of the city, and issue coupon bonds therefor, in such sums as deemed expedient. It must be understood, however, with regard to all these statutes, that they must be construed and enforced under and in connection with the paramount authority of the constitution, and that in, and making part of, article 420, authorizing the borrowing of money and the issuance of coupon bonds, must be read sections 5 and 7 of article 11 of the constitution. See Gould v. City of Paris, 68 Tex. 511, 4 S. W. 650. This is a sufficient answer to the contention, so earnestly pressed by counsel for appellee, that article 420 is in all respects constitutional, and that it, in connection with other legislative provisions, authorized the issuance of the bonds in suit, based upon a continuous appropriation of the general revenues of the city, made up of ad valorem, poll, and occupation taxes theretofore levied.

The case shows that the revenues of the city from all tax sources amounted to $3,000, all of which was required and was appropriated for the interest and sinking fund of the waterworks bonds; and the counsel for appellant contends with great force that the city council had no power, constitutional or legislative, to pledge for subsequent years all of the city's revenues in payment of a bonded indebtedness,

leaving nothing for necessary alimony, and cites this court in Millsaps v. City of Terrell, supra, and the supreme court of Texas in Citizens' Bank v. City of Terrell, supra. This contention presents a very important question, but it may be pretermitted here, because it does not appear that the city of Columbus provided for the levy and collection of a poll tax or an occupation tax to pay the interest and create a sinking fund for the principal of the bonds in suit; and it does affirmatively appear that the poll and occupation taxes theretofore levied produced more revenue than was required for the alimony of the city.

Our conclusion is that the only lawful and constitutional provision for the payment of the interest, and to create a sinking fund of at least 2 per cent., made at the time the bonds in suit were issued, was the continuing levy of an ad valorem tax of one-fourth of 1 per cent. on all the movable and immovable property situated and owned in the city, and that said bonds are valid to such amount, and to such amount only, as that tax, according to the assessment of 1883, could provide for. This conclusion is in accord with Citizens' Bank v. City of Terrell, supra, which was a case in which the city of Terrell in the same year (1883) issued a series of waterworks bonds based on a levy of taxes and an appropriation of certain general revenues; and as decidedly in point, supporting all our conclusions, we quote from the opinion of the court:

"The command of the constitution that no debt shall be created without at the same time providing for the levy and collection of a tax for its payment was evidently designed not more to insure the payment of honest debts than to admonish the people whose property was being charged with them of that fact. The other provision, limiting the amount of debt that cities can charge themselves with, had its foundation in a wise public policy. These constitutional restrictions were made for observance, not evasion. * * * The command of our constitution is that, when the debt is created, provision shall then be made for levying and collecting a tax to discharge it. It amounts to more than a direction that no debt shall ever be created above such a sum as the directed levy will pay. The constitution will not be obeyed unless it shall be ascertained, when and before a debt is created, whether one-fourth of one per cent. or less on the taxable valuation will annually pay the interest and sinking fund. The debt is not to go beyond what a tax can be levied to pay, and the clause in the constitution that defines how much may be levied shows that it is to be done on a 'valuation,' one meaning of which, given by Webster, is 'appraisement; as a valuation of lands for the purpose of taxation.' * * * There is nothing in the record before us showing when any of the bonds were issued, nor whether they were all disposed of at the time, or at different dates. There is nothing to distinguish those issued under the last ordinance from those issued under the first one, unless we can look for that purpose to the numbering of the bonds. The city had no authority to pledge or appropriate any part of the current revenues to the payment of the principal or interest of the debt. That fund is devoted by the constitution to the support of the city government, and is always under the control of the council for that purpose. The net proceeds from the waterworks, if there had been such, would have likewise been under the control of the council, and was not a basis for the creation of debt. The action of the council on the 25th day of June, 1884, was utterly void. The ordinance of the 12th day of December, 1883, was valid for such an amount as a tax of 25 cents upon the $100 of valuation, according to the last-taken assessment of the taxable values of the city, would provide for. If the bonds were delivered at different dates, those first delivered, up to the amount of the debt that the city could lawfully create, should be paid, and the remainder of them should be treated as nullities.

Daviess Co. v. Dickinson, 117 U. S. 657, 6 Sup. 897, 29 L. Ed. 1026. If all of the bonds under the first ordinance were delivered at the same time, so that none of them have priority over the others, the amount of valid debt should be distributed equally between said bonds. McPherson v. Foster, 43 Iowa, 72, 22 Am. Rep. 215. * * * Under the view we take of the law, the original holders, as well as any subsequent holders, of the bonds or coupons, may recover so much of the debt as was lawful." Pages 457, 459, 460, 461.

As we have found that the bonds in suit are valid to the extent that the ad valorem tax was sufficient to provide the interest and sinking fund, and invalid beyond, the question arises as to the proper judgment to be entered. In Francis v. Howard Co. (before this court in 1893) 13 U. S. App. 126, 4 C. C. A. 460, 54 Fed. 487, a similar question was presented; and, as that case was properly ruled, we quote from Judge Maxey's opinion on circuit, which we fully indorsed, as follows:

"It has been shown that bonds numbered 1 to 35, inclusive, are in part valid, and partly void. The question now arises, is the county liable for the amount of indebtedness within the restricted limit? The supreme court of this state replies in the affirmative. Citizens' Bank v. City of Terrell, supra; Daviess Co. v. Dickinson, supra; Ætna Life Ins. Co. v. Lyon Co. (C. C.) 44 Fed. 329. The supreme court of Iowa holds the same view, and in McPherson v. Foster, 43 Iowa, 48, 72, 73, 22 Am. Rep. 215, says: 'As we have seen, the constitutional inhibition operates upon the indebtedness, not upon the form of the debt. The district may become indebted to the amount of $2,057.50 by bond. If the debt exceeds that amount, it is void as to the excess, because of the inhibition upon the power of the district to exceed the limit, and the bonds as to the same excess are void because of the nonexistence of a valid debt therefor. But this restriction does not extend to the sum of $2,057.50, for which the district had power to issue its bonds. That sum is a valid debt. The bonds to that extent are valid. It is no unusual thing for instruments of this character to be partly valid and partly invalid. So far as they secure a lawful debt, they are valid. So far as the debt is unlawful, they are invalid. * * * It appears that the bonds all bear the same date, and were issued, though at different times, as a part of one transaction. They were intended as security for a debt of $15,000 which was attempted to be contracted in building the school house. It cannot be said that, in justice, invalidity should attach to certain particular bonds, while others, to the amount for which the district could lawfully contract indebtedness, should be held valid. Each bond, being but a part of the whole debt, must partake alike of invalidity and validity. It must be partly valid and partly invalid. The whole alleged debt is $15,000. Of this sum, $2,057.50 is valid. Each bond will be valid to the extent it represents a portion of the debt lawfully contracted. Such a sum is the proportion of the amount of the bond as $2,057.50 bears to $15,000; that is, $\frac{2,057.5}{15,000}$ of the principal of each bond is valid and collectible. The interest on each bond is determined by the same rule, or calculated upon the amount of each bond held to be valid.' Howard county could lawfully issue on November 12, 1883, bonds to the amount of $14,982.77. It did in fact issue bonds, partly valid and partly invalid, aggregating $35,000. Bonds to the extent of its power to issue ($14,982.77) became a valid indebtedness against the county, and enforceable by suit. Bonds in excess of that limit or amount are invalid and uncollectible. The thirty-five bonds were all issued and delivered at the same time to Milliken & Co., and they were subsequently bought at the same time by the plaintiff and another citizen of St. Louis. None, therefore, have priority over the others, and the amount of valid debt should be equally distributed among them all. According to the rule laid down by the supreme court of Iowa, each one of the thirty-five bonds of one thousand dollars issued represents a valid indebtedness of four hundred and twenty-eight dollars, and each

coupon of eighty dollars a valid debt of thirty-four dollars and twenty-four cents. * * * Judgment should be rendered for the foregoing amount, with six per cent. interest thereon from date (Gen. Laws Tex. 1891, p. 87, c. 68; constitutional amendment adopted August, 1891), if, indeed, it be proper to enter judgment in favor of the plaintiff for any amount in this suit at law. This question presents a serious difficulty. The supreme court of Iowa, in McPherson v. Foster, supra, and Judge Shiras, in Ætna Life Ins. Co. v. Lyon Co., supra, declined to enter judgment; the latter basing his refusal on the grounds that the rights and equities of the bondholders could only be adjusted by a proper proceeding in equity, with all the parties before the court. Discussing the question, he observed: 'It is argued that the bonds would be valid until the amount needed to refund the enforceable debt had been reached, and that it will be presumed that the bonds were sold in the order of their number. Such a presumption cannot be indulged in under the facts in this case. To settle the equities and rights of the bondholders against the county, and their rights as between themselves, would seem to require the institution of a suit in equity. In this action at law between one owner of part of the bonds and the county, it is beyond the power of the court to hear and determine the question of the order in which the series of bonds was sold, or the application of the proceeds realized from the sales thereof, and whether the facts are such that a certain number of the bonds can be held valid at law, or whether it should not be held that each owner of a bond is equitably entitled to demand his share of the total sum which may be adjudged to be collectible from the county.' Touching this point the supreme court of this state says: 'Neither the pleadings nor the proof in the record before us present the case so as to authorize a judgment of the nature indicated by us as being proper. Strictly speaking, no judgment other than the one from which the appeal was taken could have been rendered. We think it right, however, to give the appellee an opportunity to amend his pleadings, and have the issues so presented as to show what proportion of the debts sued on he may be entitled to recover, under the rules that we here announce.' Citizens' Bank v. City of Terrell, supra. See, also, Daviess Co. v. Dickinson, supra. This court fully concurs in what is said in the cases cited. But the rulings in those cases were predicated upon the particular facts of each case. While in this suit the court entertains serious doubts as to the propriety of entering judgment in behalf of the plaintiff, yet, after giving the question careful consideration, I am impressed with the conviction that such a judgment would be warranted both by the pleadings and proofs. And perceiving no insuperable objection in a case of this kind to the rendition of a judgment in a suit at law, my conclusion is that the plaintiff should recover the amount found due, with legal interest and costs of suit. If he be not permitted to recover all that he claims, he should at least have judgment for the amount to which he is lawfully entitled. Ordered accordingly."

As it thus appears that the appellee is entitled to a judgment, but the amount thereof depends upon estimates and calculations, which, although simple, ought, perhaps, to be settled contradictorily between the parties, the judgment of the circuit court is reversed, and this cause is remanded, with instructions, in due course, to enter a judgment in favor of the appellee in accordance with the views expressed in this opinion.

LEVY & COHN MULE CO. v. KAUFFMAN.

KAUFFMAN v. LEVY & COHN MULE CO.

Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,097.

1. BILLS AND NOTES—TRANSFER—CONSIDERATION.
The cancellation of a pre-existing debt is equally as valid and sufficient consideration for the transfer to the creditor of a bill or note of a third party as a payment of cash therefor.

2. SAME—ACCOMMODATION MAKER—DEFENSES.
An acceptor of drafts for the accommodation of the drawer cannot defend against the same in the hands of the payee or an indorsee, on the ground that he received no consideration, where full consideration was received by the drawer.

3. SAME—CONSIDERATION—ACCOMMODATION—ACCEPTANCE OF DRAFTS.
The purpose inducing one to accept drafts as an accommodation to the drawer does not constitute the legal consideration for his contract, and the fact that such purpose was not accomplished cannot be pleaded as a failure of consideration.

4. SAME—ACTION ON ACCEPTANCE—EVIDENCE OF PAROL AGREEMENT.
Evidence of a parol agreement made before or at the time of the acceptance of drafts is inadmissible to vary the absolute terms of the written contract made by the acceptance by showing that the acceptance was conditional.

5. CORPORATIONS—NOTICE—KNOWLEDGE OF OFFICER.
The payee of accepted drafts, for the purpose of realizing on the same for the benefit of the drawers, indorsed them to a corporation of which he was president, and the amount was placed by the corporation to the credit of the drawers, and paid out by their orders, prior to the maturity of the drafts. *Held*, that in making transfer of the drafts the president was not acting for the corporation, but adversely, and the corporation was not affected by any knowledge he might have of an infirmity in the paper.

In Error and Cross Error to the Circuit Court of the United States for the Eastern District of Texas.

This is an action at law by the indorsee against the acceptor of three bills of exchange. It was brought in the court below by the Levy & Cohn Mule Company, a corporation under the laws of Missouri, against Henry Kauffman, a citizen of Texas. The drafts in suit were for $5,000 each, drawn March 10, 1899, by Joseph Weill & Co., of New Orleans, on the defendant, and by him accepted. They were payable to the order of Jacques Levy, and were by him indorsed to the plaintiff before maturity. The petition described the drafts, and was in due form. The answer of the defendant presented three defenses: (1) That the acceptance of the drafts was procured by fraud, and that they were fraudulently used. As no ruling of the court below is before us on this plea, and no evidence of fraud on the part of the plaintiff, no further attention will be given to this defense. (2) Failure or want of consideration. (3) The third defense pleads an oral contract made contemporaneously with the acceptance of the drafts. It will be stated with immaterial abbreviations in the language of the answer:

"That at the time he accepted the said bills in the month of March, 1899, Joseph Weill, Armand Levy, and Daniel Weill were copartners in a business carried on in New Orleans, under the style of Joseph Weill & Company. That Joseph Weill was the son-in-law of this defendant, and Armand Levy the nephew of Jacques Levy. That the said firm were greatly embarrassed financially,—had reached such a point that as a firm they could

no longer go on with their business unless some help was obtained from some outside source, as their credit in New Orleans had been exhausted.—and that, being in this condition financially, Armand Levy applied to his uncle, Jacques Levy, the president of the Levy & Cohn Mule Company, for some financial assistance; and that the firm of Joseph Weill & Company at that time was indebted to the Levy & Cohn Mule Company (the plaintiffs), and Jacques Levy replied (all of which the said Levy & Cohn Mule Company, the plaintiffs, were fully advised) that he would advance Joseph Weill & Company fifteen thousand dollars in addition to what Joseph Weill & Company then owed the Levy & Cohn Mule Company, provided that Henry Kauffman, this defendant, would advance an equal amount, thereby enabling Joseph Weill & Company to have an amount of thirty thousand dollars to be put into their business, to be used in making a crop of sugar on certain plantations which they were then operating in Louisiana. This defendant replied that if the said Jacques Levy, acting for himself and for the said Levy & Cohn Mule Company, would advance the firm of Joseph Weill & Company fifteen thousand dollars, that he would accept three drafts of five thousand dollars each, in favor of Jacques Levy, to be drawn by Joseph Weill & Company, payable at a certain time, as is stated in the three bills of acceptance declared on in this action, provided the said Jacques Levy would discount or have discounted the three certain acceptances, and turn over the proceeds of said acceptances in cash to Joseph Weill & Co., with the fifteen thousand dollars additional money to be advanced to the said firm by the said Jacques Levy for himself and the said Levy & Cohn Mule Company, all of which was fully agreed to; it being understood, not only by this defendant, but by the said Jacques Levy and the Levy & Cohn Mule Company, that the said sum of thirty thousand dollars was absolutely necessary to be used in the business of Joseph Weill & Company in cash, in order that they might live through the financial difficulties which surrounded them and make and gather the crops on the several sugar plantations operated by them. That the sole inducement to this defendant to enter into these transactions and to accept these drafts, which he honestly proposed and intended to do when such acceptances matured, had the said Jacques Levy and the Levy & Cohn Mule Company carried out their contract and agreement to advance Joseph Weill & Company fifteen thousand dollars as well as the proceeds of the three bills of acceptance of this defendant which Jacques Levy and plaintiffs were to have discounted, was not only to aid his son-in-law, but also the firm of Joseph Weill & Company, through the financial difficulties which then threatened to wreck them, because this defendant was a large creditor of the firm of Joseph Weill & Company, and because he well knew that the failure of Joseph Weill & Company would involve him in much loss. That after the said three drafts of Joseph Weill & Company, in favor of Jacques Levy, for five thousand dollars each, had been accepted, the same was turned over to Joseph Weill & Company, to be by them transmitted in due course of mail to Jacques Levy to be discounted, and the proceeds thereof to be paid to Joseph Weill & Company, together with the fifteen thousand dollars additional. That said three acceptances were received by the said Jacques Levy within a few days after their execution. That instead of being discounted, as was agreed upon, and the proceeds remitted or paid over to Joseph Weill & Company, the said Jacques Levy indorsed and transferred said three bills of acceptance over to the Levy & Cohn Mule Company as a credit, and passed the same to the credit of Joseph Weill & Company with the Levy & Cohn Mule Company in part settlement and satisfaction of an antecedent debt due by Joseph Weill & Company to the Levy & Cohn Mule Company."

The case was tried on these issues. The plaintiff offered in evidence the accepted drafts and rested; and thereupon it was proven by defendant, examined as a witness in his own behalf, and by Joseph Weill, a member of the firm of Joseph Weill & Co., also examined as a witness for defendant, that the said accepted drafts were drawn by Joseph Weill & Co., accepted by defendant, indorsed by Jacques Levy, and before maturity negotiated with plaintiff for account of Joseph Weill & Co., and the proceeds

thereof paid and applied by plaintiff as directed by Weill & Co., and for their account, as follows:

To take up a draft of plaintiff on Joseph Weill & Co. (drawn to reimburse plaintiff for that amount paid out by it for accommodation of Joseph Weill & Co.), and recalled by plaintiff at request of Joseph Weill & Co.	$ 5,500 00
To pay a draft of Joseph Weill & Co. drawn on plaintiff for...	2,000 00
To pay another draft drawn by Joseph Weill & Co. on plaintiff for	2,500 00
To pay another draft of Joseph Weill & Co., on plaintiff in favor of defendant, H. Kauffman (and used by Kauffman to take up and pay a draft for $5,000.00 drawn by Joseph Weill & Co. on and accepted by him, H. Kauffman, for accommodation of Joseph Weill & Co.)	5,000 00
Aggregating the entire amount of the acceptances	$15,000 00

All of these payments were made before maturity of any of the acceptances sued on. It was also proved that plaintiff advanced to Joseph Weill & Co. $3,175 in addition to these payments, about the same time that these sums were paid. The defendant then offered evidence tending to prove the facts averred in his third defense. When evidence was offered of the oral agreement therein alleged, the plaintiff objected on several grounds stated, among them the following: "The acceptances sued upon are written contracts of defendant to pay the sums of money therein mentioned, absolutely and without condition, and it is not competent by oral testimony to show any agreement, condition, or understanding, contemporaneous or previous, whereby such written absolute contracts may be varied or qualified, so as to make their performance depend upon either the making or performance of such oral agreement, condition, or understanding." The objections were overruled, and the plaintiff excepted. Evidence was offered in rebuttal by the plaintiff, tending to show that no such agreement was made as that alleged by the defendant in the third defense. It is unnecessary to state this evidence.

On the question of the consideration of the drafts and on the alleged agreement, the court charged the jury as follows: "In this case the evidence shows that the Levy & Cohn Mule Co. paid $15,000 on the acceptances, and it is also shown that the Levy & Cohn Mule Co. paid $3,175 additional. The view I take of the law in this case is different from that argued by either side. I do not agree with either of them. One of them contends that the defendant has no defense whatever, and the other contends that it is a complete defense. I don't agree with the contention of either one of them. Under the pleadings and proof in this case, if it means anything, it means that Mr. Jacques Levy and Mr. Kauffman—that is, according to Mr. Kauffman's contention—were to advance $15,000 each. The proof unquestionably shows that the Levy & Cohn Mule Co. and Jacques Levy advanced $18,175. Now, under the contention of Mr. Kauffman, he would have been owing to the Levy & Cohn Mule Co. $15,000, conditioned that the full $15,000 had been advanced in addition to his acceptances. I cannot take any other view of this case than this: In view of the fact that the proof shows that Mr. Kauffman received $5,000 of the money, in that the draft was drawn in his favor, and he applied it to a debt that he was the indorser of Jos. Weill & Co. on, I cannot look upon it as anything more than a partial failure of consideration. If you find from the evidence that this agreement was not authorized by Jacques Levy, return a verdict for the plaintiff in the full amount of the acceptances. If you find that it was authorized, and that Mr. Kauffman acted upon the authority, then you are instructed to return a verdict in this case for plaintiff for one-half the money he advanced, which, under the evidence, was $18,175." The plaintiff duly excepted to this charge. The jury found a verdict for the plaintiff for $9,087.50, interest to be added, on which judgment was entered. The plaintiff sued out a writ of error, and contends that it is entitled to a verdict for the full amount of the drafts in suit, and that the court erred in the instructions quoted. The defendant,

Henry Kauffman, sued out a cross writ of error, and assigns error, contending that he is not liable on the drafts at all. Under rule 25 of this court (31 C. C. A. clxvi., 90 Fed. clxvi.), both writs have been heard together.

J. H. Z. Scott (Frank M. Spencer, on the brief), for plaintiff in error and cross defendant in error.

Benjamin Rice Forman and Maco Stewart, for defendant in error and cross plaintiff in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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

There is no conflict in the evidence on the question of the consideration of the contracts sued on. The drafts were drawn by Joseph Weill & Co. in favor of Jacques Levy on H. Kauffman. Kauffman accepted the drafts by writing his name across each of them. He did not owe the drawers, and had no funds of theirs in his hands. He was an accommodation acceptor, lending his name to the drawers to enable them to raise money. Before the maturity of the drafts they were indorsed by the payee to the plaintiff for the account and benefit of Joseph Weill & Co. for $15,000, the face value of the drafts. By the direction of Joseph Weill & Co., $10,000 of the proceeds of the drafts was applied to the payment of their past-due debts to the Levy & Cohn Mule Company, and $5,000 to the payment of their debt to H. Kauffman. The bills sued on, therefore, cost the plaintiff $15,000, placed subject to the order of Joseph Weill & Co. But as part of this sum came back to or never really left the plaintiff's possession, the real transaction is stated more favorably to the defendant in this way: The plaintiff obtained possession and title to the drafts by paying $5,000 in discharge of a debt which Joseph Weill & Co. owed H. Kauffman, and canceling and discharging past-due debts for $10,000 which Joseph Weill & Co. owed plaintiff. The application of the fund in both instances was by the direction of Joseph Weill & Co. On the question of consideration there is no difference in receiving a negotiable bill or note before maturity in payment of a pre-existing debt, and in paying cash for it. This is the conclusion of the best-considered and most numerous state authorities (1 Daniel, Neg. Inst. [4th Ed.] § 184), and is the doctrine unquestionably settled by the supreme court (Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Brooklyn City & N. R. Co. v. National Bank of Republic, 102 U. S. 14, 26 L. Ed. 61; 4 Rose, Notes on U. S. Rep. 133). And a pre-existing debt "is equally as valid and sufficient consideration for the indorsement and transfer to the creditor of the bill or note of a third party. * * *" 1 Daniel, Neg. Inst. (4th Ed.) § 184. The fact that Kauffman, the accommodation acceptor of the bills, did not receive the benefit of $10,000 of the bills, does not affect the case. He did get the benefit of $5,000 of the proceeds of the negotiation of the bills; but, if he had received nothing, the bills would have been valid in the hands of the plaintiff. The evidence in the case and the nature of the transaction show that it was not contemplated that the consideration for the sale of the drafts was to go to Kauffman. The parties to every accommodation note or bill by their signatures hold themselves bound to every person who shall take

the same for value, to the same extent as if that value were personally paid "to them, or on their account and at their request." Story, Prom. Notes (6th Ed.) § 194; Townsley v. Sumrall, 2 Pet. 170, 7 L. Ed. 386. It is for the benefit and convenience of the commercial world to encourage as far as practicable the credit and circulation of negotiable paper. Accommodation bills are daily placed in market for discount and sale, and an indorsee or purchaser who knows that a bill or note "still current was drawn, made, accepted, or indorsed without consideration is as much entitled to recover as if he had been ignorant of the fact." 1 Daniel, Neg. Inst. (4th Ed.) § 790, and cases there cited. Want of consideration to the accommodation acceptor or indorser will constitute a good defense against the party for whose accommodation it is made,—as, in this case, if Joseph Weill & Co. were suing Kauffman,—but to allow such defense to defeat a recovery by an indorsee for value, who has advanced money on it, "would be to defeat the very purpose for which such paper is made, and render the transaction absurd." Thatcher v. Bank, 19 Mich. 196, 202.

When Kauffman accepted the bills, he authorized the plaintiff or any one to receive them on the credit of his name, and the consideration paid by the plaintiff for them was in law paid by his direction and order. Kauffman's defense on the question of consideration is that he accepted the drafts in suit because he was the father-in-law of Joseph Weill, and a large creditor of Joseph Weill & Co., and so interested in relieving that firm of financial embarrassment; and that for these reasons, and on the promise of Jacques Levy, for himself and the plaintiff, to advance $15,000 for the relief of Joseph Weill & Co., he (Kauffman) accepted the drafts in suit. The contention is that the advance of $15,000 by Jacques Levy to Joseph Weill & Co. was to be the consideration for the acceptances by Kauffman, and that, as this advance was not made, the acceptances are without consideration. These mixed motives that induced Kauffman to accept the drafts cannot be separated and all eliminated but the promise of Jacques Levy, so as to hold that his failure to comply with his promise changed Kauffman's relation to the drafts from that of an accommodation acceptor to that of an acceptor for a consideration. The undisputed facts show a full consideration proceeding from the plaintiff for its ownership of the drafts. The facts, therefore, averred by Kauffman of his relationship to Joseph Weill as kinsman and as creditor of Joseph Weill & Co., and the alleged agreement of Jacques Levy, must be considered, not as consideration for the acceptance by him of the drafts, but as motive or inducement causing him to accept them. "There is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is 'the cause or meritorious occasion requiring a mutual recompense in fact or in law.'" Philpot v. Gruninger, 14 Wall. 570, 577, 20 L. Ed. 743; Morris v. Norton, 21 C. C. 553, 75 Fed. 912, 926; Colorado Co. v. Stratton (C. C.) 95 Fed. 741, 744; Association v. Wickman, 141 U. S. 564, 579, 12 Sup.

Ct. 84, 35 L. Ed. 860. It follows that in the record there is no evidence of entire or partial failure of consideration.

The defendant, Kauffman, by answer claims that there should be no recovery in this suit because Jacques Levy failed to comply with an oral agreement, made by him when the defendant accepted the bills, that he (Jacques Levy) would not only procure the bills to be discounted, but would himself advance to Joseph Weill & Co. $15,000, so that the latter would have $30,000 to aid them in their financial troubles. When oral evidence was offered tending to prove this agreement, the plaintiff duly objected to it, and reserved an exception to its admission. Part of the charge of the court to which exceptions were reserved was based on this alleged contract, and the verdict of the jury indicates by its amount that it is founded on this oral agreement. When Kauffman accepted the bills he became the primary debtor. 1 Daniel, Neg. Inst. § 532. Although he wrote nothing but his name, the acceptance was a shorthand contract in writing, and is fully protected by the familiar and fundamental rule that oral evidence will not be received to vary its terms. Martin v. Cole, 104 U. S. 30, 37, 26 L. Ed. 647. The contrary has been held by some courts, and notably by Mr. Justice Washington in Bridge & Bank Co. v. Evans, 4 Wash. C. C. 480, Fed. Cas. No. 13,635; but the latter case was expressly rejected in Bank v. Dunn, 6 Pet. 51, 8 L. Ed. 316. Since the decision of the supreme court in the case last cited in 1832 it has been the rule of that court, approved and followed by the weight of state authorities, that evidence cannot be received of a contemporaneous parol agreement to vary the written contract of acceptance or indorsement of negotiable paper. Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647. In a suit by payee against drawer of a bill of exchange, parol evidence of an agreement not to present the draft until defendant should provide for a previous draft was rejected. Brown v. Wiley, 20 How. 442, 15 L. Ed. 965. In Specht v. Howard, 16 Wall. 564, 21 L. Ed. 348, in a suit by the indorsee against the indorser of a note silent as to the place of payment, parol evidence was rejected that there was an agreement between the maker and the indorsee that it should be made payable in New York. The court said with reference to the agreement that it was a nullity, and could not in any wise affect the rights of either of the parties, and quoted 2 Pars. Notes & B. § 501: "It is a firmly settled principle that parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note cannot be permitted to vary, qualify, or contradict, to add to or subtract from, the absolute terms of the written contract." In Forsythe v. Kimball, 91 U. S. 291, 23 L. Ed. 352, the same rule was applied in equity. Parol evidence of the agreement which Kauffman pleads would not be admissible in litigation between Kauffman, as acceptor, and Joseph Weill & Co., as drawers, of the bill. It would be excluded upon the familiar rule already quoted. A collateral written agreement, however, is admissible in an action on an acceptance between the original parties. In a case where such an agreement was in writing the court said: "The agreement, being in writing, is to be taken and considered in connec-

tion with the indorsement, and the two are to be construed together." Davis v. Brown, 94 U. S. 423, 427, 24 L. Ed. 204.

It appears to be settled by the decisions of the supreme court that a relevant contemporaneous written agreement is admissible in evidence in an action on notes or bills between the original parties, but not admissible against an indorsee without notice for value, and that evidence of an oral agreement is not admissible in either case. In asserting the agreement as a defense, Kauffman merely claims that his acceptance was upon condition that Jacques Levy was also to advance $15,000 to Joseph Weill & Co., so that with the proceeds of the accepted bills they would have $30,000. It is a familiar principle that any conditions which are annexed to a written acceptance must appear on its face. It is true that the acceptance may be rendered conditional by another contemporaneous writing; but even then such condition would have no effect against a bona fide holder ignorant of it. It follows from the principles established by the decisions already quoted that "the terms of an acceptance in writing cannot be varied by any contemporaneous parol agreement, as that is against the first principles of the law of evidence." 1 Daniel, Neg. Inst. (4th Ed.) § 517. We cannot disregard well-settled principles of law in an effort to equalize losses between the parties. Such efforts have produced much of the conflict of authority we have on this subject. Mr. Justice Grier, in Brown v. Wiley, supra, remarked, after rejecting parol evidence that would have altered a contract shown by a bill of exchange, that "some precedents to the contrary may be found in some of our states, originating in hard cases; but they are generally overruled by the same tribunals from which they emanated, on experience of the evil consequences flowing from a relaxation of the rule." In what we have said we have had no reference to what would be the rule of evidence in cases of fraud or mutual mistake of facts.

There is another view that is conclusive of the case on the record now before us: The general proposition is true that notice of facts to an agent is constructive notice to the principal when it arises from, or at the time is connected with, the subject of his agency. The rule is based on the presumption that the agent has communicated such facts to the principal. On principles of public policy, the knowledge of the agent is imputed to the principal. But neither the rule nor the reasons for it apply to a transaction in which the agent is acting for himself. When, therefore, the president of a corporation is dealing with it on his own business, his interest is opposed to its interest, and the presumption is that he will not communicate any secret infirmity of the title he is about to convey to the corporation. Both the defendant's answer and the evidence show that Jacques Levy, so far as he was connected with Kauffman's acceptance of the bills, was acting with the view of aiding the firm of Joseph Weill & Co., because of his interest in his nephew, Armand Levy, a member of that firm. He was not acting in the interest of the plaintiff corporation. In assigning the bills to the corporation, he was not acting in his capacity as president of the plaintiff corporation, but individually. Under such circumstances, if it be conceded there were infirmities attending the

acceptance of the bills, and that there was, as between the parties, a failure or partial failure of consideration, he is not presumed to have informed the plaintiff of these facts. Notice of such facts, under the circumstances, to Jacques Levy, although he was president of the plaintiff corporation, was not notice to the corporation. When Jacques Levy was negotiating the notes to the plaintiff corporation, he was acting for himself, and his interest was antagonistic to that of the plaintiff. He was not the plaintiff's agent in that transaction. In making the sale of the bills he stood as a stranger to the corporation; and the plaintiff, therefore, is an innocent holder without notice, even if it be conceded that Jacques Levy had knowledge of facts that would affect the validity of the bills. Mr. Thompson says: "It should be borne constantly in mind that the cases where notice to the president, or any other officer of a corporation, will affect the corporation, are cases where such president or officer is acting exclusively for the corporation." 4 Thomp. Corp. § 4657. Cases applying this principle where a president or director procures the discount of notes by the corporation in which he is an officer are collected by Mr. Thompson in 4 Thomp. Corp. § 5208. This principle was recognized and applied by this court in Bank v. Tompkins, 6 C. C. A. 237, 57 Fed. 20. In that case it was held that "where a bank acquires title to real estate by conveyance from its president, who held the land under a deed reciting full payment of the purchase money, and it has no actual knowledge that the purchase money was not in fact paid, it is an innocent purchaser without notice, and is not chargeable with constructive notice because of the knowledge of its president." See, also, Morawetz, Corp. (2d Ed.) 540c; 4 Thomp. Corp. §§ 4657, 5206, 5208; Barnes v. Gaslight Co., 27 N. J. Eq. 33–37; Bank v. Cunningham, 24 Pick. 270, 35 Am. Dec. 322; Bank v. Lewis, 22 Pick. 31, 32; Koehler v. Dodge (Neb.) 47 N. W. 913, 28 Am. St. Rep. 518; Whelan v. McCreary, 64 Ala. 319; 1 Morse, Banks, 104. The instructions to the jury by the learned judge in the circuit court were in conflict with the views we have expressed, and to the injury of the plaintiff in error, the Levy & Cohn Mule Co.

We find no error in the record on the cross writ of error to the injury of H. Kauffman.

The judgment of the circuit court is reversed, and the cause remanded with instructions to grant a new trial. Reversed.

TEXAS & P. RY. CO. v. ALLEN et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,099.

MASTER AND SERVANT—DEFECTIVE RAILROAD CAR—DUTY OF INSPECTION.

An instruction defining the inspection required to be made by a railroad company to exonerate it from liability for an injury to a brakeman resulting from a defective handhold on a freight car considered and approved.

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

Mr. Thompson and T. J. Freeman, for plaintiff in error.
R. L. Carlock, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit brought by the widow and father and mother of one A. T. Allen, deceased, to recover damages from the Texas & Pacific Railway Company by reason of the negligence of said company, resulting in the death of said A. T. Allen, the same being caused by the said Allen falling from the side of a freight car while in the performance of his duties as a brakeman. The grounds of negligence relied upon are (1) in not having the proper kind of fastenings for the handhold on the car,—that is, in having used in the fastenings what is known as "lag" or "wood" screws instead of iron bolts with a nut on the end; (2) in not properly inspecting the car to see that the handholds were kept in reasonably safe condition. The bill of exceptions shows that evidence was offered tending to show that the deceased, Allen, fell from a car while the train was moving because a handhold was not securely fastened; and further tending to show that the lag screws with which the handhold was fastened were either not properly screwed in the wood, or that the wood of the car was decayed, thereby rendering the handhold insecure. There was also evidence tending to show that within a short time prior to the death of Allen the car had been inspected in the yards of the company at Baird and at Thurber Junction, division terminals, and also evidence tending to show the nature and character of the inspection made.

The trial judge charged the jury fully upon all the law applicable to the case, and to such charge no objection was made. After the jury had retired and for some time had considered their verdict, they returned into the court, and through their foreman requested the court to further define the term "inspection," as that term was used in the court's charge with reference to the duty of the defendant railway company towards the deceased, and thereupon the court made the following additional charge:

"Inspection, gentlemen, as used in the court's charge, is an inquiry, by actual observation, into the state, efficiency, safety, and quality of the thing inspected. Inspection of the appliances and instrumentalities in use by a railway company should not rest alone upon the vision, because there are many defects, the existence of which could be ascertained by reasonable and ordinary tests which involve the exercise of senses other than the sense of vision. I should say the railway company would be liable for those defects in its appliances and instrumentalities which, in the course of inspection, could be perceived; that is, capable of coming under the cognizance of any one or more of the senses of man in the exercise of ordinary care. Inspection not only involves looking at cars and appliances, but as well all those tests which would ordinarily be used to ascertain the condition of cars and appliances that a reasonably prudent man would use in the exercise of such an undertaking."

When this instruction was given, the defendant railway company duly excepted, and before the jury retired requested the court to specially charge the jury as follows:

"The court instructs the jury that the duty of a railroad company toward a servant in its employ is to exercise ordinary care to furnish such ap-

pliances as are reasonably safe for the use for which they are intended, and, within the meaning of the law, such appliances are considered as reasonably safe that are in the general, usual, and ordinary course adopted by those in the same business; and therefore if you find from the evidence that the handhold, which is alleged to have been pulled out from the car and caused the accident, was of such a character and fastened onto the car in the manner as was in general use and according to the course usually adopted by others in the same business, and that the defendant railway company, by the exercise of ordinary care, could not have discovered any defect in same, then, in such event, the defendant would not be liable to plaintiffs. The court instructs the jury that the plaintiffs cannot presume that the defendant railway company was guilty of negligence from the mere fact that the accident happened, but it is incumbent upon the plaintiffs to show that the accident happened by reason of the negligence of defendant by a preponderance of the evidence, and if a preponderance of the evidence does not establish this fact they will find for the defendant."

These special instructions were refused, and to such refusal exception was duly entered. The special charge given to the jury defining "inspection" is claimed to be erroneous, not because it is incorrect as a matter of law, but because it withdrew from the jury the question of whether the defendant company had exercised a reasonable care in the matter of inspecting the handholds of the car from which the deceased, Allen, fell.

After an attentive consideration of the brief and arguments of the learned counsel for plaintiff in error, we are unable to see wherein and how the instruction and definition given in any wise withdrew any fact from the jury or invaded the province of the jury in determining the facts in the case. The matters contained in the special instructions requested and refused seem to be in the main correct as matters of law, but we find that the judge in his general charge covered the same ground, and, so far as we are able to see, as favorably to the railway company as in the special instructions asked.

The judgment of the circuit court is affirmed.

DEWEY et al. v. STRATTON et al.

(Circuit Court of Appeals, Fifth Circuit. February 18, 1902.)

No. 1,064.

1. EQUITY—VACATION OF DECREE—ACCIDENT, MISTAKE, OR SURPRISE.
A circuit court has jurisdiction to entertain a bill to set aside a former decree on the ground of accident, mistake, or surprise, where the requisite facts to entitle complainant to such relief are alleged, although such bill is not presented until the time for an appeal or the filing of a bill of review has expired.

2. APPEAL—REVIEW—ESTOPPEL BY ACQUIESCENCE IN ERRONEOUS DECREE.
Although an interlocutory decree conditionally vacating and setting aside a former decree on the ground of accident, mistake, and surprise was irregularly entered, and therefore erroneous, where it has been acquiesced in by defendants, and the court had jurisdiction, it will be held binding on the parties on an appeal by complainants from a final decree dismissing the bill.

3. EQUITY—SUIT TO VACATE FORMER DECREE—CONDITIONAL ORDER.
Where, in a suit to vacate and set aside a decree in a former suit between the same parties on the ground of accident, mistake, and surprise, an interlocutory decree was entered vacating the former decree,

reopening the case, and permitting complainants, who were defendants in such suit, to answer therein, on condition that they pay the costs and make a deposit in court to abide the event, and further providing that upon their failure to make such payment and deposit or to file a full answer within the time limited the former decree should remain in full force, the only conditions precedent to the opening of the former suit are the making of the payment and deposit; the requirement with respect to the sufficiency of the answer to be filed therein being a condition subsequent, which can only be dealt with in the suit in which such answer is filed. And where in such case the payment and deposit were made and an answer filed, all within the time limited, the cause stands reopened, and must be proceeded with in accordance with the rules of equity practice; and the court has no power to render a final decree in the second suit dismissing the bill, and reaffirming the original decree in the first suit, on the ground that the answer therein is insufficient, while the issues joined upon such answer are pending and undetermined.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This cause was before this court at a former term on an appeal from the following decree:

"This cause came on to be heard at this term, and was argued by counsel, and thereupon and upon consideration thereof it was ordered, adjudged, and decreed as follows: That the demurrers of the defendants to complainants' bill are overruled, to which rulings defendants excepted; and the court having heard the bill and exhibits, and affidavits in support thereof, and counter affidavits and exhibits submitted by defendant, it is thereupon ordered, adjudged, and decreed that complainants, Chas. P. Dewey and A. B. Dewey, shall, within thirty days from this date, pay all costs incurred in equity cause in this court No. 235 up to this date, and also all costs that have been incurred in this cause No. 294, and that they shall pay into the registry of this court the sum of four thousand dollars ($4,000.00), with interest thereon from the 18th day of November, 1893, to the date hereof, at the rate of six per cent. per annum, to be held until the final decree shall be rendered in cause No. 235, to abide such order as may be rendered in said decree; and, upon complainants paying said costs and making said deposit within the time specified, it is ordered, adjudged, and decreed that the pro confesso taken and entered upon the order book of this court on the * * * day of August, 1893, the same being one of the rule days of this court, and also the final decree of this court pronounced, passed, and entered on the 18th day of November, 1893, in that certain cause, then pending in this court upon the equity side of the docket, wherein the said Jesse D. T. Stratton, Minnie Stratton, and her husband, J. Thomas Stratton, defendants herein, were complainants, and said Chas. P. Dewey and A. B. Dewey were defendants, and styled upon the equity docket of this court as Jesse D. Stratton et al. vs. C. P. Dewey et al., and numbered 235 on said equity docket of this court, be, and the same are, set aside, and said cause reopened, and that said complainants herein, Chas. P. Dewey and A. B. Dewey, be now permitted to answer said bill in said cause No. 235, such answer to be a full answer to the allegations of the bill, and the interrogatories therein to them propounded, and to be filed on or before the first Monday in May, A. D. 1896, and, upon said payments and deposit being so made within the time herein specified, said cause No. 235 will thereafter proceed according to rules of practice in equity. It is further ordered, adjudged, and decreed that if said costs are not paid, or said deposit not made, within thirty days from the date hereof, or if said answers are not filed within the time herein specified, then said decree pro confesso and final decree in said cause No. 235 shall be and remain in full force and not vacated by this decree, and complainants' bill in this cause will thereupon stand dismissed as on final hearing, and all costs in this cause incurred are in that event adjudged against them, for which execution may issue.

"D. E. Bryant, Judge."

The facts of the case up to the rendition of the above decree are sufficiently stated in the report of the case. Stratton v. Dewey, 24 C. C. A. 435, 79 Fed. 32, et seq.

The record shows that on May 2, 1896, the Deweys, defendants in equity suit No. 235, filed a lengthy answer, including answers to interrogatories; that on May 25, 1896, the complainants in No. 235 filed exceptions to said answer, and thereafter on November 13, 1897, filed further exceptions, accompanied with a motion to strike out; that matters remained in this condition until June 16, 1900, when the following order was entered in No. 235:

"Now, on this day came on to be heard the complainants' exceptions to and motion to strike out the answer of defendants, filed May 2, 1896, and the same having been argued by counsel for complainants and defendants, and duly considered by the court, and it appearing to the court that said answer is not a sufficient answer to the bill in this cause, complainants' general exception thereto, filed May 26, 1896, is sustained; to which ruling defendants except. D. E. Bryant, Judge."

That upon the same day, upon application of the defendants in No. 235, leave was granted to file an amended answer, the same to be filed within 10 days from that date; that on June 25, 1900, the Deweys, defendants, filed in their individual capacities, and as executors of the last will of Chauncey Dewey, deceased, an amended answer to the original bill in equity suit 235; and that following this amended answer the plaintiffs submitted the following pleading:

"These complainants, Jesse D. T. Stratton, Minnie Stratton and her husband, J. Thomas Stratton, come and except to the pretended answer filed herein June 25, 1900, purporting to be an amended answer in this cause, and moves the court to strike said pretended answer from the files on the following grounds, to wit:

"First. That a final decree was rendered in this cause on the 18th day of November, 1893, and process for the enforcement of said decree by a writ of possession was issued and duly executed in 1894, and possession of the land described in said decree was delivered under said writ in 1894. That no petition for rehearing, nor to vacate nor to set aside said decree, was ever filed in this cause, nor was said decree appealed from, and said pretended amended answer was filed in this cause on the 25th day of June, 1900, and purports to be in lieu of their orginal answer filed in this cause on the 2d day of May, 1896. That said original answer was not filed until more than two years and five months after the rendition of said final decree, and more than two years and five months after the adjournment of the term of the court during which said final decree was rendered, and long after the time had elapsed within which an appeal from said decree could have been prosecuted. That said amended answer was filed in this cause on the 25th day of June, 1900, more than six years after the final decree was rendered in this cause as aforesaid,—all of which facts appear in the records of this cause. That no written petition or application for leave of court to file said amended answer was made, and no notice was served on or given to complainants of any application for leave to file said amended answer, and no facts set up or shown that would entitle defendants to file said amended answer. That said pretended amended answer is not sworn to by any person, and it is not competent to set aside a decree to allow an answer to the bill where the facts stated in the answer are not verified by the oath of any person. Wherefore the complainants say that there was not at the time when said original answer was filed nor when said amended answer was filed any suit pending in this cause to be answered unto. Second. That there was not when said original answer was filed, nor when said amended answer was filed, any jurisdiction, power, or authority in this court to grant leave to file an answer in this cause, because the final decree rendered therein as aforesaid was a final adjudication by this court of all matters determined in said decree, and no answer could be filed herein while said final decree remained in full force, and not reversed, set aside, or vacated. Wherefore these complainants move the court to strike said original answer and said amended answer from the files of this court and this cause.

"Masterson & Masterson, Solicitors for Complainants."

"If the foregoing motion to strike from the files defendants' amended answer is not overruled, complainants except and demur to said answer, and for cause of exceptions and demurrer set up the same causes assigned in support of the said motion to strike out, and the following additional grounds, viz.: (1) Complainants say that if said amended answer had been filed in the time and manner and form authorized and required by the practice and proceedings in causes in equity in this honorable court, that the matters set up in said answer, in the manner and form as therein set out, do not show any defense to complainants' bill, and the said answer is not such an answer as would entitle the defendants at any time to reopen the decree already rendered in this cause. (2) That said amended answer is not sworn to by any person, and for that reason is insufficient. (3) That said amended answer refers to various exhibits stated therein to be attached, when in fact no exhibits are attached or filed with said answer. (4) That the part of said amended answer beginning on the fifth line with the words 'That they are advised,' and ending on the sixteenth line with the word 'tenable,' is excepted to because the same is not properly a part of an answer to the original bill, but could only be interposed by demurrer filed in proper time and in proper form. (5) That all of the parts of said amended answer purporting to be answers to interrogatories propounded in the original bill hereafter specified are excepted to as insufficient, vague, and not responsive to the interrogatories, in this: That in the answer to the 1st interrogatory C. P. Dewey states as follows: 'The first money was paid by E. C. Dewey with money furnished to him for that purpose by Chauncey Dewey.' Said interrogatory did not ask where E. C. Dewey obtained the money to make his cash payment, and that part of the answer should be stricken out, as not responsive to the interrogatory. The answer to the fifth interrogatory is not responsive, and is evasive, and while it states that copies of certain instruments are attached, and originals are subject to inspection, no copies are attached; thus leaving it in the power of the defendant to furnish any instrument he may desire or not to furnish any, and leaves the court without possession of such instruments, so as to determine their effect, in order to determine the sufficiency of the answer to the bill. The answer to the sixth interrogatory is plainly evasive in refusing to give even an approximate of the value of the estate of Chauncey Dewey, which was in his hands as executor. The answer to the seventh interrogatory is evasive. The defendant, being executor and custodian of the books of Chauncey Dewey, could, unless he desired to withhold the information from the court, have given copies of the entries called for. The answer to the ninth interrogatory is not responsive, and is evasive, in this: The interrogatory did not relate to the land covered by the conveyance in trust to C. P. Dewey, but to instructions given by Chauncey Dewey, the father, to his sons, whom he made executors and residuary devisees to provide for E. C. Dewey, the son, who was not included as a residuary devisee, and, instead of answering the question asked, undertakes to give the legal effect of a written instrument not submitted to the court. Wherefore, for all of the causes hereinbefore set forth, complainants except and demur to said answer, and pray that each of said exceptions and demurrers be sustained, and that said amended answer be held insufficient, and be struck from the files of this court and of this cause.

"Masterson & Masterson, Solicitors for Complainants."

At this stage of the litigation in equity suit No. 235 the complainants, on leave of the court in suit No. 294, on March 1, 1901, submitted a motion for final decree, as follows: "Now come the complainants in the above entitled and numbered cause, and show this honorable court that the above cause was commenced in this court, tried, and judgment entered in favor of complainants. That the defendants appealed this cause to the circuit court of appeals of the Fifth circuit, where said appeal was dismissed, and this cause remanded for further proceedings. That the mandate of said circuit court of appeals in this cause was heretofore filed in this court on the 17th day of July, A. D. 1897. That the said circuit court of appeals in their opinion on the trial of this cause said that if the order of this court heretofore entered in this cause on the 19th day of March, A. D. 1896, was fully complied with by complainants herein, a final decree should be passed upon the ap-

plication of complainants reversing the decree in suit No. 235 on the equity docket of this court, entitled Jesse D. T. Stratton et al. v. Charles P. Dewey et al., and reopening that cause for further proceedings. And complainants say that they have fully complied with all the conditions of said decree of March 19, 1896, and this they are ready to verify by proofs. Wherefore complainants now move this court for a final decree in this cause, in conformity to the said opinion of the honorable circuit court of appeals in this cause, and for such other and further proceedings as may be necessary, that justice may be done complainants herein."

On March 11, 1901, the defendants filed the following: "Now come defendants in the above-entitled cause, and show to the court that complainants on the 1st day of March, 1901, filed in this cause a motion for final decree herein, setting aside the final decree entered into cause No. 235 on chancery docket of this court, styled Jesse D. T. Stratton et al. v. Charles P. Dewey and A. B. Dewey, which motion and the answer of defendants were duly heard and considered, and the exceptions to said motion were sustained, and the motion overruled. Complainants have not complied with the terms and conditions upon which, under the said interlocutory decree, said final decree in which cause No. 235 could be vacated, and the time limit in said interlocutory decree for compliance has expired. Wherefore these defendants move the court to enter a final decree dismissing complainants' bill, and to make such order therein as may to your honor seem meet."

The defendants also filed the following answer: "Now come defendants in the above-entitled cause, and in answer to the motion filed herein, March 1, 1901, say that complainants' said motion does not show such a state of facts as entitle them to the order prayed for, even if said motion had been promptly and in due time filed. (2) That the interlocutory order entered in this cause from which said appeal mentioned in said motion was taken was so entered on the 19th day of March, 1896. That said opinion of the court of appeals was rendered at November term, 1896. That this motion of complainants was not filed until the 1st day of March, 1901, and said complainants have been guilty of laches and have shown such want of due diligence in said cause as not to entitle them to evoke the equitable powers of this court to set aside a final decree rendered in cause No. 235 more than seven years before the filing of said motion. Wherefore defendants pray the court to refuse to grant said motion, and to make such further orders as to your honor may seem meet."

Upon this last-mentioned motion, and the responses thereto, on March 15, 1901, the circuit court rendered the following decree: "This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed as follows: That complainants' motion filed in this cause on the 1st day of March, 1901, praying the court to enter a final decree in this cause setting aside and vacating the final decree rendered in cause No. 235, in equity, in this cause, styled J. D. T. Stratton et al. v. Charles P. Dewey and Albert B. Dewey, be, and the same is, overruled. It is further ordered, adjudged, and decreed that said Charles P. Dewey and Albert B. Dewey did pay the costs in suits Nos. 294 and 235 within the time required by said interlocutory decree entered in this cause on the 19th day of March, 1896, and did deposit in this court the four thousand dollars and interest within the time provided in said interlocutory decree, and they did file in said suit No. 235 an answer within the time required by said interlocutory decree, but said answer was by this court in said cause No. 235 held not to be a full answer to said bill and interrogatories to them therein propounded, as required by said interlocutory decree, and said answer did not present a good and sufficient defense to said bill, and did not comply with the terms and conditions stated in the interlocutory decree entered in this cause on the 19th day of March, 1896, in this: that they did not within the time required by said decree file a full answer to the allegations of the bill in said suit No. 235 and the interrogatories therein to them propounded, and have not shown to the court that they have a good and sufficient defense to said suit No. 235. It is further ordered, adjudged, and decreed that said complainants have not by the matters presented to the court in this cause shown themselves entitled to have a final

decree vacating and setting aside the final decree rendered in said cause No. 235 on the equity docket of this court, and entered on pages 48 and 49, book Vol. 9, of the minutes of this court; and thereupon came on to be heard the application of defendants praying the court to enter a final decree in this cause No. 235, dismissing complainants' suit; and, the same having been argued by counsel, thereupon, upon consideration thereof it is ordered, adjudged, and decreed that complainants' suit be, and the same is, dismissed, and that defendants Jesse D. T. Stratton, Minnie Stratton, and Thomas Stratton do have and recover of and from said Charles P. Dewey and Albert B. Dewey all costs in this cause incurred for which execution may issue. It is further ordered, adjudged, and decreed that said final decree rendered in said suit No. 235 is in full force. And upon motion of defendant in this suit it is further ordered, adjudged, and decreed that C. Dart, clerk of this court, shall pay to said Minnie Stratton, or to her solicitor, Branch T. Masterson, in this cause, the sum of forty-five hundred and sixty dollars and sixty-six cents ($4,560.66), deposited in the registry of this court by complainants under the interlocutory decree rendered herein on the 19th day of March, 1896, upon the receipt of said Minnie Stratton or her solicitor, Branch T. Masterson, of said sum, in satisfaction of the four thousand dollars decreed to said Minnie Stratton in the decree rendered in said suit No. 235, on the 18th day of November, 1893." From this last-mentioned decree Charles P. Dewey and Albert B. Dewey, in their own right and as executors, sued out this appeal.

John Charles Harris, A. E. Harvey, and Edw. F. Harvey, for appellants.

B. T. Masterson, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). This case turns on the questions whether the interlocutory decree of March 19, 1896, was within the jurisdiction of the court, and, if so, whether it has been so far complied with as to justify and require the reopening and rehearing of matters adjudicated in 235.

When this cause was formerly before this court we dismissed the appeal, because the decree appealed from was not a final decree, and to show its character we necessarily construed it, and determined its scope and effect, and we held:

"The manner in which this cause was heard finds no warrant in the rules of correct chancery practice, and the order made upon the hearing of the demurrer is altogether irregular. This court, however, cannot enter upon a consideration of these questions, nor determine those raised by the assignment of errors, as we are satisfied the motion to dismiss the appeal must be sustained because the order made by the court is not a final decree. It is in the nature of a conditional order, its finality depending upon certain contingencies that might or might not occur. The decree passed in suit No. 235, November 18, 1893, was ordered to be vacated, and the cause reopened, and leave granted appellees to file an answer therein, if they should within 30 days deposit $4,000 in the registry of the court, and pay all the costs of this suit and in suit No. 235. But if the costs should not be paid, nor the deposit of $4,000 made, within the 30 days, or if the answer should not be filed within the time allowed, the decree in cause No. 235 was to remain in full force; and (using the concluding language of the decree) 'complainants' bill in this cause will thereupon stand dismissed as on final hearing, and all costs in this cause incurred in that event adjudged against them, for which execution may issue.' Something more was required to make the decree final than was done in this case. If appellees failed to do what the order required to be done within the prescribed time, appellants should have applied to the court for a final decree dismissing the bill. If the order of court was fully

complied with by appellees, a final decree should have been passed, upon their application, reversing the decree in suit No. 235, and reopening that cause for further proceedings." Stratton v. Dewey, 24 C. C. A. 435, 79 Fed. 32, 34.

In so holding we neither decided, nor expressed an opinion to the effect, that the decree was justified by the bill and exhibits, nor even that the bill made a case under which the court could grant relief, and now these matters must be determined. The jurisdiction of courts of equity to reopen and set aside former decrees on the ground of accident, mistake, and surprise is well recognized and is frequently invoked, and herein we now find and hold that under the facts and circumstances shown in the bill (suit No. 294) it was within the discretion of the circuit court to take jurisdiction and permit the same to be filed, and that, having permitted the bill to be filed and the defendants having appeared to answer and contest the same, the court had jurisdiction to render the interlocutory decree of March 19, 1896. That decree seems to have been granted before the bill was fully put at issue by an answer, and on a hearing on demurrer, and a rule to show cause why an injunction should not issue, and on affidavits, counter affidavits, and exhibits. That it was irregularly granted, and was probably erroneous, may be conceded; and if the appellees were now before this court, as heretofore, complaining of that action, instead of seeking to benefit by the final decree in the case awarding them the large sum paid in by the Deweys to secure a hearing in No. 235, we could see our way clear to reopen the whole litigation to that point, and correct the interlocutory decree. As the case stands, however, the appellees seem to have acquiesced in the interlocutory decree, and, instead of complaining thereof, now seek to avail themselves of all its provisions. Under this state of the case, we feel constrained to hold that the interlocutory decree is binding on the parties, and thus is presented the question whether the said decree was complied with so as to entitle the appellants to a hearing on the merits in suit No. 235.

The final decree now under review adjudges "that said Charles P. Dewey and Albert B. Dewey did pay the costs in suits Nos. 294 and 235 within the time required by said interlocutory decree entered in this cause on the 19th day of March, 1896, and did deposit in this court the four thousand dollars and interest within the time provided in said interlocutory decree," and to this extent it is sustained by the record. These conditions admitted to be performed were all and the only conditions precedent to the reopening of suit No. 235, and the setting aside of the decree pro confesso, and the final decree entered therein, and when within the time specified the Dewey complainants paid all the costs, and deposited the sum of $4,000 and interest, they were entitled to file an answer in suit No. 235, and thereupon to have the real merits of that suit adjudged and decreed. The condition in the interlocutory decree that the Deweys were to file a full answer to the allegations of the bill and interrogatories therein propounded was a condition subsequent, default in which could only be determined and decreed in suit No. 235, which suit it was declared should proceed after answer filed according to the rules of practice in equity. The Dewey complainants did file an apparently full answer to the allega-

tions of the bill and answers to the interrogatories therein propounded, and the complainants so far followed the rules of practice in equity as to move to strike the answer out for various reasons assigned, and in the same paper to except to the sufficiency of the answer. The record further shows that on the exceptions so filed in No. 235 the court held the answer as filed not to be a sufficient answer to the bill, but thereupon on the same day granted leave to file an amended answer within 10 days. Within 10 days an amended answer was filed. To this amended answer the complainants in No. 235 filed a compound pleading made up of a motion to strike out, exceptions, and a demurrer. This pleading does not appear to have been passed upon by the court, and, so far as this record shows, said amended answer is now on file, pending and undisposed of.

In this state of the record it appears that the complainants in No. 294 have fully complied with the conditions precedent and subsequent contained in the decree of March 19, 1896; and as that decree has been acquiesced in by the parties, complainants and defendants, the scope and purpose of the bill in suit 294 has been accomplished, and the court erred in proceeding to dismiss said bill prior to the determination of the litigation in suit No. 235. It also appears that, so far as the decree appealed from reaffirms the former decrees in suit No. 235, while an answer is therein pending and undisposed of, it is erroneous, and should be reversed. So far as we can ascertain the merits of the pending litigation from the record, we are of opinion that the decrees in suit No. 235 were so far irregularly obtained through inadvertence, mistake, and surprise that equity requires that the defendants in that suit should have an opportunity to be heard on the merits, and to present their defenses, if any they have; and to that end the decree appealed from is reversed, and the cause is remanded to the circuit court, with instructions to stay further proceedings in suit No. 294 until the issues in suit No. 235 are disposed of according to the rules of practice in equity, and otherwise to proceed in suit No. 235 in accordance with the views herein set forth, and as equity and good conscience may require. The costs of this appeal to be divided equally between the appellants and appellees.

TEXAS & P. RY. CO. v. GARDNER.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,102.

1. CARRIERS OF PASSENGERS—INJURY OF PASSENGER—PRESUMPTION OF NEGLIGENCE.
   Evidence of a contract of carriage between plaintiff and defendant, and that plaintiff was injured while a passenger under such contract, casts the burden on defendant to show that it and its agents were without fault, or that plaintiff was guilty of contributory negligence.
2. SAME—NEGLIGENT STARTING OF TRAIN.
   It is negligence to start a railroad train from a station while a passenger is actually getting on board, regardless of the length of the stop.

3. SAME—CONTRIBUTORY NEGLIGENCE.
In an action against a railroad company to recover for an injury to plaintiff, alleged to have resulted from her being thrown down by the sudden starting of the train while she was going on board, evidence that plaintiff made a misstep is not necessarily even prima facie evidence of negligence, requiring a special instruction to the jury on the subject of contributory negligence.

4. APPEAL—REVIEW—REFUSAL TO DIRECT VERDICT.
The refusal of a trial judge to direct a verdict for defendant on the ground that a part of the plaintiff's testimony was improbable is not a ground for reversal of the judgment by an appellate court, the matter being one going to the credibility of the witness, primarily for the jury, and subject to review only by the trial court on a motion for new trial.

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

T. J. Freeman, for plaintiff in error.
M. L. Crawford, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This suit was instituted by the defendant in error, Jabe Gardner, to recover damages for injuries suffered by his wife, Amy Gardner, while a passenger on the defendant railway company's cars from Wills Point, Tex., to Dallas, Tex. On the trial Mrs. Gardner testified as follows:

"Am the wife of plaintiff. Live in Van Zandt county, about two miles from Wills Point. About the 3d of October last I purchased a ticket from Wills Point to Dallas. I was to come on the Cannon Ball train. The train was an hour and twenty minutes late. My husband was with me. I started to get on the train. I had four children with me. I got on the platform, and the train started suddenly, and threw me down against the iron railing. There was a gentleman present who helped me up. I had my ribs broken; my teeth broken; two or three teeth broken. Have not had my teeth fixed. They are broken off. Don't know how long train remained at Wills Point. Several parties got on before I did,—from three to five persons,—and they did not wait long enough for me to get on. I got on the west end of the coach, and went across the platform to a coach in front. When I reached Dallas I went to my sister's, Mrs. W. T. Strange. Mr. Strange met me at the depot, and took me home in a hack. I sent for Dr. Moseley. I was at Mr. Strange's house from October 3d to October 13th. I think two ribs were broken. I suffered with these broken ribs and my other injuries. My head and arm was hurt. The car I was on was crowded, but I did not know any one."

On cross-examination:

"I was on platform at depot when train came up. I saw the train porter. He was standing by the steps. My husband helped me put the children on. Several passengers got on ahead of me. Do not know whether any behind me or not. The porter helped me up the steps. I was just getting up on platform when I fell. My ribs and my head struck the iron railing. My ribs, jaw, and teeth struck the railing. I had my baby in my arms. Have not had my teeth examined. Have had no dentist. My teeth bled. I never said a word to the conductor. I did not tell any one till I got to Dallas. Rode all way to Dallas, and did not say anything to any one about it. My teeth were bleeding and my ribs hurting me. I did not tell the conductor nor the porter of my injury. I told no one on the car. When I got to Dallas I went to my sister's. Had a doctor that night, Dr. Moseley. I had Dr. Eagan for my child that was sick. I never said anything to Eagan about my injury. Never had a dentist to look at my teeth. They were broken off pretty close. Can't tell who the gentleman was that helped me. Have never

seen him since. I don't know who sat next me. I did not discuss my injury with any one. The conductor took up my ticket, but I did not say anything to him. I did not tell him I fell. I was suffering, and my teeth bleeding. I stayed in Dallas till October 13th. When I went home my husband met me at Wills Point, and I went to the wagon and got in it, and went home."

The main contention of the plaintiff in error in this court is that this evidence shows such a very peculiar character of humanity, and a state of facts so contrary to nature and humanity, that the court below should have given the general charge requested in favor of the defendant. There are other assignments of error in regard to special instructions asked and refused, but only one (the second) seems to be insisted upon in this court, and it is as follows:

" 'You are instructed that it is the duty of a passenger to exercise reasonable and ordinary care for his own safety in boarding or alighting from a train, and if you find and believe from the evidence that this plaintiff's wife did not use reasonable and ordinary care for her own safety in boarding the train, and if you further find that defendant was in no way negligent, you will find for the defendant,'—for the reason that the plaintiff's testimony disclosed the fact that the train stopped at the station for at least one and half minutes, and the testimony of the defendant showed that it stopped from two to five minutes, and the plaintiff failed to show by any evidence that the time in which it was at the station was not ample for her to board the train, and it is a fact that common experience teaches that the time was ample for her to have boarded the train had she used care and diligence. Again, the testimony of the plaintiff's witnesses disclosed the fact that after she went upon the platform she made a false step, and if any injury occurred it occurred from her own negligence in her moving across the platform in making the false step."

The reasons here assigned to show why these instructions ought to have been given are not conclusive. Mrs. Gardner was a passenger and entitled to safe carriage, and, when the contract of carriage was proved and the injuries shown, the burden was on the carrier to show that it and its agents were without fault, or, if in fault, to show that the passenger negligently contributed to her own injury. Now, whether the train stopped at the station two or five or ten minutes, it was negligence to start the same while the passenger was actually getting aboard.

It is not, necessarily, even prima facie negligence to make a false or miss step while boarding a train. If a passenger under such circumstances does make a false step, he, and not the carrier, ought to bear the consequent injuries, unless the false step is caused by or through the negligence of the carrier in starting or moving the train. If the false step is not caused by or through starting or moving the train, but the injuries were enhanced through and because the train was improperly started, then the liability of the carrier is a question for the jury.

The propositions of law contained in the requested instruction seem to be correct, and so plain that it is not a violent presumption that in substance they were given to the jury in the general charge, and this presumption is fortified by the fact that the reasons here urged why the instructions should have been given are special, and bear on particular phases of the evidence, and we can safely infer that the same reasons were given to the trial judge. The extraordinary statement

made by Mrs. Gardner in regard to her injuries and its probability in the light of human character were questions for the jury, and subject to no other review than that of the trial judge, who had power to grant a new trial if the extravagance of the case as made by the evidence overtaxed his credulity.

On the face of the record we find no reversible error of law, and the judgment of the circuit court is therefore affirmed.

CASEY v. PENNSYLVANIA ASPHALT PAV. CO.

(Circuit Court of Appeals, Third Circuit. February 12, 1902.)

No. 45, September Term, 1901.

RES JUDICATA—JUDGMENT NON OBSTANTE VEREDICTO.

A judgment entered for defendant, notwithstanding a verdict taken subject to a point reserved, is not an adjudication based upon matter alleged in arrest of judgment, but is merely the legal consequence of a ruling by the court that upon all the evidence defendant was entitled to a verdict, and its effect as an adjudication upon the merits is the same as a judgment upon a directed verdict.

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

James S. Young, for plaintiff in error.

Wm. Hall, Jr., for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. The very ingenious argument made on behalf of the plaintiff in error ascribes to a judgment for defendant non obstante veredicto a character quite different, we think, from that which has heretofore been attributed to it. It is not, either in form or effect, an adjudication against the plaintiff upon matter alleged in arrest of judgment, but is merely the legal consequence of a ruling by the court that, upon all the evidence, the defendant was entitled to a verdict. Such a ruling, when made upon the trial, is given effect through binding instructions, and between a judgment for defendant in pursuance of a directed verdict, and a judgment entered in his favor notwithstanding a verdict which had been taken for the plaintiff subject to a point reserved, there is no substantial distinction. They rest upon precisely the same foundation.

We adopt the opinion which was filed by the learned judge of the circuit court (109 Fed. 744), and for the reasons there presented the judgment of that court is affirmed.

In re WILLIAMSON.

(District Court, N. D. Georgia, N. D. August 21, 1901.)

No. 19.

BANKRUPTCY—EXEMPTION—FRAUD.

A bankrupt, whose business is carried on in the name of her son, as agent, without her having anything to do with it, cannot claim an exemption therefrom allowed by Code Ga., which requires the person claiming it to come into court with clean hands, practically all the indebtedness having been contracted within the five months preceding the petition in bankruptcy, and all the best of the stock having been sold off at auction during the last of said months, leaving old stock, which, with fixtures, is worth less than the amount of the exemption.

In Bankruptcy.

Joel Branham and Max Meyerhardt, for bankrupt.
Denny & Harris, for creditors.

NEWMAN, District Judge. Since argument of the matter of exemption for the bankrupt in this case, I have gone over the evidence carefully, and considered the same. The exemption is claimed by the bankrupt, Mrs. Williamson, "under sections 5912 and 2827 of the Civil Code of Georgia, she being an aged and infirm person, 62 years of age." The conclusion I have reached is that the exemption set apart by the trustee and approved by the referee cannot be allowed. The exemption allowed by the statutes of the state is asked out of a stock of jewelry, which, it is claimed, belonged to the bankrupt, but the jewelry business was conducted by Mrs. Williamson's son, J. K. Williamson, as it appears, under the name of "J. K. Williamson, Agent." It is shown by the testimony reported by the referee that Mrs. Williamson had nothing whatever to do with the business, but that the same was conducted entirely by J. K. Williamson. In the testimony of J. K. Williamson this appears:

"She [Mrs. Williamson] has not opened her mouth about the business since she bought it out four years ago the 12th of April. She bought it when it was sold as the property of witness. Witness was then transferring the title because he was financially involved. The sale of the Allen & McOsker property was brought about for the same reason. Witness was with Allen & McOsker for years before their business closed out. This will be the third time the business has been closed out,—changed from hand to hand."

The testimony of Mrs. Williamson taken by the referee is to the same effect,—that her son, J. K. Williamson, had entire charge and control of the jewelry business. It further appears from the testimony that this bankruptcy proceeding was arranged for Mrs. Williamson by her son, J. K. Williamson, and that all that she did was to sign her name where she was told to sign. She says this in her own testimony on the subject:

"Never did talk to Judge Branham or Judge Meyerhardt [the counsel in the case] about this bankruptcy proceeding. The signatures to the affidavits in petition of bankruptcy look like bankrupt's handwriting; they are her signatures. Don't know when she signed them. Signed some papers when Mr. Printup came out there. Bankrupt never talked with any one about it. Klip [her son] attends to all her business. Bankrupt knew what these papers were, but she never read them. She never read them, and they were never read over to her. She did not know the contents of any of these papers.

She just let Klip attend to it. He attends to all her business. Don't know whether it was a month or a year before she signed them that J. K. Williamson first stated to her that he wanted her to sign these papers; but it was before she signed them. She just signed what he said, as he always attended to everything, and bankrupt was satisfied. She did not talk to J. K. Williamson before signing these papers. He was not present when Mr. Printup was there. Don't know when J. K. Williamson asked her to sign these papers. Don't know whether it was that day. Don't know whether it was after or before."

And again:

"She signed the affidavit to the petition for adjudication in bankruptcy; she never examined it; and without having it read over to her, and without knowing what the contents were. Klip attended to the sale of the goods at the public outcry. He did as he thought best. Bankrupt didn't know anything about the sale. J. K. Williamson did not tell her that it was necessary to hold that sale in order to pay off Mr. Allen and Mr. McOsker. He didn't talk to her about it; she didn't know anything about the sale."

It further appears from the evidence that in February last J. K. Williamson conducted an auction sale, at which $1,259 of jewelry was sold. J. K. Williamson says, in his evidence, that he went to Cincinnati, and bought $200 worth of jewelry for this sale. The names of the persons from whom he bought appear in his list of creditors for considerably more than the amount he says he purchased in January; but it is not shown whether the amounts purchased in January were paid for in cash, or are a part of the indebtedness set out in the schedule. J. K. Williamson says that he intended by the auction to dispose of old stock; but concedes that he failed in this, and all he was able to sell was the new stock. It appears, therefore, clearly from the evidence that J. K. Williamson, at this auction sale, sold off the best part of his stock in the month of February, leaving principally old stock on hand. This old stock, which, together with the fixtures, is valued at $1,571.72, is now sought to be exempted as against creditors from whom the new stock so disposed of must have been purchased. It appears from the schedule of the unsecured creditors that the bulk of the indebtedness was incurred in October, November, and December, 1900, and January and February, 1901. There are only two or three items of indebtedness which appear to have been made prior to October, 1900. The auction sale, as stated, occurred in February, 1901, and the petition in bankruptcy was filed on the 12th day of March, 1901.

In Georgia the exemption from levy and sale provided by statute will not be allowed unless the person claiming the same comes into court with clean hands, and certainly, in order to justify the allowance of an exemption out of a stock of goods as against the creditors who sold the goods with which the business has been conducted, a case should be shown of fair dealing on the part of the debtor. Of the goods which were purchased in October, November, and December, a considerable amount must have been sold during the busy season, especially just preceding the Christmas holidays, when, as is generally understood, this class of business is better than at any other season of the year. Then the auction sale was held in February, at which over $1,200 worth of what J. K. Williamson concedes to have been new stock was sold, leaving, as has been stated, jewelry worth a little less in amount than the exemption allowed by the statutes of

Georgia. A case is not presented where, in my opinion, the exemption should be approved. It may be remarked that it appears that J. K. Williamson is unmarried, and that the exemption is claimed by Mrs. Williamson "under sections 5912 and 2827 of the Civil Code of Georgia, she being an aged and infirm person, 62 years of age." In the case of In re Waxelbaum (D. C.) 101 Fed. 228, this question was discussed by this court, and a similar conclusion reached as to the exemption then claimed. The decisions of the supreme court of the state on the subject are there referred to.

I think that as to the exemption of household and kitchen furniture and wearing apparel the action of the trustee in setting the same apart should be approved, but as to his action in setting apart the stock of jewelry and fixtures it should not be approved, and to that extent I differ with the referee. An order may be taken accordingly.

In re STEPHENS et al.

(District Court, N. D. Georgia. January 15, 1902.)

No. 677.

BANKRUPTCY—EXEMPTION—FRAUD.

Under Code Ga. § 2830, providing that a debtor guilty of willful fraud in concealing property from creditors shall lose the benefit of his exemption, a bankrupt claiming an exemption under the laws of that state must give a better explanation than that he "sold a great deal of goods, and sold some of them at less than cost, to try to meet obligations," where his schedule in bankruptcy shows $7,500 assets and $9,800 liabilities, while his statement, made eight months before, and which he says was correct, showed $13,500 assets and $7,000 indebtedness.

In Bankruptcy.

W. C. Wright, for bankrupt.

R. W. Freeman and R. O. Jones, for objectors.

NEWMAN, District Judge. The bankrupt firm is composed of F. M. Stephens and A. J. Stephens. The entire property shown on the schedules, except a small amount of open accounts, is a stock of merchandise. Neither of the bankrupts has a wife or children. They have a mother, who is 63 years of age, and an orphan niece, 9 years of age. The two brothers, mother, and niece live together, and constitute one family. Under the constitution and laws of Georgia, it seems that the elder brother, who is the head of a family, the females of which are dependent, would be a person entitled to an exemption. Certainly, however, both brothers cannot claim an exemption with the same beneficiaries, the mother and niece. Conceding it to be true that F. M. Stephens is so situated that he is entitled under the laws of the state to claim an exemption, is he entitled to it out of the firm assets under the facts and circumstances of the case as shown in the record? There is a claim for exemption on the part of both of the bankrupts accompanying the petition in bankruptcy. Each of the bankrupts has selected certain articles of merchandise, an itemized list of which accompanies the schedule. In the case of F. M. Stephens the total amount of merchandise so claimed as an exemp-

tion is $1,599.94, and in the case of A. J. Stephens $1,599.84. The trustee set apart the exemptions as claimed. Objection was made to the allowance of the same before the referee, and after hearing the matter he denied the exemption as to both of the partners. This ruling of the referee is certified by him, at the request of the bankrupts, to the district court. Numerous objections were urged by the creditors before the referee against the allowance of these exemptions, —among others that the purchase price of a part of the goods claimed as an exemption was still due to the creditors who interposed objections; as to A. J. Stephens, because he contributed nothing to the partnership business; as to F. M. Stephens, because he contributed less than $1,600; and by some of the creditors, upon the ground that they held notes containing waiver of homestead and exemption. Another objection, and a most important one, was, substantially and in effect, that the bankrupts were not in position to claim an exemption, because they had failed to make a full and free disclosure of their property, and that they did not come into court with clean hands, so as to be entitled to an exemption under the laws of this state. The law of Georgia on this subject is contained in Code, § 2830, as follows:

"The debtor guilty of wilful fraud in the concealment of part of his property from his creditors, of which he is possessed when he seeks the benefit of the exemption, shall, on account of his fraud, lose the benefit of such exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed."

The record shows that the bankrupts made a statement in January, 1901, as to the condition of their business, which showed assets amounting to $13,475.20, and a total indebtedness of $6,938.38, leaving a balance of assets over liabilities of $6,536.82. When examined before the referee in the matter of exemption, they testified that this statement was correct when made. Their schedule in bankruptcy filed September 2, 1901, showed assets of $7,474.58 and liabilities of $9,799.96, an excess of liabilities over assets of $2,325.38. This shows a diminution of the estate in eight months of $8,862.20. A discrepancy of this kind, in a business no larger than that the bankrupts were conducting, needs explanation of some kind. The only explanation given, so far as appears in the record, was that they "sold a great deal of goods, and sold some of them at less than cost, to try to meet obligations." A more satisfactory explanation than this should be made by the bankrupts when an exemption is claimed. A case very much like this has been decided by this court in Re Waxelbaum (D. C.) 101 Fed. 228, and the conclusion reached that the exemption would not be allowed under such circumstances. The referee had the bankrupts and other witnesses before him in this case, and had opportunity for ascertaining the truth of the matter, and he evidently found that there was not such good faith and such conduct on the part of the bankrupts as would justify the allowance of an exemption to either of them. It is stated in Re Waxelbaum, supra, by this court, that:

"The rule is well recognized that the district court will not interfere with the action of the referee in bankruptcy as to his findings on facts, unless the same are manifestly erroneous."

There is no error of law in this case, and the conclusion of the referee is abundantly supported by the facts. The referee's decision denying the exemptions will be sustained as to both the bankrupts.

ROMARE v. BROKEN ARROW COAL & MINING CO. et al.

(Circuit Court, N. D. Alabama, S. D. February 19, 1902.)

1. RECEIVERS—GROUNDS FOR APPOINTMENT—MORTGAGE FORECLOSURE.

The trustee in a mortgage securing bonds of a corporation owning about 3,000 acres of coal and timber lands, on request of the holders of about one-fourth of the bonds, brought suit to foreclose the mortgage, and applied for the appointment of a receiver to take possession of and operate the property. No interest had been paid on the bonds for 17 years, and the bill alleged, on information and belief, that the company was insolvent, that the mortgaged property was of less value than the amount due on the mortgage, and that some three or four hundred acres of the land was in possession of a lessee, which was impairing its value by taking large quantities of coal therefrom. There was no allegation of fraud, dishonesty, or incompetency in the management. The charge of insolvency was denied, and not proved; nor was there any definite evidence as to the value of the mortgaged property, the quantity of coal being mined, or the effect of the work in developing the mines. On behalf of defendant it was alleged, and there was evidence tending to prove on the hearing, that the bondholders had at all times been fully cognizant of the operations of the company, in which they had, to some extent, participated; that, up to about two years before, such operations had not been profitable, but there had at that time been a change in the management, since which time a large amount had been expended in developing the mines, which were then being operated under advantageous leases. There was testimony of disinterested witnesses that since that time the property had increased in value, and gave fair promise of yielding returns to the stockholders and bondholders. It was also shown that a majority of the bondholders approved of the management, and believed the appointment of a receiver would be detrimental to their interests. *Held*, that such evidence did not warrant the appointment of an operating receiver pending the suit.

2. SAME.

The fact that the bondholders of a corporation owning coal lands permitted the interest to become in arrears for 17 years before bringing suit to foreclose, with full knowledge of the operations of the company, during the last 2 years of which time it expended large sums in developing the property, may properly be considered in determining their equity to demand the appointment of a receiver; and the appointment ought not to be made, under such circumstances, against the opposition of the company and a majority of the bondholders, without clear proof of mismanagement, and that the receivership would better subserve the interests of all of the bondholders, at least, and is necessary for their protection.

In Equity. Suit to foreclose mortgage. On motion for appointment of receiver.

This case comes before me on motion of complainant for a receiver, and has been argued and submitted on bill and answer, and testimony as shown by the note of submission. The case, so far as it is necessary to state it, is this: Complainant, Paul Romare, is the surviving trustee under a deed of trust made by the Broken Arrow Coal & Mining Company on the 1st of November, 1883, to secure a total issue of 100 bonds, for $500 each, payable on the 1st day of December, 1903, with semiannual interest at the rate of 7 per cent. per annum. No interest has been paid since the 1st day of December,

1884, and it is alleged in the bill that the sum of $57,550, with interest thereon from the different dates when the coupons fell due, is now due to the owners of the bonds, exclusive of the principal. The deed provides, on default in the payment of interest continuing for six months, it shall be the duty of the trustee, upon the requisition in writing by the holders of not less than one-fourth of the total issue of bonds then outstanding, accompanied by adequate indemnity against costs and expenses, to enforce the rights of bondholders by suits in equity, or otherwise, as the trustee may be advised is most effective. In compliance with the request of the holders of 26 of the bonds (being more than one-fourth of the whole issue outstanding), the trustee, having been properly indemnified, files his bill to foreclose the mortgage. It is alleged, on information and belief, that the Broken Arrow Company is insolvent, and that the mortgaged premises are of less value than the amount due upon the bonds and coupons, and that since the execution of the deed of trust the Broken Arrow Coal & Mining Company has made a lease to the Coal City Coal & Coke Company, which is also made a defendant to the bill, which is in possession of three or four hundred acres of valuable land, mining coal therefrom every day in large quantities, and that, "by every ton of coal which is raised and moved from the lands in the mining operations, it is impairing the security of the bonds and coupons, and that after the mines are exhausted the land will be useless and valueless for any other purpose," etc. The prayer is for foreclosure, and for the appointment of a receiver to take possession of the mortgaged property, with power to operate it and to secure the earnings thereof until foreclosure sale. The answer sets up, among other things, that it was well known to the bondholders that respondents could not pay the interest unless a large amount was invested in opening and developing the mines, and that an agreement was had between the respondents and the holders of the first mortgage bonds, with the knowledge and consent of the complainant, that respondent should procure the necessary amount of money to be expended on the property to develop it until it could be put upon a paying basis, and that if this were done no attempt would be made by complainant and the bondholders to foreclose the mortgage; that, in consideration of this promise and agreement, respondents since the making of the mortgage have expended more than $48,000 in the development of the property; and that the bill to foreclose is premature and in violation of the agreement between the respondent and the holders of the first mortgage bonds. The answer also denies that the Broken Arrow Coal & Mining Company is insolvent, or that the premises are of less value than the debt due, or that the Coal City Coal & Coke Company is in any way impairing the security of the bonds; and it is also denied that the Coal City Coal & Coke Company is working or exhausting the mines in any manner. The answer sets up that the appointment of a receiver under the existing conditions would be disastrous and ruinous to all parties in interest,—not only the respondents, but the bondholders as well; that, after the expenditure of this large sum of money put in the property by the respondents, it will soon be placed upon a paying basis, if allowed to be operated; that the mines are being operated under an arrangement with the Northern Alabama Coal, Iron & Railroad Company, which company operates the mines under an arrangement with the Talladega Furnace Company, the owners of a large furnace at Talladega, Ala., and the Birmingham & Atlantic Railroad Company, which owns a railroad extending from Talladega to a point not far distant from the mines, and that the success of the operation of the mines is altogether dependent upon their being operated in connection with said furnace and railroad; that it is fully realized by the holders of three-fourths of the mortgage bonds of the Broken Arrow Coal & Mining Company that the well-being of the enterprise depends upon its being operated as aforesaid, and they object to the foreclosure, or to the appointment of a receiver for the property, and allege that such proceedings are not in the interest of the bondholders, but in the interest of complainant and a few minority bondholders, who seek to thereby force the holders of the majority of the bonds to purchase their interests at prices dictated by them, without regard to the disastrous effect of the proceedings upon the trust estate. It is further alleged that the trustee has been removed since the filing of the

proceeding, by a majority of the bondholders, under a power to that effect in the deed of trust. It is not necessary to notice this allegation further, in the view I take of that question on the other branch of the case.

J. J. Willett, B. F. Abbot, and Jas. T. Greene, for complainant.
Knox, Bowie & Dixon, for respondents.

JONES, District Judge. The appointment of a receiver upon the evidence before me would be as hazardous as a surgeon's undertaking an operation upon his patient in the dark. The insolvency is charged on information and belief. It is met by a positive, but merely literal, denial. Such a denial, however, is good enough for a charge thus made. The only direct evidence of the value of the trust property is the "opinion" of one of the complaining bondholders that the "market value of the property is less than one hundred thousand dollars." The bonds are secured by a deed of trust "upon all the coal and other minerals" in certain described lands in St. Clair county, amounting in all to 3,156 acres, "together with the engines and machinery now used in operating the works, and such as may hereafter be used in operating the mines." Whether engines and machinery of any considerable value are now upon the premises is not stated. The answer alleges that the present management has spent in development and opening mines $48,000, which the affidavits show has been done in the last two or three years. Complainant disputes the amount thus expended, but it is evident that large sums of money have been expended upon the mines quite recently. There is nothing to show that this money has not been judiciously expended, or that it has not correspondingly advanced the value of the mortgaged premises. There is neither allegation nor proof that the property described in the mortgage is all the property of the defendant corporation, save in the affidavit of four complaining bondholders that the coal and timber are the only security. The character and value of the timber on the land are not given. The Coal City Coal & Coke Company, of whose operations complaint is made in the bill, is charged to be in possession of only "three or four hundred acres" of the entire tract. As to the remaining 2,700 or 2,800 acres, no information is given. It does not appear how much money has been expended in development on them in the earlier operations of the company, and whether the development has added to the value, or how they compare in value with the "three or four hundred" acres mentioned. The court is not informed how far the coal and "other minerals" have been developed on the entire property, or as to the character and quantity or value of coal and other minerals therein, or how they lay, or how advantageously they may be worked. It is not shown that the respondent company owes other debts than those secured by the deed of trust. In this state of the proof, it cannot be declared, in favor of one upon whom the burden of proof rests, that the respondent company is insolvent.

It is shown by the affidavits of Alverson, Moore, Hamilton, and Daughdrill, who are entirely disinterested, and speak with knowledge of the past and present conditions of the property, that until lately the mines were not sufficiently developed to operate them at a profit, but that in the last two years the Northern Alabama Coal, Iron &

Railroad Company, out of its own funds, has spent many thousands of dollars in developing, repairing, and replacing property on the premises, and has about succeeded, after the expenditure of large sums of money without any profit to itself, in placing the property in a condition where coal can be mined at a profit, and has at the same time greatly enhanced the value of the mines, which these witnesses assert are now more valuable than at any time since the making of the trust deed. Each of these witnesses testifies positively that nothing is being done to injure the security of the bondholders, but, on the contrary, the property is being developed and greatly enhanced in value. Soley, the general manager of the Broken Arrow Coal & Mining Company, testified to the same effect, and that, from the time of the making of the trust deed until recently, the management of the respondent company has been conducted largely by certain of the bondholders who now seek foreclosure; but their management resulted disastrously; that since the present officers have been in charge of the property, and the large expenditures made upon it, it has increased in value, and gives promise of yielding returns to the stockholders and bondholders. Four of the complaining bondholders, however, state "as absolutely true that the security for the bonds is being impaired every day by the mining of coal and the cutting of timber, and that the chief and only security for the payment of the bonds secured by the deed of trust is the coal and timber upon said lands, and that the same is being exhausted every day by the mining of said coal and the cutting of said timber." They do not state the quantity of coal and timber which is being removed, nor how much money is being spent in development in the present operations, or how or in what respect the present operations are harmful to the property, save that coal and timber are being taken away from the mines. Coal and timber in considerable quantities may be taken, and yet, if there is a large quantity of coal or other minerals left upon the land, the development and the enhanced value therefrom to the remainder might more than compensate for the value of the coal and timber taken in the operations of the property, and leave it of greater value than before. The statement of these four witnesses, the honesty of which is not at all doubted, amounts to no more than their opinion that the security is being impaired merely because coal and timber are being taken from the mines, without any reference to the value and amount of the coal which remains, or the expenditures made in development, or the greater value which may thereby have been imparted to the property. It does not overcome the testimony of Alverson, Moore, Hamilton, and Daughdrill on these points.

Little need be said at this time of the defense that Romare and the bondholders agreed, if expenditures were made upon the property so as to put it upon a paying basis, they would forego the right of foreclosure, and that, in consequence of such agreement, large sums of money have been expended, whereby the property is now put upon a paying basis. The allegations as to this are vague and uncertain; it not being stated how much money was to be expended, or how long forbearance was to continue. So far as concerns Romare and the complaining bondholders, it suffices to say that the charge is made on "information and belief," and that they deny it most positively. It is

hardly necessary to say that a trustee has no authority to bind bondholders not to enforce their security in case of default, when neither the trust deed nor the individual bondholders give that authority, nor that, without specific authority to that effect, one bondholder, or a majority of them, cannot bind other bondholders to forego their rights under the trust deed. Upon the present state of the evidence, there is nothing which estops Romare and the complaining bondholders from insisting upon a foreclosure.

It is proper to refer to some other features of the case. The property is now being operated, and there is testimony which, in the least favorable view of it, certainly tends to show that the parties operating the mines, by reason of their ownership or control of a railroad and furnace, can find markets more advantageous for the coal than any other parties could. The terms of this contract, or the magnitude of the operations under it, or whether it has resulted profitably or not, are not stated. The only information given the court is that the success of the operation of the mines is "altogether dependent upon their being operated in connection with the furnace and railroad, and that under the present management the property has greatly improved, and that, if the management is allowed to continue to operate, there is reason to believe that the indebtedness of the company can soon be paid out of the earnings." The court is without any information which would enable it to judge whether this opinion is well or ill founded. It is, however, the opinion of the present management, stated under oath; and its correctness is largely supported by the affidavits of Alverson, Moore, Hamilton, and Daughdrill. All five of these witnesses testify positively that the company can operate the property to greater advantage than a receiver could, and the complainant has not furnished any testimony to the contrary. Nearly three-fourths of the bondholders insist that a receiver would be exceedingly detrimental to them. While these considerations present no bar to a foreclosure after the long default, they certainly are weighty in determining the propriety of a receiver pending foreclosure. The court cannot shut its eyes to the further facts that the complaining trustee and the minority bondholders for nearly 17 years past, in which there has been continuous default in the payment of interest, have forborne, so far as the record shows, to take any steps to collect their debts; that during this long period the property has been mined by the company in various ways,—either on its own account, or by persons who paid royalties,—without keeping down the interest, while in the last two years a new management has intervened, which has spent considerable sums of money in developing the property, under a contract of some sort with the company. These pregnant circumstances, unexplained, certainly tend to show that there was some agreement or understanding among a number of the bondholders, at least, to forbear the collection of their debt, and trust to future operations to place it on a better basis, and that the money spent in developing the property was expended on some such understanding. If not, why should the trustee remain inactive during this long period, and the complaining bondholders refrain from insisting on their right to compel him to institute foreclosure proceedings? Persons interested in property are

charged with knowledge of its vicissitudes and condition. It is unnecessary now to consider how far mere silence of bondholders, with knowledge of the agreement under which the money was expended, estops them from the right of foreclosure. It suffices here to say that the trustee and the complaining bondholders make most positive and direct denial of notice or knowledge of any agreement of the kind. Nevertheless, their inactivity and silence for so many years, and after so many and long-continued defaults, may be rightly considered in determining the equity of their sudden demand for a receiver.

It is contended on the one hand, and denied on the other, that the complainants seek foreclosure to compel the majority bondholders to purchase at a price beyond the value of the bonds, rather than submit to the sacrifice entailed by a receiver and foreclosure. In view of the vicissitudes of this property, the long delay in the payment of interest, and the various efforts to extricate the enterprise, and the abundant room for honest difference of opinion as to the best method of winding up the trust, I cannot see that this charge is made out; but, if it were, it is immaterial, since conditions have arisen which give creditors the clear and undoubted legal right to proceed, regardless of the motive which controls them. It is urged on the other hand that the majority bondholders and the managers of the property of the Broken Arrow Coal & Mining Company are so conducting it as to force the minority bondholders to sell at a sacrifice. Bearing in mind the history of this property, the long unanimity of the bondholders in foregoing their right to foreclose, and the evident hope of the majority that the debt can be worked out, it does not seem to me that this view is just. The differences of opinion among the bondholders are doubtless honest, and each side is merely trying to take care of itself without any nice calculation as to the effect of its position on the other side. The best solution of such a situation is not in litigation. Amicable adjustment would be quicker and better; but it is for the parties, not the court, to determine thus to settle the dispute.

The complaining trustee and bondholders ask for a receiver, with power to operate. They evidently believe it is not to the interest of the bondholders to shut down pending foreclosure, but, rather, to keep the mines as a going concern. The evidence, as I have stated, does not justify the conclusion that the value of the property is being impaired by the present operations, or that the company is insolvent. Suppose it is insolvent; still the question arises whether it is best for the cestuis que trustent to keep the property as a going concern pending foreclosure, or to shut down the mines. If the operations are to continue, they must be carried on by the respondent or by a receiver. In determining by whom this must be done, it should be borne in mind that the real complaint is not that the mines are being unskillfully, imprudently, or dishonestly worked, but that nothing has resulted, so far, to keep down the interest. Whether there is a profit or not, we are not told. If there be a profit which has been applied to improvements or other debts, instead of being paid on the interest, the court, by an order sequestrating the income, could cure that evil. If the management is in danger of contracting debts for materials, supplies, and labor for which liens might be claimed superior

to the mortgage debt, the management could be easily controlled in this respect. So far as the evidence shows, if the mines are to be operated at all, it should be done by the present management, subject to the control of the court, rather than by a receiver. Upon the evidence, it is apparent that a receiver would not have the advantages of profitable operation possessed by the management, and a change of policy or disarrangement of the contracts under which the company is now being operated might result disastrously to respondent company as well as the creditors. If the present management is not making money, it is not at all probable that a receiver would. The alternative is plain,—either to allow the operations by respondent to continue, under proper orders of the court, or else suspend operations altogether. If it is best to shut down, the appointment of a receiver is not necessary to accomplish that result. The court could order the respondent to shut down the mines and put a watchman in charge, or the court might put a deputy marshal in possession, to prevent trespasses upon the premises, and the deterioration of machinery, and the taking out of coal, until the property could be sold. This would be far less expensive and detrimental than the appointment of a managing receiver. In no view of the situation, as it now appears, will any good be accomplished by the appointment of a receiver to operate the mines, and much evil and increased cost might result from it. Three-fourths of the bondholders—the class most interested in the property—insist that it would be harmful.

With the meager proof presented upon many matters which enter into the proper disposition of this property pending foreclosure, the court cannot foresee what relief in this respect may be necessitated by the future developments of the litigation. I will only decree now, upon the case as made, that a receiver ought not to be appointed; but the decree will be without prejudice to the right to renew the motion if, upon further proof, it be made to appear that the mortgage security is being impaired, or that a receiver will be beneficial to the enforcement of the rights of the cestuis que trustent.

MARCH et al. v. ROMARE et al.

(Circuit Court, N. D. Alabama, S. D. February 19, 1902.)

1. TRUSTS—REMOVAL OF TRUSTEES—DISAGREEMENT BETWEEN CESTUIS QUE TRUSTENT.

Cestuis que trustent may remove and appoint trustees, in the exercise of the power given them by the instrument creating the trust, although prior to the exercise of the power the trustee has filed a bill concerning the trust, which is still pending; but in such case the removal and substitution of trustees is subject to the approval of the court which has acquired jurisdiction of the trust, and where the power is vested in the majority, and has been exercised by them in opposition to a minority, although in good faith, and without any design to oppress, the court, before sanctioning the change, will inquire whether it will be detrimental to the interests of any of the cestuis que trustent, and especially where the trustee sought to be removed is proceeding in the discharge of a plain duty, which the minority had the right to demand at his hands.

2. SAME.

The trustee in a deed of trust securing bonds of a corporation, on demand of a minority of the bondholders, and being indemnified, began suit for foreclosure, and, under advice of counsel, applied for the appointment of a receiver, all of which was a duty he was required to perform by the terms of the deed, and as to which he had no discretion. This action, however, was disapproved by a majority of the bondholders, who, in the exercise of a power given them by the deed, removed the trustee and appointed others, who applied to the court to be substituted as complainants in the suit. No question was made as to the competency or good faith of the original trustee. *Held*, that since the foreclosure was a matter of right, upon which the minority were entitled to insist, and the execution of the decree therein would terminate the trust, all of which would be under the supervision of the court, which could protect the rights of all parties, it would not sanction the removal without cause of a trustee who had merely performed his duty, and the substitution of others as complainants, who owed their election to interests which were hostile to the suit.

In Equity. On motion for an injunction based on a bill in the nature of a supplemental bill to enforce the removal of defendant as trustee.

This is an original bill, in the nature of a supplemental bill, filed by March and Hoyt against Romare and others, and grows out of the litigation on the bill filed by Romare and others against the Broken Arrow Coal & Mining Company, which, briefly stated, is this: Romare is surviving trustee under a deed of trust executed by the Broken Arrow Coal & Mining Company in 1884 to secure an issue by that company of bonds, the interest upon which had long been in default. Upon demand made by one-fourth of the outstanding bondholders, and being indemnified against costs, as required by a provision of the deed of trust, he filed his bill to enforce the debt, and also prayed for a receiver pending foreclosure. Due notice of the motion for receiver was given, and the respondents to that bill were required to show cause against it on the 19th of October, 1901; but the matter was not actually heard until the 16th of January, 1902. On the 5th of December, 1901, March and Hoyt filed their petition in the case of Romare against the Broken Arrow Coal & Mining Company, alleging that a majority of the bondholders, as authorized by the deed of trust, had on the 16th day of November, 1901, removed Romare, and by like authority had appointed March and Hoyt trustees under said instrument, wherefore they prayed to be substituted as complainants, instead of Romare. On the 4th day of January, 1902, March and Hoyt filed their "original bill, in the nature of a supplemental bill," against Romare, as surviving trustee, and the other respondents in that case; reciting the proceedings commenced by Romare for foreclosure of the deed of trust; alleging that on the 16th day of November, 1901, a majority of the bondholders, exercising a power given by the deed of trust, removed Romare by an instrument in writing, and by a similar instrument had appointed March and Hoyt as successors to Romare and John H. Porter, a trustee who died several years since. The clause in the trust deed relied on to sustain these acts of the majority bondholders is as follows: "Article VIII. The trustees may, at any time, be removed by a declaration in writing signed by a majority in interest of the holders of all the bonds hereby secured, at the time outstanding. In case of the resignation, incapacity, or removal of said trustees, or either of them, the successor or successors may be appointed by the holders of a majority in interest of the bonds then outstanding, by an instrument in writing signed by them." The bill alleges proper notice to Romare of his removal, of the action by which it was effected, and the execution of the proper instruments in writing, signed by a majority of the bondholders then outstanding, appointing March and Hoyt as his successors, and offered to pay Romare the reasonable value of his services and expenses in the proper administration of the trust. Romare declined to surrender the trust, or to make any transfer to the complainants as his successors in the trust, as it

is alleged the deed obliged him to do, and has since continued to claim to be and continues to act as trustee, and to prosecute his bill. It is further alleged that March and Hoyt are entitled to conduct the foreclosure under the deed of trust, and to "manage, direct, and execute the provisions thereof," and that it is their duty to do so, and that the conduct of Romare notwithstanding his removal, if permitted to continue, would put it out of the power of orators to execute their trust, and to discharge their duty and obligations to the bondholders. The prayer is that Romare and the other defendants to the suit brought by Romare be made respondents to the present bill, and that Romare be restrained and enjoined from further proceeding with the conduct of the suit for foreclosure and for the appointment of a receiver, and from in any wise interfering with the trust estate; that he be required to transfer to March and Hoyt all interest vested in him by the deed; and that March and Hoyt be permitted and authorized by the decree of the court to proceed with the foreclosure, etc.

Knox, Bowie & Dixon, for complainants.
J. J. Willett, B. F. Abbot, and Jas. T. Greene, for respondents.

JONES, District Judge. The case is now submitted on motion for injunction against Romare. There were also argued at the same time the demurrers to the application of March and Hoyt to be substituted as trustees in Romare against the Broken Arrow Coal & Mining Company et al., and also demurrers to the supplemental bill, as well as the motion to strike it from the file; it being the understanding, in order to speed the cause, that the court, in passing upon the motion for injunction, would also indicate its opinion as to the other matters, and outline what decree it would render in term time as to them. The motion for injunction was submitted upon the same matters as those set forth in the note of testimony in the main case. The substance of the evidence has already been stated in the opinion rendered in that case.

There is no rule of law that cestuis que trustent may not remove and appoint trustees, in the exercise of the power given them by the instrument creating the trust, because prior to the exercise of the power the trustee has filed a bill, which is still pending, concerning it, or the court in any other way has undertaken jurisdiction of the trust. The exercise of such a power will be permitted or disallowed at any time as may appear to the court for the best interests of the cestuis que trustent. It is not the law, however, when the power is given in broad terms, without requiring a specification of any cause for its exercise, that the decision of a majority of the donees of the appointing and removing power cannot be questioned by the court, save in cases of fraud, oppression, or bad faith. The controlling question in every case is whether a change promotes the execution of the trust. If the court should be of opinion that the substitution is not for the benefit of the trust, it will not sanction a removal, though made in good faith and without intention to oppress. The only case, perhaps, in which the court would feel impelled to accept without question a decision appointing and removing trustees, would be where the power is lodged in the whole body of cestuis que trustent and is unanimously exercised by them. This would be only allowing all the owners of the trust property to deal with it as they thought best. But where the power is committed to the majority of the cestuis que trustent, and the minority oppose the removal, the court should always inquire not only

whether there was bad faith or oppression, but whether sanctioning the change might be detrimental to the interest of any of the cestuis que trustent. This duty becomes imperative when the majority of the cestuis que trustent remove a trustee who is proceeding in the discharge of a plain duty which the minority have a right to demand at his hands. In this case the minority bondholders, after default, had the unquestioned and clear legal right to demand of the trustee, upon giving him proper indemnity, to proceed to foreclose. He had not a particle of discretion. He would have been derelict in duty if he refrained from acting because a majority of the cestuis que trustent opposed foreclosure. The majority bondholders have no legal or moral cause of complaint against the trustee for so acting. It is not to be presumed, in a matter of this importance, that the trustee acted otherwise than on the advice of counsel, in applying for the appointment of a receiver. Indeed, the fourth article of the trust deed requires the trustee, in event of default, upon the requisition in writing of one-fourth of the bondholders, to proceed to exercise their rights, "either by taking possession of the property under the powers granted in other articles, or by suit or suits in equity or at law in aid of the execution of such powers, or otherwise, as the trustee, being advised by counsel learned in the law, shall deem most effectual." Upon the evidence, which, it is a fair inference from the attitude of the parties, was presented to him by the minority bondholders, he is not to blame for shifting the responsibility for determining whether there should be a receiver from his own shoulders to that of the court.

The case of May v. May, 167 U. S. 320, 17 Sup. Ct. 824, 42 L. Ed. 179, is much relied on to sustain the claim that this court has no right, under the circumstances of this case, to interfere with the change of trustees, or to refuse to sanction it. The language of the supreme court in that case must, of course, be measured and construed with reference to the facts with which it dealt, and the reasons for the conclusion it reached. In that case the defendant filed his bill against his mother, brother, and sisters to obtain instructions from the court as to the execution of the trust created by the will of his testator, and as to the effect of the omission in the will of provision for disposing of the principal of the estate after termination of the trust. It was apparent that active duties, involving large discretion, and requiring harmony and co-operation among the cestuis que trustent, would devolve upon the trustee long after the litigation closed; for, no matter what the decree rendered upon the bill filed by the trustee, May, it was evident that it would not terminate the trust, but would simply provide rules for its future administration by him. Under these circumstances, the lower court, the court of appeals, and the supreme court of the United States all held, on account of the "overbearing disposition" of the trustee, and his dissentions with the other cestuis que trustent, when harmony was essential, that the power of removal of the trustee, which the will gave the other heirs, with the approval of the testator's wife, and under which, by unanimous resolution, they removed the trustee, and appointed another person in his stead, was properly exercised, notwithstanding the pendency of his bill for the construction of the will, and that the court before which that matter

was pending properly sanctioned the removal and appointment under the power given under the will. In other words, the court held that the removal promoted the execution of the trust. In this case the execution of the decree of foreclosure, which, for aught that now appears, is inevitable, will terminate the rights of the parties, and leave the trustee no further duty or discretion in connection with the trust, save the distribution of money realized from the sale, and the exercise of the right to bid in the property in behalf of all the bondholders at a price not exceeding the amount of the bonds, with accrued interest and expenses of sale, if the decree does not take away these powers. This first duty one honest trustee could certainly perform as well as another. As to the other power, the court, in its decree, where the bondholders are at variance, as here, would, of course, provide that such a power should not be exercised, save at the instance of all the bondholders. This would in no wise sacrifice the rights of any of the bondholders in this respect, since, under the terms of the deed of trust, and also under the decree, if it contained proper provisions, the individual bondholder would be entitled to use their bonds, according to their pro rata value, in payment as cash upon any bid upon the property. No harm can come to the trust estate because of any lack of harmony between Romare and the majority bondholders, since there is no way in which his discretion can be exercised to their prejudice in the performance of the duties which will remain to him. The trust will be practically ended when the decree is executed. No further field of administration will be open, as in May's Case, where discordant relations between the trustee and cestuis que trustent might mar or obstruct future administration of the trust. That Romare is a man of character and business experience is not denied, and it is not charged that he is incompetent or unfaithful in the trust. He was the original choice of those who executed the trust, and has continued to discharge its duties for many years, without manifestations of want of confidence or dissent from any of the cestuis que trustent, until the dissentions and differences which have lately arisen among the bondholders as to the management of the trust property. The majority bondholders have no legal right to object to this foreclosure, and the trustee had no discretion but to proceed. It may be the misfortune of the majority that they have minority associates who are unwilling to wait until the property can be developed, and, by insistence upon a plain legal right to have a sale of the property, may entail sacrifice upon their majority associates; but "it is so nominated in the bond," and no court has power to deprive these minority bondholders of this right. What good, then, can come from relieving a trustee who is obeying the plain command of the trust, and transferring the trust and duty to another? Whatever the motive for Romare's removal, the result, if the court sanctions the act, is that a trustee who is strictly performing his duty to the minority bondholders under the trust deed is removed by the majority bondholders. Removed for what? The question, in view of the developments of the case, admits of but one answer. No court mindful of its own dignity and duty can permit litigants thus to dismiss a faithful trustee.

It is urged that the new trustees would perform their duties under

the eye of the court, and, if slothful or unfaithful, the court can compel them to do their duty. So it can. But why take chances of having to prod a lukewarm trustee? There is already a suitable trustee, loyal to the trust, who is performing its duties, which, when the final decree it is his duty to seek is rendered, will practically terminate the trust. It is therefore neither wise nor expedient to call in new trustees, who owe their election to hostile interests, which may constantly beset the trustees not to speed the performance of their duty. A change of trustees would not promote the execution of this trust, and would increase the cost and expense of foreclosure, and perhaps delay it.

A decree will be here entered denying the injunction prayed for, and counsel for Romare may draft and present decrees, to be entered in term, in conformity with this opinion, disposing adversely of the petition and the bill filed by March and Hoyt.

In re FRANKLIN SYNDICATE et al.

(District Court, E. D. New York. May 8, 1900.)

BANKRUPTCY—EXAMINATION—INCRIMINATING EVIDENCE.

Though a bankrupt may, under Bankr. Act 1898, § 7, subd. 9, be required to submit to examination as to what property he has, what disposition he has made of any property which the court is entitled to administer, to what persons he has paid money or delivered property, and where they are, and though such section provides that no testimony given by him shall be offered against him in any criminal proceeding, he will not be required to develop the whereabouts of papers which might be used against him in a criminal proceeding.

See 101 Fed. 402.

Howse, Grossman & Vorhaus and Robert Ammon, for bankrupt.

Belfer & Flash, for petitioning creditors against Franklin Syndicate.

Myers, Goldsmith & Bronner, for petitioning creditors against bankrupt.

Wingate & Cullen, for trustee.

THOMAS, District Judge. The referee has certified that the bankrupt, William F. Miller, has refused to answer certain questions relating to his estate. When he was first summoned to testify, on a former occasion, his trial upon a serious charge, growing out of business connected with his estate, was pending in the court of the state. Whatever the power of this court to compel an answer to the questions propounded to him at that time, there was a certain impropriety in the exercise of such power. His trial was had subsequently, upon one of many indictments against him, a conviction secured, and he is now under sentence. The reasons that existed at the former trial for suspending the examination demanded by the bankruptcy act have measurably passed, and there are certain questions in the record now presented to the court which the bankrupt should answer, and which apparently he may answer without detriment to any proceedings pending against him. The following are the questions which, upon his attempted examination on May 4, 1900, before the referee, the bankrupt

refused to answer, upon the ground that such answers would have a tendency to degrade, disgrace, or to incriminate him:

(1) "Q. What business did you carry on prior to November 23, 1899?" (2) "Q. Is there any information which you desire to give to the trustee in this proceeding which will assist him in the collection of any of the property which belonged to you on the 23d day of November, 1899?" (3) "Q. Do you know of the location or whereabouts of any property which belonged to you on the 23d day of November, 1899, besides a deposit in the Knickerbocker Trust Company, standing to your credit, a deposit with F. A. Torrey, a banker in Nassau street, the balance of the cash on hand at the time you closed your office on the 23d or 24th day of November, the office furniture and office fittings, a balance of $5.61 with Ferdinand B. Hesse, and the proceeds of any drafts, post office orders, express company orders, or checks which may have been received by you or for your benefit after November 23, 1899, which had not already been collected by you and reduced to cash?" (4) "Q. Have you in your custody or under your control, or in the custody or control of any of your agents, servants, attorneys, or persons in your employ, any property which belonged to you upon the 23d day of November, 1899, which was not on the 23d or 24th day of November, 1899, delivered by you to John L. Daly, your assignee?" (5) "Q. Have you in your possession or under your control, or in the possession or under the control of any of your agents, servants, attorneys, or persons in your employ, any property, of any manner, shape, or description, belonging to you on the 23d day of November, 1899, or which belonged to you at any time previous to the adjudication in bankruptcy in this proceeding?" (6) "Q. Mr. Miller, have you any papers, documents, letters, evidence of indebtedness, or memoranda of any kind in your possession or under your control which belonged to you or were in any way concerned for the carrying on of your business at 144 Floyd street, in the borough of Brooklyn?" (7) "Q. Do you know of any debts due to you?" (8) "Q. Have you a cause of action against anybody for an accounting for money had and received for your benefit?" (9) "Q. Does any one hold for your benefit an assignment of any property which you own, had possession or control of, after November 23, 1899?" (10) "Q. Where are the books of account kept by you in your business prior to November, 1899?" (11) "Q. Are those books now in your possession or under your control?" (12) "Q. Are there in existence any books showing your financial condition at any time during the months of November, December, or January of the years 1899 and 1900?" (13) "Q. Are you willing to assist the trustee in this case in any manner, shape, or form in the performance of his duties?"

It is considered that the court has power to compel an answer to certain of these questions, and that such power may be exercised without detriment to the defendant in any criminal proceeding which is now pending or may be instituted against him.

The refusal to answer the first question may be allowed to stand.

So as to the second and thirteenth questions.

The third question is objectionable, as it assumes certain facts, to which his assent is not necessary; but the question asked in the following form should be answered:

"Q. Do you know the location or whereabouts of any property which belonged to you on the 23d day of November, 1899? If so, state it all in detail."

The fourth question should be answered, excluding the assumed fact, that he had delivered certain property to John L. Daly, his assignee.

The fifth question seems unobjectionable in form and should be answered.

The sixth question should not be answered, as it calls upon the witness to testify as to papers, documents, letters, evidence of indebted-

ness, or memoranda in his possession, or under his control, which belonged to him or were in any way concerned in the carrying on of his business at 144 Floyd street, in the borough of Brooklyn. This evidence may be objectionable, as compelling the witness to develop the whereabouts of papers and documents which might be used against him in a criminal proceeding. Although the statute provides that his evidence given in proceedings in bankruptcy should not be used against him, this question calls for a discovery of documents which, when discovered, might be used against him. For that reason the question is not sustained.

There appears to be no reason for the refusal to answer the seventh question. So as to the eighth and ninth questions.

It also appears that the tenth, eleventh, and twelfth questions may well be answered without the objection above stated to the question relating to the discovery of papers, documents, letters, etc., provided the questions be limited to the usual books of account kept in the business, of which the court now has jurisdiction.

It is considered that the bankrupt should discover to this court what property he has, what disposition he has made of any property which the court is entitled to administer, to what persons he has paid money or delivered property, where such persons are, and questions of like nature. Subdivision 9 of section 7 of the bankruptcy act suggests the general nature of an examination to which the bankrupt may be subjected, and provides that no testimony given by him shall be offered in evidence against him in any criminal proceeding. The final clause of subdivision 9, section 7, is a complete protection to the witness, and no reason whatever exists, in view of such protection, for his refusal to answer suitable questions respecting his estate. While it is the purpose of the court to be entirely fair towards persons who are subject to criminal prosecution, the purposes of the bankruptcy act may not be defeated by the refusal to give evidence concerning his transactions, whereby property belonging to his estate may escape distribution to his creditors, and no refinement of argument will be permitted to save the bankrupt from giving evidence that shall tend to that result. It is considered that the examination of the bankrupt should be again taken up and conducted along the lines suggested, and, if there shall be persistent refusal to answer, proper proceedings should be instituted looking to the punishment of the bankrupt for contempt.

In re SHERA.

(District Court, S. D. New York. February 19, 1902.)

BANKRUPTCY—RIGHT OF BANKRUPT TO REFUSE TO ANSWER INCRIMINATING QUESTIONS.

A bankrupt, on his examination, cannot be compelled to answer questions, over his claim of privilege on the ground that the answers would tend to incriminate him, where the situation is such as seems to put him in hazard.

In Bankruptcy. On review of ruling of referee.

Hayes & Hershfield, for trustee.
Myers, Goldsmith & Bronner, for creditor.
McCurdy & Gard, for bankrupt.

ADAMS, District Judge. This matter came before me in January upon a petition to review the ruling of the referee sustaining the claim of the bankrupt of a right to refuse to answer certain questions. At the time of that examination, objections were interposed by counsel for the bankrupt, to the effect that the answers would tend to incriminate the witness. The objections were sustained. I then held that the refusal to answer questions on such ground was a privilege personal to the witness, who might wish to answer, and counsel could not be heard to object to the evidence. Abb. Tr. Ev. 783; 1 Greenl. Ev. § 469d. The matter was then remitted to the referee. Another examination has been had, and the witness therein declined to answer similar questions, upon the same ground, and the referee sustained his claim. The trustee has petitioned for a review of this ruling. The question involved has been answered in this district in favor of the bankrupt by Judge Brown in Re Feldstein, 4 Am. Bankr. R. 321, 103 Fed. 269. But my attention has been called to the cases of In re Franklin Syndicate, 4 Am. Bankr. R. 511, 114 Fed. 205, and Mackel v. Rochester, 4 Am. Bankr. R. 1, 42 C. C. A. 427, 102 Fed. 314, which apparently take a contrary view. In the former, however, I do not think that the decision of Judge Thomas is inconsistent with the view that the bankrupt can avail himself of the privilege when the situation is such as seems to put him in any hazard. I cannot follow Mackel v. Rochester, as it appears to me that it is not in accord with Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, which holds, in substance, that an immunity similar to that which the bankruptcy act purports to afford is not sufficient to protect the witness in his constitutional privilege.

The ruling of the referee is sustained.

THE RICHMOND.

(District Court, E. D. Virginia. February 19, 1902.)

1. COLLISION—STEAM AND SAILING VESSELS—PRESUMPTION OF FAULT.
   Under the navigation rules requiring a steam vessel to keep out of the way of a sailing vessel when there is risk of collision, and requiring the latter to keep her course and speed, where it appears that she did so, a presumption arises that the fault for a collision was that of the steam vessel, and such presumption must be acted upon unless the accident is shown to have been inevitable, or that it was the result of neglect or omission on the part of those navigating the other vessel.
2. SAME—MAINTENANCE OF LIGHTS—EVIDENCE.
   The failure of those in charge of one of two vessels to see or observe the lights of the other prior to collision does not disprove their existence; and cannot be accepted to outweigh the positive testimony of the officers and crew of the other vessel that the lights were properly set, and were seen to be burning up to within five minutes before the collision.
3. SAME—EX PARTE EXPERIMENTS.
   Testimony in regard to experiments to determine the position of a vessel's lights, and whether they could have been seen by the officers

and crew as claimed, when the vessel was in a shattered condition from a collision, or after she had been rebuilt and materially changed, is not entitled to great weight, especially where the experiments were made by the adverse party without notice to the owners or crew, and when they were not present.

4. SAME.

Where it is shown that a vessel was equipped with lamps of an approved style, bought from a reputable dealer, the court will be slow to find that they were inefficient, or that those navigating the vessel failed to light and keep them burning on a dark and stormy night, when they were sailing in a locality where there was a probability of encountering other vessels.

5. SAME.

The claim of a steamer that a collision with a schooner was due to the failure of the latter to carry proper lights is materially weakened by the fact that such omission was not mentioned in the steamer's log, nor in the protest lodged against the schooner on the following day.

6. SAME—STEAMER AND SCHOONER CROSSING.

Evidence considered, and *held* to establish the claim that a collision between a steamer and a schooner in Chesapeake Bay on a stormy night was due solely to the fault of the steamer in failing to maintain an efficient lookout, or to reduce speed after lights were reported two or three miles off the port bow, until the location and course of the vessel carrying such lights could be ascertained, as well as because of improper maneuvers after the schooner was seen when 1,000 feet away, which were in themselves calculated to bring on a collision.

In Admiralty. Libel in rem to recover damages for collision.

This is a libel to recover damages caused by a collision between the steamship Richmond and the Georgie Clark, a three-masted schooner. The collision occurred on the night of January 31, 1899, about three miles E. S. E. of Thimble Light, in Chesapeake Bay, between 9:30 and 9:50 p. m. The steamship was on its outward trip to New York, having left Norfolk about 7 p. m. The schooner was also bound from Norfolk to New York, with a cargo of lumber; but after passing out of the capes had, on account of the threatening condition of the weather, to put about for harbor, and at the time of collision was bound into Hampton Roads for anchorage. The tide was flood. The night was dark and cloudy, with passing rain and snow squalls, but lights could be seen a considerable distance. The wind was about N. N. E., increasing, and the schooner had her three lower sails and three head sails set. She had a crew of seven men, consisting of the captain, mate, four sailors, and a steward. She passed in the capes about 7 p. m., bearing southward, some four miles distant from Cape Henry. Her course was about west, until, in the neighborhood of 9 o'clock, finding that she was getting too far to the southward, she made a short port tack to the N. E., continuing on this tack 15 or 20 minutes, when she was put back on her starboard tack, heading W. by N., and continued on that course until in collision. The schooner was making between five and six miles an hour, and the steamer, on a course E. S. E. from Thimble Light, some 9½ miles an hour. The vessels came together by the bow of the schooner coming in contact with the after part of the midship house of the steamer on her port side, about 70 feet from her stern, doing some injury to the joiner work of the stearing gear to the steamer. The forward portion of the schooner was wrecked, the bow burst open and carried away, and it left in a disabled condition. The charges of fault in the libel are that the steamer failed to keep out of the way of the schooner, slacken her speed, stop or reverse, or to take any other precautions necessary and prescribed to avoid a collision, and that the collision was caused entirely and exclusively by the fault and negligence of the steamer's navigators. The charges of negligence against the schooner are: Unskillfulness on the part of those in charge of her navigation; the failure to have and maintain lawful lights, properly set and burn-

ing; and that the schooner was proceeding at too rapid a rate of speed, and improperly changed her course.

Whitehurst & Hughes, for libelant.
Hughes & Little, for respondent.

WADDILL, District Judge (after stating the facts). The collision in this case being between a sailing vessel and a steamship, reference may be had to the rules of navigation properly applicable, with a view of ascertaining if they have been violated, and by whom. Article 20 of the rules of navigation is as follows: "When a steam vessel and a sail vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sail vessel." Article 21 is as follows: "Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed." Upon its appearing that the sailing vessel in collision kept its course, a presumption at once arises that the accident resulted from the failure of the steamship to keep out of its way, and this presumption should be acted upon, unless the accident is shown to have been inevitable, or that the same was the result of neglect or omission on the part of those navigating such vessel. The Carroll, 8 Wall. 302, 19 L. Ed. 392; The Fannie, 11 Wall. 238, 20 L. Ed. 114; The Scotia, 14 Wall. 170, 20 L. Ed. 822; Squires v. Parker, 42 C. C. A. 51, 101 Fed. 843; Spencer, Mar. Coll. 222, 223. There is no suggestion in this case of any inevitable accident, and the evidence, as viewed by the court, quite clearly establishes the fact that there was no change of course by the vessel at the time of collision, as it also does that the vessel was not proceeding at an undue rate of speed, or that its navigators failed properly to discharge their duty.

The only fault alleged against the schooner seriously contended for is that at the time of the collision its lights were not up and properly set and burning. As to this a great deal of evidence was taken, which, in part, it will be necessary to review. Four officers of the steamship were examined, viz., the master, the first officer, quartermaster, and lookout. Of this number, only two testified as to seeing the vessel and not observing the light, viz., the first officer and the master. The former observed the vessel when about a thousand feet away; the other, the master, did not see it until practically in collision, he having about that time come into the pilot house. Against this evidence we have the positive statement from four of the officers and crew of the vessel that the green light was burning. Clark, the mate, who made special examination, testified that twice within 40 minutes of the vessels' coming together he saw the lights in place, and properly burning, and that by the shock of the collision they were knocked out of their sockets and put out. Lund, the lookout, testified that he was in a position to see the lights, and actually observed them within five minutes of the collision. Watson, one of the mate's men, who was called out to assist in making the port tack, within 40 minutes of the accident, testified to seeing both the port and starboard lights burning; and Bartlett, the master, who was at the wheel, testified that he saw the glimmer of the green light on the jib when

the schooner was on the port tack. The steward, Peterson, testified that he trimmed and put them up in good order, and that Lund, the lookout, reported that they were burning 5 or 10 minutes before the collision.

This positive testimony by those on the schooner, in a position to see the lights, and know of their condition, will not be lightly rejected because other persons, whose duty it was to have seen them, either failed to observe, or happened not to see them. Negative evidence of this character cannot be accepted to outweigh positive evidence. The failure to observe a light cannot be said to disprove its existence. Stitt v. Huidekopers, 17 Wall. 384, 21 L. Ed. 644; The Thingvalla, 1 C. C. A. 87, 48 Fed. 764; The Michigan, 11 C. C. A. 187, 63 Fed. 280; The Alice B. Phillips, 26 C. C. A. 467, 81 Fed. 415; Green v. Compagnia Generale, 42 C. C. A. 580, 102 Fed. 650.

Effort was made to elucidate this important question, of whether or not the lights of the schooner were burning, and, if burning, were sufficient, and could have been seen from the positions from which the several witnesses on the vessel claim to have seen them,—the contention being that as these lights were fastened to an iron standard or stanchion extending from the rail of the vessel, and not in the rigging, they were improperly placed, and could not have been seen, and that the lamps were without proper ventilation and reflectors; and with this end in view, shortly after the collision, while the vessel was in the harbor at Norfolk, certain officers of the steamship company and others went at night upon and examined the vessel, and experimented with the same, from its forecastle deck, in its then shattered condition, and the conclusion was that the lights could not have been seen as testified to by the vessel's master and crew. Subsequently, hoping to refute the testimony as to this experimental examination, the libelant, after the vessel had been repaired, had examinations made of it in the city of Philadelphia, and made experiments also, as far as they could be then had; the vessel having been materially changed in rebuilding.

As to all of this testimony, it may be said, in passing, that it is hearsay in character, purely speculative, and entitled to but little weight; and especially is this true of that secured by the steamship's representative when the vessel was in dock after the collision. No notice was given of the proposed experiments to the other parties in interest or their counsel. They were denied any opportunity to know as to the exact condition of affairs when the experiment was made, and, indeed, what was done and seen. At least notice ought to have been given, and an opportunity afforded those to be affected to be present, before such testimony should be considered. The R. R. Kirkland (D. C.) 48 Fed. 760.

To the experiment made in Philadelphia by the libelant, possibly more weight should be given, if any, as opportunity was afforded the other party to be affected to be present if he desired. But, at best, all such evidence, by reason of the necessarily changed conditions and surroundings existing at the time of the particular occurrence, ought to be received with the greatest caution, if at all. The evidence taken by the libelant as to the character of the lights, and

their position upon the schooner, of persons not in the collision, who were familiar with the schooner prior to the time of the collision, and who testified that the arrangement of the lights on the stanchion instead of in the rigging was preferable, and that such lights could be seen on the schooner from the screen box on the stanchion, is entitled and ought to receive the weight due to evidence of any other persons who knew of the existence of particular facts and testified to them.

The court should be slow to hold that the officers and crew of a vessel were navigating the same without lights, as by so doing they were imperiling, not only the ship and its cargo, but their own lives (The Gate City [D. C.] 90 Fed. 314–317); and, for like reason, the lamps upon the vessel should not be quickly condemned, as it is not probable that the vessel owner would have used an inefficient appliance of this importance to the existence of his property, at least intentionally. The evidence taken in Philadelphia by the libelants is to the effect that the Flick light, used in the test there made, could be seen more than two miles distant on that night, which was more favorable for seeing than the night of the collision; and it is admitted that the light taken from the schooner was a Flick light, of satisfactory size, with corrugated glass of the proper dimensions, and bought from a ship chandler in Philadelphia who had been in the business 30 years. In the case of The Olympia (D. C.) 52 Fed. 991, it was held that one can rely upon an article as being reliable for its purpose when bought from a reputable ship chandler.

A most significant circumstance, bearing upon the vessel's lights, is the fact that, although the failure of the vessel in this regard is made the chief basis of the steamer's defense, the fact that such lights did not exist was not made record of at the time of the collision, either in the steamer's log or the protest made the next day. Both the log and the protest utterly fail to make any reference to such conditions, and it is hard to believe that so important an omission would have been made had the lights not been burning. Nothing could have been more material to the steamer,—nothing would so likely have accounted for the collision, and probably have vindicated the steamer. The Utopia (D. C.) 1 Fed. 892; The Frostburg (D. C.) 25 Fed. 451. The object of keeping the log was to have a record made at the time of the then existing facts. The Newfoundland (D. C.) 89 Fed. 510–515. Congress by act of the 14th of February, 1900, amending section 4290 of the Revised Statutes, has specifically required the facts of collision to be set forth in the log. This significant conduct on the part of the steamer, together with the other facts and circumstances in the case, convince me that the schooner's lights were properly set and burning at the time of the collision.

In two particulars, at least, is the negligence of the steamer established from the evidence, as viewed by the court:

First. The failure to have a proper lookout, or the neglect of the one employed properly to discharge his duty. The steamer's lookout testified that shortly after passing Thimble Light a red light was reported several miles distant on the port bow of the steamer, and, although the hull and spars of a vessel could be seen a half a mile

away, he neither saw the vessel in collision with his ship, nor its lights, until they were within 300 feet of each other, and then not until his attention was called by the screams of persons aboard of the schooner, when, without reporting the schooner, he immediately left his station. Had this lookout been competent, or in the proper discharge of his duty, the schooner could easily have been seen and reported, with or without lights, according to his own statement, in time to avoid the collision. The Ariadne, 13 Wall. 475, 478, 20 L. Ed. 542; The Oregon, 158 U. S. 186, 193, 15 Sup. Ct. 804, 39 L. Ed. 943; The Manhasset (D. C.) 34 Fed. 408; The Samuel Dillaway, 38 C. C. A. 675, 98 Fed. 138; Steamship Co. v. Low (C. C. A.) 112 Fed. 161, 172.

Second. The first officer of the steamer having observed the hull of the schooner in collision 1,000 feet off, and the schooner's masts 300 feet off the steamer's port bow, should have immediately ported his helm, and gone full speed ahead, or have hard ported and reversed. To have slowed down under one bell, and starboarded, was to do the two things most likely to bring about the collision, as, it seems quite demonstrable, it did in this case. To starboard with a green light off of the port bow, or the starboard side of a vessel without lights off of the port bow, was manifestly an improper maneuver, and could be only justified where the collision was so imminent that the coming together of the two vessels would be lightened, possibly, by so doing.

The Richmond, a propeller, would have responded much more readily to its port than its starboard helm, particularly with the then condition of the wind and tide; and had this course been pursued, as clearly contemplated by the rules of navigation (articles 21 and 22), this collision would, in all human probability, have been averted. The Farnley (C. C.) 8 Fed. 629; The Excelsior (D. C.) 102 Fed. 652.

Moreover, it may be said that the steamer, having had reported a red light on its port bow, a distance of two or three miles away, should, under the circumstances, have done more than itself port one point, and proceed at full speed. It was a bad night, and the vessel, while apparently not across its course, was still reported ahead, and the steamer should have slackened her speed until its exact location was ascertained. The fact that the vessels did collide quite disposes of the contention that there was no risk of the collision at that time, as does the circumstance of the steamer's porting strongly indicate that there was apprehension of this collision. A possibility of collision is all that is requisite to charge the steamer, unless it can establish that it was free from fault. The Carroll, 8 Wall. 302, 305, 19 L. Ed. 392; Hoben v. The Westover (D. C.) 2 Fed. 91; Steamship Co. v. Low (C. C. A.) 112 Fed. 161, 166, 171.

In the recent case of The New York, 175 U. S. 187, 207, 20 Sup. Ct. 67, 75, 44 L. Ed. 126, the supreme court said:

"The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn; but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect."

The disappearance of the light itself was a warning to the steamer, at least, sufficient to make it exercise extraordinary diligence, which it seems not to have done. Indeed, although the lookout could have seen the schooner's lights two miles away, and the vessel itself a half mile away, he admits that he saw neither until his attention was attracted by the screams of those on the vessel. This is equivalent to a confession of his own negligence.

A decree may be entered holding the steamer solely responsible for the collision.

THE ALABAMA.

THE CURTIN.

(District Court, E. D. Virginia. February 19, 1902.)

1. COLLISION—EVIDENCE—MAINTENANCE OF LIGHTS.
   The positive testimony of credible witnesses, who were in a position to see, that the lights were set and burning on a vessel at the time of a collision, is entitled to greater weight than the negative testimony of other witnesses that they did not observe such lights.
2. SAME—STEAMER MEETING TUG WITH TOW—DUTY OF CARE.
   The duty rests upon a steamer, having full control of its own movements, to keep out of the way of a tug with a tow, which occupies the position of an incumbered vessel.
3. SAME—STEAMER AND BARGE.
   A steamer, which, on leaving her wharf in the night, saw the lights in the channel ahead, indicating the presence of a tug with other vessels in tow, was bound to proceed with caution, and at a speed which would enable her to keep out of the way and avoid collision, and must be held in fault for a collision, which occurred within four lengths of her pier, with a barge constituting a part of the tow, which had been cast off, and was moving by its own momentum, alone, toward the shore to an anchorage, and carrying proper lights.
4. SAME—NEGLIGENT NAVIGATION BY TUG.
   A tug which was navigating a narrow and much frequented channel on a dark night with four barges in tow, and which elected to take the left-hand side of the channel, which placed it in the track of outgoing steamers, was bound to the exercise of extraordinary care to guard against collision between such steamers and the vessels of its tow, and it failed to exercise such care in sheering one of the barges under its own momentum across the space intervening between it and the shore, which was considerable, where it would be directly in the pathway of any steamer passing on that side, and without power to control its movements, and must be held in fault for a collision between such barge and a meeting steamer.
5. TUG AND TOW—ANCHORAGE OF TOW—CARE REQUIRED OF TUG.
   The law imposes upon a tug the duty of exercising reasonable care and caution and maritime skill in everything relating to the safe anchorage of its tow, and it is liable to any one injured by its negligence in that respect.

In Admiralty. Libel in rem to recover damages for collision.

This is a libel by the owner of the C. C. McIlvaine to recover damages sustained in a collision with the Alabama on the evening of the 16th of January, 1900, in the harbor of Norfolk, Va. On the day in question the McIlvaine, along with three other barges,—the Emma and Bessie, the Schuylkill, and the J. B. Blades,—in the order named, were in tow of the Curtin, an ocean-going tug, en route from the port of Philadelphia to the port of

Norfolk; and about 7:40 p. m., at a point opposite Nottingham & Wrenn's Pier, on the eastern side of the Elizabeth river, and a little below and across from Hospital Point, the barge McIlvaine, being the barge next to the tow, in sheering out from the tow to take anchor in the anchorage ground on the eastern side of the channel, came into collision with the Baltimore Steam Packet Company's steamship the Alabama, then leaving its pier en route on its outward trip to Baltimore, and sustained serious damage. The contest is a triangular one, and many faults are alleged by the parties respectively against each other. The charges of the libelant against the steamer are, briefly: The failure to keep out of the way, the maintenance of an improper and excessive rate of speed, the fact of going to starboard instead of port, the failure to stop and reverse, and the lack of a competent master and lookout. And against the Curtin are: That it should have taken the barge safely to anchorage, without placing it in a dangerous position, and, if so placed, should have promptly extricated it; that it should have given the Alabama two whistles in time to have advised her of the situation of the tug and tow and the danger of her going to starboard, and that it also should have sounded its danger signal. The tug Curtin, denying the several faults alleged against it by the libelant, insists that the collision was solely the fault of the Alabama, and specifically charges against the said steamer that she failed to keep a proper lookout; that she was proceeding too fast; that she did not slow down, and stop and reverse; that she should have proceeded, under the circumstances, to port, instead of attempting to pass to starboard, and have gone more to starboard if intending to pass on that side of the channel; and that she failed to keep away from the barge, which, at the time of the collision, was moving only by its own momentum. The steamer Alabama, protesting its own freedom from fault, insists that the collision was the result of the joint carelessness of the McIlvaine and the Curtin, and that the former negligently allowed the latter to cast her loose in the nighttime, in a crowded harbor, across the track of vessels; that, having the Alabama on her starboard bow, she should have kept out of the way; that she was proceeding at an improper speed, without lawful lights properly set and burning, and was not manned by a competent and skillful crew. And against the Curtin particularly for casting the barge adrift; failing to carry the barge to her anchorage ground and properly anchor the same; placing the barge in a dangerous position and doing nothing to relieve her; the failure to respond to the steamer's signals, but, on the contrary, giving a cross signal; the failure to give danger signals, or otherwise acquaint the steamer with the situation; having an incompetent master; and recklessly and negligently monopolizing and blocking the entire channel at the worst time it could have selected for the purpose.

Edward R. Baird, Jr., for libelant.
Hughes & Little, for the Alabama.
Heath & Heath, for the Curtin.

WADDILL, District Judge (after stating the facts as above). A great mass of evidence was taken, the witnesses being examined in open court, and in many important particulars the contest is sharply drawn, and the conflict between them apparently irreconcilable. Indeed, the condition in this respect frequently arising in collision cases exists in an unusual degree; yet in many particulars it can be accounted for by the peculiar character of the accident, the fact that it occurred in a narrow channel, on a dark night,—all of them matters as to which persons most frequently differ. The witnesses, in the main, from their frankness of statement and manner of testifying, appeared to be giving an accurate account of the occurrences as they saw them, and many of them were disinterested. The matter most in dispute, and upon which the case will largely turn, is the location of the tug and tow

prior to and at the time of the collision, their claim being that they were on the eastern side of the channel of the Elizabeth river, having come up from Lambert's Point on that side, with a view of making the anchorage ground for the McIlvaine; whereas the Alabama claims that they were well to the westward side of the channel, and that, as it sprang out from its pier, a distance of some 1,200 feet or more away, it observed the line of red lights well off of its port bow, and thereupon sounded the usual passing signal, and proceeded on its course down the eastern side of the channel; and that, upon the failure of the Curtin to answer its passing signal, it slowed down, stopped and reversed, and turned on its search light, when it discovered the barge McIlvaine a short distance off of its port bow, moving immediately across the channel; that it put its engines full speed astern, and did everything possible to avert the collision, but without avail, the barge coming into collision with it on its port beam, while it was moving backwards. These two contentions present the peculiar coincidence of the steamer's insisting that the tug and tow were just where they should ordinarily have been in the channel, and the tug and tow maintaining that they were not there, but on the opposite side of the channel, immediately across the pathway of outgoing steamers. After giving to this evidence much consideration, I am convinced that the tug and tow were not on the western side of the channel, but on the eastern side, though possibly not so far over to the east as claimed. The eastern side of the channel is where it should have been to have properly placed at anchor the McIlvaine; and the uncontradicted evidence is that other shipping, including an ocean-going steamship, passed it on the western side of the channel coming up from Lambert's Point. The presence of a three-masted schooner anchored well into the channel off Nottingham & Wrenn's pier doubtless accounts for the tug and tow being further out into the channel than they otherwise would have been. The fact that the Alabama found her course along the usual pathway on the eastern side of the channel blocked by this tug and tow, and that it, too, upon extricating itself from the collision, starboarded, and proceeded down the western side of the channel, further satisfies me of the location of the tug and tow. The position of the Alabama as to the tug and tow being well to the western side of the channel is not borne out by the facts in the case, and, in order for the collision to have happened upon that theory, involves the fact of a barge, of its own momentum, moving across the channel against the tide, and proceeding at such speed as to collide with a steamer moving backwards. The steamer's confusion as to seeing the red lights, thought to be on the western side of the channel, can, doubtless, be accounted for by its springing out from the front of its piers heading itself rather across the channel, to the east, at a greater momentum than it anticipated, and its failure to shape its course down the channel as quickly as it should have done.

Having determined the location of the tug and tow, the question of negligence against the barge, the steamer, and the tug will be taken up, in the order named.

First. The only assignment of negligence against the barge for which it should be held responsible as between itself and the tug, as to which

there is any evidence, is that of the failure to have its lights properly set and burning. Upon that question there is some conflict in the testimony, but it largely preponderates in favor of the barge, and establishes that its lights were properly set and burning. This is shown by positive evidence of persons who were in a position to have seen and did see the lights, and is entitled to greater weight than that of mere negative witnesses, who say they did not observe the lights. The Thingvalla, 1 C. C. A. 87, 48 Fed. 764; The Michigan, 11 C. C. A. 187, 63 Fed. 280; Green v. Compagnia Generale, etc., 42 C. C. A. 580, 102 Fed. 650. Moreover, it should not be readily inferred that this barge, then in command of its owner, would have been guilty of the gross negligence of navigating without its lights, which would have been of such serious consequences to it. The Gate City (D. C.) 90 Fed. 314, 317.

Second. It will not be necessary to pass upon all the various faults alleged against the steamer by the tug and tow, respectively, but rather to deal generally with them. The tug and tow occupied the position of an incumbered vessel, and a duty was imposed upon the steamer, having full control of its own movements, to keep out of the way, and, if need be, to stop and reverse its engines; and this obligation was the more incumbent as the steamer itself, only a few minutes before the collision, was standing lashed to its own pier. The obligation upon it was a positive one, and no risks or hazards should have been taken as to its course; and for any error in this regard it is clearly liable. The Syracuse, 9 Wall. 672, 675, 19 L. Ed. 783; The Mayumba (D. C.) 21 Fed. 476; The B. B. Saunders (C. C.) 25 Fed. 727; The Aller, 20 C. C. A. 79, 73 Fed. 875; The Lucy, 20 C. C. A. 660, 74 Fed. 572; The New York, 175 U. S. 187, 207, 20 Sup. Ct. 67, 44 L. Ed. 126. The steamer's conduct, under the circumstances of this case, according to her own theory, could only be justified, if at all, by the exercise of extreme care on her own part, when it is remembered that she was mistaken in supposing that the pathway was clear down the eastern side of the channel, and that, on the contrary, before she had proceeded four lengths of the steamer from her pier, she became entangled with the tug and tow. By the exercise of proper care on her part, she could easily have seen the blocked condition of the channel just ahead of her before or at the time she left the pier; and upon having observed, as she admits she did, the lights ahead, indicating the presence of a tug and tow, and having signaled the same, she should not have approached it in such close proximity as not to have been able to avoid colliding with it. Her stopping and reversing her engines did not take place in time to avert the collision, as it manifestly would have done with a tug standing still and a barge moving only with its own momentum and against the tide. The cross signals given by the tug, and alleged as one of the faults against it by the steamer, do not appear to have affected the collision, so far as the steamer was concerned; for, while the libelant's evidence and that of the tug tends strongly to show that these signals were given in time to have enabled the steamer to avoid the collision by going to port and passing down the western side of the channel, still the steamer's contention is that the vessels were practically in collision when the signals were given. Upon the assumption

that these signals should have been given earlier, or that danger signals should have been sounded, in either event the steamer would not be excused for leaving its wharf, and moving out into a blocked channel, only a few hundred yards away from it, at such speed as to be unable to control its own movements.

Third. Coming to the faults assigned against the tug Curtin. Being in charge of a tow, it occupied, as before stated, the position of an incumbered vessel, and as to many matters would be relieved of liability. Still this did not relieve it from all responsibility, or from the exercise of that care and caution that a due regard of the rights of others required. It was navigating a narrow and a much frequented channel, on a dark night, at the time that it was known that the outgoing steamers usually passed; and having elected to take the eastern, instead of the western, side of the channel from Lambert's Point up to Norfolk, which placed it in the direct pathway of outgoing vessels, it should have exercised extraordinary care in bringing in a tow of the length and character of the one in question. The Mary McWilliams (D. C.) 47 Fed. 333; The Plover (D. C.) 100 Fed. 883. The law imposed upon the tug the duty to exercise reasonable care and caution and maritime skill in everything relating to the safe anchorage of the barge until the work in hand was accomplished, and for any negligence on its part in this regard it was liable to those sustaining injury thereby. The Syracuse, 12 Wall. 167, 20 L. Ed. 382; The Margaret, 94 U. S. 494, 24 L. Ed. 146; The James Jackson (D. C.) 9 Fed. 614; The Annie Williams (D. C.) 20 Fed. 867. Upon reaching Nottingham & Wrenn's wharf, and finding its pathway in part obstructed by an anchored vessel, which necessarily threw it further to mid-channel, the tug ought not to have attempted at that place, under such circumstances, to have still further obstructed the channel by sheering the barge of its tow in collision out to anchor as it did. This conduct on its part monopolized more of the fairway of the channel than was reasonable, and at least imposed upon it (assuming that room enough, at that particular time, was left for the outgoing shipping to pass to port, and down the western side of the channel, instead of to starboard) the obligation to take every possible precaution, and, if need be, to give danger signals, upon the steamer's approaching it, in order to avoid injury to others.

It follows from what has been said that the barge McIlvaine was free from fault, and that the collision was the result of the joint negligence of the steamship Alabama and the tug Curtin; and a decree may be accordingly so entered, dividing the damages between them, with costs against the tug and steamer.

In re DENNING.

(District Court, D. Massachusetts. March 22, 1902.)

No. 1,951.

1. BANKRUPTCY—PERSONS ENTITLED TO PROVE CLAIMS.
One partner sold out to his copartner, pending the insolvency of the firm, receiving notes in payment for his interest. Two months later the continuing partner filed a voluntary petition in bankruptcy. The assets in his hands were: (a) Proceeds of the sale of the business plant formerly owned by the firm; (b) proceeds of the collection of debts arising from the sale of goods sold to the firm; (c) proceeds of a contingent interest in real estate inherited by the bankrupt; (d) money received by the bankrupt for goods sold by him after the firm was dissolved. Certain joint creditors proved claims against the bankrupt. *Held*, that the retiring partner could not prove his notes, since to permit him to do so would permit him to compete with his own creditors.

2. SAME—PARTNERSHIP—RETIREMENT OF MEMBER—BANKRUPTCY OF CONTINUING PARTNER—DISPOSITION OF ASSETS.
In such case, the property belonging to the firm at the time of the dissolution should be applied by the trustee first to the payment of firm creditors, the separate estate of the bankrupt should be applied first to the payment of his separate debts, and any surplus in either fund should then be applied on the other, as provided in Bankr. Act, § 5f.

3. SAME.
Bankr. Act, § 5b, providing that, if one partner only is adjudged bankrupt, the partnership property shall not be administered in bankruptcy, except by consent of the other partners, has no application to such a case.

In Bankruptcy.

James H. Sisk, pro se.
Richard L. Sisk, for certain partnership creditors.
Sullivan & Dennis, for Brown.

LOWELL, District Judge. The bankrupt was formerly in partnership with one Brown, doing business under the firm name of Brown & Denning, up to August 22, 1899. On that date they were insolvent, and may be supposed to have known their financial condition. On that date Brown sold all his interest in the partnership to the bankrupt, and received from the bankrupt eight promissory notes, of $100 each, without interest, payable, respectively, in two, three, four, five, six, seven, eight, and nine months. On October 25, 1899, the bankrupt filed his voluntary petition. At that time the firm was indebted to the amount of about $1,100. The assets in the bankrupt's hands were: (a) Proceeds of the sale of the business plant formerly owned by the firm and transferred to the bankrupt as above set forth; (b) proceeds of the collection of debts arising from the sale of goods by the firm; (c) proceeds of a contingent interest in real estate inherited by the bankrupt; (d) money received for goods sold by the bankrupt after the partnership was dissolved. Brown proved the promissory notes above stated without objection. The trustee moved to expunge the claim, which motion the referee allowed, and the claim was expunged. Brown now seeks a review.

It is plain that the bankrupt's former partner cannot be allowed to prove in this case. To permit him to do so would permit him to compete with his own creditors. Under a separate commission like this, joint creditors may prove, and, at the least, they may share in the surplus of the separate estate after payment of the separate debts. There are joint creditors in this case who have proved, and, until the claims of the joint creditors are settled, Brown cannot share in the distribution of his former partner's estate. Lowell, Bankr. § 133; Amsinck v. Bean, 22 Wall. 395, 402, 22 L. Ed. 801. There is nothing in section 5g of the act to change this well-established rule.

Certain creditors of the firm seek to prove their claims against the bankrupt individually, and, together with the separate creditors, to share in the estate now in the hands of this court. If they are to be treated as joint creditors only, and if all the assets are to be treated as separate assets, they will be entitled only to come upon the surplus after payment of the separate debts. In re Wilcox (D. C.) 94 Fed. 84. In Re Johnson, Fed. Cas. No. 7,369, 2 Lowell, 129, it was decided that joint creditors could, even after bankruptcy, so assent to the bankrupt's undertaking to pay the firm debts as to make themselves separate creditors of the bankrupt, and thus to share alike with separate creditors in the separate estate. In the same case it was intimated that the conveyance of the firm assets to one partner was a fraudulent preference, which could be set aside in bankruptcy, and that thus the assets, which originally belonged to the firm, could be brought back into the estate. If both these propositions are true, there will be confusion in working them out together. Each joint creditor will have an election (1) to come with the separate creditors upon the separate estate, including that formerly joint, or (2) to have the assets marshaled, and come with the other joint creditors upon the former joint estate. It seems that a former joint creditor, who has elected to become a separate creditor of the bankrupt, assents to the conversion of the joint into separate assets, and is permitted to come upon the converted estate as a separate creditor. On the other hand, a creditor who procures the avoidance of the conversion and a marshaling of the assets comes as a joint creditor upon the property thus returned to the joint estate, and it is hard to see how accounts can be kept which treat the same property as joint property for the payment of some claims and as separate property for the payment of others. See St. Mass. 1865, c. 113; Bucklin v. Bucklin, 97 Mass. 256.

There are considerable difficulties in dealing with joint estate under a separate commission. See In re Wilcox (D. C.) 94 Fed. 84. As was there pointed out, courts of bankruptcy at one time permitted the creditors of the bankrupt, whether joint or separate, to come upon all the estate in the assignee's hands, both joint and separate, and share in it alike, unless application was made for a separation of accounts. This application had originally to be made, not to the court of bankruptcy, but to a court of equity. Some courts of bankruptcy in this country have held that the distribution of joint estate among joint creditors, and of separate estate among separate creditors, is confined to cases where the commission is joint. See 94 Fed. 105. The con-

trary was held by this court in Re Wilcox, and the principle was treated as of general application, at least under the provisions of this bankrupt act. The court has, therefore, to consider if the assets in the bankrupt's hands which came from the firm are to be treated as converted by the transaction of August 22d, or if the conversion was avoided by the adjudication October 25th.

It is somewhat difficult to construe the conversion as a preference within the terms of section 60 of the act. Under section 60 only that is a preference which enables a creditor to obtain a greater percentage of his debts than other creditors of the same class. If creditors are thus classified exclusively with regard to the priorities established by section 64, then the conversion of joint into separate estate is a preference; but it is at least doubtful if joint and separate creditors are "creditors of the same class." If they are not, then the conversion does not enable any creditor to obtain a greater percentage of his debt than any other creditor of the same class. The conversion enables creditors of the separate class to be paid in full, while depriving creditors of the joint class of any payment whatsoever. Even in England, however, the rule in Ex parte Ruffin, 6 Ves. 119, is subject to an exception where, as here, partnership and partners were insolvent at the time of the conversion. Lindl. Partn. (2d. Ed.) *338. As to the American rule, see Lowell, Bankr. § 139. Moreover, section 5g of the bankrupt act was intended, I believe, to clear up the whole matter, and to permit the court to deal with conversions of this kind so as not only to prevent preference in the technical meaning of that word, but also so as to "secure the equitable distribution of the property of the several estates." Lowell, Bankr. § 468; In re Gillette (D. C.) 104 Fed. 769; In re Shapiro (D. C.) 106 Fed. 495. That it is highly inequitable in this case to permit what was joint estate before the dissolution of the partnership to be treated as separate estate in the distribution of the bankrupt's effects is plain. To permit the joint creditors to come, alike with the separate creditors, upon the whole estate, even if admissible, seems to me to cut the knot, rather than to untie it. The trustee should be directed to keep separate accounts, the property belonging to the firm at the time of the dissolution of the partnership on August 22d should be applied first to the payment of the joint debts, and the separate estate of the bankrupt should be applied first to the payment of the separate debts. If there is any surplus in either fund, that is to be distributed as provided in section 5f. It is true that section 5h provides that, if one partner only is adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the other partners; but that provision has plainly no application to the case at bar.

The case is remanded to the referee, with instructions to proceed in accordance with this opinion.

In re WELLS.

(District Court, W. D. Missouri, C. D. February 24, 1902.)

1. BANKRUPTCY—JURISDICTION OF COURT OF BANKRUPTCY—PROPERTY CLAIMED BY THIRD PERSONS.

The filing of a petition in involuntary bankruptcy does not of itself vest the court of bankruptcy with jurisdiction over all property then in the possession of the bankrupt, whether owned by him or not, to the exclusion of the jurisdiction of a state court to try the title to such property.

2. SAME—ENJOINING SUIT IN STATE COURT—PRIORITY OF JURISDICTION.

On the day following the filing of a petition in involuntary bankruptcy against a debtor, and before any action had been taken by the court, a corporation commenced an action in replevin in a state court to recover property of which it claimed to be the owner, but which was in the possession of the bankrupt, and such property was taken under the writ of replevin. Subsequently the court of bankruptcy appointed a receiver, made an adjudication, and appointed a trustee. *Held*, that it did not acquire jurisdiction over the property which had been taken on the writ of replevin, and which was never in its possession, and was not authorized to enjoin the further prosecution of the action in the state court, and compel the plaintiff therein to submit its claims to its own jurisdiction.

In Bankruptcy. On bill by the trustee for an injunction to restrain further proceedings in an action in a state court.

Willard P. Hall, for trustees.

James S. Botsford and Sangree & Lamm, for McFarland Carriage Company.

McPHERSON, District Judge. The petition by creditors was filed in this court on the 8th day of November, 1900, against Charles B. Wells, in involuntary bankruptcy proceedings. An injunction, warrant, or process was not asked for. Wells was adjudicated a bankrupt on the 26th day of November, 1900, on the confession of his, filed November 8, 1900, that he had committed the act of bankruptcy charged. November 10, 1900, a receiver was appointed by the referee. On the same day (November 8, 1900) that the proceedings in bankruptcy were instituted, the McFarland Carriage Company prepared a petition in replevin against Wells to recover certain personal property in his possession, but which, as alleged, belonged to the carriage company. The petition in replevin was filed in the circuit court of Pettis county on the following day (November 9, 1900), and on that day the writ of replevin was issued, and on that day served, and on that day the property in question was reduced to the physical possession of the state court. To restate the case, after the petition in bankruptcy was filed, but before the receiver was appointed, and before the adjudication of bankruptcy, the state court took possession of the property now in controversy. The trustee, by direction of the referee, appeared in the state court, and asked leave (which was granted) to defend against the action in replevin. He filed his answer therein a year or more ago. The trustee now files in this court his bill in equity, asking that the carriage company, by writ of injunction, be enjoined from the further prosecution of the replevin action in the state court, and that the carriage company be commanded to deliver possession of the property

taken under the writ of replevin, over to the trustee, and, if the property cannot be delivered, that the carriage company be required to account to the trustee for the value thereof. The question, therefore, is, does the filing in this court of a petitioner in involuntary bankruptcy, of itself, and before any order is made by this court, give this court jurisdiction of all the property then in the possession of the bankrupt, whether by him owned or not? And if the bankrupt then has possession of the property, but not owned by him, or the question of ownership is disputed, must the claimant have the question of ownership adjudicated by this court, and to the exclusion of the state court, which has taken possession of the property for adjudication?

All agree that the court, state or federal, which first takes possession of the property, retains the possession and the jurisdiction. This is elementary, and cases need not be cited to emphasize the proposition. But the trustee, by counsel, argues that the "possession" does not mean physical possession. This court, by any of its officers, never has had physical possession of the property. And the decision of this question requires a construction of the bankrupt statute of 1898. Counsel for the trustee insists that the mere filing of the petition in involuntary bankruptcy is notice to the world, and no other court must interfere with any property then in the possession of the bankrupt, and that any subsequent interference by a state court is avoided and nullified by the subsequent adjudication of bankruptcy of the debtor. I decline to so hold, and for reasons which seem to me conclusive. Conflicts between courts over the same property should at all times be avoided, if possible, because at times such conflicts are unseemly. The mistake is constantly being repeated, and sometimes by lawyers, by asserting that the United States courts are greater and more commanding than the state courts. I cannot agree to this. The state courts are courts of general jurisdiction, while a federal court is one of limited jurisdiction. Of course, when a federal court once acquires jurisdiction, then such jurisdiction becomes complete. And it is true that on some questions the federal courts have exclusive jurisdiction,—such as in admiralty and other cases. Under some of the old bankruptcy statutes such has been the case. But it is not so under the act of 1898. But little is gained by reviewing the decisions of the different state supreme courts or of the federal trial courts. Such decisions are not binding on this court, and are in conflict, and cannot be reconciled. And no great headway is made by reviewing the dicta of the writers of opinions of the cases in the supreme court. But light has been given us by six cases decided by the supreme court: Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1,000, 44 L. Ed. 1175. That case was a thoroughly considered one. The object sought in that case was, in one respect, just the same as in the case at bar, viz., the trustee wanted to reduce to physical possession property which was not in his hands, but to which, as he alleged, he was entitled. And the supreme court held that the trustee must litigate the matter in a state court; which state court would have exclusive jurisdiction unless the adversary to the trustee would consent to come into the federal court. The language of the opinion in that case has been criticised, but the holding of the court in that case stands. Mitchell v. McClure, 178 U. S. 539, 20

Sup. Ct. 1000, 44 L. Ed. 1182; Hicks v. Knost, 178 U. S. 541, 20 Sup. Ct. 1006, 44 L. Ed. 1183. These two cases follow the Bardes decision. In White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183, the supreme court held that property in the possession of the bankrupt when he was adjudicated a bankrupt, and subsequently seized by replevin proceedings in a state court, could be recovered by a proceeding in the federal court. Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814, shows this state of facts: The debtor made an assignment for the benefit of creditors. Then proceedings in bankruptcy were brought. After the filing of the petition in bankruptcy, the assignee in the state insolvent law proceedings sold some of the debtor's property. Subsequently, the adjudication in bankruptcy. Still later, proceedings were instituted in the federal court to recover the property thus sold. And the purchaser appeared in the federal court, and asserted his claim to the property, and it was held that the property belonged to the estate in bankruptcy. It will be observed that the purchaser surrendered himself, without protest, to the jurisdiction of the federal court. That this is what gave the federal court jurisdiction is apparent from the case, and is specifically stated in a paragraph on page 197, 181 U. S., and page 560, 21 Sup. Ct., 25 L. Ed. 814. Of course, the federal court in such a case has jurisdiction, and would have in the case at bar if the carriage company would consent. But it protests. Mueller v. Nugent, 22 Sup. Ct. 269, 46 L. Ed. ——, was a case where the agent of the bankrupt had the property. He sold the property as the agent of the bankrupt, and did not hold it adversely to the bankrupt. And what the supreme court held was that where property passed into the hands of a party as agent of the debtor, even before the petition in bankruptcy was filed, the federal district court could, by orders and contempt proceedings, coerce the surrender of such property to the trustee in bankruptcy. And this is emphasized by the record, wherein it is shown that after the case had been tried, and was about being decided, the claimant wanted to change his pleadings, and allege that, instead of holding the property as agent of the debtor, he held it adversely, and this was denied. And I have no doubt but that it was denied because, if he were an agent of the debtor, the court had jurisdiction, but if he held it adversely the court did not have jurisdiction, although this is my notion only. The foregoing is what has been held by the supreme court. And all of these holdings are consistent one with another, and inconsistent, in my judgment, with the contentions of the trustee in the case at bar.

But as an independent question, without these holdings of the supreme court, I would regard it my duty to deny the injunction herein. The act of 1867 carried with it many evils, real or supposed. One of such evils was its oppressive and expensive features. The estates were eaten up by a most vicious fee system. The litigation was all, or practically all, in the federal courts, generally sitting at a great distance from the debtor, the claimants, and the witnesses. It was the purpose of the present statute to correct this, and limit the fees and expenses, and have the greater part of the litigation where the parties resided. Under the former statute, the title to all property passed upon the mere filing of the petition. The judiciary committee of the house,

in reporting the bill which became the present statute, called attention to this evil, and said that it was corrected by passing the title as of the date of adjudication. And such is the language of the statute. And if this is not so, see what we have: A petition is filed. The debtor can, and often does, deny the commission of the alleged act of bankruptcy. He can demand a trial by jury, and perhaps never be adjudicated a bankrupt. This takes months. The petitioning creditors can obtain an injunction and keep the property intact. But in this case the creditors kept quiet and avoided such expense and liability. Now in the meantime can it be possible that nothing can be done by the debtor or by any other court?

The writ of injunction is denied.

MARVIN v. UNITED STATES.

(District Court, D. Connecticut. March 17, 1902.)

1. COSTS—FEE BILL—COURT RECORDS—EXPENSE OF CARTAGE.
   Expenses paid for cartage of court dockets, files, and minute books cannot be allowed to the clerk, but the item should be presented to the attorney general by the marshal for allowance by him, under the head of "Miscellaneous Expenses," in the department of justice.

2. SAME—CHARGE FOR COPY OF INDICTMENT.
   A charge for a copy of an indictment furnished by the clerk to accused at his request, but not shown to have been furnished to a United States marshal, or under order of the court, cannot be allowed.

3. SAME—DOCKET AND FINAL RECORD FEE.
   Where an accused was indicted in a federal court in Texas, and was apprehended in Connecticut, and brought before the clerk as United States commissioner, but the question of his removal was referred to the district judge, who admitted accused to bail, and thereafter ordered his removal, the clerk was entitled to charge docket, final record, and transcript fees.

4. SAME—COPY FEES.
   A clerk of a federal court is entitled to charge in his fee bill in a criminal case for copies of papers furnished to United States attorneys at their request, but he cannot charge for copies of an order excusing jurors, and for a copy of estimated costs furnished to a collector of internal revenue.

5. SAME—COPIES OF SUBPŒNAS—WARRANTS OF ARREST—COMPLAINTS.
   Since proceedings in criminal cases before United States commissioners are required to conform to the state practice, and in Connecticut the clerk of the state court is entitled to charge for copies of subpœnas, warrants of arrest, and complaints, a United States commissioner is entitled to charge for such items in his fee bill.

6. SAME—CHARGE FOR FURNISHING LIST OF WITNESSES.
   A charge for furnishing a list of witnesses cannot be allowed a United States commissioner, the requirement being fulfilled by sending a copy of the subpœna with the officer's return.

7. SAME—COPY OF MITTIMUS.
   Where the record of the proceedings in a criminal case shows that a mittimus was issued, a copy was unnecessary, and the United States commissioner was not entitled to charge therefor.

8. SAME—COPIES OF RECOGNIZANCES.
   Since Rev. St. § 1014, requires that the original recognizances in criminal cases be sent up, a commissioner is not entitled to charge in his fee bill for copies thereof.

9. SAME—COPY OF MITTIMUS.
A clerk of a federal court is entitled to charge for a certified copy of a mittimus left with a jailer.

10. SAME—UNEXPLAINED CHARGES.
Where items of a clerk's fee bill are suspended by the department "for explanation," the court will not interfere to enforce allowance thereof until final determination by the department.

11. SAME—CERTIFICATES.
Since the clerk is required to make duplicate copies of orders to pay jurors, which he is required to keep in his office for public inspection, and such duplicates should be authenticated by the clerk's certificate, the clerk is entitled to charge for such certificates in his fee bill.

12. SAME—COPIES OF INTERROGATORIES.
A clerk is not entitled to charge in his fee bill for making copies of interrogatories in depositions in a criminal case.

13. SAME—FILING DEPOSITIONS AND EXHIBITS—CONTINUANCES.
A clerk is entitled to charge for filing and marking depositions and exhibits in a criminal case and for continuances, and this though the date of each term at which such continuances were taken was not stated.

14. SAME—ITEMIZED STATEMENT.
The clerk is not required to furnish an itemized statement of charges for entering in his minute book a memorandum as to court business transacted, and the hour of adjournment of court, as a condition to his right to the allowance of his fees for such entries.

15. SAME—STATUTES—PRESENTATION OF CLAIM BEFORE SUIT.
Acts June 27 and July 1, 1898 (2 Supp. Rev. St. pp. 813, 880), providing that no suit can be maintained by any United States officer to recover fees unless an account therefor has been presented for allowance and acted on in the auditing department, having no retroactive force, a clerk was not precluded from recovering fees in a suit begun before the passage of the act by reason of the fact that through inadvertence, or by reason of a custom to postpone such charges until termination of the cause, some of the charges included in the action had not been presented.

E. E. Marvin, in pro. per.
F. H. Parker, U. S. Atty.

TOWNSEND, District Judge. The first item is for cash paid for cartage of dockets, files, and minute books to and from New Haven; amount, $1.60. This charge was disallowed by the department on the ground that the marshal has the custody of court files, and should move them, if necessary. It seems clear that this is a proper expense, but I do not find any provision for its payment to a clerk. This item should have been presented to the attorney general by the marshal for allowance by him, under the head of "Miscellaneous Expenses," in the department of justice. The first item is disallowed. See Instructions to U. S. Marshals, Attorneys, Clerks, and Commissioners, 1899, p. 89 (instruction 562).

Item 6. The first charge is for a copy of indictment furnished by the plaintiff to an accused person at his request, and claimed to be payable under the rule that copies furnished to United States marshals in the scope of their duties, or under the order of the court, are chargeable. It does not appear from the statement that the copy was furnished to a United States marshal, or under an order of the court. The first charge is therefore disallowed. U. S. v. Van Duzee, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. Ed. 399. The second charge

is $1 for docket fee; final record, $3.15; and transcript of proceedings before plaintiff as United States commissioner, $3.45,—made in the case of United States v. Teams. This item does not seem to come within the cases cited. Teams came into this district, and while here was indicted in the United States district court at Paris, Tex., for murder. A copy of the warrant was brought here, and accused was brought before plaintiff and admitted his identity. He stated that he purposed to go to Texas and stand trial, but did not wish to be sent there long prior to the date of trial. The matter was brought before Judge Shipman, in this district, who refused to remove accused at that time, whereupon he was admitted to bail, and the hearing was adjourned from time to time until Judge Shipman issued a removal warrant, and admitted accused to bail on the removal warrant, himself, as judge of the district court. It is claimed the admission to bail, as the act of the judge of the court, required a docket and a record of the case to be made in the court. This charge is allowed. The third charge, $10.60, includes copies of papers furnished to United States attorneys at their request in criminal cases, which copies, presumably, were necessary to enable them to prepare their cases for trial. These charges are allowed. The fourth charges, of 75 cents for certified copies of order excusing jurors, and 20 cents for copy of estimated costs furnished to a collector of internal revenue, are disallowed, as there appears to be no statutory authority therefor.

That part of item 7 which is contested by the government is for a total amount of $34. This includes charges for copies of subpœnas, warrants, complaints, mittimuses, recognizances, and witnesses. The statutes and authorities hold that proceedings before a commissioner should conform to the state practice. Gen. St. Conn. § 697; U. S. v. Barber, 140 U. S. 164, 11 Sup. Ct. 749, 35 L. Ed. 396; U. S. v. Ewing, 140 U. S. 142, 11 Sup. Ct. 743, 35 L. Ed. 388; Marvin v. U. S. (C. C.) 44 Fed. 405, 410, 411; U. S. v. Dundy, 22 C. C. A. 219, 76 Fed. 355. In this state the charges for copies of subpœnas, warrants of arrest, and complaints are proper ones, and are therefore allowed. The charges for list of witnesses are disallowed, as the requirement is fulfilled by sending copy of subpœna with the officer's return. As to the mittimus, it appears from the record of proceedings that one was issued, and therefore a copy was unnecessary. As to recognizances of witnesses, Rev. St. § 1014, requires that the original recognizances should be sent up. The charges for copies of mittimus and recognizances are therefore disallowed. U. S. v. Barber, 140 U. S. 167, 11 Sup. Ct. 749, 35 L. Ed. 396.

Item 8. Charge for certified copy of mittimus left with jailer is allowed on the authority of Van Duzee v. U. S. (D. C.) 48 Fed. 643, 651 (item 16); Erwin v. U. S. (D. C.) 37 Fed. 470, 487, 2 L. R. A. 229 (item 15).

As to item 10, for $2, the comptroller's report (152,913) states that this charge "is suspended" for further explanation. By the auditor's report (page 9, item 18), it appears that this item has never been explained. "If such claims are presented to the department for allowance, and this department, in the exercise of its discretion, suspends

action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken. So long as the claim is suspended and awaiting final determination in the department, the court should not be called on to interfere." U. S. v. Fletcher, 147 U. S. 664, 667, 13 Sup. Ct. 434, 37 L. Ed. 322.

Item 11 is a charge of $9.45 for certificates of substance of orders to pay jurors. The statute requires such vouchers and accounts to be made in duplicate; that the clerk shall forward the originals to the proper accounting officers, and "retain in his office the duplicates, where they shall be open to public inspection at all times." If the department had not required a duplicate copy, or that such duplicate copy should be authenticated, the clerk would not be entitled to these fees. U. S. v. Van Duzee, 140 U. S. 169, 174, 11 Sup. Ct. 758, 35 L. Ed. 399; Jones v. U. S. (D. C.) 39 Fed. 410, 412. But as the copy required must be a duplicate, and must be one appropriate for public inspection, it should be authenticated at least by the certificate of the clerk. This item is allowed.

Item 13, for filing interrogatories and cross interrogatories attached to a commission to take testimony in United States v. Salt; making copies thereof for the use of the court in hearing on allowance of same, 60 cents; for filing and marking depositions and exhibits, $1.50; total, $2.10. The charges for copies of interrogatories, 60 cents, are disallowed on the ground that there is no provision therefor in the fee bill. The charges for depositions and exhibits, $1.50, are allowed. Goodrich v. U. S. (C. C.) 35 Fed. 193; U. S. v. Van Duzee, 140 U. S. 169, 11 Sup. Ct. 758, 35 L. Ed. 399.

Item 16. Charges for continuances, 90 cents, are allowed. Rev. St. § 828; U. S. v. Kurtz, 164 U. S. 49, 17 Sup. Ct. 15, 41 L. Ed. 346. No necessity appears for stating the date of each term.

Item 17. Charges under this item amount to $6, and are for entering in the minute book a memorandum as to court business transacted and the hour of adjournment. This charge was suspended for an itemized statement of same. It does not appear that any such itemized statement is required, and the charge is allowed. Erwin v. U. S. (D. C.) 37 Fed. 470, 2 L. R. A. 229.

The charges in items 18, 19, and 20 are for charges correct in amount, and such as are allowed in the ordinary quarterly accounts of clerks. Some of the charges were omitted from the plaintiff's accounts through inadvertence, and others because of his custom to postpone such charges until the termination of the cause. They have, however, been presented in a supplemental account, and approved by the court. For this reason these items have not been presented to or passed upon by the auditing department. In accordance with the provisions of acts of June 27 and July 1, 1898 (2 Supp. Rev. St. pp. 813, 880), no suit can be maintained by a United States officer to recover fees unless an account therefor has been presented for allowance and acted upon in the auditing department. This suit, however, was commenced prior to the passage of said statute. The statutes are not retroactive, and therefore do not affect plaintiff's right to recover. These charges are allowed.

In re DRAKE.

(District Court, D. South Carolina. March 24, 1902.)

INVOLUNTARY BANKRUPTCY—PERSONS ENGAGED CHIEFLY IN FARMING.

On an issue whether defendant was "engaged chiefly in farming," within Bankr. Act, § 4, excepting such persons from proceedings in involuntary bankruptcy, it was shown that the stationery used by him in ordering merchandise had the words "Merchant and Planter" at its top, and a traveling salesman testified that in outward appearance, etc., defendant's place of business did not differ from an ordinary country store. The bankrupt showed that he lived about 10 miles from town; that he had several large plantations under cultivation; that about one third of the land was worked by hired labor, another third on shares, and the remaining third let for a stipulated rental, defendant reserving the general control; that he bought all the fertilizers and provided the plantation supplies, and for that purpose kept what he called a "little commissary," selling a few goods to outside parties. It appeared that he and his brother had been engaged in a mercantile business on the same premises some time before, which ended in failure, etc. In explanation of the printed letter heads, defendant said he thought they "looked nice." A bank president testified that he loaned defendant about $5,000 per year for his farming business and nothing for his mercantile business, and that he regarded him as engaged chiefly in farming. Merchants testified to selling him goods for family use. His neighbors testified that they regarded him as engaged chiefly in farming, etc. *Held*, that defendant was not subject to involuntary bankruptcy.

In Bankruptcy.

Willcox & Willcox, for petitioners.
Knox Livingston, for respondent.

BRAWLEY, District Judge. The only question in this case is whether J. N. Drake is a person "engaged chiefly in farming," which the answer sets up as a defense against the petition in involuntary bankruptcy, alleging the making of a general assignment that is not denied. On the part of petitioners requisite in number and amount of claims it is proved that the stationery used in ordering merchandise had the words, "J. N. Drake, Merchant and Planter," printed and stamped at the top of the page; and a traveling salesman for one of the largest creditors testifies that he visited the premises where the mercantile business was conducted, and that in all outward appearance and in the character of the goods therein it did not differ from what is ordinarily known as a country store; that the building was filled with counters and shelves and an iron safe, and therein differed from the class of buildings known in the country as "commissaries," wherein, according to the custom proved, the larger planters keep the supplies for their own plantations. On the part of the alleged bankrupt it is proved that he lived about 10 miles from Bennettsville, in the county of Marlboro; that in the year 1891 he had under cultivation Argyle plantation, containing 350 acres, the Covington place, containing 225 acres, and the Lane tract, containing 85 acres, the title to all of which was in his name, and a tract of 450 acres, the title to which was in his children; that his expectation that year was to raise 600 bales of cotton upon these lands, but, owing to the bad season, the lands produced only about 300 bales, and the testimony

makes it clear that a like disaster attended all the farming operations in that section of the state during that year. J. N. Drake testifies: That he and his brother conducted a mercantile business about 18 years ago upon the premises described, which ended in failure. That thereafter he, in partnership with a brother, was in a mercantile business at a point about two miles distant, which firm was dissolved in the year 1899; and that during the years 1900 and 1901 he was engaged chiefly in farming, and was not engaged in any mercantile business, except in connection with his farming operations, which were conducted substantially as follows: About one-third of the land was cultivated with hired labor, at stipulated wages. About one-third of it was farmed upon shares of the crop. In some cases he furnished all of the commercial fertilizers, and fed the stock, giving to the laborers one-third of the crop. In some cases, where the laborers were to furnish one-half of the fertilizers and the stock, they received one-half the crop. About one-third of the land was let for a stipulated rental; but by contract he had the general control, direction, and management of all the lands cultivated, as well of that for which he was to receive a stipulated rental as of that wherein he employed the laborers at fixed wages. He bought all of the fertilizers for all of the lands, and provided the plantation supplies for all of the laborers and tenants, and for this purpose kept what he calls a "little commissary"; these supplies being kept at the place and in the storehouse where he and his brothers, as already described, had formerly carried on a country store. He says that this was for the convenience and benefit of his farming interests, and for supplying his own hands and tenants, and that, although he sold a few goods to others for cash, whenever parties called for them, he did not advertise or otherwise solicit business; that all of the fertilizers bought were used upon his farm, except a small portion, which he let his brother have; and that the groceries and other goods were supplied to the laborers and hands employed upon his farms, it being the custom of the country, and necessary to the conduct of farming operations upon any large scale, for the landowner to keep on hand and supply the laborers with such groceries and other articles of merchandise as were required. In explanation of the printed letter heads, he said he thought it "looked nice." The president of the bank at Bennettsville with which Drake did business testifies that for several years he had loaned him about $5,000 per annum for the conduct of his farming operations, taking liens on his crops; that he did not lend him any money for conducting any mercantile business; that he regarded him as chiefly engaged in farming, and the other business was an appendage to his farming, the store which he designated as a "commissary" being for the purpose of supplying the persons employed on his farms. Merchants at Bennettsville testify to selling him general merchandise for his family use. His neighbors all testify that they regarded him as chiefly engaged in farming, and that the store described was kept for the purpose of supplying his hands. All of the witnesses concur in saying that, by the custom of the country, a store or "commissary," as they call it, was kept by all farmers or planters for the purpose of furnishing supplies to their laborers whenever the farming

operations required the employment of any considerable amount of labor; that this practice had grown up out of the necessities of their situation, and enabled them the better to control the labor, and to prevent their men from going off to the neighboring towns to secure the supplies necessary to the plantation; the greater the distance from the towns, the greater being the necessity for such stores. The contention of the petitioners is that, as to so much of the land as was not cultivated by Drake personally, he could not be said to be engaged in farming; that his relation to it was simply that of landlord, and that his tenants were the farmers. The testimony of Drake, which has not been contradicted, is that he exercised supervision, control, and management of all the labor employed upon all of his lands.

The supreme court of this state, in Carpenter v. Strickland, 20 S. C. 1, held that a person employed to cultivate the land of another, and who received for his services one-half of the crop produced, was a laborer, and, under the statute, could not give a lien upon the crop. It is suggested, too, that there is a distinction between a "planter" such as Drake describes himself in his letter heads and a "farmer," and that the word "farming" in the statute should be given a restricted meaning, and applies only to those actually working on the land. The precise words of the act are (section 4): "Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, * * * may be adjudged an involuntary bankrupt," etc. 30 Stat. 547. There was a well-marked distinction in South Carolina anterior to the war between the states between a planter and a farmer, but the distinction has disappeared with the social and economic conditions which produced it, and for the purposes of this case it would be as idle to discuss it as the social conditions in Judea described by St. Matthew when those bidden to the marriage of the king's son "made light of it, and went their ways; one to his farm, another to his merchandise." Nor will it profit to trace historically the meaning of the word "farming." In its purely agricultural sense, its use is comparatively modern. Within the purview of this statute it is understood to mean the business of cultivating land, or employing it for the purposes of husbandry; and a farm is a tract devoted to cultivation under a single control, whether it be large or small, isolated, or made up of many parcels. For a long time after the words began to be used in an agricultural sense, they were applied to lands held on lease, and "demise, lease, and to farm let" are still the operative words of a lease, but they are, in modern use, applied without respect to nature of tenure. Robinson Crusoe says, "I farmed upon my own land," so it appears that the words have been used in their present sense for nearly 200 years. Under the proofs in this case the defendant had the direction and control of the farming operations upon all of the land described, and was "engaged in farming," and I am of opinion that these words cannot be given the restricted meaning which would take out of the protection of the statute only those engaged in actual labor upon the farm. "Wage-earners" are excepted, and, if it was intended to except only the agricultural laborer, the words "tiller of the soil," or some other

apt expression, would have been employed. When the bankrupt act excepts from its operation persons "engaged chiefly in farming or the tillage of the soil," due effect must be given to the words. The act defines "wage-earner" as an "individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year," and, if the intent was to limit the protection of persons engaged in agricultural pursuits to those only who were farming upon a small scale, it could easily have been done. It may be difficult to find a good reason why this defendant should be protected from the consequences of an act which, in every other class, would entail adjudication in bankruptcy; but it is not for the courts to vindicate the wisdom of laws which it is their duty to administer. If he is "engaged chiefly in farming," he cannot be adjudicated a bankrupt in an involuntary proceeding, and the test must be whether his chief occupation—the pursuit from which he expects to derive his support and profit—is farming or some other. The testimony leaves little room for question on that point. Although his purchases of merchandise were large, amounting to fifteen or twenty thousand dollars, a large part of this was for commercial fertilizers used upon the land. The remainder, he says, was sold to his laborers, etc., at a profit, which he says was small, owing to the competition of neighboring stores. His time was mainly devoted to the management and supervision of the farming operations, while the store was in charge of his nephew, a youth of 17 or 18 years. It might require a nice calculation to determine whether the profits from his farming were greater than the profits on the merchandise, but there is nothing in the testimony which would lead to any correct conclusion on that point. It appears that, owing to the disastrous season, there were no profits from any source, and that nearly $5,000 of advances to persons engaged on the farms remains unpaid. That he regarded his mercantile business as an incident to his farming operations; that he made no attempt to extend it, and devoted his time and energies to his farms, and looked to them mainly for his profits,—seems to be clear. If so, it would follow that he is a "person engaged chiefly in farming," and the petition must, therefore, be dismissed.

Inasmuch as the petitioners were doubtless misled as to the nature of the defendant's business by the letter heads which he used, it is considered that he is not entitled to recover costs from them.

DICKINSON et al. v. CONSOLIDATED TRACTION CO. et al.

(Circuit Court, D. New Jersey. February 13, 1902.)

1. CORPORATIONS—SUIT BY STOCKHOLDER—ANNULMENT OF EXECUTED CONTRACTS.

Where the management of a number of street railroad lines was consolidated in a single company by means of leases executed by the several companies owning the same, with the approval of a majority of their stockholders, and the lessee has gone into possession and is operating such lines, and has issued and sold a large amount of stock and bonds for the purpose of carrying out its plans, a court will not annul one of the leases, and compel the restoration of the property to the

lessor, at suit of a single stockholder therein, unless a legal wrong and injury have clearly been done to him, or the corporation of which he is a stockholder.

2. SAME—JURISDICTION—PLEADING.

While a stockholder in a corporation may, under certain circumstances, maintain a suit in his own right against the directors to restrain them from doing an illegal or ultra vires act, yet where such act has been consummated, and by virtue thereof some third person has acquired rights, as against such person the rights of the stockholder are derivative, and not primary, and depend upon the failure and refusal of the corporation to enforce such rights in its own behalf; and he can only maintain a suit to annul the action taken in right of his corporation, and where the suit is in a federal court, by bringing himself within the requirement of equity rule 94, by showing in his bill that he has made proper efforts, without success, to secure such action as he desires on the part of the managing directors of the corporation, or, if necessary, by the stockholders, or by alleging such facts as will excuse a literal compliance with the rule, by making it appear that such efforts would have been futile.

3. SAME.

A suit in a federal court by a minority stockholder against his corporation and another to annul a lease of the property of the corporation to its codefendant, which has been executed by the directors with the approval of a majority of the stockholders, given at a meeting duly called for the purpose, is one in which the stockholder sues in the right of the corporation, whether the invalidity of the lease is asserted on the ground of fraud of the directors, or because it was ultra vires; and, to authorize the court to entertain such suit, the bill must contain the jurisdictional averments required by equity rule 94.

4. PLEADING—AMENDMENT—SUPPLYING JURISDICTIONAL AVERMENTS.

Jurisdiction must affirmatively appear at every stage of a case, and the court is without authority to permit amendments to supply essential jurisdictional averments in the bill.

5. CORPORATIONS—SUIT BY STOCKHOLDER.

The provision of equity rule 94, which requires a bill filed by a stockholder, founded on a right which may properly be asserted by the corporation, to "set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary of the shareholders, and the cause of his failure to obtain such action," merely prescribes a rule of pleading; but the efforts of plaintiff so required to be alleged are jurisdictional unless it is both alleged and proved that they would have been futile, and where the question comes up on final hearing the evidence must be resorted to for the purpose of ascertaining whether the allegations relied upon to excuse the failure of plaintiff to apply to the directors or stockholders to bring the suit are true in point of fact.

6. SAME.

Plaintiffs in a suit in a federal court alleged that they became the owners, as executors, of stock in one of two corporations which were made defendants; that while such owners the directors of such corporation leased all of its property to its codefendant; that such lease was the result of fraud and conspiracy of the directors, was ultra vires, and was highly detrimental to the interests of the stockholders generally; that plaintiffs had, in a friendly manner, applied to the defendant corporations and to the directors to desist from such acts, but without effect; and the bill prayed that the lease be annulled. There was no allegation that plaintiffs had applied to the directors or stockholders to bring the suit, but it was alleged that the directors who made the lease controlled the majority of the stock. The proofs showed that the latter allegation was untrue; that the lease was confirmed by a large majority of the stockholders at a meeting duly called for the purpose, and that during the 18 months which elapsed between the making of

the lease and the bringing of the suit there had been a number of stockholders' meetings, and a new board of directors had been elected, only 5 of whom, out of 15, were directors at the time the lease was made. *Held*, that the allegations of the bill were not sufficient to excuse the failure to allege the jurisdictional fact required by equity rule 94, that plaintiffs had made efforts to secure from the directors, or, failing in that, from the stockholders, the action they desired, and the cause of their failure, nor the proofs sufficient to entitle plaintiffs to maintain the suit had such allegations been made.

7. SAME—GROUNDS FOR ANNULLING CONTRACT—FRAUD OF DIRECTORS.
The directors of a street railroad company, who owned about one-third of its stock, with the approval of a majority of the stockholders leased its property for a long term of years to another company, pursuant to a plan to unite the lines of the lessor and a competing company, together with those of the lessee, under a single management. In this plan a majority of the directors of the lessor company were interested, and after its consummation they became stockholders, and some of them directors, in the lessee company; paying for the stock, however, the same as other subscribers. The lessor company had a floating debt, besides its bonded debt, and no available funds, and had never paid a dividend. As a result of the lease, its debts were assumed by the lessee, and it was placed on a dividend-paying basis, which caused the market price of its stock to advance nearly 50 per cent. *Held*, that there was nothing in such facts to establish fraud and conspiracy on the part of the directors which would authorize a court of equity to annul the lease at suit of a minority stockholder, commenced 18 months after its execution, and after the lessee had been in control and operation of the consolidated lines, and had marketed its stock and bonds with reference to the same.

8. SAME—POWER TO LEASE PROPERTY—TRACTION COMPANIES UNDER NEW JERSEY STATUTE.
Act N. J. March 14, 1893 (Gen. Pub. Laws 1893, c. 172), authorizing the organization and providing for the regulation of traction companies, in section 16, authorizes any corporation created thereunder to lease the property and franchises of any other corporation owning or operating any street railway, subject to conditions therein prescribed. *Held*, that it also conferred power on one of two corporations organized thereunder to lease its property to the other.

9. SAME—MODE OF EXERCISING POWER.
Power given to a corporation by its charter, or by the general act under which it is incorporated, to lease its property and franchises, enters into the agreement between its stockholders; and, where no particular mode of exercising such power is prescribed, it may be exercised in the same manner as other general powers of the corporation,—by the vote of a majority of the stockholders, or by the board of directors.

10. SAME—RIGHTS OF MINORITY STOCKHOLDER.
Where a corporation is authorized by the law under which it is created to lease all of its property and franchises, the making of such a lease does not deprive a dissenting stockholder of his property without due process of law, since the exercise of such power by a majority was one of the implied conditions under which he became a stockholder.

11. SAME—NEW JERSEY STATUTE.
Act N. J. March 14, 1893 (Gen. Pub. Laws 1893, c. 172), after authorizing traction companies organized thereunder to lease the property and franchises of any other street railway company, provides, in section 17, that any stockholder in a company which shall so lease its property who objects to such action may institute a proceeding in court, in which his damages shall be appraised, and also the value of his stock, and that the lessor company shall either purchase his stock at the appraised value, or pay the damages assessed. *Held*, that such provision is not invalid as against a stockholder in a corporation organized under the act, who

took his stock subject to such condition, as authorizing a condemnation of his property under the power of eminent domain for private use, but that it is valid, as providing an additional remedy for his benefit, of which he may avail himself, or not, at his option.

In Equity. Suit by stockholders to annul a lease made by the corporation.

Joseph A. Duffy and Charles J. Roe, for complainants.
Coult & Howell and Spencer Weart, for defendants.

GRAY, Circuit Judge. The bill in this case was filed December 28, 1899, by the complainants, both citizens and residents of the state of Maryland, as executors of Samuel T. Dickinson, deceased, a citizen of New York, who died October 9, 1896, appointing the complainants his executors by his last will probated in the state of New York. The bill and answer, as summarized in complainants' brief, are as follows:

The defendants are corporations of New Jersey and citizens of the states of New Jersey, New York and Pennsylvania, all of whom have answered. The bill alleges that the complainants are the owners as executors of 100 shares of the capital stock of the Consolidated Traction Company, which came in their hands as assets of the estate of their testator. That the Consolidated Traction Company was incorporated on March 15, 1893, under an act of the legislature of New Jersey, particularly set forth in the said bill of complaint. That on September 25, 1893, the Consolidated Traction Company leased the property and franchises of the Jersey City and Bergen Railroad Company, a special corporation of New Jersey. (Schedule B.) That on January 2, 1894, the Consolidated Traction Company leased the New Jersey Traction Company, a corporation organized under the act concerning corporations. (Schedule C.) That they also became possessed of the capital stock of a ferry line. (Schedule A.) That they thereby became the owners of very valuable franchises, which were continually increasing in value and in financial returns. That on June 12, 1894, the North Jersey Street Railway Company was incorporated under the same act under which the Consolidated Traction Company was incorporated. That prior to the lease hereinafter mentioned, the North Jersey Street Railway Company was a small company, having but little property and few franchises. The bill further sets forth the directors of the Consolidated Traction Company and the North Jersey Street Railway Company on March 1, 1898, and also the directors of the Consolidated Traction Company on March 22, 1898, and the directors of the North Jersey Street Railway Company on June 26, 1898, and the directors of both companies on November 1, 1899, all of whom are made defendants. That in the month of March, 1898, the directors of the Consolidated Traction Company, to wit:—Edward F. C. Young, John D. Crimmins, P. A. B. Widener, A. J. Cassatt, Jeremiah O'Rourke, Thomas F. Ryan, A. Q. Garretson, William L. Elkins, Elisha B. Gaddis, Thomas Dolan, Almeric H. Paget, David Young, J. Roosevelt Shanley, C. A. Griscom, and George F. Perkins, controlling the majority of the capital stock of said company, knowing the value of its franchises and property and the increasing income of the same, for the purpose of benefiting themselves personally and di-

verting the same from the stockholders at large, combined with Bernard M. Shanley and the directors of the North Jersey Street Railway Company, to wit, James J. Corbiere, Wilber S. Johnson, Dudley Farrand, Halsey Barrett, John J. Kehoe, John E. McArthur, William J. Davis, John W. Omberson, James E. Hulshizer, Jr., and Henry M. Doremus, who were agents of the directors of the Consolidated Traction Company, to transfer by means of lease, the Consolidated Traction Company to the North Jersey Street Railway Company. That in pursuance of such scheme, on May 25, 1898, the Consolidated Traction Company executed a lease of its property and franchises to the North Jersey Street Railway Company for 999 years; which lease is appended to and made part of the bill. That the complainants had no notice of this transaction. That the money by which this scheme was carried out was furnished by the proceeds of the sale of $6,500,000 of bonds secured by a mortgage issued by the North Jersey Street Railway Company, the security for which was principally the property and franchises of the Consolidated Traction Company, and the money necessary to pay the interest and the redemption of such bonds arising from the earnings of the Consolidated Traction Company. That Bernard M. Shanley, through whom the transaction was brought about, was made president of the Consolidated Traction Company, and by the terms of the lease was given $10,000 a year. The bill further alleges that the said lease is invalid, unconstitutional and void, and charges fraud and breach of trust on the part of the directors of the Consolidated Traction Company. That application was made to the defendants to redress the wrong, which was refused. And praying that the lease may be set aside and declared null and void, and the property of the Consolidated Traction Company be restored to its stockholders, and that the North Jersey Street Railway Company account for the profits derived from the operation of the franchises and property of the Consolidated Traction Company.

The answer filed by the defendants admits the leasing and the organization of the companies, and states the constituent formation of the Consolidated Traction Company. It denies that the directors had any interest in the North Jersey Street Railway Company, directly or indirectly. And says that the stock of the North Jersey Street Railway Company was lawfully issued for a valid consideration paid to the company, and denies the right of complainants to question the same. That the Consolidated Traction Company employed its entire stock of $15,000,000 and had issued its entire bonds of $15,000,000. That on March 28, 1898, it was further indebted to a list of persons in amounts there given, amounting to $1,007,128.78. That it was in receipt of a large income from traffic, but that additional expenses necessary for extension and general development of the system had exhausted its funds, and the legal limit of its capacity to borrow money had been reached, and some immediate relief had to be had. That the Newark & South Orange Railway Company was a competitor with the Consolidated Traction Company in the railway business in the county of Essex, which company was operated independently and not controlled by the Consolidated Traction Company or individuals composing its board of directors. That the North Jersey Street Railway Company

was another competitor, and on March 28, 1898, had an authorized capital of $5,000,000, of which only $325,400 was subscribed. That in the month of April, 1898, its capital was increased to $15,000,000, with authority to issue $15,000,000 of bonds; setting forth its directors. That prior to March 28, 1898, a proposition was made by the North Jersey Street Railway Company, through its president, to lease the franchises and leaseholds of the Consolidated Traction Company for 999 years, naming the directors of the Consolidated Traction Company. That the proposition was submitted by and under a resolution of the board of directors of the Consolidated Traction Company, on March 28, 1898, to the stockholders; that notice was sent to Samuel T. Dickinson, the complainants' testator, at 239 Washington street, Jersey City, where in his lifetime and at the time of becoming owner of the 100 shares of said company's stock he had an office, and also the date of the meeting advertised in a Jersey City newspaper. That at the stockholders' meeting, 108,333 of shares in interest voted in favor of making the lease, and 26,132 shares in interest voted against the same. That the minority stockholders were led by John D. Crimmins, one of the directors of said corporation, who afterwards assented to said lease. That by virtue thereof the North Jersey Street Railway Company took possession on June 1, 1898, of the property and franchises of the Consolidated Traction Company, and have been operating the same since.

The answer denies fraud or conspiracy, or that any of the directors of the Consolidated Traction Company were interested in a single share of the stock of the North Jersey Street Railway Company, or that the board of directors were the largest stockholders of the Consolidated Traction Company. And says that early in 1898 the board of directors of the North Jersey Street Railway Company, by their agents, with the avowed purpose of placing the control of all of said railway systems under one head, began negotiations to purchase the capital stock of the Newark & South Orange Railway Company, and that such proceedings were had in relation thereto that eventually, as part of said plan, the North Jersey Street Railway Company became the owner of all the capital stock of the Newark & South Orange Railway Company, for which it paid the sum of $1,500,000; that it took up the bond issue of $1,525,000 of that road and paid off the floating debt, amounting to $235,000, and paying upwards of $3,250,000 in cash therefor from the money that was realized from the sale of the bonds and stock of the North Jersey Street Railway Company; and that the transaction was completed so that the North Jersey Street Railway Company took possession of the property and franchises of the Newark & South Orange Railway Company on May 25, 1898, six days prior to the time when the North Jersey Street Railway Company took possession of the property and franchises of the Consolidated Traction Company. And charges that the complainants had knowledge of the intention of the North Jersey Street Railway Company to purchase the stock of the Newark & South Orange Railway Company, and that they knew when the same had been purchased, and that the purchase was part of the general plan conceived by the North Jersey Street Railway

Company for placing the operation and control of all of said railway lines under one management; and that all the stockholders, except the complainants have acquiesced and tacitly consented. They admit that the complainants personally, or by attorney, came to the office of the Consolidated Traction Company in the beginning of the year 1899, and that the treasurer and counsel of the company explained to them fully the conditions of the lease, and exhibited to them fully the manner in which it had been authorized and executed, and stated to them briefly the reason why the lease had been entered into, and gave them full information as to their rights as stockholders, etc.; that the complainants expressed dissatisfaction and claimed that the legislature could not pass a law authorizing the lease. That they had been subject to expenses and disbursements by reason of the lease, and that the stock of the Consolidated Traction Company had risen in value. That the original intention on the part of the officers, directors and stockholders of the said three corporations in uniting their roads under one management, was to operate them in a more economical manner and with greater satisfaction to the large number of people who daily became passengers thereon. That it would be inequitable and unjust to set aside said lease and interfere with the business of the North Jersey Street Railway Company, and take from its stockholders and bondholders a large part of the consideration upon which the value of their stock and bonds depend.

An amendment was allowed by the court to be filed to the bill, covering certain alleged specifications of fraud that complainants claimed to have discovered in the taking of the testimony. Upon the issues thus framed, testimony was taken on both sides, and the contentions on the part of the complainants are: First. That such fraud has been shown on the part of the directors of the Consolidated Traction Company as vitiates the whole transaction of the lease. Second. That the lease of the Consolidated Traction Company was an illegal, as well as an ultra vires, act on the part of the defendants. Third. That the lease in question, in its effect, takes the private property of the complainants, against their assent, and is in violation of the rights of complainants, guarantied to them by the constitution of the United States. Their bill, therefore, prays that the defendants, and each of them, may be restrained from carrying on the business of the Consolidated Traction Company, under the lease to the North Jersey Street Railway Company; and that the said executed indenture of lease may be set aside and declared null and void; and that the property of the Consolidated Traction Company may be restored to it and to the stockholders thereof; and that the North Jersey Street Railway Company may desist from operating the railways of the Consolidated Traction Company; and may account for the profits derived by it from the operation of the street railway lines, franchises and other property of the Consolidated Traction Company, of which it obtained possession by virtue of said indenture of lease; that the North Jersey Street Railway Company may desist from paying any sums of money to the Consolidated Traction Company in accordance with the terms set forth in said in-

denture of lease, and that the Consolidated Traction Company may desist and refrain from accepting the same, and that the Consolidated Traction Company, or its directors, and the North Jersey Street Railway Company, or its directors, may desist and refrain from making any other agreement, contract, lease or other arrangement to take from the Consolidated Traction Company its property, franchises and business.

It thus appears that the end sought by these complainants, as holders, in their representative capacity as executors of their decedent's estate, of 100 shares of stock of the Consolidated Traction Company, is no less than the setting aside and nullification of an executed transaction of lease between the two corporations defendant, under and by means of which an important railway property has been bought and controlled by the lessee company, $6,000,000 of its bonds marketed, $15,000,000 of stock issued, and an extended railway system made possible, and operated for a period of more than 18 months prior to the filing of the bill in this case. Consequences that will involve the destruction of present conditions of comfort and convenience to a large community, and the demoralization of settled plans for the administration of large and valuable properties, with possible serious resulting loss to the stockholders of the defendant companies, ought not to be lightly incurred. That a wrong and injury has been done by the transactions complained of, to the estate of the single decedent stockholder, whose executors are complainants in this case, or to the corporation of which he was a member, should be made clearly manifest before the asked for interference of this court should be granted. But though it is true that no pecuniary loss or damage has been shown to have resulted to the holders of these 100 shares of stock, by reason of these transactions, we must nevertheless consider whether a legal or technical wrong has been done them by reason of some contravention of their legal rights as stockholders, or to the corporation itself, by reason of the illegal action or the fraudulent mismanagement of its interests, by those who for the time being controlled it.

In the present case, the alleged fraudulent acts of the directors of the Consolidated Traction Company, as well as the invalidity and ultra vires character of the lease complained of, were wrongs, not against the complainants as individual stockholders, but against the corporation, for which it would be entitled to be the complainant in a suit such as this, and it is only because of its failure to seek a remedy for these alleged wrongs, by suit, that a minority stockholder is permitted to carry the flag of the corporation, and under that flag fight the battle that the corporation ought to fight. Though the corporation is brought into court as a defendant, its real status is that of a plaintiff, and the relief sought must be such as will inure to its benefit. A stockholder who has grounds to believe that his directors are about to do an illegal act or thing, in order to restrain them therefrom, need not necessarily invoke the jurisdiction above referred to, because the thing complained of being in fieri, his individual interests in relation thereto may, under certain circumstances, be such, that he is not compelled to deal with the corporation itself,

but may proceed in his own name directly against the individual directors, to obtain relief for the wrong being perpetrated against him. But when the act complained of is not in fieri, but is consummated, and by virtue thereof some third person has acquired rights, then, as against that third person, the act of his corporation having been consummated, the stockholder's right to ask for a decree is derivative and not primary. A stockholder of a corporation cannot, by simply averring—"I am a stockholder of the corporation, and that corporation has made a contract which is illegal or improper, with another corporation"—ask that it shall be decreed against that other corporation, that the contract is illegal or improper, and that it shall surrender whatever it has taken under it. The case is one of corporation against corporation, and but for the equity principle above alluded to, and to be hereafter more fully referred to, there would be no relief whatever, because the third person (the other corporation) would say to the complaining stockholder, "You are not a party in any way to this case; you are only a stockholder; your corporation must sue me." But, although the stockholder as an individual can never go into a court of equity, and ask for relief against a third person, upon the ground that the corporation has made a bad bargain, whether by the fraudulent or the illegal action of its directorate, yet, if the corporation ought to bring a suit against such third person, and seek, as against him, to take back property, and if the corporation refuses so to do, the minority stockholder may, in equity, be permitted to assert the right which the corporation ought to assert, by alleging that the corporation so refuses to act, after he has made honest and bona fide efforts to induce them to do so, and by making his corporation a party by bringing it in as a defendant, though its real status is that of plaintiff, and seek to obtain for it the relief to which it would have been entitled, had it itself sued.

It has long been recognized as a principle in courts of equity, that a stockholder may enforce a right belonging to the corporation of which he is a member, or obtain relief for a wrong inflicted upon it, and for which the corporation itself might have maintained a suit, where he makes it appear to the satisfaction of the court that he has honestly endeavored to induce those in control of the corporation to bring such suit, and that he has failed in such endeavor, by setting forth the particulars of his efforts and the reasons for his failure. The inconveniences that would result from the interference of individual stockholders, where these preliminary efforts were not made, are so apparent, that the supreme court of the United States has guarded against them, by the peremptory requirements of a rule, that the bill in such cases must be under oath and contain allegations of the jurisdictional facts above stated. This is the well-known ninety-fourth rule in equity, which also embraces another requirement, which, owing to the peculiar jurisdiction of the circuit courts of the United States, had pressed itself upon the attention of these courts. This matter was the prevalence of collusive practices for the purpose of creating the conditions of federal jurisdiction, by diverse citizenship in the said courts. Accordingly, the ninety-fourth

equity rule was promulgated at the October term, 1891, and is as follows:

"Every bill brought by one or more stockholders in a corporation against a corporation and other parties founded on a right which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary of the shareholders, and the cause of his failure to obtain such action."

There are no allegations in the bill, as filed, complying with the requirements of this rule. The complainants, however, contend that they are within certain recognized exceptions to the rule. These exceptional conditions which are said to excuse a literal compliance with the rule, are consistent with the reasons that support equitable jurisdiction in such cases. If it is apparent in a case like the present, that the directors, who are alleged to have offended, are still in control of the corporation, and so implicated in the alleged wrongdoing as to make it certain that a demand upon them to right such wrong or to bring suit for that purpose would be an idle ceremony, it would be unreasonable to require such demand to be made. Suits by one or more stockholders of a corporation, to assert a right belonging to the corporation, or remedy a wrong committed against it, where the corporation itself is powerless to act by reason of the refusal of those having management and control of it, had been recognized as cognizable in equity long before the promulgation of the rule referred to. The development of this equitable jurisdiction in England and America, is set forth in the judgment of the supreme court, in Hawes v. City of Oakland, 104 U. S. 450, 26 L. Ed. 827. Mr. Justice Miller, in delivering the opinion in that case, thus describes and defines this jurisdiction:

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

Such being the grounds of the jurisdiction, the court proceed to say that, like other jurisdictional facts, they should be alleged in the bill. In addition to this foundation of equitable jurisdiction, common to both English and American jurisprudence, the supreme court, owing to the exceptional and limited character of federal jurisdiction depending upon diverse citizenship, added in the rule another requirement, that in all such cases, the bill of complaint thus

sworn to, should contain an allegation negativing collusion practiced for the purpose of creating the diverse citizenship necessary to jurisdiction in a federal court. At the same term at which this judgment was delivered, the ninety-fourth rule, as above quoted, was promulgated. This rule, of course, did not and could not create the jurisdiction, the exercise of which it thus properly undertakes to regulate. The essential jurisdictional facts are prescribed by the settled equitable doctrines above referred to, and by the constitutional requirement of a bona fide diverse citizenship. The manner in which the jurisdiction may be invoked in the federal courts, is prescribed by the said rule.

The defendants contend that the complainants have not complied with the ninety-fourth rule in any of its requirements. They say that the bill makes no allegations whatever in regard to these vital and important jurisdictional facts. It is not denied by complainants that there is no allegation in the bill, as filed, "that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance," and that in this respect, they have failed to comply with the rule. This rule is binding upon this court, and it is without authority to entertain a suit in equity, wherein the bill of complaint is lacking as to any of its requirements. Complainants, however, after the taking of testimony on both sides had been concluded, or was about to conclude, asked that they be allowed to amend their bill by inserting the allegation, that the suit was not a collusive one, in the respects and in the form prescribed by the rule. And they contend that this amendment should be allowed at any time, inasmuch as they allege that the defect in the bill, which it was designed to cure, was a technical and formal one. We think, however, that the defect is not merely technical or formal. It is jurisdictional. It was within the power of the supreme court to require by rule that essential jurisdictional facts should appear by averment in the bill of complaint, that the bill should be sworn to, and that the right of the circuit court to entertain the suit should be conditioned upon the presence of such averments. An allegation in the bill under oath, that there is no collusion, is a condition precedent to the jurisdiction of this court over the case. This court cannot permit a bill to be amended in a case, over which it has no jurisdiction. Jurisdiction must affirmatively appear at every stage of the case. It can be questioned in any mode and at any time, and does not require to be formally objected to by plea or demurrer. The court may, of its own motion, note the want of jurisdiction and dismiss the bill. In this case, however, objection to the jurisdiction on the ground stated was made in the answer of defendants as if on demurrer.

But passing over the question as to the right to amend, in the manner proposed, and assuming for the present that such an amendment could be allowed, we come to the objections by complainants, that this suit is not founded on rights which the corporation against whom the suit is brought, and of which complainants are stockholders, could properly assert, and therefore not within equity rule 94. We think, however, that by an examination of the allegations of

the bill, and the prayers for relief, it will abundantly appear that the jurisdiction in this case, must rest primarily upon the equitable doctrine, that permits a minority stockholder to assert a right or pursue a remedy, belonging to the corporation of which he is a member, and which it has declined to assert or pursue in its own behalf upon due demand from such stockholder, or where the circumstances are such as to make it clear that such demand would be idle. The thing complained of is a lease of its property and franchises, made by the corporation of which complainants are stockholders to another corporation through the action of its board of directors, confirmed by the stockholders as a body, at a regularly called annual meeting, with notice that the matter of such lease was to be considered. This lease, it is charged by complainants, was made by a board of directors, who controlled a majority of the capital stock of the said corporation, and who, for their own selfish purposes, are alleged to have entered into a conspiracy among themselves and with the directors of the North Jersey Street Railway Company, which company and its directors, as well as the directors of the lessor company, are made defendants in this suit. It is also charged that the lease so made by the directors, and sanctioned by the majority of the stockholders, was ultra vires, and therefore illegal and invalid. The fraud here charged against the directors was not in fieri, but a fact accomplished, and was clearly practiced against, and an injury to, the corporation and to the whole body of the stockholders as a corporate entity, and it belonged to such corporate entity, to assert the right to redress against such delinquent directors, and against the lessee corporation, if it had participated in the fraud. No right accrued to a single stockholder, or any number of stockholders, as individuals, primarily to sue in their own names, because whatever injury resulted to them as individuals, is indirect and derivative. This is true also as to the charge, that the lease in question was ultra vires. It belonged primarily to the corporation to assert the right to have it set aside. If, however, the corporation, through its directorate, or its stockholders as a body in lawful meeting assembled, refused to assert these corporate rights, due demand having been made that they should do so by one or more stockholders, or circumstances having been shown from which it clearly appears that such demand could not be made in time, or, if made, would have been certainly futile, then, out of these facts arises a distinct equity in such stockholder or stockholders to institute, in behalf of the corporation, the suit which said corporation ought to have instituted, and seek before a chancellor for the relief to which such corporation would be entitled, if it had brought suit in its own name. The relief sought must inure to the benefit of the corporation, which is made defendant for the purpose of bringing it into court, where, as we have said, it really stands in the attitude of a plaintiff. The equity which permits the bringing of such a suit by a stockholder, is as distinct and well defined as any other head of equity jurisdiction. It depends upon and arises from the facts above recited, and if these do not all appear as concurring, to the satisfaction of the chancellor, his jurisdiction fails for want of the equity to support it. The ninety-fourth

rule merely requires that these necessary jurisdictional facts must be alleged under oath, as a matter of pleading, as well as be shown to exist. If they fail to be so alleged under the requirements of the rule, there is no jurisdiction in the court to proceed, and the bill must be dismissed. Likewise, the requisite allegations being made, they must be supported by proof, and if they fail to be so supported, jurisdiction fails for want of the peculiar equity, as above defined, to sustain it, and for that reason, the bill must be dismissed.

Being of opinion that this suit is founded upon rights which the corporation, against whom the suit is brought, could and should properly assert, we are brought to the consideration of the important question, whether, first, this suit develops the fact that equity rule 94, in other respects than those requiring a denial of collusion, has been complied with, and second, whether, if the allegations required by the rule have been made, they have been supported by the evidence in the case. These allegations, it must be remembered, refer to essential jurisdictional facts, out of which alone the equity that will support this bill can arise. They must both be alleged and proved. Passing over again the question of the right of complainants to amend their bill at the time they offered to do so, in order to supply the admitted absence of any allegation therein respecting collusion, which has to do only with the conditions necessary to the peculiar jurisdiction of federal courts, and not with those necessary to their jurisdiction as courts of equity, we turn to the contention by complainants, that, in other respects, equity rule 94 has been complied with.

An inspection of the bill shows that it has been verified by affidavits of both the complainants; that it contains an allegation that the complainants were shareholders of the Consolidated Traction Company; that the shares devolved upon them as personal representatives of a decedent, who owned these shares at the time of his death, and that they were shareholders at the time of the grievances complained of. In these respects, the allegations complied with the requirements of the rule. The bill contains, however, no allegation which "sets forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, or, if necessary, of the shareholders, nor the cause of his failure to obtain such action." Manifestly, the allegation in the bill, that complainants had frequently and in a friendly manner applied to the said corporations defendant, and to all the other individual defendants, and had "endeavored to persuade them to desist in their unlawful and unjust conspiring against your orators and their violating law," etc., does not meet the requirements of the rule; that requirement being a setting forth in the bill of the efforts by complainants to induce the managing directors, or the body of stockholders, to bring the suit which they now seek to institute, and the reason of the failure of such efforts to induce the directors or body of stockholders so to do. As we have seen, it is on this important and essential fact, that the equity of an individual stockholder or stockholders, to maintain a suit in behalf of the corporation, is founded, and the jurisdiction of this court depends. But as, in considering whether such efforts have in fact

been made, their absence can be excused by showing exceptional circumstances which prevented their being made in time, or that the conditions were such as made it manifest that if such efforts had been made, they would have been futile, so, in considering the requirements of the rule, that there should be an allegation under oath that such efforts had been made, courts have, in a number of cases, said that, where the general allegations of the bill were such as to make it manifest that, if true, such application to the directors or stockholders would have been without avail, the necessity for such allegation would be dispensed with. No general rule can be laid down to guide us, as to when the general allegations of a bill make such a showing, as will dispense with this particular allegation as to efforts on the part of the complainants, to induce directors or the body of stockholders, to redress the wrong alleged to have been committed against the corporation. Each case must stand upon its own facts and circumstances. The rule is a peremptory one, that the fact that such application, if made, would be futile, must absolutely and clearly appear, and so, if the question comes up at final hearing, the evidence in the case must be resorted to, to show that the allegations of the bill relied upon for this purpose, are true in point of fact. And especially is this so, when we reflect that the fact of application to the directors, or circumstances excusing the want of such application, are jurisdictional facts, the failure of which to appear in the testimony, negatives the equity of the complainant stockholders for the relief prayed for.

An examination of the testimony in this case, discloses the fact that the board of directors of the Consolidated Traction Company, who negotiated and executed the lease, was not the board of directors of said company at the time the suit was brought, and had not been for many months previous thereto. Of 15 directors constituting the board at the time of the lease, only 5 were members at the time of the bringing of this suit. It is true, that some or all of the remainder were members of the board of directors of the North Jersey Railway Company, but they were engaged then in a transaction not alleged to be in itself illegal, and must have viewed the whole situation from the standpoint of their own company, the lessee. But, as directors of the lessor company, they were not committed in any way to make it unnatural or self-stultifying, if they should inquire whether the former board of directors of the lessor company had transcended their powers or committed a fraud. Nothing is shown which would have prevented an application to the new board of directors, asking them to take steps to redress these alleged wrongs to the corporation. That a refusal on their part was probable, ought not to excuse the lack of such an application. Some explanation of the situation might have been given, that would have been satisfactory to these complainants. But the rule further requires that, if necessary, application should be made to the shareholders for the same purpose. This was not done, and nothing in the evidence, or in the allegations of the bill, appears to excuse the want of such an application. The allegation that the directors controlled a majority of the capital stock of the Consolidated Traction Company, appears from the evidence to be untrue. The shareholders, as a body, are not accused of fraudulent or improper

conduct, in regard to this lease, and though the great majority voted for its confirmation, it does not lie in the mouths of these complainants, in considering the requirements of this rule, to say what might or might not have been the result of an application made to a regular and lawful meeting of the body of shareholders. Nothing appears in the allegations of the bill, or the evidence produced in the record, that would reasonably prevent the shareholders from being convinced, notwithstanding their previous vote for confirmation of the lease, that the same was a fraud upon the corporation of which they were members, and upon themselves as stockholders. On the contrary, it is presumable, that, if the allegations of the complainants, as to the ruin wrought by the lease, and to be hereafter wrought by a continuance thereof, are true, that fact could be made to appear to the fellow stockholders of the complainants, and in that case, the ordinary motives governing human conduct, would excite them to co-operation with the complainants.

The contention made by complainants that, those of the stockholders who subscribed to the bonds of the North Jersey Street Railway Company, were bribed by the reception of an allotment of shares of stock of that company, with each bond subscribed for, cannot be sustained. The subscription to their bonds was open, and on the same terms to all, whether stockholders of the Consolidated Traction Company, or not. These complainants had the same right and opportunity to subscribe and receive the bonus stock, as the other stockholders. It is not and cannot be truly alleged that such stockholders could not, with perfect propriety, subscribe to these bonds, just as others, not stockholders, could do. They owed no duty to the corporation of which they were members, or to their fellow stockholders, which would forbid their so doing; nor is there any evidence to connect the great body of stockholders, other than those in the direction, with the alleged conspiracy of the directors denounced in the bill.

During the more than 18 months that elapsed between the execution of the lease and the bringing of suit, more than one regular meeting of stockholders was held, at any of which it would have been possible for these complainants, to have stated their grievances, and asked for such action as was competent for the stockholders as a body to take. If complainants believed the allegation of their bill, that the lease complained of, was the result of the machinations of the directors of the Consolidated Traction Company, practiced for the selfish purpose of diverting an enormous income, that was about to come into the treasury of the said company for the benefit of the stockholders, and appropriate the same to themselves personally, and that, as is alleged in their brief, the making of said lease in the manner and upon the terms set forth, completely wrecked the said Consolidated Traction Company, and that the cancellation of said lease, and the undoing of the transactions connected therewith, would restore these enormous profits, and put them in a position in which they could reasonably expect them to be increased for the future, it is hard to imagine why they should not reasonably hope to so impress their fellow stockholders, by an appeal to their selfish interests, as to gain their co-operation in compelling the corporation to

assert the rights, which in this suit the complainants seek to assert in its behalf.

We think, therefore, that the allegations of the bill (relied upon by the complainants for that purpose) are not sufficient to dispense with the allegations of the jurisdictional fact as required by the ninety-fourth rule, that complainants had made efforts (setting forth with particularity what those efforts were) to secure from the managing directors, or, failing in that, from the shareholders, such action as they desired, and the cause of their failure to obtain such action. But if such allegations in the bill had been sufficient as allegations, they cannot, when at this stage of the case they have been shown from the testimony to be untrue in essential particulars, be relied upon for the purpose of dispensing with the requirements of the rule. And this brings us again to say, without regard to the question of whether the allegations of the bill conform to the requirements of the rule, that the essential facts required by said rule to be alleged under oath, are jurisdictional facts, and if they fail to be proved, whether alleged or not, the foundation for that peculiar equity which this suit is instituted to assert, fails, and this court is without jurisdiction to give the relief sought. To this conclusion we have come, because, as we have just said in another connection, there is nothing in the case as developed by the evidence, which will, as a matter of fact, justify the admitted neglect of the complainants to make any application to the new board of directors, to institute a suit on behalf of the corporation for such redress as is sought by these complainants in the present suit.

But if the facts necessary to support the equitable jurisdiction of this court had appeared, we are of opinion that complainants have failed to substantiate either of the grounds upon which they rely for relief. A careful examination of the testimony in this regard, fails to disclose the fraudulent and improper conduct on the part of the directors of the two defendant companies, charged in the bill. Bernard M. Shanley, who is made a defendant, and charged with being a leading co-conspirator with the other defendants, seems to have been, what in modern parlance is called, a promoter of large schemes for the combination of rival corporations under one management, so as to achieve for all concerned the benefits of more economical administration and increased facilities for earning profits. It appears, also, that the Newark & South Orange Railway Company was a company competing with the Consolidated Traction Company, in Newark, and also in a large stretch of suburban country. The desirability of the Consolidated Traction Company obtaining control of this competitor, had been manifest for a long time prior to the transactions here in question. But the Consolidated Traction Company had a large floating debt, and had exhausted its capacity for borrowing money. It seems to have occurred, probably first to Shanley, but possibly to the executive officers of the defendant the North Jersey Street Railway Company, as possibly also to the executive officers of the Consolidated Traction Company, that the former company might be so reorganized as to make it a valuable instrument for consolidating the railway interests of the Consolidated

Traction Company, the Newark & South Orange Railway Company, and those already controlled or capable of being controlled by the said North Jersey Street Railway Company. This latter company had been doing business in a small way, on a small capital, and needed a reorganization to make it capable of accomplishing this design. It had authority, or it was known that authority could be conferred upon it, to issue $15,000,000 in par value of the stock, and $15,000,000 of bonds. It was an independent corporation, although a small one, and none of its directors were directors in the Consolidated Traction Company. Shortly prior to the transactions here in controversy, Shanley became a subscriber to a syndicate formed to develop this North Jersey Street Railway Company, with a view to provide the money to pay off the floating debt of the Consolidated Traction Company, and purchase the Newark & South Orange Railway Company. With this end in view, he seems to have determined, with advances made by himself and others who might join with him, to provide the North Jersey Street Railway Company with sufficient cash to start the project proposed. John F. Dryden, a citizen of the state of New Jersey, of large means and high character and standing, was selected to receive subscriptions of cash for that purpose. $354,000 was deposited in Mr. Dryden's hands, by 32 subscribers, for this purpose, of which $117,000 was subscribed by 10 of the directors of the Consolidated Traction Company. These amounts were afterwards credited on account of subscriptions to the bonds and stock of the North Jersey Street Railway Company. A movement was then started by Shanley, and his associates, to provide money to pay off the floating debt of the Consolidated Traction Company, and purchase the Newark & South Orange Railway Company. In the carrying out of this plan, Shanley seems to have acquired, or obtained an option upon, all the securities of the Newark & South Orange Railway Company, and the Suburban Traction Company, which he placed in the custody of one L. D. Howard Gilmore, as his agent. Gilmore then, as the actual and legal custodian of these securities, made a proposition to sell the same and pay $2,400,000 in cash, for $6,500,000 of bonds, and $14,659,400 par value of stock of the North Jersey Street Railway Company. The company accepted the proposition, and Mr. Shanley, in behalf of the North Jersey Street Railway Company, proceeded to obtain the money for the project, by selling its bonds, giving a $1,000 4 per cent. bond, and $2,000 of par value of stock of the North Jersey Street Railway Company, for $1,000 in cash. With the money thus obtained, the floating debts of the Consolidated Traction Company and of the Newark & South Orange Railway Company were paid off, and being thus in control of these valuable competing properties, so long desired by those in control of the Consolidated Traction Company, a proposition was made to the latter company, that it should lease its property, franchises and privileges to the North Jersey Street Railway Company for a period of 999 years, the latter company assuming its liabilities and agreeing to pay to the lessor company the sum of $1,000,000 upon the execution of the lease, and a rent thereafter to be paid annually, amounting to $300,000 for the first two years, and increasing at intervals

until 1906, when and thereafter, the annual rent should be $600,000. No dividend had ever been theretofore paid upon the stock of the Consolidated Traction Company. The proposition was accepted, and the lease executed, with the result that the stock of the Consolidated Traction Company rose in the market nearly 50 per cent. Before, however, the project was actually accepted by the directors of the Consolidated Traction Company, or the lease executed, the question of its advisability was submitted to a meeting of the stockholders of the company. The meeting was a regular annual meeting, but, in the call for the same, notice was given that the project of this lease would be brought before the meeting for consideration. After full explanation, it was confirmed, and approved by the stockholders, 108,000 shares out of 150,000 voting in favor thereof, and 23,000 against. These 23,000 afterwards, by written assent, were recorded in favor of the lease, and finally all but 400 shares, 100 being in the hands of the complainants in the present suit, had, in one way or another, assented to the transaction. The remainder of the $15,000,000 of bonds had been marketed, and were widely distributed, as also the stock of the North Jersey Street Railway Company, and for 18 months prior to the suit, and for nearly 2 years since, the properties leased and controlled by the North Jersey Street Railway Company have been administered without complaint, so far as the record shows, on the part of any other stockholders than those representing the 400 shares mentioned. Much is made of the fact that Mr. Dryden was a secret trustee for the receiving of the cash subscriptions necessary to start the project, but there seems to have been no special injunction of secrecy, and what was done was known to a large number of interested persons. It was part of a plan that seems to have been well calculated to achieve an object that was conceived to be by both directors and stockholders of the Consolidated Traction Company a desirable one to achieve. It is altogether probable that this scheme was known to the directors of the Consolidated Traction Company. They were all of them large holders of the stock of that company, although they did not control the same, as alleged by the complainants in their bill; fully two-thirds of it being in other hands. But whatever the proportion of their holdings may have been, it was large enough to give these directors a personal interest in the successful management and prosperity of the corporation they were managing. Their subscription to the stock of the North Jersey Street Railway Company was consistent with this personal interest, and did not place them in the position of antagonism to the interests of their own corporation, a thing abhorred by equity, where trustees are personally benefited by the thing done by them as trustees, except in so far as they are benefited, in common with all other stockholders, by wise business management. Shanley was a director in neither company, but was a large holder of the stock of the Consolidated Traction Company, and certainly could have had no interest in wrecking that company. What his profits were as a promoter of the scheme, does not clearly appear. They were probably large, but the transaction was one requiring experience as a financier, skill and large pecuniary means. At all

events, there is nothing in the record to show that the directors shared in the profits accruing to Shanley as a promoter, or received any benefit from him, other than what came to all the stockholders from what was accomplished by his efforts. The lease, so far as the evidence before us goes, approved itself to the judgment of all the stockholders, except those interested in this suit, and it seems to have redounded to the well-being and prosperity of the enterprise in which their capital was embarked, by placing it upon a dividend-paying basis, where it had never before been. It likewise seems to have given to the public a better organized and more extended service. That the lessee company is controlled by many or most of the same men who, before the lease, controlled the Consolidated Traction Company, would seem to be to the advantage of the stockholders of that company, and not to their detriment. This state of things as disclosed by the record, is very far from sustaining the allegations of fraud against the individual defendants in this case, directors in the two companies, or any of them, and nothing but the clearest proof of such fraud would justify the interference asked of this court on that ground.

We now turn to what seems, from the argument of the complainants, the principal ground upon which they rest their case. This is the alleged ultra vires character, and the consequent invalidity, of the lease made by the Consolidated Traction Company to the other corporation defendant. It is, of course, necessarily true, that the activities of a corporation must be confined within the limits prescribed by the sovereign authority creating it; and especially is it true, that while a corporation has by implication all the ancillary powers necessary to the exercise of expressly granted powers, and to carry into effect the purposes of its creation, it can exercise no others that are not expressly granted. In this case, the power of these two corporations defendant, the one to be lessor and the other the lessee, of the property, rights, franchises and privileges which the lessor company had acquired by the legislative authority that granted it corporate existence, is not to be implied from any general power connected with the object of their creation. As the power to negotiate and execute the lease here in question has been challenged, those who would sustain it, must point to some express authority of the legislature of the state by which these corporations defendant were created. We find that both of them were formed under an act of the legislature of New Jersey, approved March 14, 1893, and constituting chapter 172 of the General Public Laws of 1893. The title of the act is, "An act to authorize the formation of traction companies for the construction and operation of street railways, or railroads operated as street railways, and to regulate the same." The act is a long one, and prescribes, with much detail, the manner in which a corporation may be formed and organized under it. It carefully defines and limits the powers and franchises, which such corporations may exercise and enjoy. Its sixteenth section contains the following grant of power:

"Any corporation created under this act may lease the property and franchises of any other corporation owning or operating any street railway or other railroad operated as a street railway, or any turnpike or plank road,

or any motor power or traction company and such other corporation and corporations are hereby authorized to make such lease and after such lease the corporation created under this act may use and operate the franchises and property of such corporation or corporations so leased upon such compensation to be made to the lessee company as such respective lessor corporation may have been entitled to demand from persons using or traveling in or upon the property of such lessor corporation: provided, that all rights of creditors and all liens upon the property of the corporation lessor, and all privileges and immunities of such lessor corporation shall be preserved unimpaired to the same extent as if such lease had not been made; and all debts, liabilities and duties of such lessor corporation shall thenceforth attach to the lessee corporation, and be enforced against or be enjoyed by it to the same extent and in the same manner as they were enforceable against or enjoyed by the lessor corporation: and provided further, that no greater tolls or charges shall be made or demanded by any corporation created under this act than were or are authorized to be charged and collected for the same service by the corporation or corporations, lessor or lessors in said lease."

An act of the legislature, approved on the said 14th day of March, 1893, but said to have been passed and approved prior to the act above referred to, is entitled "An act to authorize street railway companies, or companies owning railroads operated as street railways, to lease their property and franchises to traction companies, and to prescribe a method therefor." It is printed in the volume of General Public Laws of 1893, just before the one quoted from, and is chapter 169, the act quoted from being chapter 172. The first section of this chapter 169 is as follows:

"That it shall and may be lawful for any company owning any street railway or railways or any company owning any railroad operated as a street railway, whether such lessor company or companies are incorporated under any general or special act of this state, to lease their property and franchises to any traction company created under the laws of this state for such term or terms, upon such condition or conditions as to the use and operation of the property of the corporation, the enjoyment of privileges or immunities of such lessor corporation and the amount of rent to be paid therefor, and the manner of making payment of said rent, and such other conditions, limitations and restrictions as said lessor and lessee corporations may agree upon."

Both this chapter and chapter 172 contain identical provisions for appraising and paying the value of the stock of dissentient stockholders. Section 17 of chapter 172 is almost a verbatim copy of section 2 of chapter 169, and is as follows:

"Any stockholder of any company whose property and franchises shall have been leased to a corporation created under this act who shall not assent to lease, or who shall resist or object to the making thereof, may at any time within thirty days after the making of such lease as in this act provided apply by petition to the circuit court of the county in which the chief office of the lessor corporation may be kept or to a judge of said court in vacation, if no such court sits within such period, on reasonable notice to said company, to appoint three disinterested persons to estimate the damage, if any, done to such stockholder by said proposed lease; and whose award, or that of a majority of them, when confirmed by the said court, shall be final and conclusive; and the persons so appointed shall also appraise said stock of such stockholder at the full market value thereof without regard to any depreciation or appreciation in consequence of the said lease; and the lessor company may at its election either pay to the said stockholder the amount of damages so found and awarded, if any, or the value of the stock so ascertained and determined, and upon the payment of the value of the stock as aforesaid the said stockholder shall transfer the stock so held by

him to said lessor company to be disposed of by the directors of said company or to be retained for the benefit of the remaining stockholders; and in case the value of said stock as aforesaid is not so paid within thirty days from the filing of the said award and confirmation by said court, and notice to said lessor company, the damages so found and confirmed shall be a judgment against said company, and collected as other judgments in said court are, by law, recoverable."

As both of the corporations lessor and lessee respectively, and defendants herein, were formed and organized under the provisions of chapter 172, it would seem that there could be no doubt, that plenary capacity to stand in the mutual relation towards each other, of lessor and lessee, was conferred upon said corporations by section 16 of said chapter. If it should be objected, however, that the words, "such other corporation and corporations are hereby authorized to make such lease," are insufficient, for any reason, to confer the requisite power on the lessor company, the prior act constituting chapter 169, is direct and ample for that purpose. But we are of opinion that section 16 of chapter 172 of the act under which both corporations were organized, confers the requisite authority upon both corporations.

The lease that has been executed, and here the subject of controversy, was made pursuant to the careful provisions of the said section 16. It complies with all its requirements as to protecting all rights of creditors and liens upon the property of the corporation lessor, and all privileges and immunities of such lessor corporation. It also provides for the assumption by the lessee company of all debts, liabilities and duties of the lessor corporation. As has been seen, section 17 of said act provides a mode by which any dissentient stockholder may be compensated, if he should fear the effects of such lease upon the value of his stock, or if for any other reason he desires to retire from the corporation without loss. This provision would seem to have been adopted out of cautious solicitude for the rights of possible dissentient stockholders. Even in a case where a lease or consolidation was authorized, by a legislative act subsequent to the act under which the corporation was organized, such a provision as that of section 17, above quoted, has been held a competent exercise of the power of eminent domain. It was construed to be a taking of private property for a public use, and the fact that it was for a public use has been held to be settled by the legislative act providing for the taking. Black v. Canal Co., 24 N. J. Eq. 455. But in the case in hand, no such question, as to whether, or how far, dissenting stockholders would be bound by a subsequent legislative provision authorizing a lease, can arise. The act, under which both of these corporations were organized, and the legislation existing at the time, expressly conferred upon these corporations, from the beginning of their existence, the power to be either lessor or lessee. Every stockholder, including these complainants, in subscribing for his stock, took it subject to the conditions of the act, under the authority of which it was issued, and of the relevant provisions of law existing at the time, and were bound by their several requirements and conditions. Every stockholder knew, when he subscribed, or was bound to know, that the corporation had power to lease the property, and they also knew that if they did not assent, or did assent, what provision had been made, out of abun-

dant caution, for their benefit. These provisions entered into the contract of the stockholders, inter sese, and they took their stock upon the express condition that they would be bound thereby.

So far, it seems too plain for argument, that lawful authority to be parties to the lease in question, was conferred in express terms upon both of the defendant companies. It is not necessary to dwell long upon certain objections made by complainants, in their argument, to the sufficiency of the acts referred to, to authorize this lease. The objections seem to us hypercritical, and it would be an unnecessary consumption of time to discuss them further than to say that they are, in our opinion, without merit. One objection, however, should receive a passing notice, and that is, that the act constituting chapter 172 of the General Laws of 1893, in its sixteenth section, is unconstitutional, in so far as it attempts, after authorizing corporations created under it to lease the property of other corporations, to confer authority on all such other corporations to make such lease, the constitution of New Jersey providing that every law shall embrace but one object, and that object shall be expressed in its title. This objection would be good, were the lessor corporation created under another and different act. It would in that case, as in the case of Camden & A. R. Co. v. May's Landing R. Co., 48 N. J. Law, 560, 7 Atl. 523, be an amendment to a charter subsisting under a different act. In the case before us, however, both companies derived their corporate powers from the same act, and if the power to lease the property of another corporation be sufficiently embraced in the general object expressed in the title, the power of such a corporation to make a lease, would also be so embraced.

The objection most seriously and strenuously urged, is, that although express power may be given to a corporation to lease, that power cannot, in the absence of express legislative authority to the contrary, be exercised without the assent of all the stockholders. It is argued, with some plausibility, that without express legislative authority, a corporation could not make a lease of its property and franchises, even with the assent of all its stockholders, and that express legislative authority to make a lease is only a conferring of a power not existent without such legislative grant, upon the whole body of stockholders. Many cases have been cited in the brief and in the argument, to support these propositions. The distinction, however, between these cases and the one at bar, is, that the former concern grants of legislative power to lease, to corporations already in existence, and whose stockholders have subscribed under the conditions of the original charter, by which no such power was given. The implied contract between the stockholders, inter sese, in such cases, is, as already stated, that no such additional power, so radical in its nature, though conferred by legislative authority, shall be capable of being exercised without the assent of all the stockholders. In the case before us, however, the power to lease was conferred by the act under which both corporations were formed. It was inherent in their organization and corporate existence, and was a condition upon which every stockholder received his stock. It was competent for the legislature to have imposed in its creative act, any conditions it

pleased, upon the stockholders of the corporation which it had called into existence. The power to lease having been so given, without prescribing any mode in which it was to be exercised, it must be classed with the general powers conferred by a charter, which are to be exercised by the majority of corporators or stockholders. This is the general rule, applicable to all corporate powers originally conferred by charter, and inherent in the corporate organization in its inception. It is unreasonable to suppose that a power conferred by the creative act, should, in the absence of any other mode prescribed for its exercise, be made to depend upon the unanimous consent of the stockholders. Corporate existence might be so imperiled, and corporate ends defeated. The view stated has the sanction of well-considered judgments in American and English cases, which have been summarized by Morawetz, in his work on Private Corporations (section 407), as follows:

"It is evidently the intention of all parties who join in creating a corporation, that all acts which are done by the company under its charter shall be done in the usual manner, and by the agencies through which a corporation usually acts. The majority in shareholders' meeting, and in some instances the board of directors, are impliedly invested with full powers to do on behalf of the corporation whatever they deem judicious in carrying out the company's chartered purposes. If the charter contains a provision purporting to authorize the corporation to do a certain act, this is not merely a grant of authority from the legislature to the corporation, but it enters into the agreement of the shareholders, and impliedly invests the majority, or the board of directors, with authority to do the act on behalf of the corporation. This is true, although a change in the company's constitution, or an alteration of the character of its main enterprise, be the result. The powers of the majority, or board of directors, under these circumstances, are derived strictly from the agreement of the shareholders."

See, also, sections 475 and 941. See, also, 3 Cook, Corp. § 895, and cases cited.

It should not pass without comment, that in the present case, the lease in question was assented to formally, by more than two-thirds of the stockholders, and informally in writing by every stockholder, save the holders of the 400 shares interested in this litigation, the complainants being the owners of only 100 shares. Courts of equity are reluctant to act in cases where their action would unsettle and disturb enormous interests, especially where most of them are attached to innocent third parties, and to which the interests of those invoking judicial action are overwhelmingly disproportioned. And still more is this the case, where the evidence discloses that those seeking such drastic judicial intervention, have not suffered, and are not likely to suffer pecuniary loss.

It is also contended by complainants, that there is jurisdiction in this court, independently of the grounds heretofore discussed, in that the lease in question, in its effect, takes the private property of the complainants, against their consent, and is in violation of the rights of the complainants, guarantied to them by the constitution of the United States and of New Jersey. If this contention were valid, this proposition would not only be a ground of jurisdiction, but one justifying, in part at least, the relief sought by complainants. The gravamen of this charge is, that section 17 of the act under which the companies

defendant were formed, provides for the condemnation of the stock of any "stockholder of any company, whose property and franchises shall have been leased to a corporation created under this act, who shall not assent to the lease, or who shall resist or object to the making thereof," when no public use justifies the same, the contention being that this would be a taking of private property, without due process of law, in contravention of the constitutions of the United States and of the state of New Jersey. The fallacy of this contention consists in the ignoring of the fact that all stockholders of the lessor company are bound by the conditions imposed by the legislative act which created their corporation, and have impliedly assented to the exercise of the power to lease, when authorized by the lawfully constituted directors of the company, and by the holders of a majority of the stock therein. There has, consequently, been no taking of the property of the dissentient stockholders in the constitutional sense. The authority for appraising the stock of such minority holders, and paying them the value of it, need not in such a case have been provided for, nor are the proceedings authorized by section 17 of chapter 172, or by section 2 of chapter 169, strictly proceedings for condemnation of private property for public use. They only provide a way, in which minority stockholders may receive the present value of their stock, and retire from the corporation, when a lease, legally authorized, and to which they object, has been approved by a majority of the stockholders. It is, moreover, to be noted, that the argument of complainants seems to go also upon the assumption, that the provision for assessment and payment is obligatory upon the dissentient stockholders, whereas, it is entirely optional with such stockholders to avail themselves of this provision, or not. It is needless to further discuss the elaborate argument of complainants' counsel, under this head, except to say that the cases cited to support their contention, so far as we have examined them, are very different from the present; being cases where the legislature has sought to condemn holdings of minority stockholders in their corporation, by legislation enacted after the stockholders' rights under their charter had accrued.

For the reasons stated, we think the bill of complaint should be dismissed, with costs, and it is so ordered.

In re WATERBURY FURNITURE CO.

(District Court, D. Connecticut. February 25, 1902.)

No. 692.

BANKRUPTCY—PREFERENCES—PAYMENT ON NOTE HELD BY INDORSER.

A payment made by an insolvent within four months prior to his bankruptcy to a bank, to apply on a note given by him to a solvent creditor, who had indorsed the same and sold it to the bank, constitutes a preference to such creditor, which must be surrendered, under Bankr. Act 1898, § 57g, before he can prove his claim against the bankrupt estate.

In Bankruptcy. On question certified by referee.

Josiah G. Beckwith, Jr., for petitioners.
Cooley & Bell, for Houghton & Fraser.
Bronson & Minor, for trustee.

TOWNSEND, District Judge. The certificate of the referee states the facts and question of law, with his ruling thereon, as follows:

"The petition of creditors in said case was filed in court on July 15, 1901, and the corporation was adjudicated bankrupt on August 2, 1901; having been insolvent for more than four months prior to the adjudication. On March 15, 1901, the bankrupt gave Houghton & Fraser a three-months note for $421.28; being a part of the balance then due from the bankrupt to said Houghton & Fraser. Houghton & Fraser had this note discounted in bank, and when the note became due, on June 15, 1901, sent to the bankrupt their check for $250, receiving a new note from the bankrupt therefor; and the bankrupt paid the note in bank on which Houghton & Fraser were indorsers. On May 1, 1901, Houghton & Fraser sold to the bankrupt goods to the amount of $30, which were not paid for. The question arises whether the payment of $171.28 (being the difference between the $250 advanced by Houghton & Fraser on June 15, 1901, and the $421.28 note in bank which had been discounted by Houghton & Fraser) should be considered as a preference, and charged against the dividend of Houghton & Fraser. The claim of Houghton & Fraser, as filed, was $369.02. The referee holds that the $171.28 should be returned, and, considering it as returned, allows the claim for dividend at $540.30, and charges $171.28 against the dividend, which sum will still leave a balance of dividend due Houghton & Fraser of about $30; and, at the request of Houghton & Fraser, the question of the correctness of this ruling is certified to the judge of the court for his opinion thereon.

"In Landry v. Andrews (supreme court of Rhode Island; April 26, 1901) 6 Am. Bankr. R. 281, 48 Atl. 1036, a note was paid by an insolvent at the request of the indorsers, who had reasonable cause to believe that it was intended thereby to give them the preference over other creditors. It was held that this payment was a preference, under section 60b, and the trustee recovered back the amount from the indorser. If Houghton & Fraser had been aware that the Waterbury Furniture Company was insolvent, the trustee could recover back the $171.28 from them. A distinction ought not to be made between the meaning of 'preference' under section 57g and section 60, unless absolutely necessary and in accordance with the general intent of the act. The note to Houghton & Fraser was given within four months of the commencement of the proceedings in bankruptcy. The payment made inured to the benefit of Houghton & Fraser as much as if it had been made directly to them. The objection is one of form, rather than of substance. To hold this payment not a preference, and at the same time hold direct payments to creditors as preferences, would be unjust to the other creditors. The ruling above is believed to be in accordance with the intent and spirit of the statute, and in the line of equity on which the decision in Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, was justified by the supreme court. The bankruptcy statute should be construed so as to promote equality among creditors."

It is not disputed that the facts and questions at issue are correctly stated. Under section 57g of the bankrupt act, if the bank had continued to hold the note, and had not proved the claim, Houghton & Fraser could have proved it. The payment was wholly for their benefit, and, as their solvency is not questioned, the bank had no interest in the payment. The provisions of section 60 have been repeatedly cited to aid in construing the term "preferences" in section 57g. See, for example, In re Soldosky, 7 Am. Bankr. R. 126, 111 Fed. 511; In re Dickson, 7 Am. Bankr. R. 190, 111 Fed. 726.

The decision of the referee is affirmed.

MILLS et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 43.

CUSTOMS DUTIES—FIGURED COTTON CLOTH.

Tariff Act 1897, par. 313, imposing an additional duty on "cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure," includes cotton cloth in which there is a separate and extra thread, not introduced for the purpose of ordinary manufacture, but with the sole object of forming the figure, and which does not in any way enter into the structural part of the goods, but is for ornamental purposes, and without which the fabric would have been a completed fabric.

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

Appeal from a decision of the United States circuit court for the Southern district of New York (109 Fed. 564), affirming a decision of the board of United States general appraisers, which sustained the action of the collector and overruled the protests of the appellants.

W. Wickham Smith, for appellants.

Chas. D. Baker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. In May, 1890, the appellants, Mills & Gibb, imported into the United States at the city of New York a case of cotton woven goods of 25 different varieties, each containing figures of various kinds produced in weaving, and known as "fancy cottons." They were all assessed for duty as cotton cloth, under paragraphs 307 and 308, Schedule I, of the tariff act of July 24, 1897, and known as the "countable clauses." Upon 17 fabrics an additional duty was assessed under paragraph 313 of the same act, which is as follows:

"313. Cotton cloths in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure, whether known as lappets or otherwise, and whether unbleached, bleached, dyed, colored, stained, painted or printed, shall pay in addition to the duty herein provided for other cotton cloth of the same description or condition, weight and count of threads to the square inch, one cent per square yard if valued at not more than seven cents per square yard; and two cents per square yard if valued at more than seven cents per square yard."

The importers protested against the exaction of this additional duty, but the protests were overruled by the board of general appraisers as to every fabric except one. The circuit court affirmed the decision of the board.

The substantial question in the case was whether, in these fabrics of cotton cloth, other than the ordinary warp and filling threads had been introduced in the process of weaving to produce a figure, and upon this question the witnesses for the importers and for the government differed. It was agreed that the figure effects in the goods in question were produced by attachments to the loom, such as Jacquard attachments, dobby attachments, drop boxes, or lino attachments; but the witnesses for the government conceded that this fact did not afford

a sufficient test for the purpose of determining the disputed question in regard to the use of ordinary warp and filling threads. For example, Mr. Henry F. Lippett, a witness of large manufacturing experience, testified as follows:

"Q. For what purpose are they [the Jacquard head or the dobby head] attached to and worked in conjunction with the loom proper? A. They are used for the purpose of making some of the very wide range of goods that is called 'fancy goods.' Q. And does that usually employ a separate and an independent thread in forming the fabrics? A. They may or may not. There are a great many dobby goods and a great many Jacquard goods in which the figure is produced by the ordinary threads of the fabric."

For some years before 1897 the importers and the appraising officers had differed in regard to the proper rate of duty to be imposed upon embroidered cotton fabrics, but it does not seem certain that paragraph 313 was inserted in the act of 1897 for the purpose of attempting to settle this question. There is reason to think that the introduction was due to a desire on the part of the domestic manufacturers that "lappet weaves," a new product, and produced by new and special machines in this country,—"a figure weave of the kind when the plain cloth has a woven pattern or design in its surface or embroidery,"—should be subject to additional specific duties. The lappet method of weaving is described as follows:

"It is a motion by which a thread is lapped onto the ordinary warp and filling of a piece of cotton goods. It consists of a number of needles, which by the proper mechanism it is possible to either raise or depress, and also to move either to the right or to the left. In that way the thread that these needles control can be put under or over the filling threads, or by moving to the right or to the left can be put under or over, as the case may be, the warp threads. In the ordinary Jacquard only one of these motions is possible."

It is probably true that a filling thread which can be used for the ordinary purpose of filling is sometimes used and introduced in the process of weaving by the skill of manufacturer for the sole purpose of forming a figure, and so has become an extraordinary thread; and this fact constitutes a part of the difficulty in defining with exactness the term which is used for the first time in paragraph 313. Our opinion is that the paragraph intends to describe and include cotton cloth in which there is a separate and an extra thread; that is, a thread not introduced for the purpose of the ordinary manufacture of plain cloth, but introduced in or during the process of weaving for the sole purpose of forming the figures, and which does not in any way enter into the structural part of the goods, but is for ornamental purposes, and without which the fabric would have been a completed fabric.

It follows that all the goods which are the subject of this appeal were properly dutiable under paragraph 313. The decision of the circuit court is affirmed.

H. B. CLAFLIN CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 47.

CUSTOMS DUTIES—FIGURED COTTON CLOTH.

Tariff Act 1897, par. 313, imposing an additional duty on "cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form a figure," applies to cotton goods, known as "Madras" or "damask" goods, which are "ornamental, with spots or figures woven in by independent filling threads introduced for that purpose"; the threads not being an integral part of the fabric, and the portions not needed to make the figure being cut off after the weaving process is concluded.

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

Appeal by the H. B. Claflin Company from a decision of the United States circuit court for the Southern district of New York (109 Fed. 562), affirming a decision of the board of United States general appraisers, which sustained the action of the collector and overruled the protests of the appellants.

Albert Comstock, for appellants.

Chas. D. Baker, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The question in this case is the same as that involved in the case of Mills v. U. S., 114 Fed. 257, and is whether the additional duty imposed by paragraph 313 of the tariff act of July 24, 1897, upon a certain class of cotton woven fabrics, was properly assessed upon cotton goods, known as "Madras" or "damask" goods, which are "ornamental, with spots or figures woven in by independent filling threads introduced for that purpose, portions of which threads have been afterwards cut away." The circuit court further found that in the figured Madras goods "the figure is made by means of a shuttle carrying an independent thread, and thrown back and forth through the warp threads. These threads, however, are independent in the sense that they are not an integral part of the fabric, and the portions not needed to make the figure are cut off after the weaving process is concluded." The circuit judge, in discussing the meaning of the word "ordinary," as used in paragraph 313, said:

"I think that the word 'ordinary,' as applied to such [warp and filling] threads, means those threads which ordinarily enter into the construction of the ordinary plain fabric, and which cannot be removed without destroying its integrity, as distinguished from extraordinary threads, which are not an integral part of the fabric, but which, as in the case of lappets and dotted Swisses, are independent threads introduced to form a figure, and for no other purpose."

This is in harmony with the construction which was given by this court to paragraph 313 in the Mills Case. The result is that the assessment of duty upon Madras goods is sustained, and that the decision of the circuit court is affirmed.

CARBON SLATE CO. v. ENNIS.

BACON v. SAME.

(Circuit Court of Appeals, Third Circuit. February 24, 1902.)

Nos. 30, 31.

1. SHIPPING—BREACH OF CHARTER—DAMAGES.
The owner is entitled to recover from a charterer the amount necessarily expended by the master in trimming a cargo after loading, made necessary by the fact that the cargo was not in proper condition, or that the ship was loaded at a place where she could not "always lie afloat," as required by the charter.

2. SAME—DEAD FREIGHT.
Under a charter which required the ship to proceed to the port of loading, "or as near as she can safely go," and required the charterer to furnish a full and complete cargo of ore, it was the duty of the latter to deliver the cargo at a place from which the ship could get away after being loaded, and he is liable for dead freight where the ship could not load a full cargo at the berth he assigned her, because of a bar in the harbor which she could not cross, and the master was not requested to stop for further loading after crossing the bar.

3. SAME—CONSTRUCTION OF CHARTER—COMMENCEMENT OF LAY DAYS.
A provision in a charter, "Lay days not to commence to count until 12 o'clock noon after the steamer is entered at the custom house and in every respect ready to load," though negative in form, is positive in effect, and means that the lay days shall commence to count at that time; and where, by a further clause, the ship was required to load "when, where, and as directed" by the charterer, and she was ready on her part, and her master had given the required notice, the lay days commenced to count from the succeeding noon, and the responsibility for a further delay in commencing to load rests upon the charterer, although caused by a custom of the port which compelled her to await her turn to get to the berth assigned her.[1]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 110 Fed. 404.

H. L. Cheyney and John F. Lewis, for appellant.

Ira J. Williams, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. These cases were argued together, and may be disposed of in a single opinion. The question presented is whether the court below erred either in allowing the claims for trimming charges and for dead freight, respectively, or in disallowing those relating to dispatch money.

Respecting the two items first mentioned, we concur in the views expressed and in the conclusions reached by the learned judge of the district court. The respondents were charterers under a charter party which provided that the chartered vessel should proceed to Bilboa, Spain, "and there load when, where, and as directed, in the usual and customary manner, from the charterers' shippers, a full and complete cargo of ore, same to be delivered to her where she can always lie

[1] Demurrage, see note to Randall v. Sprague, 21 C. C. A. 337.

afloat," etc. Notwithstanding this provision, the ore was delivered to her where she could not always lie afloat. Consequently, and because it was in a wet condition, it was necessary to trim cargo; and as the expense incurred in doing this was not occasioned by any default of the master, but by the failure of the shippers to properly deliver, it was rightly held that that expense must be borne by the charterers.

The respondents contend that their obligation to furnish a full and complete cargo was fulfilled because they had a full cargo ready for shipment, and this position would be impregnable if certain other provisions of the charter party and the particular facts of the case were not to be regarded. But the contract was, in legal effect, that the vessel should proceed to Bilboa, or as near as she could safely get, and when loaded get away from, in order to proceed to the port of Philadelphia (Shields v. Wilkins, 5 Exch. 304); and the fact is that she was directed to load at a berth where a full cargo, if taken aboard, would have made it impossible for her, at any stage of water or at any time, to pass out over the harbor bar. The suggestion now made that the master should have detained the vessel outside the bar for reception of the balance of the ore is without force. He was not asked to do so, and it is quite evident that the shippers did not contemplate any delivery of cargo elsewhere than at the "tip." The district court was therefore right in deciding that nothing had been shown to excuse the nonperformance by the charterers of their express undertaking to furnish a full cargo, and in accordingly sustaining the libelant's demand for compensation by way of dead freight upon the difference between what would have been a complete cargo and the partial one which was actually put on board.

We are unable to adopt the construction which was put by the court below on that clause of the charter party which concerns lay days. In our opinion, the phrase, "lay days not to commence to count until twelve o'clock noon after the steamer is entered at custom house and in every respect ready to load," etc., though negative in form, is positive in effect. It means that they shall commence to count at that time, but not before. It does not mean that they shall not be counted before that time, but may not commence even then. When the steamer had been entered and was ready to load, and the stipulated notice had been given, all had been done which she was required to do. It then became the duty of the shippers to promptly load her, subject only to the provision by which they were allowed till 12 o'clock noon thereafter for the commencement of lay days. The ship's readiness to receive the cargo "from the charterers' shippers" was not dependent upon their readiness to assign her a berth. So long as this was not done, she was detained in waiting, not by any lack of readiness on her part, but by the unreadiness of the shippers, and therefore they, and not the master, were responsible for the consequent delay in loading her. It was not for him to obtain a berth, for the charter party expressly required him to load "when, where, and as directed." Upon reaching the harbor the arrival of the ship was complete, and, while it was the duty of the master to then make the vessel ready to receive cargo, the designation of a place for its reception was, as we read the contract, as clearly incumbent upon the shippers as was

preparedness to make delivery at some point within the port of Bilboa. Gronstadt v. Witthoff (D. C.) 15 Fed. 265. If, as is contended, the delay in question was caused by a custom of the port that each vessel should await its turn to obtain a wharf, that fact could not relieve the charterers from their positive engagement as to the time at which the lay days would commence to count. It is true that an incident not expressly mentioned may be by custom annexed to a contract, unless the annexing of such incident would be repugnant to, or inconsistent with, its terms, and this rule applies to a charter party as well as to other contracts; but it does not derogate from the right of the contracting parties to themselves agree by which of them any burden imposed by custom shall be borne. Therefore, as in this instance the contract, as we construe it, was that the lay days should commence at 12 o'clock noon, etc., it cannot, consistently with its terms, be held that the time for their commencement was not fixed, but was left open for future and contingent determination. Davis v. Wallace, 3 Cliff. 123, Fed. Cas. No. 3,657; Sleeper v. Puig, 17 Blatchf. 36, Fed. Cas. No. 12,941; Keen v. Audenried, 5 Ben. 535, Fed. Cas. No. 7,639; Moody v. Five Hundred Thousand Laths (D. C.) 2 Fed. 607; Mott v. Frost (D. C.) 47 Fed. 82. Nor is the clause directly under consideration at all qualified by the distinct provision that the ship was to load "in the usual and customary manner." These words do not apply to the time to be taken in loading, but only to the manner of loading. Davis v. Wallace, supra; Dunlop v. Balfour [1892] 1 Q. B. 520.

Solely upon the ground that its disallowance of the claims respecting dispatch money was erroneous, the decrees of the district court are reversed, and the causes designated at the head of this opinion will be remanded to that court for further proceedings to be there taken in pursuance of this determination.

F. L. SMIDTH & CO. v. BONNEVILLE CEMENT CO.

(Circuit Court of Appeals, Third Circuit. February 17, 1902.)

No. 32.

PATENTS—ANTICIPATION—TUBULAR BALL MILLS.

The Davidsen patent, No. 548,115, for improvements in tubular ball mills for pulverization of various materials, is void for anticipation by the British patent to Redfern.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Edwin H. Brown and Louis C. Raegener, for appellant.
Wm. A. Jenner, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The suit in the court below was brought by F. L. Smidth & Co., for alleged infringement by the Bonneville Cement Company, of United States letters patent to Joseph Davidsen, No. 548,115, for improvements in tubular ball mills for pulverization

of various materials. The bill is in usual form, and sets forth the grant of the letters patent to Davidsen, its assignment to complainant, extensive manufacture thereunder by complainant, infringement by and profit therefrom by defendant, after notice, with the usual prayer for relief. The answer denies infringement, and alleges certain prior patents, notably the United States patents to Close and Robertson, and a British patent to Redfern, as anticipating Davidsen's invention, and invalidating the patent in suit. The record is a voluminous one, setting forth many prior patents referred to by defendant, and the protracted proceedings in the examiner's office as disclosed by the file wrapper, which shows that the complainant's application was seven times rejected on references to prior patents, and was finally granted on an amendment to the claim, with expressed reluctance.

We have carefully examined the record, and the elaborate statements therein made by expert witnesses, who testified for complainant and defendant respectively, and considered the argument of counsel thereupon, and are of opinion that the bill was properly dismissed by the court below. The opinion of the learned judge in that court, deals so clearly and satisfactorily with the questions involved in the case, that a separate opinion by this court would be an unnecessary paraphrase thereof. Referring to that opinion, as reported in (C. C.) 106 Fed. 930, we adopt its reasoning and conclusion.

The judgment of the court below is therefore affirmed.

CENTRAL R. & BANKING CO. OF GEORGIA v. FARMERS' LOAN & TRUST CO. et al. FARMERS' LOAN & TRUST CO. et al. v. CENTRAL R. & BANKING CO. OF GEORGIA et al. (CHARLESTON & W. C. RY. CO. et al., Interveners).

(Circuit Court of Appeals, Fifth Circuit. February 18, 1902.)

No. 1,087.

1. CORPORATION—POWER TO MAKE GUARANTY.
   The Central Railroad & Banking Company of Georgia, which was given by its charter full banking powers, which it exercised, had power thereunder to guaranty the bonds of a railroad company of which it owned a majority of the stock, where such guaranty was made for its own purpose and advantage.
2. TRUSTS—REPUDIATION BY TRUSTEE—RECOVERY OF FUND.
   A corporation which assumed the duties of a trustee of a sinking fund created by another corporation for the benefit of its bondholders, and received such fund, will not be permitted by a court of equity to withhold it from those to whom it belongs, or who have claims against it, on the ground that it had no power to act as trustee.
3. BONDS—RIGHTS OF TRANSFEREE.
   The validity of negotiable bonds issued and sold to bona fide purchasers for value is not affected in the hands of a subsequent holder, because an intermediate owner could not have enforced the same.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

This is an appeal prosecuted from a decree passed by the United States circuit court for the Southern district of Georgia (115 Fed. —), on the inter-

vention of the Charleston & Western Carolina Railway Company and Robert S. Adams in the consolidated equity causes in said court entitled "The Central Railroad & Banking Company of Georgia against the Farmers' Loan & Trust Company et al.," and "The Farmers' Loan & Trust Company et al. against the Central Railroad & Banking Company of Georgia et al." The decree appealed from adjudges to said interveners the amounts which they claim to be due them upon certain second mortgage bonds of the Port Royal & Augusta Railway Company. The railway company just named executed on May 1, 1882, a second mortgage on its property to the Central Railroad & Banking Company of Georgia to secure an issue of second mortgage bonds. The Central Railroad & Banking Company of Georgia indorsed on each of said bonds its obligation to pay the principal and interest of said bonds in case of default by the Port Royal & Augusta Railway Company, and accepted the trusteeship of a sinking fund for the redemption of the bonds. This fund was to consist of annual payments to be made to the Central Railroad & Banking Company of Georgia by the Port Royal & Augusta Railway Company, and of interest thereon, which the former was to allow. The bonds are now past due. Before their maturity the Port Royal & Augusta Railway Company became insolvent, its property was sold under a decree of the United States circuit court for the district of South Carolina, and, as the proceeds of the sale were absorbed by prior incumbrances, nothing was realized on the bonds in question. The Central Railroad & Banking Company of Georgia owned a majority of the stock and a large number of the bonds of the Port Royal & Augusta Railway Company, and had guarantied many bonds of other railroad companies in the same manner that it had guarantied the bonds in question. All holders of the second mortgage bonds of the Port Royal & Augusta Railway Company were called upon, by orders of said United States circuit court for the district of South Carolina, to come in and prove their bonds. Seventy-nine of the bonds then proven were subsequently purchased by Samuel Thomas and Thomas F. Ryan at par and accrued interest. These were afterwards transferred by them at full cost to the Charleston & Western Carolina Railway, one of the present appellees; and Robert S. Adams, who is the other appellee herein, then proved two bonds, which then belonged, and still belong, to him. The Central Railroad & Banking Company of Georgia was placed in the hands of receivers by the United States circuit court for the Southern district of Georgia, and, in pursuance of a certain "plan of reorganization," all the assets and property of the Central Railroad & Banking Company of Georgia were transferred to the Central of Georgia Railway Company, as is stated more fully in the case of Railway Co. v. Paul, 35 C. C. A. 639, 93 Fed. 878. In the said receivership proceedings, by order of the court, certain properties of the Central Railroad & Banking Company of Georgia, which were free from mortgage, were sold, and the proceeds formed a fund, which is referred to as the "Overflow Fund." This fund was turned over to the new corporation. An order of court was passed calling on all persons having claims on said fund to come forward and prove their claims. The appellees filed their intervention, praying that their bonds, with interest, be paid out of the said overflow fund, and that in default of such payment out of said fund the Central of Georgia Railway Company be decreed to pay said bonds and interest. The master reported in their favor, and the court affirmed the report, decreeing that the interveners be paid as by them prayed. From this decree the Central of Georgia Railway Company and the Central Railroad & Banking Company of Georgia have appealed.

H. C. Cunningham and Alex. R. Lawton, for appellants.

A. P. Wright and A. T. Smythe, for appellees.

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

PARLANGE, District Judge. The record in this cause is voluminous, but the issues are simple. The purpose of the interveners is to

recover on the guaranty of their bonds by the Central Railroad & Banking Company of Georgia, and also on the bonds themselves, as entitled to share in the sinking fund provided for these bonds and received by the Central Railroad & Banking Company of Georgia. The appellants urge that the Central Railroad & Banking Company of Georgia had no power to guaranty the bonds. Apart from the judicial admissions of liability made by the Central Railroad & Banking Company of Georgia on similar guaranties in the receivership proceedings, but in other pleadings than those in this particular cause, and apart from judicial action had in the proceedings in which those judicial admissions were made, we are clearly of opinion that the Central Railroad & Banking Company of Georgia had power under its charter to guaranty the bonds in question. It had full banking powers, which it used without any doubt or suspicion as to their validity. It seems that at one time it did the largest banking business in Georgia. The guaranty was made for its own purpose and advantage. It dominated and controlled the Port Royal & Augusta Railway Company, as it did several other railroad corporations. Under circumstances similar to those of the guaranty in this cause, it guarantied other bonds of railroad corporations for an amount aggregating millions of dollars, and the bonds were put in circulation without any doubt of the validity of their guaranty.

It is immaterial whether there be force or not in appellants' contention that the Central Railroad & Banking Company of Georgia had no power to make itself the trustee of the sinking fund. It is evident that, that corporation having received the fund, a court of equity will not allow it to be withheld to the detriment of those to whom it belongs or who have claims upon it.

The appellants make an attack upon the doctrine announced by this court in the case of Railway Co. v. Paul, 35 C. C. A. 639, 93 Fed. 878. This court was, and still is, perfectly satisfied with the conclusion it reached in that cause. That conclusion has since been additionally fortified by the decision of the supreme court in the case of Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 174 U. S. 684, 19 Sup. Ct. 827, 43 L. Ed. 1130. The appellants contend that there can be no recovery in this cause by reason of fraud. They argue, as we understand them, that, if the reorganization of the Central Railroad & Banking Company of Georgia was a fraud, the bonds in question became stricken with nullity when they came into the hands of Thomas and Ryan, who were principal participants in the fraud, and that the Charleston & Western Carolina Railway Company, one of the present interveners, being a transferree from Thomas and Ryan, cannot recover on the bonds because Thomas and Ryan could not have recovered upon them. Substantially, what this court held in the Paul Case was that, because of the reorganization, the Central of Georgia Railway Company is liable for the claims of the unsecured creditors of the Central Railroad & Banking Company of Georgia. There was no connection between the bonds in question and the reorganization which could have affected them injuriously. The scope and effect of the decision in the Paul Case was to protect the rights of the class of creditors to which the interveners belong, and we do not see how it

was believed that a deduction could be drawn from the decision which would have defeated, instead of benefiting, the creditors in this cause. Upon this question of fraud the learned judge below said in his opinion:

"We have not been able to discover in this record any evidence of fraud on the part of Thomas and Ryan which, if they were the present holders, would deny them payment for these bonds."

He further said:

"We refrain from discussing the alleged fraud in the reorganization of the Central Railroad & Banking Company of Georgia, referred to by counsel. Counsel on either side had much to say about this supposititious fraud, and yet on both sides they protested that there was no fraud. This discussion seems superfluous, and, in view of the mutual protestations, not a little mystifying and vague. Certainly, nothing was said on this topic to affect the right of the interveners to have their bonds paid from the unpledged property set apart by the order of the circuit court for creditors of the class to which they belong."

On this point, it is sufficient to say that the bonds now held by the Charleston & Western Carolina Railway Company were originally issued to parties who acquired them years ago, for full value, and whose good faith has in no manner been questioned. Therefore, under a well-established doctrine, it is clear that the Charleston & Western Carolina Railway Company can claim and recover on the title of the persons who transferred the bonds to Thomas and Ryan. As for the intervener R. S. Adams, he was one of the original bona fide purchasers at the time of the issue, and has held his bonds ever since then.

There is no virtue in the contention that certain former debts or liabilities of the Central Railroad & Banking Company of Georgia, now paid or satisfied, should be allowed to prorate in the overflow fund. It may be well to notice in this connection that the main question in this cause is whether the appellants are liable to the interveners for their bonds, and, as we hold that they are, the means by which payment is to be made would seem to be of little practical importance in the end.

The answer to the complaint that the interveners, instead of resorting to the procedure of an intervention, should have filed a bill in equity, is that the interveners came in by the invitation and upon the call of the court, and that the appellants have had the opportunity, of which they have fully availed themselves, of presenting their defenses; and, besides, a stipulation in this cause, entered into between the counsel, estops the appellants from objecting to the interveners' form of procedure.

After a careful consideration of this cause, we find no error in the decree appealed from, and the same is therefore affirmed, with costs.

DUBOIS v. DECKER.

(Circuit Court of Appeals, Third Circuit. February 24, 1902.)

No. 44.

APPEAL—PROCEEDINGS NOT IN RECORD—NECESSITY OF BILL OF EXCEPTIONS.

Assignments of error based on the charge of the court or rulings on the admission of evidence present no question which can be considered by the appellate court, unless the charge and the evidence adduced have been brought into the record by bills of exception, duly certified and sealed by the trial judge.

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

G. A. Jenks, for plaintiff in error.

A. L. Cole, for defendant in error.

Argued before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

GRAY, Circuit Judge. This case comes before us on a writ of error to the circuit court for the Western district of Pennsylvania. The suit was brought to recover for the price of goods sold and delivered by plaintiff below to defendant below. The principal defense was the alleged failure of plaintiff to deliver in the time stipulated for in the correspondence between the parties, the other defenses being the alleged inadequacy of the log loader (the subject matter of the sale) to do its work, etc. The record presents the docket entries in the suit:—the statement of claim and the affidavit of defense, the issues joined, the submission of the same to the jury, certain requests to the court to charge, by plaintiff and defendant respectively, the verdict of the jury, in favor of plaintiff, for $4,438.18, motion by defendant in arrest of judgment, order of the court denying the same, and final judgment for the amount of the verdict. The petition for a writ of error, and its allowance by his honor, Judge Acheson, is also set forth, together with the supersedeas bond.

In this court, the plaintiff has filed six assignments of error. The first four allege error by the court in its conclusions of law, as stated in its charge to the jury. These assignments of error set forth as their basis, at great length, what purport to be extracts from the charge of the learned judge of the court below, and also what purport to be portions of the evidence, documentary and oral, to which the said extracts from the said charge relate. The fifth and sixth assignments allege error in the exclusion by the court of certain testimony, with what purports to be a statement of the offers of testimony, so alleged to have been refused.

These are the only assignments, and we look in vain to the record for any matter to which they refer. They deal exclusively with the charge and rulings of the court, and the evidence adduced at the trial before the jury. The charge of the court, its rulings during the trial, as to the exclusion or admission of testimony and the evidence adduced before the jury, are not of themselves part of the record. They can only be made such by bills of exception, duly presented and sealed by the trial judge. The law and practice in this regard is well es-

tablished, and requires no discussion. No bills of exception to either the charge or the rulings of the court are included in the record here, and none, in fact, are alleged to have been presented to, or sealed by the learned judge of the court below. The assignments of error are, therefore, in the air, as the charge and rulings of the court below, upon which they purport to be founded, are not before this court for review, as part of the record in the case.

The counsel for plaintiff in error, as if for the purpose of remedying this defect in the record, has added to his brief of argument, submitted to this court, an appendix, containing what purports to be a full stenographic report of all the testimony taken at the trial, including a copy of all the correspondence between the parties, and admitted in evidence. This, of course, can in no way supply the want of a properly certified and sealed bill of exceptions. We have, however, examined the same, and, in view of the zeal and ability of the counsel for the plaintiff in error, think it proper to state, that we are of opinion, that, if the portions of the charge criticised, and the evidence, especially that contained in the correspondence between the parties, to which they relate, are correctly set forth, there was no error in the conclusions of law reached by the learned judge of the court below.

For the reason that neither the charge of the court, as a whole, nor the parts to which the assignments of error refer, nor the evidence, in whole or in part, upon which the said alleged erroneous conclusions of law by the court below were founded, are before this court, as part of the record, the motion of counsel for the defendant in error, that the judgment below be affirmed pro forma, must be granted, and

It is so ordered.

MUTUAL LIFE INS. CO. OF NEW YORK v. KELLY.

(Circuit Court of Appeals, Eighth Circuit. February 17, 1902.)

No. 1,635.

1. APPEAL—REVIEW—ACTION TRIED TO COURT.

Where an action at law tried to the court without a jury is submitted on an agreed statement of facts, which is filed and made a part of the record, such statement is equivalent to a special verdict, and the court's conclusion of law based thereon is subject to review.

2. LIFE INSURANCE—CONTRACT—IOWA STATUTE.

In the provision of Code Iowa 1897, § 1782, that no life insurance company shall make any contract of insurance or agreement as to such contract other than as "plainly expressed in the policy issued thereon," the word "policy" must be construed to include the application, where that is in terms and by reference made a part of the policy, especially in view of section 1819, enacted in 1897, which requires a true copy of any application or representation of the assured which by the terms of a policy is made a part thereof to be attached to, or indorsed on, the policy.

3. SAME—VARIANCE BETWEEN APPLICATION AND POLICY—ESTOPPEL.

An application for life insurance requested that the policy be made payable to a third person, but as issued it was payable to the insured, his executors, administrators, or assigns. It recited that it was issued in consideration of such application, a copy of which was attached. It was accepted by the insured, and by him assigned to the beneficiary intended. *Held*, that both were estopped to repudiate the application as a part of the contract because of the variance.

4. SAME—EXECUTORY PROMISES BY INSURED—CONDITIONS BINDING ON BENEFICIARIES.
The beneficiary named in a life insurance policy, by accepting it and asserting a claim thereunder, ratifies the acts of the insured as agent in procuring it, and adopts the contract subject to the conditions and limitations therein expressed or implied, and cannot repudiate promises made to the insurer as a consideration for its undertaking, nor enlarge the obligation beyond that undertaking. Where the insured warranted and agreed in the application that he would not die by his own act within two years after issuance of the policy, and covenanted that such agreement should be a consideration for the contract, such agreement is a condition of the insurer's liability which is binding on the beneficiary.

5. SAME—DEPENDENT COVENANTS.
The effect of such a warranty and agreement in the application is to make the promise of the insurer to pay the amount of the policy dependent upon the death of the insured, exclusive of death by suicide within two years. The agreement of the insured, having been expressly made part of the consideration for the promise made by the insurer, cannot be treated as an independent covenant by which the rights of the beneficiary are not affected.

6. SAME—APPLICATION AS PART OF CONTRACT.
Where the representations and agreements in an application for life insurance are in terms "offered to the company as a consideration of the contract," and the policy expressly refers to the application and makes it a part of the contract, the agreements found in the application, as well as those in the policy, properly enter into and form a part of the contract.

7. SAME—CONSTRUCTION OF POLICY—COVENANT AGAINST SUICIDE.
An application for life insurance, the covenants and agreements in which were expressly offered as part of the consideration of the contract, and which was by reference in the policy issued thereon in terms made a part of the contract, contained agreements restricting the place of residence and occupation of the insured during the two years following the issuance of the policy, and also the following provision: "I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years." The policy contained a provision "that after two years from date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums. * * * and that the requirements of the company as to age and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed." *Held*, that the effect of such mutual covenants, fairly and reasonably construed, was to make the agreement against suicide a condition to the company's liability for the period of two years, and to show that the death of the insured by suicide, sane or insane, within the two years, was a risk not assumed by the company.

8. SAME—ACTION ON POLICY—DEFENSES.
A life insurance company is not required to return the premiums paid on a policy as a prerequisite to its right to contest its liability thereon, on the ground that the insured committed suicide, which was a risk it did not assume, where it admits the validity of the policy.

9. SAME—COVENANT AGAINST SUICIDE WHILE INSANE—VALIDITY.
A covenant in a contract of life insurance that the insured will not die by his own act while insane is not void as one known by the parties to be impossible of performance, but is valid as creating an excepted risk.

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

This was an action on two policies of insurance for $2,500 and $5,000, respectively, executed by the Mutual Life Insurance Company of New York,

the plaintiff in error, insuring the life of one Edward S. Kelly. Two separate applications in writing were made by Kelly for these policies, one dated April 19, 1893, wherein he made his wife, Josephine R. Kelly, defendant in error, the proposed beneficiary, and the other dated December 18, 1893, wherein he designated one Robert P. Mulock, his wife's father, as the proposed beneficiary. The first application was accepted by the insurance company, and the policy for $2,500, bearing date May 24, 1893, was in due time executed, and, with a copy of the application attached thereto, delivered to Kelly. The second application resulted in the execution of the policy for $5,000, bearing date December 28, 1893, which, with a copy of the application therefor duly attached, was delivered to Kelly; but instead of making Robert P. Mulock the beneficiary, as designated in the application, the same was made payable to the insured, Edward S. Kelly, his executors, administrators, or assigns. Each policy recites on its face as follows: That it was issued "in consideration of the application for this policy, which is hereby made a part of this contract." Each application contained the following statement, signed by Kelly: "I hereby warrant and agree not to reside or travel in any part of the torrid zone, and not to engage in any specially hazardous occupation or employment, during the next two years following the date of issue of the policy for which application is hereby made, and also not to engage in any military or naval service in time of war, during the continuance of the policy, without first obtaining permission from this company. I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years." The application, after enumerating the excluded hazardous occupations or employments, continues as follows: "I also agree that all the foregoing statements and answers * * * are by me warranted to be true, and are offered to the company as a consideration of the contract, which I hereby agree to accept as issued by the company in conformity with this application." After receiving the second policy of $5,000, wherein Kelly or his estate was made beneficiary, he, on January 4, 1894, assigned the same to Robert P. Mulock, as beneficiary, as contemplated in the application. On February 21, 1895, after having paid the second annual payment on each policy, but before two years had elapsed from the date of either policy, Kelly while insane aimed a pistol at his own head and shot himself, and thereby inflicted upon himself a wound from which he thereafter, and on the same day, died. After his death, and on September 5, 1895, Mulock duly assigned all his right, title, and interest in the second policy to Josephine R. Kelly, the widow and defendant in error herein.

Both policies were, by explicit stipulations contained therein, made subject to the provisions stated on the back thereof. One of those provisions is as follows: "It is hereby further promised and agreed that after two years from the date hereof the only conditions that will be binding upon the holder of this policy are that he shall pay the premiums at the time and place and in the manner stipulated in said policy, and that the requirements of the company as to age and military and naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed."

Proofs of death were waived. Suit was instituted on the policies, and an agreed statement of facts, substantially as hereinbefore stated, was signed by the respective counsel of the parties and filed in the court below. Upon such agreed statement of facts, a jury having been duly waived, the cause was submitted to the trial court. Judgment was rendered in favor of defendant in error, hereinafter called "plaintiff," for the full face value of the two policies, with accumulated interest. The plaintiff in error, hereinafter called "defendant," now brings the case here by writ of error for review.

W. E. Odell and James L. Blair (Julien T. Davies and Edward Lyman Short, on the brief), for plaintiff in error.

Milton Remley (J. J. Ney and W. O. McElroy, on the brief), for defendant in error.

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

ADAMS, District Judge, after stating the case as above, delivered the opinion of the court.

It is first contended by learned counsel for the plaintiff that there is nothing before us for review; that the so-called "Agreed Statement of Facts" is only a concession of certain independent and separate facts, which were offered in evidence as a basis for a general finding; and that, inasmuch as there was no objection made to the introduction of such facts in evidence or exceptions saved to the ruling of the court thereon, the doctrine announced in Barnard v. Randle (C. C. A.) 110 Fed. 906, and cases therein cited, is applicable. Undoubtedly it is true, as settled by a long line of authority, that where evidence is heard in an action at law, and a general finding made thereon, an exception to such finding alone presents nothing for review. But such is not the case now before us. The judgment entry and bill of exceptions both clearly disclose that the cause was submitted to the court upon an agreed statement of facts, signed by counsel for the respective parties, filed and made part of the record, and that no other evidence whatever was heard at the trial. It is of no significance that counsel at the trial formally offered in evidence the facts so agreed upon or any of them. Such practice, if adopted, did not change the essential character of the submission. It was a submission of facts agreed upon in writing for the judgment of the court as a conclusion of law thereon, and as such is the equivalent of a special verdict, presenting questions of law alone for the consideration of the court. Its conclusion thereon is subject to review by this court. Supervisors v. Kennicott, 103 U. S. 554, 26 L. Ed. 486; Bond v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Cudahy Packing Co. v. Sioux Nat. Bank, 16 C. C. A. 409, 69 Fed. 782. Guided by the foregoing authorities, our sole duty is to determine whether the trial court reached the correct conclusion of law from the facts so agreed upon.

It is next contended that we are foreclosed from any consideration of the force and effect of the suicide clause in question, because the policies in suit, being Iowa contracts, do not contain in their bodies the agreement exonerating the insurer from liability in case of suicide. Attention is called to the act of the general assembly of Iowa approved April 17, 1890, entitled "An act to prevent discrimination in life insurance." Laws 1890, p. 49. Section 1 of this act is as follows:

"No life insurance company doing business in Iowa shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectations of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contract it makes; nor shall any such company or any agent thereof make any contract of insurance or agreement as to such contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance any rebate of premium payable on the policy, or

any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

It is contended by plaintiff's counsel that the clause relied upon by defendant to defeat recovery in this action, namely, "I also warrant and do agree that I will not die by my own act, whether sane or insane, during the said period of two years," being found only in the application made by Kelly for insurance, is not so "plainly expressed in the policy" as to be a valid and enforceable agreement, within the purview of that act.

The contention, as we understand it, is that the "policy," within the purview of the act, is that particular paper signed by the insurer which contains its promise, and nothing else, and particularly that it does not include any of the agreements found in the proposition for insurance usually denominated the "application," even though the same be attached to the other paper, and by express stipulation therein made part of the contract. This contention, in our opinion, is narrow and technical, and ignores the rule of construction of contracts, requiring a consideration of all its provisions, wherever found, to determine the intention of the parties. The stipulations of a paper, referred to in a contract as the consideration upon which it is made and by express terms made part of it, are as binding upon the contracting parties as if the same were bodily incorporated therein.

The act of Iowa, supra, in our opinion, creates no exception to the foregoing general rule governing the interpretation of contracts. That act was obviously intended for three purposes: (1) To prevent discriminations in favor of particular insurants; (2) to secure that certainty with respect to the rights and duties of the parties which is always best attained by written agreements; (3) to provide a ready and available method by which the insured or assured may at all times have before them the covenants and agreements which they are required to observe or perform. Society v. Puryear's Adm'r (Ky.) 59 S. W. 15. That the foregoing is the true interpretation of the act in question is, in our opinion, also conclusively shown by subsequent legislation in Iowa.

By section 1819 of the Code of Iowa, enacted by the 26th general assembly at its extra session, in 1897, it is enacted as follows:

"All life insurance companies or associations organized or doing business in this state under the provisions of the preceding chapters shall upon the issue of any policy, attach to such policy or indorse thereon a true copy of any application or representation of the assured, which by the terms of such policy are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy, or, upon reinstatement of a lapsed policy shall attach to the renewal receipt a true copy of all representations made by the assured upon which the renewal or reinstatement is made. The omission so to do shall not render the policy invalid, but if any company or association neglect to comply with the requirements of this section it shall forever be precluded from pleading, alleging or proving such application or representations, or any part thereof, or the falsity thereof, or any part thereof, in any action upon such policy, and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representation, but may do so at his option."

The last-mentioned act was passed while the act of 1890 was on the statute book of Iowa, and both are found in the revision of 1897. They must therefore be construed together, and given full force and effect if possible. If the act of 1890 is to be construed as plaintiff's counsel contend, the act of 1897 is meaningless.

Its provision for attaching a true copy of the application was obviously intended to furnish the certainty of, and familiarity with, the terms of the whole contract which was generally contemplated by the act of 1890, and the special prohibition against reliance upon any of the terms and stipulations found in an application, unless a true copy of the same be attached to the policy, by necessary implication permit such reliance if a copy is so attached. In our opinion, it is perfectly clear that the legislature of Iowa by the latter act recognized an application for insurance when a copy of the same is attached to the policy at the time it is delivered, as a constituent part of the contract or policy of insurance itself. A legislative construction has therefore been given to the act of 1890 in full harmony with what seems to us to have been its obvious meaning. It follows that plaintiff's contention to the contrary cannot be sustained.

It is next contended that defendant cannot avail itself of the insured's agreement against suicide, as found in the application for the second policy of $5,000, because of an alleged variance between the policy as issued and that applied for. The application was for insurance payable to Robert P. Mulock. The policy, as issued, made Kelly, his executors, administrators, or assigns, the beneficiary. No explanation is found in the record of this alleged variance, but in argument it was stated that as Mulock, by whom the policy was to be taken as collateral security for some obligation of Kelly, had apparently no insurable interest in his life, the change was made in order that the policy might be made an available collateral by assignment. However this may be, the fact appears that immediately after the receipt of the policy by Kelly he assigned the same to Mulock. In this way the purpose contemplated by the application was accomplished. Mulock got the policy exactly as applied for.

Not only so, but both Kelly and Mulock are clearly estopped from contending that the policy was not issued in conformity to the application. Kelly accepted the policy, which contained a statement that it was issued in consideration of the application, a copy of which was attached to it; in other words, that the policy was issued in consideration of the very application which is now sought to be repudiated. Whatever variance there was between the application and policy must be presumed to have been made with Kelly's full consent and approval. Neither he nor any one claiming under him can now be heard to repudiate the application so acted upon by the company and recognized by him. Insurance Co. v. Myers (decided at the present term of this court; C. C. A.) 112 Fed. 846.

The next contention requiring consideration by us is that the plaintiff acquired vested rights at least in the $2,500 policy, in which she was originally named as sole beneficiary, immediately upon its issue, which could not have been affected by any subsequent conduct of the insured; that even though Kelly agreed as a part of the consideration

of the contract of insurance not to kill himself, sane or insane, within the period of two years, and even if he violated that agreement, such violation cannot be invoked against the claim of the plaintiff.

It cannot be disputed that plaintiff, who was Kelly's wife and beneficiary in the policy in question, had a certain vested interest in the policy immediately upon its issue; such an interest, in fact, that neither Kelly nor the insurer, nor both, could by appointment or agreement take from her without her consent. Her rights were created by the contract, and she, as one of the parties thereto, must, on familiar principles, consent to any deprivation, modification, or change of such rights before the same can be accomplished. Bank v. Hume, 128 U. S. 195, 206, 9 Sup. Ct. 41, 32 L. Ed. 370, and cases cited. But this well-recognized principle falls far short of sustaining plaintiff's contention in this case. The question still remains, with what rights was she vested? This obviously depends upon the terms and conditions of the contract creating them. The husband assumed to act as her agent in the negotiation of a contract intended to be beneficial to her. He gave a consideration therefor, consisting partly of certain executory promises. He secured the promise from the insurance company to pay money to the wife, in case of his death, by promising that such death should not, for two years at least, be the result of his own act, sane or insane. All this was so done as to disclose a clear intention on the part of both that no risk against such death should be assumed by the company.

The wife, by asserting a claim on the policy, ratifies and affirms the contract as made by her agent, and that, too, subject to all its terms and conditions. She cannot avail herself of the promise to pay her the amount of the policy, and simultaneously repudiate the promise made by her husband, which was given to the insurer as a consideration for its undertaking. Neither can she enlarge the obligation of the insurer beyond the scope of that undertaken by it. Baker v. Insurance Co., 43 N. Y. 283; Pitt v. Insurance Co., 100 Mass. 500.

These conclusions would seem to be the necessary result of well-recognized principles of agency and contract. But our attention is called to the case of Seiler v. Association, 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537, to which special consideration was given by the learned trial judge. In that case the supreme court of Iowa held that where a policy of life insurance contains no stipulation against suicide, and is taken out in good faith, it is not avoided, as against a third party named as beneficiary in the policy, by the fact that the insured, while sane, purposely took his own life. In so holding it attempted to distinguish that case from Ritter v. Insurance Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, Id., 17 C. C. A. 537, 70 Fed. 954, 42 L. R. A. 583, which decided that the personal representative of an insured, who, when sane, deliberately killed himself with intent to secure to his estate the amount of insurance he had effected on his own life, could not recover on the policy though it contained no provision at all respecting suicide. The supreme court of Iowa held that even though the intentional suicide by an insured might constitute a defense to a suit brought on a policy payable to his estate, containing no provision against such suicide, it would be no defense in

such case if the policy was by its terms payable to a third party as beneficiary.

It is urged that in so far as the $2,500 policy involved in the present case is concerned, wherein the wife is named as the beneficiary, the express agreement not to commit suicide is of no greater obligatory force than the implied one would have been if there had been no express one, and that, therefore, the Iowa case is directly in point. This may or may not be so, but, in any event, neither the case itself, nor the argument deduced therefrom, is fully persuasive to our minds. A view contrary to the Iowa doctrine is taken in Hopkins v. Assurance Co. (C. C.) 94 Fed. 729, and affirmed by the court of appeals of the Third circuit, 40 C. C. A. 1 (99 Fed. 199). See, also, the case of Dean v. Insurance Co., 4 Allen, 96, 99.

Moreover, it seems to us that if there be an implied agreement on the part of every insured not to intentionally kill himself for the purpose of enforcing the liability under a policy,—and such, in our opinion, is the rule laid down in Ritter v. Insurance Co., supra,—such agreement inheres in and forms a part of the contract, and is as much a condition to liability as if it were written out into an express agreement; and, that being so, for the reasons already pointed out a third party, claiming under such a policy of insurance made for her benefit, ratifies and adopts the implied as well as the express conditions and limitations of the contract. But we are not forced to any refinement of logic to support the conclusion reached in this case. There is here an express agreement, showing that the contracting parties had the subject fully in mind, and came to a definite understanding to the effect that the insurer did not undertake to assume the risk of suicide for at least two years, and this agreement must be enforced.

The case of Fitch v. Insurance Co., 59 N. Y. 557, 17 Am. Rep. 372, relied on by the supreme court of Iowa in the Seiler Case, makes it clear that the court of appeals of New York considered that force and effect should be given to an express condition of a policy against suicide, even as against a third party, who might be the beneficiary. It there says:

"The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch [the insured], but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy."

The case of Kerr v. Association, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631, is also relied upon by the supreme court of Iowa as sustaining its conclusion in the Seiler Case. A reference to that case shows that the provision of the policy made the basis of a defense was as follows:

"If the assured shall die in, or in consequence of, the violation of any criminal law of any country, state, or territory in which the assured may be, this certificate shall be null and void."

The defendant in that case offered to prove on the trial that Kerr, the insured, had committed the crime of forgery in Minnesota, and

fled to Canada to escape arrest, where he was ultimately discovered and apprehended by detectives, and, to avoid being brought back to Minnesota for trial, shot and killed himself. The supreme court held that that evidence was not admissible, saying:

"His death in Canada cannot be treated as the proximate result of his crime in Minnesota. * * * And the fact of his suicide is not in itself to be construed as occurring in or growing out of a violation of law, within the meaning of the policy."

The court then remarked as follows:

"In the law of insurance, suicide is not, as a rule, recognized as a ground of exemption from liability or for forfeiture of a policy issued for the benefit of a third person, unless it is expressly so provided in the policy."

The supreme court of Iowa also seems to think that a different result might follow if the contract of insurance contained an express provision exonerating the company in case of suicide. It says, after reviewing the cases to which reference has just been made, as follows:

"We wish now to add a few words on principle by way of emphasis of a thought already expressed. It is not the wrongdoer who makes claim here, nor any representative whose rights are to be measured by those of the wrongdoer, but persons who acquired an interest at the time the policy was taken out, and who are not in any way responsible for the loss under it. The defendant might well have guarded against this contingency in its contract. Not having done so, we think it is now in no position to complain."

How different is the case now under consideration by us!

As already pointed out, the plaintiff's right, even in the policy of $2,500, was to be measured by those of the wrongdoer, and the insurer in the present case has in the contract specifically guarded against the very contingency which the supreme court of Iowa said might have been guarded against in the contract. We unhesitatingly reach the conclusion that, on principle as well as authority, no such vested rights were created by the $2,500 policy in favor of the plaintiff in this case as to relieve her against the consequence of self-destruction by the insured.

The other policy for $5,000, in which plaintiff acquired no rights until after the death of the insured, raises no such question as has just been discussed with reference to the $2,500 policy. She, by accepting an assignment from the beneficiary, directly or indirectly, after the death of the insured, is confessedly made subject to all the infirmities inherent in the contract as originally made.

The learned trial judge in his opinion (C. C.; 109 Fed. 56) places great confidence in plaintiff's right to recover upon the principle that the covenant of the defendant to pay the amount of the policy in question is an independent covenant, and not at all dependent upon the covenant of the insured not to kill himself. We are unable to concur in this view. The covenant to pay is obviously dependent upon whether the death insured against occurs, and that death, as already seen, is one exclusive of suicide within two years. Not only is this so, but the promise not to kill himself within two years was by agreement made part of the consideration moving the insurer to make this promise.

As said by Mr. Justice Miller in announcing the opinion of the supreme court in Construction Co. v. Seymour, 91 U. S. 646, 650, 23 L. Ed. 341:

"Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and, if by the terms or nature of the contract one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered before that party can sustain a suit against the other."

In the case of Loud v. Water Co., 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822, Mr. Justice Jackson, speaking for the supreme court, says:

"The question whether covenants are dependent or independent must be determined in each case upon the proper construction to be placed on the language employed by the parties to express their agreement. * * * The question in each case is, which intent is disclosed by the language employed in the contract?"

Applying the test last stated, we have no difficulty in reaching the conclusion that the parties to the contract of insurance in question obviously and plainly intended that the covenants should be mutual and dependent, and not independent of each other.

It is next contended that the contracts of insurance sued on in this case are by their own terms embodied exclusively in the policy, and do not comprehend the applications made by the insured therefor. An argument to this effect is drawn from the fact that the policies state on their face that the payment was to depend upon the following condition: "* * * The annual premium * * * shall be paid in advance on the delivery of this policy, and thereafter, * * * on a certain day, every year during the continuation of this contract;" "and subject to the provisions, requirements, and benefits stated on the back of this policy, which are hereby referred to and made a part hereof." The maxim, "Expressio unius exclusio alterius," is invoked, and it is claimed that because the provisions of the application are not found on the back of the policy their stipulations and contents are not a part of the contract of insurance. We cannot agree to any such view. We have already considered this general question in disposing of the argument based on the Iowa statutes, but it may not be improper to observe further that the company said in each of the policies that it was issued in consideration of the application made for it, and that such application was made a part of the contract. It thus clearly appears that by the same token by which the provisions on the back of the policy were made part of the contract the application therefor was also made a part of it. Nothing can be clearer than this.

Kelly, by accepting a policy which by its terms incorporated the application as a part of the contract, necessarily admitted that such was a fact. He had already said the same thing in the application signed by him, namely, that it was offered to the company as a consideration of the contract, which he was to get. The entire application having been so made a part of the policy by agreement of the parties must be so treated by us, and the agreements, found in the application

as well as those found in the policy proper, must be considered in determining the true import and meaning of the contract. Ritter v. Insurance Co., 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693; Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308; First Nat. Bank v. Hartford Fire Ins. Co., 95 U. S. 673, 24 L. Ed. 563; Insurance Co. v. Webb, 45 C. C. A. 648, 106 Fed. 808; American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co., 36 C. C. A. 671, 95 Fed. 111.

Accordingly, treating the application and all its terms and provisions as a part of each contract entered into between the insurance company and Kelly, what does it mean? In answering this question there does not seen to be any necessity for resort to technical distinctions between representations and warranties or affirmative and promissory warranties. The cardinal rule to be observed in construing all contracts is to determine, from a consideration of the four corners of the instrument or instruments creating it, what was the intention of the parties to the same. Insurance Co. v. Gridley, 100 U. S. 614, 615, 25 L. Ed. 746; Long v. Timms, 107 Mo. 512, 519, 17 S. W. 898. Subjecting the contracts in question to this test, it is very apparent, as we have already indicated in disposing of other branches of the case, that the death of Kelly by suicide at any time within two years after the date of the policy, whether sane or insane, was not a risk assumed by the insurer at all. The parties to the contract, when made, the insurer speaking for itself, and Kelly speaking for himself and as agent for the beneficiary, so agreed. This clearly enough appears from the following: The company agreed, in effect, that in consideration of the representations and agreements found in the applications for insurance, made by Kelly, it would upon the death of Kelly pay a certain sum of money to the beneficiaries named in the policies. Kelly agreed that such death should not occur by suicide within two years at least. The fair and reasonable import of these mutual agreements, in our opinion, is that the death insured against was such a death as might occur at any time in the future, excepting that, however, by suicide, sane or insane, if the same should occur within two years.

Kelly, in his proposition for insurance called "Application," said:

"I hereby warrant and agree not to reside or travel in any part of the torrid zone, and not to engage in any specially hazardous occupation or employment, during the next two years following the date of issue of the policy for which application is hereby made, and also not to engage in any military or naval service in time of war, during the continuance of the policy, without first obtaining permission from this company. I also warrant and agree that I will not die by my own act, whether sane or insane, during the said period of two years."

The company in its acceptance of the proposition, under the heading "Incontestability," found on the back of the policy, said:

"It is hereby further promised and agreed that after two years from date hereof the only conditions which shall be binding upon the holder of this policy are that he shall pay the premiums at the times and place and in the manner stipulated in the said policy, and that the requirements of the company as to age and military or naval service in time of war shall be observed, and that in all other respects, if this policy matures after the expiration of the said two years, the payment of the sum insured by this policy shall not be disputed."

This last-mentioned covenant or agreement on the part of the company obviously has reference to the agreements of Kelly found in the proposition above quoted. It cannot escape observation that the parties treated the agreements referred to as conditions of continuing liability on the part of the company. They are referred to as "conditions," and it is agreed that the only ones which shall be binding after two years are those relating to engaging in military or naval service in time of war. In all other respects it was agreed that "if this policy matures after the expiration of the said two years the payment of the sum insured by this policy shall not be disputed." This carries the reasonable implication that, if the policy should mature by the death of the insured within two years, the policies might be disputed for breach of any of the "conditions" upon which liability depended.

The clear import and meaning of all this is that the policy was issued and the company's obligation of payment assumed on certain specified conditions, among them that Kelly should not reside or travel in any part of the torrid zone, or engage in any of the specially hazardous occupations recited in the application, or die by his own act, whether sane or insane, within the period of two years after the date of the policy. The wisdom of conditions of this kind is not for us to consider, but it is perfectly obvious that they were intended to prevent devising schemes to defraud an insurance company by securing insurance in contemplation of immediate exposure to probable death or immediate purpose to take one's own life. However this may be, the parties, by language admitting of no other rational meaning, agreed upon it, and that puts an end to our inquiry. The insured, acting for himself in one application, and as agent for the proposed beneficiary in the other, warranted and agreed, as a consideration for the execution of the policies, that he would not die by his own act, whether sane or insane, during the period of two years after the date of the policies. This, by reference to the incontestibility clause, already quoted, was by agreement made a condition to continuing liability.

But we do not wish to be understood as holding that it required any express agreement that the clause in question should be treated as a condition to liability. In our opinion, it, having been offered to and accepted by the company as a consideration of the assumption of the risk and for the continuance of liability for two years at least, is, in and of itself, a promissory warranty, requiring the insured to strictly conform thereto, in order to hold the company to a liability on the policies in favor of the beneficiaries. Failure to observe the stipulation of warranty, resulting, as in this case, in the death of the insured, undoubtedly absolves the insurance company from liability.

For the reasons already given, we cannot agree with counsel for plaintiff that it is necessary to find in the policy itself an express stipulation that in case of failure to observe the warranty the policy should be void. Such is the conclusive result of such failure determined and fixed by the law itself. While we have endeavored to answer the argument of counsel based upon the technical doctrines of condition and warranty, we prefer to place our determination of this

case upon the broad proposition that the contracts of insurance, when fairly and reasonably construed, show that death of the insured by suicide, sane or insane, was a risk not undertaken by the insurer at all. There is no merit in the contention that a return of the premiums paid by Kelly was a prerequisite to a defense by the insurance company. The company earned the premiums paid by Kelly for the risk which it agreed to assume, and which it did assume and carry until Kelly's death. This risk embraced death from practically all other causes but suicide. Cases where fraud may have been so practiced in the negotiations as to render the contract voidable at the instance of the company, or cases where no risk at all ever attached, are totally inapplicable to the facts disclosed in this case, and afford no warrant for plaintiff's contention.

It is next contended that the agreement of Kelly not to die by his own act while insane was impossible of performance, and known to be so by both parties to the contract, and therefore void. The argument is that self-destruction by an insane person is not his act, but rather the result of an irresistible impulse, over which he had no control, and therefore not within his power to prevent, and that an agreement to prevent it falls within that class of agreements which are void because of impossibility of performance. This argument is obviously founded on the doctrine taught by the case of Insurance Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236. It is there held that where the condition is that, "if the insured shall die by his own hand" (without the qualifying words sane or insane), the policy shall be void, the defense must show affirmatively that the death was the result of an intentional act of a responsible being, and not the act of one driven by an insane impulse, over which he had no control.

The history of insurance litigation shows that the decision in the last-mentioned case brought about other and different stipulations in policies of life insurance, exonerating insurers from liability in case of suicide by the insured, whether he was sane or insane at the time of committing the act. Stipulations of the latter kind have been frequently before the courts, and been pronounced valid and enforceable on the distinct ground that they create an excepted risk; in other words, that a clause of that kind found in a policy of insurance evinces a clear intention on the part of both parties to the contract that self-inflicted death by the insured, whether sane or insane at the time, was not one of the risks assumed by the insurer.

In the case of Bigelow v. Insurance Co., 93 U. S. 284, 23 L. Ed. 918, Mr. Justice Davis, in delivering the opinion of the court, says:

"There has been a great diversity of judicial opinion as to whether self-destruction by a man, in a fit of insanity, is within the condition of a life policy, where the words of exemption are that the insured 'shall commit suicide,' or 'shall die by his own hand.' But since the decision in Insurance Co. v. Terry, 15 Wall. 580, 21 L. Ed. 236, the question is no longer an open one in this court. In that case the words avoiding the policy were, 'shall die by his own hand,' and we held that they referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life. But the insurers in this case have gone further, and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract, as neither the policy of the

law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they cannot limit their liability, if the assured is in proper language told of the extent of the limitation, and it is not against public policy. The words of this stipulation, 'shall die by suicide (sane or insane),' must receive a reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion, but it is obvious that they were not so used. 'Shall die by his own hand, sane or insane,' is doubtless a more accurate mode of expression, but it does not more clearly declare the intention of the parties. * * * Nothing can be clearer than that the words 'sane or insane' were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity."

In the case of Insurance Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 308, the policy sued on contained a clause that "no claim shall be made under this policy when the death or injury may have been caused by * * * suicide (felonious or otherwise, sane or insane)." Mr. Justice Harlan, in delivering the opinion of the court in that case, said if the insured "commit suicide then the law was for the company, because the policy by its terms did not extend to or cover self-destruction, whether the insured was at the time sane or insane." See, to the same effect, the case of Scarth v. Society, 75 Iowa, 346, 39 N. W. 658. There are many other cases, both state and federal, to which attention might be called, which announce the same doctrine, but we do not deem it necessary to pursue this inquiry further.

Applying the rule governing the interpretation of contracts hereinbefore referred to, and seeking to give a reasonable interpretation to the clause now under consideration, consonant with the manifest intention of the parties as disclosed by all the provisions of the policies, we can only reach one conclusion: that the insured, Kelly, not only agreed that he would not die by his own act, whether sane or insane, within the period of two years, but, in effect, agreed, as already stated, that the risk actually assumed by the company excluded death by suicide within two years. The facts of the case therefore do not warrant the application of the rule rendering contracts void which are impossible of performance, and so known by both parties to it.

The ability and persistence with which learned counsel for plaintiff, both in oral argument and brief, pressed the points already considered upon the attention of the court, caused us to enter upon a discussion of questions more at length than their intrinsic difficulty, in the light of controlling authority, probably required.

The result reached, after a full consideration of all questions presented, is that as a conclusion of law, deducible from the agreed statement of facts on which the case was submitted, the plaintiff cannot recover. The judgment of the trial court must be reversed and remanded, with directions to render a judgment in favor of the defendant.

WESTERN UNION TEL. CO. v. TRACY.

(Circuit Court of Appeals, Third Circuit. February 20, 1902.)

1. MASTER AND SERVANT—INJURY TO SERVANT—DUTY OF INSPECTION.
In an action by a lineman against a telegraph company to recover for an injury sustained by plaintiff by reason of the breaking of a pole upon which he was working, which was decayed below the surface of the ground, it was not error of which defendant can complain to submit to the jury the question whether, by the custom and practice in that kind of work, the duty of inspecting the pole rested upon the foreman or the plaintiff, and to make defendant's liability dependent upon whether the duty was that of the foreman, where the evidence as to the custom was conflicting, but it was shown that a proper inspection would have disclosed the defect.

2. SAME—PLACE TO WORK—RESPONSIBILITY OF MASTER.
The duty of inspecting a telegraph pole before a lineman climbs it to work thereon, if not that of the lineman himself, is the positive duty of the master which is responsible for the failure to have such inspection made, notwithstanding it has engaged another, however competent, to perform the duty.

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

For opinion below, see 110 Fed. 103.

Wm. D. Dalzell, for plaintiff in error.

John O. Petty, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

DALLAS, Circuit Judge. This writ of error has brought up for review the record of an action which was instituted by the defendant in error against the plaintiff in error to recover for personal hurt which the plaintiff had suffered while engaged at his work as a servant of the defendant, and which he alleged was caused by its negligence. The case as presented in the circuit court, and the general view of the learned judge of that court with respect to it, are so clearly and well set forth in the opinion which he filed in overruling the motion for a new trial as to render it unnecessary for us to preface the statement of our conclusions upon the questions of law which have been raised in this court otherwise than by extracting from that opinion the following:

"The plaintiff was a lineman in the employ of the defendant, the Western Union Telegraph Company. The duties of a lineman are to climb telegraph poles and to string wires on the cross arms, and remove wires therefrom and do other work thereon. The defendant had occasion to remove part of a line of its wires from four old poles, which had been standing for eleven or twelve years, to four new poles, which had just been set. Before the work of moving the wires began the defendant's foreman (Joseph Krotzer) visited the premises and made an inspection. He caused three of the old poles to be guyed, but did nothing with respect to the fourth pole. That pole appeared to the eye to be sound and firm, and the foreman applied no test to determine its condition. The plaintiff was one of a gang of linemen working immediately under another foreman of the defendant (Oscar Long), assigned to the work of removing the wires from these old poles to the new ones. In the course of his employment and in the discharge of his duty as lineman

the plaintiff climbed the fourth pole, just mentioned, to assist another lineman in removing the wires from the cross arms. While thus engaged the pole suddenly broke, and the plaintiff was thrown to the ground and very badly injured. The cause of the disaster proved to be the rotten condition of the lower end of the pole underneath the surface of the ground. The pole broke off three or four inches under the ground. There was evidence to show that a proper inspection of this pole by the usual test, by means of tools provided for the purpose, would have disclosed that the pole was in an unsafe condition for a lineman to ascend and do his work thereon. The defendant alleged and gave evidence tending to show that, according to the custom and practice in doing such work as this, it is the duty of the lineman to determine for himself the safety of the poles. This the plaintiff denied, and gave evidence tending to show the contrary, and that it is always the practice and business of the foreman to inspect the poles to determine their safety, and that the linemen rely on the foreman's inspection. The court left this disputed question of fact to the determination of the jury, and upon their verdict in favor of the plaintiff it must be accepted as established that the plaintiff was not under the alleged duty, and also that he was not guilty of any contributory negligence and was free from fault."

The only averments of error are that the court below erred in its disaffirmance of the four points which were presented for the defendant and in its answers to those points, in that it declined to give binding instructions in favor of the defendant, or to charge that there was not sufficient evidence to justify the jury in finding that any negligence of the defendant was the proximate cause of the plaintiff's injury, in that the learned judge submitted to the jury, for determination from all the evidence, the question whether or not the injuries to the plaintiff resulted from a latent defect which was one of the ordinary risks of his employment; and, finally, in that he refused to charge "that if the jury believed from the evidence that the defendant had a competent foreman in charge of the work, and that the foreman and the plaintiff were furnished with proper tools and appliances with which the pole could have been adequately tested, and, if any weakness was discoverable, secured, then the defendant was not guilty of any negligence which was the approximate cause of the plaintiff's injuries." None of these averments can be sustained. That the case was not one which the court would have been warranted in taking from the jury, unless upon the ground either that inspection of the pole was not a part of the foreman's duty, or (if it was) that the defendant was not responsible for the foreman's failure to discharge that duty, is too clear for argument, and that these subjects were dealt with in a manner as favorable to the defendant as was at all possible we are entirely satisfied. It is not necessary to decide whether, by reason of the company's legal obligation to exercise ordinary care to provide a reasonably safe place and appliances for its employés, it was not unconditionally bound to look to the safety of the pole upon which the plaintiff was required to work; for it was not ruled that the defendant's responsibility was conclusively fixed by this general rule of law, but that it depended upon whether, as matter of fact, the custom in doing such work was for the foreman to inspect the poles, or for the linemen themselves to inspect them. Upon this question the testimony was conflicting, and it was submitted to the jury with the statement that "if, according to the custom and practice in this kind of work, the duty of inspecting the poles is upon the lineman, and not upon the foreman, it would follow

that the company here would not be responsible for this disaster." In our opinion, the court, in thus holding that the company was but provisionally responsible, and in leaving it to the jury to find whether the practice was such as to make it absolutely so, went quite as far as could be justified in restriction of the defendant's liability.

Upon the remaining point the law is well settled. The duty of inspection, if not that of the linemen,—and the jury has found that it was not,—was the positive duty of the company itself, and it was responsible for its nonperformance, notwithstanding the fact that it had engaged another, however competent, to perform it. Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994.

The judgment of the circuit court is affirmed.

EVANS et al. v. DICKENSON et al.

(Circuit Court of Appeals, Fifth Circuit. February 25, 1902.)

No. 1,084.

1. ACKNOWLEDGMENT—POWER OF NOTARY TO TAKE—TERRITORIAL LIMIT.
Under the statute of Florida (McClel. Dig. p. 791, § 1), providing for the appointment of notaries public, who "shall use and exercise such office of notary public for such places and within such limits and precincts as the governor shall direct," one commissioned by the governor "to be notary public in and for" a certain county has no power to take an acknowledgment outside of such county.

2. HUSBAND AND WIFE—CONVEYANCE BY WIFE OF SEPARATE PROPERTY—REQUISITES.
Under the laws of Florida, a married woman can convey or incumber her separate statutory property only by an instrument executed in strict conformity to the requirements of the statute, and such a conveyance is void where the notary public before whom it was acknowledged had no authority to act in the county where the acknowledgment was taken.

3. SAME—RATIFICATION OF VOID MORTGAGE.
A married woman gave a mortgage upon her separate statutory property, which was void for defective acknowledgment. She subsequently joined with her husband in a mortgage on other property, which recited the prior mortgage, and that the second was given to secure an extension of the indebtedness thereby secured. It further provided that, on default in payment of taxes, etc., both mortgages should be subject to foreclosure. The second mortgage was properly acknowledged, but it was stated in the acknowledgment of the wife that she executed the same for the purpose of releasing her dower, etc., in the property therein described. *Held*, that the execution by her of the second mortgage did not operate by ratification or estoppel to validate the first mortgage, there being nothing therein indicating such intention.

4. SAME—CURATIVE STATUTE—EFFECT ON PENDING LITIGATION.
Where a mortgage given by a married woman, and admittedly securing a valid debt, was held void solely on the ground that the acknowledgment was taken by a notary public of another county, not authorized to act outside of such county, and, pending an appeal from the decree, the legislature of the state passed an act legalizing all such notarial acts done by notaries of the state in good faith, the appellate court may, and should, in the interest of justice, give effect to such act as curing the irregularity in the execution of the instrument before it. Per Pardee, Circuit Judge, dissenting.

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

The following is the opinion of the circuit court, delivered by LOCKE, District Judge:

Not only must the findings of the master in this case be considered prima facie correct, but a careful consideration of the master's report, the exceptions thereto, the testimony upon which the same is based, and the arguments of counsel in this case, both orally and by brief, compels me to reach the same conclusion that he has reached. It is unquestionably the policy of the law to protect a woman's private property by requiring and demanding an exact compliance with the terms and conditions upon which she may convey the same. The property in question, although conveyed by the husband to the wife, was so conveyed at a time when, as it appears, there was no reason why a gift should not be legally justifiable, and convey the full title. See Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908. The deed had been on record for about 10 years, and the property was recognized and well known as the property of a married woman. In order to convey such property, it was required by the law that she make an acknowledgment of her intentions in regard to such conveyance before a party duly authorized to receive such acknowledgments. The law of Florida is that a notary public is appointed only for such places and within such precincts as the governor shall direct. The party taking this acknowledgment had only been appointed and commissioned for the county of Alachua, and the acknowledgment was taken and certified in Marion county. If his power to take acknowledgments, which is one of the most important powers of a notary, is not limited to that county, what limitations could there be to any of his acts or doings, and of what force would be the terms of the statute? It is true that some courts have held that the power of a notary in taking acknowledgments, under the statutes of certain states, is not limited to the county of his appointment, but it is considered that the weight of authority, where the language of the statute is as clear and distinct as it appears to be in this state, is to the contrary.

The supreme court of this state has not passed upon the question positively, but in Stewart v. Stewart, 19 Fla. 848, where the question was raised, it says: "It appears by the certificate of acknowledgment and proof, and by the testimony of the case, that the justice of the peace certifying the same was an officer of Alachua county, and that he took the acknowledgment and certified the same within the county of Marion. This act of the justice beyond his territorial jurisdiction may be void, but yet is good inter partes," —appearing to intimate that, if the question had turned entirely upon the extraterritorial act of the justice, it might be considered void.

Although there is found in the certificate of acknowledgment a declaration that the notary who took the same was a notary of Marion county, yet the seal affixed thereto showed that he was a notary for Alachua county only, and this was sufficient to put the mortgagee on notice that the acknowledgment had not been taken before a person duly authorized.

As to the ratification by the second mortgage, upon other property, it is considered that the terms of the acknowledgment, taken separate and apart from her said husband, declared and determined the intention of the married woman in joining in that document. Her declaration upon that examination, as appears by the certificate, was that she joined therein for the purposes of "releasing, relinquishing, renouncing, and mortgaging her right of dower, dower, separate estate, and property of every nature and character whatsoever in and to the said property and every part thereof." There had been in this second mortgage no property mentioned or described except that conveyed therein; and to presume that at that time she had the intention of ratifying the first mortgage, and in effect consenting to a transfer of the property described in it, or that such declaration was made upon her separate examination at that time, appears to me to be an unnatural and forced construction.

Unquestionably, the complainants suffer pecuniary loss, but there appears to be not only a noncompliance with the letter of the law required to transfer

the property of a married woman, but a notice thereof contained in the very seal of the document. The exceptions to the master's report will therefore be overruled, and a decree follow in accordance therewith.

Robert L. Anderson (William Hocker, on the brief), for appellants.
Wm. Wade Hampton, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of this court are of opinion that there is no reversible error in the record, and they approve the conclusions of the judge presiding in the circuit court, as shown by his opinion in the record.

Affirmed.

PARDEE, Circuit Judge (dissenting). The bill in this cause was filed to foreclose two mortgages executed by appellees. One of these bears date August 24, 1887; the other, February 23, 1893. The latter was executed upon an agreement for extension of time for payment of the original debt secured by the former. Both were designed to create a lien upon lands in Marion county, Fla.

The answer "admits the giving of" both these mortgages by the appellees, but defense is made as to the original one, of August 24, 1887, based exclusively upon the alleged facts that the property therein described was held by M. Julia Dickenson as her separate statutory property, she being at the time and ever since a married woman; that this mortgage was never executed and acknowledged as required by the state laws relating to the conveyances of such property; that the acknowledgment was "illegal, null, and void," because taken in Marion county, Fla., by a notary public of the adjoining county of Alachua, this notary having been appointed for the latter county only. This is the only ground upon which the mortgage was assailed or the suit resisted, and is the only ground upon which the court below refused to decree appellants the substantial relief demanded.

January 1, 1901, the learned special master, in his report against the right of the appellants to recover in this case, concluded as follows:

"In the case presented here we find a lady signing the mortgage with her husband in the presence of witnesses, making a declaration in writing under her own hand declaring that the officer who took her acknowledgment was an officer of the county in which she lived, and permitting complainants to go for years under the apprehension that this declaration was true, when the fact is when the lien is undertaken to be enforced she then discloses that this same officer was not the officer that she had previously declared that he was, and that he was an officer of another county, and it is to be presumed that he had simply gone across the border line of the two adjoining counties to her home for her convenience and accommodation, and took this acknowledgment. The authorities seem to sustain, however, just such transactions as this. W. S. Bullock, Special Master in Chancery.

"January 1, 1901."

In his opinion confirming the master's report, filed February 23, 1901, the learned judge of the circuit court admits the hardships of the case. The legislature of the state seems also to have been advised of the injustice in this and perhaps other cases; for on the 22d of May, 1901, following, it enacted a law, which was approved and went into

effect the same day, entitled "An act to legalize the acts of all notaries public of the state of Florida up to April 1, 1901," which act provides "that any and all notarial acts that were done in good faith by any notary public in the state of Florida, or who was a notary public in the state of Florida and whose term of office expired before the 1st day of April, A. D. 1901, are hereby declared valid." Acts 1901, p. 113.

As in the instant case, there is no dispute that the only irregularity in the whole transaction was and is that a duly qualified notary for Alachua county only took the acknowledgment of Mrs. M. Julia Dickenson in Marion county; and as it is admitted that this was done in good faith, and as the act is broad and full enough to cover the present case, I am of opinion that the legislative act aforesaid fully ratified and legalized such acknowledgment; and as the irregularity of this acknowledgment is the only ground upon which this court relieves Mrs. M. Julia Dickenson from the obligations of an honest contract, honestly entered into by all the parties, I enter my dissent.

There can be no doubt that the legislature by ratification may make valid any act which it had authority to previously authorize. I can see no reason why a ratifying act may not be available in the interest of justice, on appeal or writ of error, and there are respectable authorities to that effect. Underwood v. Lilly, 10 Serg. & R. 97; King v. Course, 25 Ind. 202. I have no doubt the authorities can be multiplied on research.

And there is another feature of this case which justifies some mention. The second mortgage, by and between the same parties, dated February 23, 1893, recites the first, and the indebtedness thereunder, acknowledging its full effect, and the said second mortgage was given to procure an extension of time for the payment of the indebtedness. This mortgage was regularly acknowledged according to the strictest requirements of the state law, and, among other things, it contains this provision:

"It is further agreed that a failure to pay the taxes aforesaid or any part thereof, or of failure to pay the said debt or any part thereof, or of any interest due thereon, shall render the foreclosure of this mortgage and the said former mortgage liable to a foreclosure for the whole of the said debt, or for such part thereof, at the election of the mortgagors or their assigns."

Except for the peculiar favor which it is claimed should be extended to married women, the second mortgage in this case would be held to estop Mrs. M. Julia Dickenson from setting up any irregularity in the acknowledgment of the first mortgage in any and all courts where decrees are rendered in accordance with equity and good conscience.

SOUTHERN BUILDING & LOAN ASS'N v. CAREY et al.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 1,013.

MORTGAGES — FORECLOSURE — RECEIVERS — DEFICIENCY — APPLICATION OF RENTALS.

A bill to foreclose a trust deed averred that the taxes were unpaid, and a receiver was appointed, with authority to rent the premises. Afterwards the mortgaged property was sold for a sum not sufficient to satisfy the debt. The receiver's report showed a balance in his hands after the payment of the taxes and certain other expenses. There was no proof that the mortgagors were insolvent, and no steps had been taken to reach the rents and profits on that ground. *Held*, that the balance in the receiver's hands should be paid to the mortgagors, and could not be applied on the unpaid balance due the mortgagee.

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

The bill in this case was filed in the circuit court by the Southern Building & Loan Association against Joseph P. Carey and Emma A. Carey, his wife, seeking the foreclosure of two trust deeds executed by said Carey and wife in favor of the appellant, one for $1,700, and the other for $1,000, secured on certain premises belonging to Emma A. Carey. Among other allegations of the bill there was an averment that the taxes were unpaid, and upon an application to the court a receiver was appointed, with authority to rent the premises. Issues were made, and upon trial a decree was rendered in favor of the building and loan association upon both trust deeds, and the property was put up for sale, and did not sell for enough to pay both incumbrances by the sum of $1,132.22. The report of the receiver, being duly filed, showed a balance in his hands after the payment of taxes and certain other expenses. Upon hearing, the circuit court ordered the balance in the hands of the receiver to be paid over to Emma A. Carey. Error was assigned to the action of the court in thus applying this balance of rentals, and in failing to apply the same upon the unpaid balance of the decree.

Before LURTON and DAY, Circuit Judges, and WANTY, District Judge.

DAY, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

This case presents the single question as to whether the court committed error in ordering the balance of rentals in the receiver's hands to be paid to Emma A. Carey, instead of making application thereof upon the unpaid balance of the plaintiff's decree. It is the claim of the appellant that a court of equity may, upon a showing of the insufficiency of the security for the payment of the mortgaged indebtedness, appoint a receiver for the purpose of reaching, not only the body of the premises mortgaged, but the rentals thereof as well. This is undoubtedly the practice of courts of equity where a sufficient showing is made that the mortgaged premises will not be sufficient to pay the debt, and that the mortgagor, or other person primarily liable for the indebtedness, is insolvent and unable to make good the deficiency in the security. The rule is thus stated in High, Rec. § 666:

"Stated in general terms, the well-established rule, deducible from the clear weight of authority, is that, in all cases where the rents of the prop-

erty are not specifically pledged for the security of the debt, to entitle a mortgagee to a receiver of the mortgaged premises, and of the rents and profits, he must show—First, that the property itself is an inadequate security for the debt, with interest and costs of suit; and, second, that the mortgagor or other person who is personally liable for the payment is insolvent, or beyond the jurisdiction of the court, or of such doubtful responsibility that an execution against him for the deficiency would prove unavailing. And this being shown, the courts will generally interpose and appoint a receiver. And it has been held that the aid of a receiver should be granted or withheld, according as it may or may not be an essential means to pay the indebtedness secured by the mortgage, and there can be no necessity for the relief, if the mortgagor is solvent and able to pay any deficiency."

We fail to find facts in the record in this case sufficient to bring it within the rule. The receiver was appointed upon the ground that the taxes were unpaid upon the mortgaged premises. This is a well-recognized ground of equity jurisdiction. High, Rec. § 672.

The order appointing the receiver in this case expressly provided that he should not take possession of the property until the expiration of 10 days from the date of the order, and that if in the meantime the defendants should pay the taxes and the costs and the charges for the collection thereof the order might be vacated. There is not apparent in the record any attempt to sequester the rentals on the ground that the principal in the obligation secured by the mortgage was insolvent, and the premises inadequate security for the payment of the mortgage loan. It is true that it is alleged in the bill that Carey and his wife are insolvent, and that the security of the mortgaged premises was insufficient, but no proof, so far as we have been able to discover, was offered in support of these allegations, and no attempt, for this reason, was made to secure the appropriation of the rentals by means of a receiver.

A receiver had been appointed, who, by the terms of the order, was not to take possession of the mortgaged premises except for the purpose of subjecting the rentals for the payment of taxes. He was appointed upon the allegations in the bill seeking the appointment of a receiver for the purpose of appropriating the rentals to the payment of taxes. In this state of the record, the court could do only the thing which was done, namely, order the balance to be turned over to Mrs. Carey as the owner of the fee of the mortgaged premises. This view of the case requires an affirmance of the judgment below, and renders it unnecessary to consider whether, in the absence of a conveyance of the rents and issues of the premises mortgaged, a court of equity could apply the same upon the mortgage debt as against a married woman, and one who, at least as to one of the trust deeds, had mortgaged her separate property as security for a debt of her husband in which she had no separate interest. Upon the state of the record disclosed, no proper steps having been taken to secure the rentals except for the single purpose which had been satisfied, the court did not err in ordering the balance in the receiver's hands to be paid to Mrs. Carey, the original owner of the fee.

Judgment affirmed.

CONTINENTAL NAT. BANK OF MEMPHIS, TENN., v. BUFORD.

(Circuit Court of Appeals, Eighth Circuit. March 12, 1902.)

No. 1,621.

CORPORATE OFFICERS—LIABILITY FOR CORPORATE DEBTS—LIMITATIONS—ACCRUAL OF CAUSE OF ACTION.

Under Sand. & H. Dig. Ark. § 1347, providing, if the president of a corporation neglect to make an annual certificate showing certain facts, as provided by section 1337, he shall be liable to an action founded on the statute for debts of the corporation contracted during the period of such neglect, the cause of action against the president accrues not later than maturity of the note given by the corporation for the debt, and the statute runs from then, though the note is renewed.

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

The Bank of Mammoth Springs was an Arkansas corporation, located at Mammoth Springs, in that state. On the 9th day of June, 1891, G. C. Buford, the defendant in error and defendant below, was elected president of the bank, and continued to be such until the 9th day of June, 1896. A statute of Arkansas under which the bank was organized, and which was in force during the period mentioned, contains the following provisions:

"Sec. 1337. The president and secretary of every corporation organized under the provisions of this act, shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the names and number of shares of each stockholder; which certificate shall be deposited on or before the 15th day of February or of August with the county court clerk of the county in which said corporation transacts its business, who shall record the same at length in a book to be kept by him for that purpose."

"Sec. 1346. The certificates required by sections 1334, 1337, 1343 and 1344, except certificates of transfers of stock, shall be made under oath or affirmation by the person subscribing the same; and if any person shall knowingly swear or affirm falsely as to any material facts, he shall be deemed guilty of perjury, and be punished accordingly.

"Sec. 1347. If the president and secretary of any such corporation shall neglect or refuse to comply with the provisions of section 1337, and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute for all debts of such corporation contracted during the period of such neglect or refusal."

Sand. & H. Dig. Ark.

This action was commenced July 21, 1900. The complaint alleges that during the whole time the defendant was president of the bank he neglected to comply with the requirements of the foregoing provisions of the statute by making, swearing to, and depositing the certificate required thereby. It further alleges: "That on September 6, 1894, said Bank of Mammoth Springs became indebted to plaintiff in the sum of $2,500 by note for that amount due November 8, 1894. That on said date said note was renewed, and upon maturity of said renewal it was likewise renewed. These renewals continued from time to time, with occasional payments at some of the times of renewal, until May 20, 1897, when said Bank of Mammoth Springs, being then indebted to plaintiff in the sum of $1,150 as balance due on said original indebtedness, executed to the plaintiff its note for that amount due and payable three months after date. That on May 3, 1894, said Bank of Mammoth Springs was also indebted to the plaintiff in the sum of $5,000 by note, which, by the

same process of renewals and part payments as above stated in regard to the first note, was reduced on May 2, 1897, to $3,500, for which said Bank of Mammoth Springs executed to plaintiff its note for said amount, due ninety days after date." The defendant demurred to the complaint on the ground that it appeared on the face of the complaint that the cause of action was barred by the statute of limitations. The circuit court sustained the demurrer, and, the plaintiff declining to plead further, final judgment was rendered for the defendant, and the plaintiff sued out this writ of error. The opinion of the circuit court is reported in 107 Fed. 188.

Rhea P. Cary, for plaintiff in error.

Robert Neill (Davidson & Meeks, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

It is settled by the decision of the supreme court of Arkansas in the case of Bank v. Walsh, 68 Ark. 21, 59 S. W. 952, that the statute on which this action is founded is a remedial statute, and imposes "a statutory liability, and not a penalty," and that the three-years statute of limitations applies to actions founded thereon. The single question left for our consideration is, when did the plaintiff's cause of action against the defendant accrue? The contention of the plaintiff in error is that it did not accrue until the maturity of the last renewal notes; the contention of the defendant is that it accrued when the debts sued for were contracted, or, at the furthest, on the maturity of the notes given at the time the indebtedness was created. The complaint does not disclose when the debts sued for were contracted, but they must have been contracted on or before May 3, 1894, and September 6, 1894, the respective dates at which the first notes mentioned in the complaint were executed. As the action is barred whether the statute of limitations commenced to run from the creation of the debt or from the maturity of the notes given at its creation, it is not essential to the decision of the case to determine whether, when the plaintiff made a loan to the Bank of Mammoth Springs or otherwise became its creditor for a present consideration on an agreed term of credit and took a note accordingly, the plaintiff could the next day have brought suit for the amount of the debt against the defendant on his statutory liability to pay it as a debt of the bank "contracted during the period" of his neglect and refusal to file the required certificate. Under the statute the defendant did not sustain to the debtor bank the relation of a joint principal, surety, or guarantor. His liability was primary, and not secondary. It was created by statute, and was not contingent upon the failure or inability of the bank to pay, but was absolute and unconditional. It resulted from his dereliction of official duty, and, if he had been compelled to pay the debt, he would have had no right of reclamation or indemnity from the bank. The statute imposed upon him the obligation of a principal debtor for his refusal and neglect to perform a duty enjoined upon him by law for the protection of the public. His legal liability for the debt was fixed and perfect the moment it was contracted, without regard to the solvency or insolvency of the bank, or to any proceedings against it to enforce pay-

ment. At the time when the first renewal notes were taken, the debt and the original notes given therefor had then become due and payable. The renewal of the notes operated as an extension of time for the payment of the debts by the bank, but did not release the defendant either from his statutory liability to pay the debts or from immediate action therefor. As soon as the original notes became due and payable, if not before, the defendant was liable. The defendant was unquestionably then liable to an action, and so was the bank. These two rights of action in the plaintiff were not dependent. They were concurrent and independent. The plaintiff could assert either or both. The assertion of one would not preclude the assertion of the other. Suspending the assertion of the one would not preclude the assertion of the other. Nothing but satisfaction of the plaintiff's debt by the pursuit of one would take away its right to follow the other. If, therefore, the right of action against the defendant on his statutory liability did not accrue on the creation of the debt, it unquestionably did on its maturity, and the statute, having once commenced to run, could not thereafter be suspended so far forth as concerned the defendant, by any action of the plaintiff and the bank which might have that effect as between them. Without pursuing the subject further, we may say that we concur in the opinion of Judge Folger in Jones v. Barlow, 62 N. Y. 202, 213, and have, in substance, adopted its reasoning. It seems to have been followed in later cases in that state (Hardman v. Sage, 124 N. Y. 25, 26 N. E. 354; Parrott v. Colby, 6 Hun, 55, affirmed on appeal in 71 N. Y. 597; Iron Co. v. Walker, 76 N. Y. 521) and elsewhere (Mining Co. v. Woodbury, 14 Cal. 265; Davidson v. Ranken, 34 Cal. 503; Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; Young v. Rosenbaum, 39 Cal. 646).

The complaint counts on an open account also, touching which it is only necessary to say that that portion of the account contracted while the defendant was president is clearly barred, and for that portion of the account contracted after he ceased to be president he never was liable.

The judgment of the circuit court is affirmed.

CITY OF FT. MADISON v. FT. MADISON WATER CO.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,570.

CITIES—CONTRACTING FOR WATER—EXCEEDING SPECIAL TAX.

Under McClain's Code Iowa, § 641, empowering cities to contract with a water company for water, and to pay therefor such sum as may be agreed on, and section 643, providing, if a city contract for water, it shall annually levy a special tax sufficient to pay the agreed water rents, provided said tax shall not exceed five mills, the city may contract debt for water in excess of five mills, and be subject to action thereon.

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

For opinion below, see 110 Fed. 901.

E. C. Weber, for plaintiff in error.
James C. Davis, for defendant in error.
Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Ft. Madison Water Company brought this action against the city of Ft. Madison to recover $4,440 alleged to be due for rent of hydrants. The contract for the hydrants was made by ordinance of the city, and contained this provision: "Said hydrant rental to be paid quarterly out of the special tax fund, to be levied and collected as other taxes of the city are for this purpose." The statutes relating to the powers of cities to contract for a supply of water in force at the time the contract was entered into read as follows:

"* * * and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes, and for such other purposes as may be necessary for the health and safety thereof, and to pay therefor such sum or sums as may be agreed upon between said contracting parties." Section 641, McClain's Code. "* * * if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water for any purpose, such city or town shall levy each year, and cause to be collected, a special tax as provided for above sufficient to pay off such water rents so agreed to be paid to said individual or company constructing said works, provided, however, that said tax shall not exceed the sum of five mills on the dollar for any one year." Id. § 643.

The defense to the action set up in the city's answer is that the city has levied, collected, and paid a special tax of five mills on the dollar on the taxable property of the city to pay the hydrant rentals due under the contract, but that since September, 1896, that levy has not furnished sufficient revenue for that purpose, and that the city has no power or authority to pay the deficit out of any other fund, and "therefore," says the answer, "said city is not indebted to the plaintiff in said sums or any other sum." The only question in the case is this: Is the city under obligation to pay that portion of the contract price for the hydrant rentals that is in excess of the revenue the five-mill levy will produce, and will an action lie against it therefor? Under the statutes quoted there is no limitation on the amount of indebtedness a city may contract to procure water for its corporate purposes. It is authorized "to pay therefor such sum or sums as may be agreed upon." The "special tax" authorized to be levied to pay the water rents is limited to five mills, but this is not a restriction on the power of the city to contract debts for that purpose. The power of the city to levy the special tax to pay for water is not the measure of its power to contract debts for water. There is no necessary connection between the power to contract debts and the power to levy taxes to pay them. Board v. King, 14 C. C. A. 421, 67 Fed. 202. The power of a municipality to contract a debt does not imply that it possesses the power to levy a special tax, or any tax, to pay it; and the grant of a power to levy a special tax for some purpose does not imply a prohibition of the power to contract a debt for that pur-

pose in excess of what the special tax will discharge. It frequently happens that a municipality may lawfully contract debts which it has no power to levy a tax to pay. Board v. King, supra; U. S. v. Miller Co., 4 Dill. 233, Fed. Cas. No. 15,776; Stryker v. Board, 23 C. C. A. 286, 77 Fed. 567; King v. Same, 23 C. C. A. 348, 77 Fed. 583.

It is clear, both upon principle and authority, that under the statutes quoted the defendant city is liable on its contract for the amount due for water in excess of what the five-mill levy will pay. U. S. v. Clark Co. Ct., 96 U. S. 215, 24 L. Ed. 628; U. S. v. Macon Co. Ct., 99 U. S. 582, 25 L. Ed. 331; Knox Co. Ct. v. U. S., 109 U. S. 229, 3 Sup. Ct. 131, 27 L. Ed. 915; Grand Junction Water Co. v. City of Grand Junction (Colo. App.) 60 Pac. 196; Creston Waterworks Co. v. City of Creston, 101 Iowa, 694, 70 N. W. 739. And the water company is entitled to have the amount due it under the contract judicially ascertained and judgment against the city for the same.

Whether the water company can by mandamus compel the city to levy either a general or special tax to pay such judgment is a question not raised by this record. The right to a judgment against the city for the debt, and the right to a mandamus to compel the city to levy a tax to pay the judgment, are separate and distinct questions, the latter of which is not now before us, and concerning which it will be distinctly understood we express no opinion.

The judgment of the circuit court is affirmed.

HINGSTON et al. v. L. P. & J. A. SMITH CO.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 992.

1. CONTRACTS—FRAUDULENT REPRESENTATIONS—RIGHT OF RELIANCE.
   A party making a contract to dredge a harbor, and being some distance from the harbor at the time, is entitled to rely on the representations of the other party, who has done a portion of the work and had access to the chart showing soundings, as to the thickness of the rock to be removed, and is not required to investigate the facts himself, and, such representations being relied upon and being false and known to the party making them to be so, is not bound by the contract.
2. SAME—MATTERS OF OPINION.
   Representations made after soundings had been taken in the harbor for the purpose of ascertaining the character of the work, and a chart thereof made with which the party making the representations was familiar and the other party not, were not mere expressions of opinion, but were matters of fact, which could be relied on, though not accompanied with specific statements as to actual measurements having been made.

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

W. M. Duncan, for plaintiffs in error.

George B. Marty, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge. This action was brought to recover damages alleged to have been sustained by the plaintiff, the L. P. & J. A. Smith

Company, for an alleged breach of contract made with the defendants, Hingston et al., for certain dredging in the harbor of Ashtabula. The defendants alleged that the contract upon which a recovery was sought was obtained by certain fraudulent misrepresentations, among others that the rock which it was necessary to remove under the terms of the contract would average a foot in thickness, which representation was false and untrue, and known to be such when the representation was made, and that the falsity thereof was unknown to the defendants, who made said contract believing said statements to be true and in reliance thereon. Other allegations were made in the answer, unnecessary to notice in the disposition we shall make of this case.

The court charged the jury among other things, as follows:

"If you find that Smith, the agent of the plaintiff, and Hingston, one of the defendants, had equal opportunities of obtaining information as to the character, location, and amount of the work to be done, then, as a matter of law, Hingston had no right to rely upon representations made by Smith, but it was his duty to inform himself as to these matters."

To understand the relevancy of this charge, it is necessary to know something of the facts which the testimony tended to develop. The dredging which Hingston & Co. undertook to do for Smith & Co. was in the completion of a contract to remove certain materials from the harbor at Ashtabula, in order to deepen and improve the same for the purposes of navigation. Smith & Co. had already done a considerable portion of the work. The harbor was to be excavated to the depth of 20 feet, the rock and dirt removed where the channel was not of that depth, so as to give 20 feet of clear water. For the purpose of knowing the character of the work to be done, soundings had been taken and a map or chart prepared showing the excavation to be made in carrying out the work. This chart was accessible to the Smiths, and, doubtless, known to them. The character of the work was so far developed that the jury might find it to have been known to the Smith Company's representative when he made the contract with Hingston which has given rise to this suit. The contract was made at Buffalo, a very considerable distance from Ashtabula. Hingston gave testimony tending to show that he did not know the nature and character of the work necessary to be done in carrying out the contract, and relied upon the representation made to him by Smith as to the thickness of the rock excavation to be made. The testimony shows that the thickness of the rock to be removed was a very material circumstance in view of the fact that the work was paid for by the cubic yard, and thick rock could be more profitably handled than thin layers of rock could be. In this situation of affairs is it sound law to say that Hingston might not rely upon the representations of Smith as to the thickness of the material to be excavated? In a sense it is true that Hingston had equal opportunities with Smith to know the character of the work to be done, and by going to Ashtabula he might have inspected the work and examined the chart. But was he bound to do so? Undoubtedly a party may not shut his eyes to facts which are apparent at the time of making a contract in blind reliance upon the assurance of another that things are not what his senses, if used, would show him they, in fact, are. The rule is well stated in

Slaughter's Adm'r v. Gerson, 13 Wall. 379–383, 20 L. Ed. 627, cited to sustain the charge of the court below, wherein Mr. Justice Field says:

"Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

The important condition that the means of information be at hand is not to be overlooked. The matters directly before the party which may be observed he must be presumed to see. But does the reason or the justice of the rule apply where the subject-matter is not present, but distant from the contracting parties? In such case, where the party making the representation has had means and opportunities to know the facts concerning the subject-matter of the contract which the other party has not had, and cannot have without going to the expense and delay of an investigation of matters at a distance, we see no reason why he may not rely upon such representations of fact. In our opinion, the party making such representations cannot be heard to say, "Their falsity might have been known by an investigation of the facts, and had the other party not been so credulous as to rely upon my representations he would not have been deceived." The rule is thus stated in Bigelow, Frauds, 67:

"Every contracting party, not in actual fault, has a right, however, to rely upon the express statement of an existing fact, the truth of which is known to the contracting party who made it, and unknown to the party to whom it is made, when such statement is the basis of a mutual engagement. He is under no obligation to investigate and verify the statement, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith."

This statement is taken almost verbatim from the opinion in Mead v. Bunn, 32 N. Y. 275–280, and is amply sustained by the authorities. McClellan v. Scott, 24 Wis. 81–87; Hale v. Philbrick, 42 Iowa, 81; Faribault v. Sater, 13 Minn. 228 (Gil. 210); David v. Park, 103 Mass. 501; Savage v. Stevens, 126 Mass. 207; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Henderson v. Henshall, 4 C. C. A. 357, 54 Fed. 320.

In view of the superior knowledge which the testimony tended to show was possessed by Smith as to the nature and character of the work to be done in the execution of the contract entered into, we think it was error to instruct the jury that Hingston had no right to rely upon these material representations, which, if untrue, were misleading and prejudicial.

In this connection the jury were further instructed:

"Statements of what condition of things exist beneath the water, made between people whose business it is to deal with things below the water, must be regarded as conjectures, as statements of opinion merely, unless there goes with such statements the assertion of a fact with respect to actual measurements having been made, of which report is sought to be given."

We think this statement, in view of the facts shown, is too broad and liable to mislead. The thickness of the rock to be excavated after the soundings were made was not mere matter of opinion. It was a matter of fact which Smith, there was testimony tending to show, assumed to know and state. Expressions of opinion as to things in their nature not capable of being known, as the prospects of an unopened mine and the like, may not be relied upon, but matters of fact capable of positive knowledge may be the subject of representations for which one may be held liable. In the present case the statement as to the average thickness of the rock to be excavated, under the charge given, could not be relied upon unless statements of actual measurement were made in the same connection which were false. But if the testimony disclosed that the facts as to the thickness of the rock to be excavated might be within the knowledge of Smith resulting from measurements or other means with which he was familiar, and which were unknown to Hingston, such representations may become material, although unaccompanied with specific statements as to measurements. The charge in this respect should be modified in a retrial of the case.

For error in the respects pointed out the judgment will be reversed, and a new trial awarded.

BROOKS v. CITY OF WICHITA et al.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,636.

1. DAMAGES—BREACH OF CONTRACT WITH CITY—PROVISION FOR LIQUIDATED DAMAGES.

   By reason of the fact that a city in its corporate capacity does not suffer any loss or damage from the breach of a contract by which a private corporation has agreed to furnish a public utility for the benefit of the inhabitants, and that the inconvenience and loss to the public from such breach are too remote and speculative to furnish a basis for the recovery of damages, it is competent for the parties to fix the measure of damages in the contract itself, and provisions of a contract to furnish electric lights that, if they are not furnished by the time agreed, a sum deposited with the city shall be forfeited as liquidated damages, "for the reason that the actual damages * * * cannot be definitely or accurately ascertained," and that it shall not be considered as a penalty, show that the parties had knowledge of such rules of law, and clearly intended what their language expressed; and such provision will be enforced, where the lights were never furnished.

2. SAME—CONTRACT FOR LIQUIDATED DAMAGES—POWER OF EQUITY TO RELIEVE AGAINST.

   A court of equity cannot, more than a court of law, relieve a party from his obligation to pay liquidated damages, where it has been determined that the damages are liquidated, and that the provision is not for a penalty.

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

On the 23d day of September, 1898, the Wichita Railway, Light & Power Company entered into a contract with the city of Wichita by which it agreed to furnish the city with 150 arc lights of the standard of 2,000 candle power, and to have the same "in operation by April 1st, 1899." The contract contained the following provisions: "And it is further agreed that in the event

that the said first party shall fail to furnish and put in operation for the use of the said city the one hundred and fifty (150) arc lights before referred to by the first day of April, 1899, then it is agreed that the said first party is to forfeit and pay to said second party, as liquidated damages, and not as a penalty, the sum of ten thousand (10,000) dollars now on deposit with the city treasurer of the city of Wichita. It is further agreed that the ten thousand dollars ($10,000) is to be treated as liquidated damages in case of a breach of this contract, for the reason that the actual damages sustained by the said city in case of a breach of this contract cannot be definitely or accurately estimated or computed. And it is further agreed and understood that, as a part of the consideration of this contract, the sum of ten thousand dollars ($10,000) has been deposited with the city treasurer of the city of Wichita, as a guaranty that the said first party shall begin to furnish lights herein contracted for by the first day of April, 1899; the said sum of ten thousand dollars ($10,000) to be treated, as hereinbefore set forth, as liquidated damages, and not as a penalty; and further conditioned to pay the second party all damages, penalties, and forfeitures that may arise under this contract in case of the first party's failure to perform its part of the same by April 1st, 1899." The $10,000 was deposited with the city treasurer as recited in the contract. The company never furnished and put in operation the 150 arc lights, or any of them. The appellant, Francis A. Brooks, brought this bill in equity against the city and the Wichita Railway, Light & Power Company to recover the $10,000 deposited in the treasury of the city under the contract, alleging he had furnished the company the money to make the deposit, and was the equitable owner thereof; admitted the company did not put the arc lights in operation, but denied that the money was thereby forfeited to the city under the contract; and prayed "that the said city of Wichita may be ordered and decreed to account with him for so much of the money deposited with it by him in September, 1898, as is not required to meet and satisfy the damages, loss, or injury caused to or sustained by said city, if any there was, by reason of the failure of said railway, light, and power company to keep and perform the contract made by it as aforesaid." A demurrer to the bill was sustained, and the bill dismissed "without prejudice to an action at law," and the plaintiff appealed to this court.

Kos Harris, for appellant.

A. E. Helm (David Smyth and C. V. Ferguson, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

Waiving any consideration of the question of equitable jurisdiction, concerning which there may be some doubt, owing to the equitable character of the plaintiff's alleged claim to the fund, we will proceed to dispose of the case on its merits.

By the express terms of the contract, if the 150 arc lights were not put up and in operation within the time limited, the company was to forfeit and pay to the city, "as liquidated damages, and not as a penalty, the sum of ten thousand dollars now on deposit with the city treasurer of the city of Wichita." Cases of penal bonds between private persons, where the damages resulting from a breach are readily ascertainable, have no application to this case. A city is a public corporation designed for local government. It is an agency of the state to assist in the civil government of the territory and people of the state embraced within its limits. It has no private interests. It is a public agency, and acts for the public; and when it contracts for the

establishment and maintenance by a private corporation of waterworks, gas or electric lights, street railroads, and other like public utilities, it does so in the performance of its public functions, and for the purpose of promoting the convenience and preserving the health of its citizens, and protecting them in their persons and property. And when a private corporation which has engaged with the city to construct and maintain one of these public utilities—as in the case at bar, to light the public streets of the city—fails to comply with its contract in that regard, the city, in its corporate capacity, does not suffer any loss or damage capable of judicial ascertainment. Nor is the inconvenience and loss suffered by the public, on whose behalf and for whose benefit and protection the contract was made, capable of ascertainment. The loss and damage sustained by the public, however great it may be, in the loss of health or life or the destruction of property, is too remote, conjectural, and speculative to be made the basis of recovery in such cases. Clark v. Barnard, 108 U. S. 436, 459, 460, 2 Sup. Ct. 878, 27 L. Ed. 780. For this reason it is common for municipal corporations, in making contracts of this character, to stipulate for the payment of a fixed sum as liquidated damages in case the public utility is not constructed and put in operation within the time limited by the contract. Nilson v. Town of Jonesboro, 57 Ark. 168, 20 S. W. 1093. This is the only method by which the city can obtain anything like an adequate compensation for the loss and damage sustained by the public by the breach of such a contract. The sum forfeited as liquidated damages goes into the treasury, and inures to the benefit of the public. The contract in this case does not stop with declaring that the sum of $10,000 has been agreed upon between the parties as liquidated damages in case of its breach, but it contains the further and somewhat unusual provision that they have agreed upon this sum "for the reason that the actual damages sustained by the said city in case of a breach of this contract cannot be definitely or accurately ascertained or computed." This clause of the contract evinces a knowledge on the part of the contracting parties of the rules of law to which we have adverted, and which preclude a city from recovering substantial damages in this class of cases unless they are liquidated by the agreement of the parties. It was the knowledge of this fact that led the parties to this contract to agree on the damages for its breach, and this is conclusive evidence that they intended what they expressed in their contract, namely, that the sum agreed upon was "liquidated damages, and not a penalty." If this provision of the contract does not mean what it says, then it does not mean anything; and, when the company failed to put up and operate the arc lights within the time limited by the contract, all that remained to be done was for the city to cancel the contract, and hand back to the company the $10,000 it had been at such pains to exact. Such an interpretation of the contract violates the clearly expressed and actual intention of the parties, is in the teeth of its plain provisions, and makes the deposit of the $10,000 a vain and useless act.

The law on the subject of liquidated damages and penalties has recently received great consideration at the hands of the supreme court, in the case of Association v. Moore (Oct. term, 1901) 22 Sup. Ct. 240,

46 L. Ed. ——. After a very extended review of the authorities on the subject, the court declares:

"The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not, bona fide, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed; it being the duty of the court, always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

And the court quotes approvingly from the case of Bagley v. Peddie, 16 N. Y. 469, 471, 69 Am. Dec. 713, these two rules:

"Sixth. If, independently of the stipulated damages, the damages would be wholly uncertain, and incapable of being ascertained except by conjecture, in such case the damages will be considered liquidated if they are so denominated in the instrument. Seventh. If the language of the parties evinces a clear and undoubted intention to fix the sum mentioned as liquidated damages in case of default of performance of some act agreed to be done, then the court will enforce the contract, if legal in other respects."

The case at bar falls directly within the doctrine of the supreme court in this case, and is, moreover, in principle, on all fours with the case of Clark v. Barnard, supra.

It is needless to say that a court of equity, no more than a court of law, can relieve a party from his obligation to pay liquidated damages. When it is once settled that the damages are liquidated, it is then settled that they are not a penalty. A court of equity can no more relieve from the obligation to pay liquidated damages than it can relieve from the obligation to pay a promissory note executed upon sufficient consideration.

The decree in the case should be that the plaintiff's bill be dismissed for want of equity, and, as thus modified, the decree of the circuit court is affirmed.

BUTLER v. McGORRISK et al.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,633.

MINES AND MINING—CONVEYANCE OF COAL—CONSTRUCTION OF DEED.

A deed conveyed "all the coal and the right to mine and remove the same" under lands described, and further provided that the grantee "is to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date. By accepting this conveyance, the grantee agrees to mine and remove said coal by May 1, 1891." *Held*, that the legal effect of said deed, construing its provisions together, was to convey all the coal in the land which the grantee should mine and remove by the time limited, and no more.

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

On the 2d day of July, 1887, Redhead and wife made a deed to E. K. Butler, the plaintiff in error and plaintiff below, which reads as follows: "Know

all men by these presents: That Wesley Redhead and Annie S. Redhead, his wife, of Polk county and state of Iowa, in consideration of the sum of thirty-five hundred dollars ($3,500) in hand paid by E. K. Butler, of Cook county and state of Illinois, do hereby sell and convey unto the said E. K. Butler, all the coal and the right to mine and remove the same under the following described premises, situated in the county of Polk and state of Iowa, to wit: The north half (½) of lot twenty (20), lot twelve (12), and all that part of lot ten (10) lying south of the extension of the south line of lot two (2), all said real estate lying in the official plat of section sixteen (16), township seventy-eight (78) north, range twenty-four (24) west of the 5th P. M., Iowa. The grantor warrants that no coal has been taken from under lot twelve (12) or from under the north half of lot twenty (20), and said Butler is to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date. By accepting this conveyance, the grantee agrees to mine and remove said coal by May 1, 1891. And I hereby covenant with the said E. K. Butler that I hold the coal under said premises by good and perfect title, that I have good right and lawful authority to sell and convey the said coal, that the coal thereunder is free and clear of all liens and incumbrances whatsoever. And I covenant to warrant and defend the coal so conveyed under said premises against the lawful claims of all persons whomsoever." On the same day Redhead and wife, for the consideration of $20,000, conveyed to the Clifton Heights Land Company certain lands, among which were the lands described in the deed to Butler. This deed, after describing the lands conveyed, contains this exception: "Except all the coal being and lying under the following described land, to wit: The north half of lot twenty (20), lot twelve (12), and all of that part of lot ten (10) lying south of the extension of the south line of lot two (2), all of said real estate being and lying in the official plat of section sixteen (16), township seventy-eight (78) north, of range twenty-four (24) west of the 5th P. M., Iowa, with the privilege to remove said coal until the first day of May, 1891, per deed made to E. K. Butler, July 2, 1887." Subsequent to the 1st day of May, 1891, the defendant, the Clifton Heights Land Company, or the defendants who were its grantees, mined and removed coal underlying the lands described in the deed from Redhead and wife to Butler, and thereupon Butler brought this action to recover the value of the coal so mined and removed, claiming to be the owner of the same under the deed of Redhead and wife to himself. The defendants, in their answer, admitted they had mined and removed the coal, but that they did so subsequent to the 1st day of May, 1891, and set out the deed from Redhead and wife to Butler, and alleged that by the terms thereof the plaintiff had no right, title, or interest in the coal after that date. The plaintiff interposed a demurrer to this answer, which was overruled, and the plaintiff electing to stand on his demurrer, final judgment was rendered for the defendants, and the plaintiff sued out this writ of error.

N. T. Guernsey, for plaintiff in error.

C. C. Nourse, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The single question in this case is: Did the plaintiff, under the provisions of the deed from Redhead and wife to himself, have any right to the coal under the land after the 1st day of May, 1891? The deed conveys "all the coal and the right to mine and remove the same" under the lands described, and declares that "said Butler is to mine and remove said coal by May 1, 1891, and no coal is to be mined after that date. By accepting this conveyance, the grantee agrees to mine and remove said coal by May 1, 1891."

The language of the deed is clear and unambiguous. It can have but one meaning, either to the lay or professional mind, and that meaning is that Butler's right to mine the coal in the land, as well as the right to the coal not mined on the 1st day of May, 1891, terminated on that day. The explicit language of the deed is, "No coal is to be mined after that date." It is unreasonable to suppose that Butler bought coal which he agreed never to mine. He was guilty of no such absurdity. No court would place such a construction on the deed unless its language compelled it. The plain language of the deed refutes such a construction. The coal that he bought was, not all the coal under the land, but the coal that he should mine up to the day his right to mine the coal in the land was terminated by the terms of the deed. The right to the coal and the right to mine it are, by the terms of the deed, indissolubly linked together, and expired together. The legal effect of the deed, when its several clauses are taken and construed together, as they must be, was to convey to Butler all the coal in the land which he saw proper to mine and remove up to the 1st day of May, 1891, and no more. The right to mine and remove the coal is the very substance of this contract. A limitation upon that right is necessarily a limitation upon the coal conveyed, for the coal conveyed is of no use or utility to the purchaser without the right to mine and remove, and there can be no implied right to mine and remove the coal where the right is express and the limitation is expressly put upon the right. Barring. & A. Mines, p. 26; Baker v. Hart, 123 N. Y. 470, 25 N. E. 948, 12 L. R. A. 60; Austin v. Mining Co., 72 Mo. 541, 37 Am. Rep. 446; Knight v. Iron Co., 47 Ind. 105, 17 Am. Rep. 692; Perkins v. Stockwell, 131 Mass. 529; Pease v. Gibson, 6 Greenl. 81; White v. Foster, 102 Mass. 375. This construction gives effect to the obvious intention of the parties to the deed. No technical rule of law or construction can be admitted to subvert this fundamental and paramount rule.

The judgment of the circuit court is affirmed.

WHITWORTH v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,631

1. CRIMINAL LAW—JURISDICTION OF CIRCUIT COURT OF APPEALS—DISCRETIONARY ORDER AFTER JUDGMENT.

   A circuit court of appeals has no jurisdiction to review or reverse the order of a district court in a criminal case denying a motion to set aside a judgment and to permit a defendant to withdraw his plea of guilty, where this motion presents no question of the jurisdiction or right of the district court to grant the motion, because such an order is not a final decision, and because such a motion does not present a question of law, but, like a motion for a new trial, is addressed to the discretion of the trial court.

2. SAME—JUDGMENTS FOR EXCESSIVE PENALTIES.

   In the national courts a judgment in a criminal case must conform strictly to the act of congress which authorizes it. Any departure

from the statute in the extent or character of the punishment adjudged is a fatal error.

8. SAME—JUDGMENTS FOR COSTS.
Section 974 of the Revised Statutes empowers a federal court to award that the defendant shall pay the costs of the prosecution when he is convicted of an offense not capital.

4. SAME—POWER OF COURTS OF APPEALS.
Where error is discovered in the proceedings in a criminal case properly presented to a circuit court of appeals for review, it is empowered to enter such judgment and to impose such sentence as the law prescribes, or to reverse the judgment, and direct the court below to take such further proceedings as the justice of the case may require.

(Syllabus by the Court.)

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

This writ of error challenges the judgment and sentence of the plaintiff in error upon an indictment found in the district court for the Eastern district of Missouri on November 9, 1900. The indictment contained two counts. The first charged the embezzlement of $236.06 of the money-order funds of the United States, under section 4046 of the Revised Statutes, and the second charged the embezzlement of $16.96, under Act March 3, 1875 (18 Stat. 479, c. 144). The defendant, Whitworth, pleaded not guilty, and upon a trial the jury disagreed. Afterwards, and on May 10, 1901, he withdrew his plea of not guilty, and entered a plea of guilty, and thereupon the court sentenced him upon the first count to pay a fine of $236.06 and the costs of the prosecution of the cause, to stand committed until the fine and costs were paid, and to be confined in the penitentiary for three years, and on the second count of the indictment to be confined in the penitentiary at hard labor for one year and one day. On May 22, 1901, Whitworth made a motion to set aside this judgment against him, to withdraw his plea of guilty, and for a new trial, because he was induced to withdraw his plea of not guilty and to enter that of guilty by the promise of a post-office inspector, who was preparing the evidence for the prosecution, that, if he would do so, his sentence would not be more severe than a fine of $50. This motion was denied, and the judgment still stands.

Charles H. Brock (Simon S. Bass, on the brief), for plaintiff in error.

Edward A. Rozier, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The motion to set aside the judgment and to permit the defendant to withdraw his plea of guilty because he had been induced to enter it by the promise of the inspector that he should not suffer a severe sentence was supported and opposed by affidavits. It was properly presented to the district court at the same term at which the judgment was rendered. It was in the nature of the old writ of error coram nobis to correct a mistake of fact, and the trial court had jurisdiction to hear and determine it. But its decision of this motion is not reviewable in this court for two reasons. In the first place, it is only the final judgments or decisions of the district courts in criminal cases that the act of congress empowers the circuit courts of appeals to review (Act March 3, 1891; 26 Stat.

828, c. 517, § 6), and the only final decision or judgment in this case was the judgment which imposed the sentence upon the defendant. The order denying his subsequent motion was not a final decision or judgment. He may renew it at any time. In the second place, the authority of the courts of appeals to review the acts of the district courts in criminal cases is limited to the power to reverse or modify their judgments for errors of law. In criminal cases a circuit court of appeals is a court for the correction of errors of law exclusively, and the denial of the motion to set aside the judgment was not an error of law, whether it was right or wrong. The motion was addressed to the judicial discretion of the court below. There was no question of its jurisdiction, no question of its right to grant or refuse the motion, raised or involved in the hearing or decision of the motion. The only question presented was whether or not, in the exercise of a wise discretion, the motion ought to be granted. A perusal of the affidavits used upon the hearing shows that the district court committed no abuse of this discretion in denying the motion, and the result is that this court has no authority to review or reverse its order. A circuit court of appeals has no jurisdiction to review or reverse the order of a district court in a criminal case denying a motion to set aside a judgment and to permit a defendant to withdraw his plea of guilty, which presents no question of the jurisdiction or right of that court to grant the motion, because such an order is not a final decision, and because such a motion does not present a question of law, but is, like a motion for a new trial, addressed to the discretion of the trial court. Walden v. Craig, 9 Wheat. 576, 6 L. Ed. 164; Pickett's Heirs v. Legerwood, 7 Pet. 142, 149, 8 L. Ed. 638.

The penalty prescribed by section 4046, Rev. St., for the commission of the crime charged in the first count of the indictment was that the culprit should "be imprisoned for not less than six months nor more than ten years, and be fined in a sum equal to the amount embezzled." The judgment against the defendant for this offense was that he should be imprisoned for three years; that he should pay a fine equal to the amount embezzled, and also the cost of the prosecution of this cause; and that he should stand committed until the fine and costs were paid. This judgment was erroneous. The statutes gave to the court below no power to add to the fine prescribed by the act of congress the cost of the prosecution of the case. In many instances, where, as in the case at bar, the amount embezzled was small, the costs would far exceed the amount of the fine fixed by the law. In the national courts a judgment in a criminal case must conform strictly to the act of congress which authorizes it. Any departure from the statute in the extent or character of the punishment adjudged constitutes an error which is fatal to the judgment. In re Graham, 138 U. S. 461, 463, 11 Sup. Ct. 363, 34 L. Ed. 1051; In re Bonner, 151 U. S. 242, 257, 14 Sup. Ct. 323, 38 L. Ed. 149; Harman v. U. S. (C. C.) 50 Fed. 921, 922; In re Johnson (C. C.) 46 Fed. 477, 481; In re Pridgeon (C. C.) 57 Fed. 200, 201; In re Christian (C. C.) 82 Fed.

199, 201. The result is that, while there was no error in the receipt and acceptance of the defendant's plea of guilty, the judgment rendered thereon was not warranted by the law.

A single question remains, and it is whether the judgment shall be modified by this court and affirmed, or reversed and the case remanded to the court below, with instructions to impose a sentence in accordance with the provisions of the statute. Where error is discovered in the proceedings in a criminal case properly presented to a circuit court of appeals for review, it is empowered to enter such judgment and to impose such sentence as the law prescribes, or to reverse the judgment, and direct the court below to take such further proceedings as the justice of the case may require. Act Sept. 24, 1789 (1 Stat. 73, 85, c. 20, §§ 24, 25); Act June 1, 1872 (17 Stat. 196, c. 255, § 2); Act March 3, 1879 (20 Stat. 354, c. 176, § 3); Act Feb. 6, 1889 (25 Stat. 655, c. 113, § 6); Act March 3, 1891 (26 Stat. 826, c. 517, § 11); Rev. St. § 701; Ballew v. U. S., 160 U. S. 187, 201, 202, 16 Sup. Ct. 263, 40 L. Ed. 388; Haynes v. U. S., 42 C. C. A. 34, 37, 101 Fed. 817, 820; Gardes v. U. S., 30 C. C. A. 596, 87 Fed. 172; Murphy v. Com., 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711; Beale v. Com., 25 Pa. 11. This case was once tried in the court below before a jury, which disagreed. The judge who conducted that trial necessarily has a knowledge of the circumstances surrounding and the nature of the offenses of which the defendant is guilty, which this court, in the absence of the evidence there produced and of an acquaintance with the demeanor and character of the defendant, cannot acquire. Counsel for the defendant insist that the sentence below, which was imposed by another judge in the absence of the district judge who presided at the trial, was severe; and in view of the disagreement of the jury and of the small amount of money appropriated we are by no means confident that they are mistaken here. In view of these facts, the wiser course seems to be to remand the case to the court below, with directions to that court to impose a just sentence.

The judgment below will accordingly be reversed, and the case will be remanded to the district court forthwith, with directions to enter such a judgment and impose such a sentence upon the plea of guilty already interposed as, under all the circumstances, the justice of the case requires, and the acts of congress authorize; and it is so ordered.

Since the above opinion was announced, the attention of the court has been called for the first time to section 974 of the Revised Statutes, which provides:

"When judgment is rendered against a defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

This statute undoubtedly empowered the court below to adjudge that the defendant, Whitworth, should pay the costs of the prose-

cution, and, if this provision of the acts of congress had been called to our attention, the judgment below would not have been reversed on account of the imposition of the costs. Meanwhile the case has been remitted to the court below, and the defendant has probably been re-sentenced pursuant to our direction. No motion for a rehearing has been made, and no injustice has resulted from our decision, because the conviction was not disturbed. The former sentence was very severe, and the presumption is that a just sentence has been imposed since our mandate issued. For these reasons the judgment will be allowed to stand, notwithstanding the fact that section 974 undoubtedly empowers the trial judge to award that the defendant shall pay the costs of the prosecution when he is convicted of any offense not capital.

THAYER, Circuit Judge. I concur in the foregoing.

GARDNER v. LAKE.

(Circuit Court of Appeals, Eighth Circuit. March 3, 1902.)

No. 1,623.

APPEAL—REVIEW—ACTION TRIED TO COURT.

Where an action at law is tried by stipulation to the court, which makes only a general finding for plaintiff, where no exceptions were taken to any ruling, there is no bill of exceptions, and the complaint states a cause of action, there is nothing which can be reviewed on a writ of error.

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

Frawley & Laffey, for plaintiff in error.

Edwin Van Cise and James W. Fowler, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. By agreement of the parties in writing filed with the clerk, this action was tried by the court. The court's finding was general in favor of the plaintiff, and judgment was rendered accordingly. No exceptions were taken during the trial to the admission or rejection of evidence or to any other ruling of the court, the record does not contain the evidence, there is no bill of exceptions, and the complaint states a good cause of action. On this state of the record, we cannot consider the errors assigned. The presumption is that the judgment of the circuit court was right, and it is accordingly affirmed.

THE ELIZA LINES.

(Circuit Court of Appeals, First Circuit. February 13, 1902.)

Nos. 368-371.

1. SHIPPING—CONTRACT OF AFFREIGHTMENT—TERMINATION BY ABANDONMENT OF SHIP.

The involuntary abandonment of a vessel by her master and crew under stress of weather, without any actual intention to renounce the contract of affreightment between the ship and cargo owners, does not terminate such contract, but on the bringing of the ship into port by salvors in a condition to resume her voyage without unreasonable delay the master is entitled within a reasonable time to reclaim the vessel and cargo, and on indemnity to the salvors to take the cargo to the stipulated port of destination.

2. SAME—INTERRUPTION OF VOYAGE BY CARGO OWNER—DAMAGES RECOVERABLE.

Where a vessel, abandoned at sea under circumstances which rendered such abandonment excusable, so that it did not operate to terminate the contract of affreightment, is brought into port by salvors, but by the action of the cargo owners the resumption of the voyage is prevented, the shipowner is entitled to be compensated for his loss of freight on principles of equity; but under such principles his damages cannot go beyond compensation, and he is not entitled to recover the gross freight he would have earned under the contract, but only the estimated net freight, and from that should be deducted the net amount the ship earned, or should reasonably have earned, during the time it would have taken her to complete the voyage.

3. ADMIRALTY—OBJECTIONS TO COMPUTATION BY COMMISSIONER—WAIVER.

Practice on a hearing before a commissioner in admiralty is analogous to that before a master in chancery, and objections to computations made by the commissioner should be taken by exception to his report, and, if not so taken, or at least urged on the hearing before the court on such report, they will be treated as waived, and will not be considered when raised for the first time by assignments of error in the appellate court.

4. SAME—PRACTICE—CONSOLIDATION OF CAUSES.

Where several proceedings have been instituted in a district and a circuit court, growing out of a disaster at sea, against the ship and cargo, to recover for salvage services, by the cargo owner to obtain possession of the cargo, and also by the master to subject the cargo to the payment of freight and general average, it is within the power of the circuit court thus having acquired jurisdiction of the subject-matter and the parties to consolidate the several suits, and determine and adjust the rights of all parties.

5. SHIPPING—ADJUSTMENT BETWEEN VESSEL AND CARGO—VALUATION OF CARGO.

Where the cargo of a vessel has been sold by order of the court in a port to which it was brought by salvors, in proceedings regularly instituted by the owners to recover possession, the proceeds of the sale may properly be taken as its value for the purpose of making adjustment between the several parties in interest, although the proceeding by the cargo owners was unwarranted, and the cargo was sold for less than its actual value.

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

Lewis S. Dabney and Frederic Cunningham, for Henry P. Booth and Bradford Darrach and others.

Edward S. Dodge, for Catharine T. Black and Banque de Genes.

James A. Lowell (John Lowell, on the brief), for Hans Andreasen.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. We have taken time to carefully examine the cases consolidated under the title of "The Eliza Lines, Her Cargo and Freight," and our conclusion is that the circuit court, after a thorough and exhaustive examination of the details involved in the situation, and a comprehensive consideration of the general principles of law which should govern the disposition of the several cases, disposed of them without substantial error.

A full narrative of the facts, and a sufficiently comprehensive history of the various proceedings grouped under the title of "The Eliza Lines," will be found in the two opinions of the circuit court, and by referring thereto it becomes unnecessary for us to reiterate. The Eliza Lines, 61 Fed. 308; Id., 102 Fed. 184.

We do not feel called upon to discuss, and we do not feel that justice requires that we should discuss, seriatim, the 80 or more assignments of error. The substantive rights of the various parties are principally involved in the question whether the involuntary abandonment of the vessel at sea, under the circumstances pointed out, operated to terminate the contract of affreightment, or whether, under principles governing in the admiralty law, the master of the vessel was entitled, within a reasonable time after the vessel was brought into port, to reclaim the cargo, after discharging the liens and claims incident to its recovery. The solution of this question either way would render it unnecessary to examine many of the assignments of error set out in the record.

When these cases were brought to the circuit court, the cargo had been sold, and that court was confronted with the duty of dealing with the situation as presented,—of making ascertainments, adjusting the interests and liabilities of the various parties, and distributing the proceeds according to equity, under the guidance of such general principles of admiralty law as were applicable to the situation as it then existed; and after finding the facts relative to the disaster at sea, and the efforts of the master to reclaim the vessel and her cargo after arrival in port, and before the sale of the cargo, the learned judge proceeded to an examination of the substantial question in the case, and the one upon which the rights of the parties largely depended, and, as a result, concluded that the involuntary abandonment at sea, under the circumstances, did not terminate the contract of affreightment, and that the master should have been treated as entitled to proceed with the cargo upon proper stipulation. This result was reached after a most careful and painstaking examination of the English and American cases, and upon a line of reasoning which makes it clear that any other rule than the one adopted would be an unjust rule as applied to a situation like the one presented. The Eliza Lines (C. C.) 61 Fed. 308; Id., 102 Fed. 184. It is not altogether clear that the English authorities establish the proposition that the owners of a cargo may, under an involuntary abandonment at sea, like the one in question, and in the absence of an actual

intention on the part of the shipowner to abandon the vessel, treat the contract of affreightment as absolutely at an end, and proceed to a sale of the cargo, regardless of the prompt and reasonable efforts of the master to regain possession, regardless of the strong equity created by an actual earning of a large part of the freight covered by the contract, and regardless of the question whether the cargo is perishable or otherwise. If such a rule is deducible from the English authorities, it is abundantly demonstrated by the reasoning of Judge Putnam in the circuit court to be contrary to a natural sense of justice, and therefore one which we should not feel bound to follow in the absence of a supreme court decision to that effect; and none such is suggested.

It is apparent that the abandonment of the vessel was not voluntary, and that there was no actual renunciation of the contract by the shipowners; neither was there, in that respect, any actual intention, one way or the other, involved in the abandonment. It is probably true that when, under stress of weather and circumstances, the master and crew were taken from her deck, they acted upon the idea that she was lost; but there was no wrongful intention, and probably no actual thought one way or the other upon either the question of the recovery of the vessel or the abandonment of property rights. Under such circumstances the vessel was picked up by others, and, without any substantial change in her condition or that of her cargo, was brought into the port of Boston, and the master made prompt and reasonable effort to regain possession of the property, which temporarily, but without his fault, had been put out of his control. The shipowner, in no sense, from the beginning of the voyage from Pensacola to the time he asserted the right of repossession at Boston, had renounced the contract between himself and the cargo owners. He had not agreed that the contract should be treated as off. No act of the cargo owners contributed to the force which brought the vessel under control and into the port of Boston, and it is only a rule of plain and simple justice that, upon indemnity to the salvors and a proper stipulation, the master, under such circumstances, should be permitted to take charge of his vessel, and to carry its unperishable cargo to the stipulated port of destination.

The Arno, 8 Asp. 5, and other English cases, make the question turn largely upon the question of intention; and in The Arno, as well as in the American case The Elizabeth and Jane, 15 Fed. Cas. 478 (No. 8,321), the shipowner had made no effort nor shown any intention to reclaim the property at the time the cargo owners interposed. We are not dealing here with a situation where the carrier does not choose to stipulate, or where no intention is shown, nor reasonable effort made, to reclaim the property; and it is therefore unnecessary to examine into such a situation, or state any rule with respect to the rights and obligations of the parties under such circumstances. After the vessel and cargo in question were brought into port, the shipowner speedily got possession of his vessel, and made prompt and reasonable effort to regain possession of the cargo, and to discharge the obligations to the salvors, and go on with his voyage.

The just doctrine enunciated by Judge Putnam in The Eliza Lines has found its place in Carv. Car. Sea (3d Ed.) §§ 308, 373b, 445, 554, 561, 651. The rigid rule of The Kathleen, L. R. 4 Adm. & Ecc. 269, though the cargo was perishable, was strenuously assailed by counsel in the later case of The Cito, 7 Prob. Div. 5, and, while some features of the Kathleen were sustained, the appellate court said (page 9):

"We do not decide what would have been the result if, after the ship had been brought in, as it was, by the salvors, and before the cargo owners had come and exercised their right to the cargo, the shipowner had given bail for the ship and the cargo, and had carried the cargo on."

That at least amounts to a query as to the application of the doctrine of The Kathleen to a case like the one at bar. In The Leptir, 5 Asp. 411, the doctrine of The Cito was questioned by the court, for it is there said, at page 412, "I do not intend to carry The Cito a step farther than it has gone;" and, under the circumstances of that case, the owner of the cargo was held liable for the freight. In referring to the rule of The Kathleen and The Cito, it is observed in Abb. Merch. Ships (13th Ed.) 456, that "the reasonableness of this decision is not clear," and in Wendt, Mar. Leg. (3d Ed.) 627, 629, the rule is assailed with vigor by the author, who, upon forcible reasoning,—which involves the idea that the rule gives the cargo owner full option to take advantage of common misfortune for the purpose of evading a contract entered into by him, which, according to the law of every civilized country, holds good until both parties to it, of their own free will, agree that it shall not be carried on, and that an involuntary abandonment, or the action of the crew in leaving a vessel to save their lives, is not an expression of an agreement on the part of the owners of the vessel to cancel or abandon the contract,—proceeds to declare the rule as one "opposed to every principle of law and justice; * * * a doctrine utterly opposed to common sense."

We must confess our inability to contend against the idea expressed by this author that a rule which enables the cargo owner to take advantage of such misfortune of the shipowner is in violation of plain principles of law, and contrary to justice; and we assume that the necessity for this harsh rule in respect to derelict property on the ocean has ceased to exist. The spirit of modern law and present conditions of civilization will justify a closer approximation to a rule of justice than the rule which, on the forced theory of renunciation, though in fact the abandonment was involuntary, deprived the carrier of compensation for the carrying benefit bestowed upon property put out of his possession without his fault, even though, upon recovery, the carrier made prompt and reasonable effort to discharge salvage claims and regain possession of the ship and cargo.

We think it is unnecessary to deal further with this question, and prefer to leave this branch of the case upon the critical analysis and the careful reasoning of the circuit court.

Now, what was the effect of the sale of the cargo under order of

court upon the rights of the various parties? It is sufficient for the purposes of this case to say that under the circumstances disclosed by the record the proceedings in the district court and the sale of the cargo by order of that court did not determine and establish the ultimate rights of the parties consequent upon the alleged abandonment of the ship and cargo at sea.

The circuit court, having determined these two questions according to views which we sustain, proceeded, under the general principles of the admiralty law, which, in a sense, adjusts itself to the necessities and contingencies of maritime affairs, to ascertain the rights and interests of the various parties, and to give directions for determining general average and net freight under the peculiar circumstances of these particular cases.

In view of this we are confronted by the claim that, as the master was without fault, and had made prompt and reasonable effort to regain possession of the vessel and cargo when the vessel was brought to the port of Boston, and was entitled, upon proper stipulation, to take possession of the vessel and cargo, and proceed to the port of destination, which right was denied him, he should be accorded gross freight, rather than the net freight awarded by the circuit court.

It must be borne in mind in this connection that the circuit court was not dealing with the question whether the shipowner should then be permitted to complete the voyage. The cargo had been sold by order of the district court, and, although the breaking up of the voyage by the cargo owners was not justifiable under the circumstances, the only thing the circuit court could do was to determine what the shipowner should receive in damages by way of indemnity for being kept out of his rights. Should he, therefore, be accorded gross freight, or should there be deducted from the gross freight what it would cost to complete the voyage, and what the vessel ought to earn in the time which would necessarily be occupied in carrying the voyage forward to the port of destination? The latter view would seem to be fair, because it gives full indemnity. Gross freight would seem to be unfair, because it would give more than indemnity. It would give the shipowner the contract price, without regard to the fact that it would have cost him something to reload the cargo, after making the necessary repairs, and continue the voyage. Considerations of equity which relieve the shipowner who, without fault, has been forced from the deck of his vessel by the perils of the sea, from the rigid rule of absolutism which denies him the freight actually earned, would deny the shipowner a rule of absolutism which would give him a larger measure of freight than the vessel was equitably entitled to receive. The spirit of equity which relieves a party upon the ground of misfortune from the hardship of a rigid rule consequent upon abandonment at sea would be offended by a rule which would accord to the party relieved a measure of damages beyond that which he has sustained or what is equitable. The voyage was temporarily interrupted by the perils of the sea, and permanently prevented by the fault of the cargo owners, and the shipowner was accorded freight in the nature of damages, not by virtue of the strict

terms of the unexecuted contract, but upon grounds of equity because nonperformance was excusable, and notwithstanding the fact that the contract was unexecuted. The right to reclaim the ship and cargo after abandonment by discharging salvage claims, acting promptly and with reasonable diligence, though further performance of the contract is prevented by the cargo owners, does not necessarily restore the shipowner to a position where he may insist upon recovery according to the strict terms of the contract, but to a position where he may receive what he is equitably entitled to for freight already earned, and what equity would accord to the vessel for the remainder of the voyage. It is because of equitable considerations that he is restored to any right of recovery after his property has remained derelict upon the open sea, and therefore his measure of damages should be an equitable measure. This manifestly would not be gross freight, for, as said, the voyage could not be taken up and continued without the burden of incidental and necessary expense, and, if this burden is not sustained, full freight should not become the measure of recoverable damages; and the further suggestion is susceptible of proof in a given case that a ship might and should earn something in the time which would necessarily be occupied in carrying freight forward to the port of destination. As observed by the circuit court, if such beneficial results to the shipowner were not taken into consideration, he would be more than indemnified, and an award of damages based upon full affreightment would operate to impose a penalty upon the cargo owners. Such would not be an equitable rule.

When the shipowner, with his crew, was on the way to Halifax, and the disabled vessel, with her cargo, was adrift in midocean, control was lost, not through renunciation, but through disaster. Control had been wrested by the supreme powers of the ocean, yet the right of property remained. The owner did not renounce his right of property though the right of possession was temporarily gone (The Bee, 1 Ware, 332, 339, Fed. Cas. No. 1,219); and if the unexpected should happen, and the lost property should be brought into a harbor of refuge, upon identification and discharge of such obligations as should be created in favor of strangers who found and saved it the right of possession by the shipowner would be re-established. It is in this sense that the right of the shipowner remains, and it is upon this ground that he is restored to possession upon indemnity to the independent, though unexpected, force which finds and brings under control the lost property.

Wrongful abandonment of a ship and cargo at sea, or actual renunciation of the right of possession, of course, amounts to a permanent breach of the contract of affreightment, and the right of the shipowner to be repossessed of property abandoned under force of circumstances, and which remained at large upon the open sea until brought under control and into a port of refuge by the act of strangers, results, under the elastic principles of the admiralty law, because it is repugnant to equity and justice that the right under such circumstances should be wholly and permanently lost. The right of possession being thus restored upon grounds of equity, it logically

and philosophically follows, we think, that the rule of damages should be an equitable rule, rather than an arbitrary one, through a rule of law making the strict terms of the contract as to freight the measure of recovery. Therefore the rule adopted by the circuit court in respect to the unearned part of the voyage was sufficiently favorable to the shipowner, and that court was right in holding that no damages should be recovered in excess of the net injury suffered, and in proceeding to estimate this injury by deducting from the gross freight such charges as were saved to the vessel and such amount as she was able to earn by the termination of the contract prior to the time contemplated. Watts v. Camors, 115 U. S. 353, 6 Sup. Ct. 91, 29 L. Ed. 406; The Gazelle, 128 U. S. 474, 487, 9 Sup. Ct. 139, 32 L. Ed. 496.

It would seem that, under somewhat analogous conditions at law, the rule of damage is indemnity, or what the party has lost. Bank of U. S. v. Bank of Washington, 6 Pet. 8, 19, 8 L. Ed. 299; Fuel Co. v. Brock, 139 U. S. 216, 220, 11 Sup. Ct. 523, 35 L. Ed. 151.

While Ward & Co. have succeeded in pointing out certain minor errors in respect to details and to the method of computation, errors of that character may—rightfully enough, we think—be treated as harmless upon the findings of the circuit court that they were more than compensated by errors of computation in their favor. On the whole, in our opinion, the judgment is rather too favorable to Ward & Co. than otherwise; and, had one question now urged been based upon proper exceptions by the other appellants, it is probable that we should have been called upon to enhance, rather than to diminish, the judgment against Ward & Co. upon the whole case. The position taken by the interests adverse to Ward & Co. that the liability of Ward & Co. should not have been diminished by any deduction of freight's contribution to general average at least presents a serious question. It is by no means clear, however, that the preliminary opinion of the circuit court justified the commissioner's mode of computation in his first report, or that the alternative report is so clearly correct that we can now adopt it; and on the whole we think that we cannot fairly go to the merits of this question, presented here in the appellate court for the first time. The report of a commissioner stands, and should stand, in respect to exceptions, like exceptions at a jury trial, where they should be taken at a time and under circumstances where error can be easily corrected if urged, and, if not urged, should be treated as waived. But, aside from the analogy of the practice as to exceptions upon a jury trial under the eighty-third rule of practice in equity, parties have a given time in which to file exceptions to the report of a master, and, if none are presented within that time, the report stands confirmed, or, in other words, exceptions are waived. Admiralty rule 44 contemplates that proceedings before commissioners shall be under the rules which govern masters in chancery in equity proceedings; but, without regard to rule 44, it would be assumed that practice in respect to a report of a commissioner in an admiralty proceeding would be in accordance with practice in equity, unless otherwise expressly regulated by the rules of admiralty. If the parties had intended to rely

upon objections to computations by the commissioner, the objections and exceptions should have been distinctly stated upon the coming in of the report, or at least upon the hearing before the circuit court, upon the question as to its acceptance, to the end that, if errors in computation were either apparent or could be discovered, the report should be recommitted for correction. This was not done, nor was any objection or exception in this regard taken to the regulations promulgated by the circuit court under which the master was to work out his results; and, so far as the record shows, no exceptions were taken by these parties to the computation upon the hearing before the circuit court. It is true a letter was appended to the commissioner's report in which the question is suggested; but, as the point was not taken by the parties, the circuit court was warranted in viewing it as one which the parties did not desire to press. So far as we can see, this question was first raised upon the record by the assignment of errors, and such assignment in no way presented the question for the circuit court, but raised it here for the first time. We think, in all fairness to the parties, that this question should be treated as waived, because, as already said, if it had been taken upon the report of the commissioner, if found to be tenable, it could have been easily corrected by recommittal. While other parties filed various specific objections to the report, the parties now presenting this question did not file any exceptions to the report on the ground now urged, and, as a result, the cases have proceeded upon other lines for several years; and we think it would assuredly be unfair to the various interests, and to the court as well, to disturb the findings, the calculations, and the decrees by allowing this question to be raised as an original question in this court at this late day. The error is not so manifestly apparent, and injustice on the whole case is not so clear, as to require our interference with the computations in this case in respect to a question raised as this question is.

The manifold assignments of error by the different parties under the various appeals are largely constructed upon the particular theory of each party as to the rights and obligations resulting from the abandonment at sea and the subsequent salvage of vessel and cargo. Many of the alleged errors relate to matters of discretion, others to just and reasonable expedients necessitated by the peculiar and exceptional situation of these cases, others are pecuniarily inconsequential, while others are frivolous. Of these minor assignments of error, many of which may be said to be subsidiary to the particular view of the different parties in respect to the substantive right involved in the main contention relative to the effect of the abandonment of the vessel at sea, and their rights and interests thereunder, we only feel called upon to say that we are not satisfied that any of the details of the course adopted by the circuit court involved error which would justify this court in reversing its action; but, on the contrary, we are satisfied that the cases were disposed of, on the whole, with substantial justice to all interests.

It only remains, therefore, to deal with the questions relating to the consolidation of the various proceedings, and to the power and duty

of the court in respect to the attitude which Darrach and Ward & Co. sustained thereto.

The rights and interests of the various parties by reason of their diverse claims in respect to the disaster at sea and in respect to the various proceedings relating thereto which were pending in the district and circuit courts were involved in the intricacies of an inextricable legal tangle, and we have no doubt of the power of the circuit court to consolidate the proceedings in question, or of the wisdom of such action. Indeed, it is difficult to see that the controversy could have otherwise been adjusted without subjecting the parties and their interests to unwarrantable expense and interminable delay. There seems to be no limit upon the power of the court, in the exercise of a sound discretion, to consolidate different cases pending in the same court and relating to the same subject-matter where justice can be administered more speedily and less expensively through such consolidation, and the duty of the court to order such consolidation would seem to be plain when no individual interests will be prejudiced, and when all interests will be beneficially subserved by thus speeding an ultimate ascertainment and establishment of the several rights.

The court having jurisdiction of the subject-matter in controversy, Ward & Co., through Bradford Darrach and others, submitted themselves to its jurisdiction, and, having thus interposed for the purpose of having their rights relative to the subject-matter ascertained and established, and having for that purpose thus voluntarily attached themselves to and interrupted the course of the proceedings between other parties, they were in for all purposes, and the court unquestionably had power not only to deal with the particular rights which Ward & Co. asserted in their own behalf, but, upon proper incidental and auxiliary proceedings, to deal with all the rights and all the consequences which sprung from or naturally and reasonably followed their interruption of the further prosecution of the voyage and from their interposition in respect to the adjustment of the various rights. Ward v. Todd, 103 U. S. 327, 26 L. Ed. 339; Ober v. Gallagher, 93 U. S. 199, 23 L. Ed. 829.

It is of no consequence whether they were or were not strictly interveners or cross libelants. They were in with their libel against the cargo in rem for possession, and with their claim in the salvage suit for a delivery of the cargo upon stipulation; while Andreasen, the master, also had his libel against the cargo and the owners of it for the payment of freight and general average. The subject-matter and the parties all being thus before the court, either upon personal notice or upon notice to their proctors of record, there is no known reason why the rights should not all be ascertained and established. Such course avoids circuity of action and multiplicity of process, and the modern rule of practice not only permits it, but convenience and justice require that it should be so.

Several of the parties—perhaps all—suffered by reason of the forced sale of the cargo in a disadvantageous port, and those other than the cargo owners who have suffered by such sale urge that the award against the cargo owners should be for the true value of the cargo,

rather than the net proceeds of the sale thereof. There are strong reasons why the cargo owners should be held for the value of the property. Their interference, even under the regular forms of maritime procedure, was unwarrantable and inexcusable under the circumstances. Such interference operated to interrupt a voyage which should and would otherwise have been completed. But the claim of the cargo owners of their right to take possession of the cargo at the port of refuge and terminate the voyage was asserted through regular process, which, under the rules and practice of admiralty, threw the property into the custody of the district court; and, the sale being a public sale upon order and in an open court, we have difficulty in finding grounds upon which to hold the cargo owners for or on account of the cargo in a sum greater than the net proceeds of the sale, which was the basis adopted by the circuit court.

The rights of the parties were in litigation, and the sale of the cargo was under the forms of law and upon the ascertained necessity of protecting the property, not because it was perishable, not because it was deteriorating in value, but in the sense of saving the absorbing expense incident to custody, and in the supposed interest of whatever party should establish the right to realize from it. And, though the order of sale did not settle the ultimate and substantive rights of the parties, and though it worked an injustice, we do not see our way clear, under the circumstances, to hold the parties whose proceeding precipitated the sale liable in respect to the cargo beyond the proceeds realized from the public sale under the forms of law and upon the order of the district court, in whose custody the property then was.

On the whole, our conclusion is that the decree of the circuit court should be affirmed.

The decree of the circuit court is affirmed, without costs in this court to either of the parties.

AMBS v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court, E. D. Missouri, E. D. April 8, 1899.)

No. 4,178.

1. MALICIOUS PROSECUTION—PROBABLE CAUSE—MALICE—BURDEN OF PROOF.
In an action for malicious prosecution, plaintiff has the burden of showing both that defendant did not have probable cause and that it acted with malice.

2. SAME—"PROBABLE CAUSE"—DEFINITION.
"Probable cause" means reasonable cause to believe that plaintiff was guilty, based on facts and circumstances sufficient in themselves to induce such belief in an ordinary person.

3. SAME—EFFECT OF MALICE ALONE.
If defendant had probable cause, it would make no difference that it acted with malice.

4. SAME—PRESUMPTION OF MALICE.
Malice may be inferred from the absence of probable cause.

5. SAME—COMMITMENT OF PLAINTIFF BEFORE MAGISTRATE—EFFECT.
A judgment of a magistrate, finding that there was probable cause for believing plaintiff guilty, and binding him over to await the action of the grand jury, constitutes prima facie evidence of probable cause.

6. SAME—IGNORING OF BILL OF GRAND JURY—EFFECT.
The ignoring by the grand jury of the bill against plaintiff constitutes prima facie evidence of want of probable cause.

7. SAME—QUESTION FOR JURY.
The question as to which of the two prima facie cases has the greater weight is for the jury

8. SAME—ADVICE OF PROSECUTING ATTORNEY—EFFECT.
If defendant's agents and attorney before making the complaint against plaintiff made a full and fair disclosure of all the facts in their possession, and which they could reasonably obtain, to the prosecuting attorney, and were advised by him that a crime had been committed, and that there was probable cause to believe defendant guilty, and if the prosecuting attorney himself drew the complaint, plaintiff would have probable cause, and would not be liable for malicious prosecution.

9. SAME—PROSECUTION UNDER INAPPLICABLE STATUTE.
The fact that the statute under which plaintiff was presented did not afford an authority for his punishment would not alone render defendant liable for malicious prosecution.

10. SAME—MEASURE OF DAMAGES.
In estimating the damages caused by a malicious prosecution, the jury may consider loss of time and expenditure of money by accused in his defense, and any injury to his reputation, character, standing, or feelings directly occasioned by the other party's wrong.

Chester H. Krum and A. G. Hirsch, for plaintiff.
Gardiner Lathrop, Adiel Sherwood, and S. W. Moore, for defendant.

ADAMS, District Judge (charging jury). You have been brought here, as an important and valuable auxiliary of this court, to aid it in the administration of justice, and you, as well as the judge of this court, have taken an oath, to administer justice with an even hand, to the rich and to the poor, to the high and to the low, alike.

Now, in entering upon the consideration of your verdict in this case, you must at the outset recall your duty as well as the oath you have taken, and at once compose yourself to treat this case, so far as the right of recovery is concerned, as you would if the case were between

two individuals, irrespective altogether of the amount of wealth of one or the poverty of the other. So much by way of preface.

And now I will give you, as clearly and distinctly as I am able, the legal principles, as well as the issues of fact, which are involved in this trial. This is a suit, as you are already advised, instituted by the plaintiff to recover damages for an alleged malicious prosecution of himself by the defendant. The undisputed facts, as shown by the proof in the case, show that in January, 1898, the defendant railway company, after having discovered that a considerable number of its railroad coupon tickets had been so altered from what they were reported to the company as having been sold as to entitle the holder to transportation over a much greater distance than that for which payment had been made to the company, and suspecting this state of facts, and having been so informed thereof, the defendant caused complaint to be lodged before an examining magistrate at St. Joseph, Mo., charging the plaintiff in this case with having so altered said tickets and sold the same, and thereby with having violated the provisions of section 3573 of the Revised Statutes of the state of Missouri. This section reads as follows:

"If any person in the employ of any railroad company, whether such company be incorporated by this or any other state or the United States, shall fraudulently neglect to cancel or return to the proper officer, agent or company any coupon or other railroad ticket with intent to permit the same to be used in fraud or to the injury of any such company, or if any person shall embezzle any such coupon or other railroad ticket, or shall fraudulently sell or put in circulation any such ticket, the person so offending shall upon conviction thereof, be punished by imprisonment in the penitentiary not exceeding five years, or by a fine of not more than one hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

The complaint, as made against the plaintiff in this case, is a charge of having sold and put in circulation a certain railroad ticket, exactly in the language of this section 3573, and I call attention to this at the present time, on account of the argument just made with respect to the meaning of this particular action of the defendant company. It is stated by counsel that the charge was the altering of a railroad ticket only. The charge as made by the agent of the defendant company was not that. The charge found in the affidavit filed before the magistrate is simply this: that the defendant feloniously and fraudulently did sell and put in circulation a certain railroad ticket. It makes no difference, for the purposes of this case, what the justice of the peace afterward added in issuing the warrant. The charge made by the agent was in the language of the statute. Whatever may have been the subsequent action of the magistrate is immaterial for your present inquiry. You are now considering what the defendant did and what its responsibility is therefor. It appears, further, gentlemen, from the proof, that the plaintiff was arrested upon a capias issued upon the complaint so made by one of the defendant's agents before this magistrate; and after some intermediate proceedings in St. Louis, where the arrest was first made, the plaintiff was brought before the magistrate for examination, with a view and for the purpose of ascertaining whether an offense had been committed, and whether there was such

reasonable ground to believe that the plaintiff had committed the offense as warranted holding the plaintiff to await the action of the next coming grand jury. It further appears that a full hearing was had before this magistrate, at which the plaintiff, as well as the state, was represented by counsel, and that as a result of this examination it was adjudged by the magistrate that an offense had in fact been committed, and that there was reasonable ground to believe that the plaintiff was guilty of the offense as charged, and, as a necessary result of such finding by the magistrate, the plaintiff was bound over to await the action of the next grand jury. It further appears that at the next session of the grand jury of Buchanan county the case was brought to the attention of that body, but that body ignored the bill, and the plaintiff was discharged. The prosecution was thereby ended. This suit is now instituted by the plaintiff to recover damages from the defendant, alleged to have been sustained by him by reason of this proceeding.

To entitle the plaintiff to recover in this action, the burden of proof rests upon him to satisfy you by a preponderance of the evidence of two facts: First, that the defendant company, at the time of lodging the complaint against him, did not have reasonable or probable ground to believe that the plaintiff in this case was guilty; second, that the defendant instituted the charge against him with malice.

If you find from the evidence, by the measure of proof which I have already indicated,—that is, by a preponderance of the proof,—that the defendant so instituted the prosecution without reasonable or probable cause and maliciously, then the plaintiff is entitled to a verdict in this case. If, on the other hand, you find that the defendant had reasonable or probable cause to believe that the plaintiff was guilty or that the defendant did not institute the proceedings maliciously, your verdict must be for the defendant.

In determining these issues there are certain well-recognized rules of law which, when understood by you, will be of considerable aid to you, and which in reaching your conclusion it is incumbent upon you to observe: First. "Probable cause," as here used, means simply this: A reasonable ground to believe that the plaintiff was guilty, based upon facts and circumstances sufficiently strong in themselves to induce such belief in the mind of an ordinarily prudent person. Second. If you find that the defendant had such probable cause for believing the plaintiff guilty, no malice, however distinctly proved, will render the defendant liable; that is, if the defendant had probable cause for believing him guilty, it does not make any difference with how much malice it may have acted. Third. If you believe that there was no such probable cause for believing the plaintiff guilty of the offense charged, you are at liberty therefrom—that is, from the absence of reasonable or probable cause—to infer malice. In other words, "malice," as employed in the instructions which the court is now giving you, does not necessarily mean ill will, hatred, or any active expression of such emotions, but only a wrongful act done intentionally, without legal justification or excuse. Therefore it is that the intentional commencement of a criminal prosecution against one without probable cause entitles a jury to infer the requisite malice to maintain the action for malicious prosecution. Inasmuch as the hearing before the magis-

trate (now having reference to the hearing which was had before the magistrate at St. Joseph) was for the express purpose of inquiring into the existence of probable cause, and inasmuch as in this case such inquiry was made, which resulted after a full hearing on the merits, in the conclusion and judgment of the magistrate that there was such probable cause, this judgment of the magistrate constitutes in law prima facie evidence of such fact, namely, probable cause to believe that the plaintiff was guilty, for all purposes of this case which you are now trying. By "prima facie evidence," gentlemen of the jury, is meant that degree of proof which, in the absence of satisfactory rebutting proof, will justify you in concluding that the defendant had probable cause to believe the plaintiff guilty.

Again, the ignoring the bill by the grand jury of Buchanan county affords, when taken by itself, prima facie evidence of want of probable cause. Thus, you will observe, is created for your consideration in this case an apparent conflict in two presumptions, or what the lawyers recognize as prima facie cases, and the court has concluded to leave these two presumptions or prima facie cases to you for such consideration and weight as, under all the evidence, you in your better judgment see fit to give them, with the remark, however,—and I do not refrain from making such remark,—that it seems to the mind of the court that the conclusion reached by the magistrate, considering the legal character, scope, and significance of the proceedings before the two bodies in question, is entitled to greater consideration than the discharge by the grand jury; and this for the following reasons: The hearing before the magistrate is essentially a proceeding to determine the very issue now presented, namely, the existence or nonexistence of probable cause. It permits evidence on both sides, the appearance of counsel for the accused, the examination and cross-examination of the witnesses, and the full and unrestrained opportunity for ascertaining the truth; while, on the other hand, the proceeding before a grand jury is secret in its character,—affords no opportunity for public inspection or criticism of its work or conclusion reached. It hears evidence only on the part of the state, and has it in its power to determine whether, irrespective of the proof of probable cause, it is for the best interests of the public to present the accused for trial to a trial court. It seems to me that, on thus comparing the two proceedings, a finding of probable cause by the magistrate, with the accused and his counsel having a full opportunity to be heard in his defense, is more persuasive on the question of probable cause than the action of the grand jury, as already stated. But, whatever may be my personal views of the relative weight and significance of these two presumptions, I leave the whole determination thereof to you, as the sole judges of the facts of the case.

Again, whatever may be your conclusion as to the relative force of these presumptions taken by themselves, you may and should consider all the other facts, evidence, and circumstances surrounding the case, and any and all reasonable inferences deducible therefrom, and from them all determine whether the defendant did have reasonable ground to believe the plaintiff guilty at the time of the filing of the complaint against him before the magistrate at St. Joseph. It will be your duty

in considering this other phase of the case to take all such facts and circumstances as appear in evidence, together with any and all reasonable inferences and deductions therefrom, together with the presumptions to which I have alluded, and give to them all such weight and consideration as your better judgment dictates, and to determine from them all the primary issue, and the most important issue involved in this case, which is, as I have already stated, the issue of probable cause.

Now, gentlemen, independent of any and all presumptions arising from the action of the examining magistrate or of the grand jury, what do you think the facts of the case, as disclosed by the evidence, signify? Are they or are they not sufficient, in your mind, to have warranted a reasonably prudent person to believe the plaintiff guilty? Counsel have critically analyzed all such facts, and have called your attention to every possible phase of them, and I do not deem it necessary to comment further on them myself. If, in your opinion, they are of such character and force as to have justified a reasonably prudent and cautious person in believing the plaintiff guilty of the offense charged against him, then, entirely independent of any and all other considerations, you must conclude that the defendant had probable cause to believe the plaintiff guilty, and there can be no recovery in this case.

In addition to this, there is an entirely different phase of the case. It of course centers upon the primary issue, probable cause or want of probable cause, but it is entirely different from that which I have been considering. Inasmuch as the issue you are now trying is not whether the plaintiff was in fact guilty or not guilty of the offense with which he was charged, but is simply the question whether the defendant when instituting the prosecution against the plaintiff acted with the honest belief (that is all) that he was guilty, and upon facts and circumstances which afforded to the defendant a reasonable ground for such belief, it becomes necessary for you to consider the evidence relating to the submission of this matter to counsel, and the advice of counsel with respect to the defendant's duty in the premises.

The laws of the land, gentlemen, should never be so construed or administered by the courts as to discourage or deter our citizens, through fear of civil actions against them, from bringing offenders against the law to the bar of the courts for trial. Accordingly, the law has wisely declared that if any person or persons, having reason to suspect any one to be guilty of a violation of the law, communicates all the facts known to him, or which in the exercise of reasonable care he could have ascertained, to the duly constituted public official, charged with the duty of prosecuting offenders, and if such official, possessed of such knowledge, advise that an offense has been committed, and that there is reasonable ground for belief that the person suspected has committed the offense, such person or persons may, with perfect impunity, put the machinery of the law in motion to secure that one's trial before an impartial tribunal, and not only may they do it with impunity, but as good citizens, solicitous for the public welfare, it becomes, in the opinion of the court, their bounden duty to do so. The court, therefore, charges you that, if you believe from the evidence in this case that before the making of the complaint against the

plaintiff by the defendant's agent Burdge, he and other agents of the defendant, including the defendant's local attorneys, made a full and fair disclosure of the facts in their possession, or which they might by the exercise of reasonable diligence have had in possession, relating to the alleged fraudulent disposition of its railroad tickets and plaintiff's connection therewith, to W. B. Norris, prosecuting attorney of Buchanan county, and that thereupon said Norris advised that a crime had been committed, and that there was probable cause to believe the plaintiff guilty thereof, and that said prosecuting attorney then himself drew the complaint sworn to by the defendant's agent Burdge, upon which the warrant was issued under which the plaintiff was arrested, the jury are instructed that such facts constitute probable cause for the defendant's action in making such complaint, and the verdict must be for the defendant.

So much has been said, gentlemen of the jury, by counsel with respect to the true meaning of section 3573 of the Revised Statutes of Missouri, which I have already read to you, that the court deems it proper to call your attention to its true relation and bearing on this case. It probably is true, and the court so declares, that this section of the law to which I have referred did not afford an authority for the punishment of the plaintiff in this case for the offense with which he was charged; and if the defendant's agents knew, or in the exercise of reasonable caution should have known, of such infirmity, and notwithstanding such knowledge proceeded to make the complaint in question and inaugurated the proceedings against the plaintiff, you would be justified in finding that they so acted without probable cause; but if, on the other hand, they did not know of the inapplicability of the law, or if by reasonable inquiry they could not have known of its inapplicability, it has no bearing on this case whatsoever. It seems to the court that the defendant's agents, not being lawyers or learned in the law, could not be reasonably required to do more than to fairly and fully submit the facts of the case to counsel of the state, and, if no such infirmity was suggested to them prior to making the affidavit in question, the defendant cannot be constructively held to any of the consequences arising from the inapplicability of the statute in question. It is oftentimes, gentlemen, as you have doubtless observed in your experience here and elsewhere, either as jurors or possibly litigants, a matter of grave difficulty and uncertainty on the part of learned counsel, and often on the part of the courts, to interpret accurately the statutes and laws of the land. Much greater is this difficulty and uncertainty when the task is undertaken by laymen or the ordinary business man, who rely upon their attorneys and upon the courts for the true interpretation of statutes. Considering what has been said in argument by counsel, it seems to me proper to caution you with respect to the legitimate scope and bearing of the act and conduct of defendant's agents in St. Louis, connected with the arrest of the plaintiff in this city. Whether their conduct was harsh or inconsiderate toward the plaintiff—as to which it is unnecessary to make observation—cannot, in and of itself, have any bearing on the issue of probable cause for instituting criminal proceedings in St. Joseph, by filing a complaint before the magistrate there. The issue of probable

cause, gentlemen, must be determined by the facts and circumstances as they existed then,—that is to say, at the time when this affidavit was made in St. Joseph, for it was then, and only then, that the defendant in this case put the machinery of the law in motion which resulted in plaintiff's prosecution; these facts and circumstances, I say, as they existed at that time, aided by the presumption arising from the action of the examining magistrate and the grand jury, which have already been considered by you in determining the issue of probable cause.

You are the sole judges, gentlemen, of the facts of this case, and whatever may be the suggestions of the court concerning them, or any of them, or of the inferences which may arise from them, you are to take such suggestions for what, in your judgment, they are worth, and give them such consideration as to you they seem entitled, but whatever directions are now given you concerning the law of this case you are to receive as conclusive directions controlling your judgment. If, on the whole case, you should conclude to find a verdict for the plaintiff, you should assess his damages in such sum as will reasonably compensate him for the loss, injury, and damage sustained by him. In arriving at this conclusion, you should consider any loss of time and expenditure of money in the defense of himself; any injury to his reputation, character, standing, or feelings directly brought about by the wrong of the defendant,—not exceeding, however, the amount claimed in the petition.

There will be two forms of verdict prepared for you,—one for the plaintiff and one for the defendant,—and they are already prepared. You can take them, and I will hear counsel on the question of exceptions.

In re TOPLIFF et al.

(District Court, D. Massachusetts. April 7, 1902.)

No. 5,346.

BANKRUPTS—PREFERENCES—SURRENDER—NET INCREASE OF INDEBTEDNESS.

Bankrupt stockbrokers four months before adjudication owed a customer $1,550. Thereafter they were employed by him to purchase and carry stocks on a margin, receiving from him considerable sums of money, and paying to him considerable, but lesser, sums as profits on his operations. At the date of the adjudication they owed him $6,500. *Held* that, though the relation between the broker and the customer was anomalous, no injustice was done by treating them in the case at bar as debtor and creditor, and the effect of the transactions having been to increase the net indebtedness to the customer, and presumably to increase the bankrupt's estate, the customer did not have to surrender the payments made to him within the four months to entitle him to prove his claim.

In Bankruptcy.

Walter N. Buffum, for creditor.

Edward C. Bradlee, trustee, pro se.

LOWELL, District Judge. The bankrupts were stockbrokers. The creditor who seeks to prove was their customer. Four months

before adjudication, viz., on July 2, 1901, the bankrupts owed the creditor $1,550. Thereafter they were employed by him to purchase and carry stocks on a margin. At times he paid them considerable sums of money, and at other times they paid considerable but smaller sums to him as profits on his operations. The last of their payments to him was subsequent to the last of his payments to them. At the date of the adjudication, November 2, 1901, they owed him about $6,500. The trustee disputes the creditor's right to prove this debt without the surrender of the alleged preferential payments. It was admitted that the bankrupts were insolvent on and after July 2d. There was no proof that the creditor knew this.

It appears to me that the case at bar is governed by Dickson v. Wyman, 49 C. C. A. 574, 111 Fed. 726. There the court said:

"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." 49 C. C. A. 577, 111 Fed. 728.

In the case at bar the transactions between June 2d and November 2d increased the net indebtedness to the creditor, and so presumably increased the bankrupt's estate. If the transactions "be regarded as one," they did not enable the creditor to obtain a greater percentage of his debt than other creditors of the same class. This is true, whether (1) the account be taken as stated in the trustee's brief, including purchases and sales of stocks, or (2) only the cash payments on the one side and on the other of the account are considered. The trustee seeks to avoid the effect of Dickson v. Wyman by arguing that that decision does not apply to transactions like these, but only to merchandise accounts like those there in controversy. But no material difference is pointed out between the two cases, and the language and the reasoning of the court of appeals are broad enough to cover both. The relation of stockbroker and customer is anomalous, as was pointed out by the supreme court of Massachusetts in Chase v. City of Boston, 62 N. E. 1059, and Rice v. Winslow, Id. 1057 (not yet officially reported), and by this court in Re Swift, 105 Fed. 493; but no injustice is here done the creditor by treating that relationship as one of debtor and creditor. If the bankrupts actually bought and sold the stocks mentioned in the account which they rendered to the creditor, then their estate was actually increased by the net result of the four months' transactions. If these purchases and sales be treated as fictitious, and if the fluctuations of the stock market be taken to fix day by day the amount due one party from the other, without regard to any actual purchase or sale of stock, then

the bankrupt's estate was increased by the excess of cash payments made by the creditor over those received by him.

The trustee further contended that only subsequent credits can be taken to balance prior preferences, and that the last payment, if made by the bankrupt, must be surrendered before the creditor's claim can be proved. Whatever may be the rule regarding "set-offs," strictly so called, as regulated by section 60c, there is no sufficient reason for this limitation upon the principle laid down in Dickson v. Wyman. That case was decided without regard to section 60c.

This court is well aware of the different decisions and opinions rendered by different courts regarding sections 57g and 60 of the bankrupt act. Some of these are so different as to be irreconcilable. The decision in Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, authoritatively settled one question, but left others open. Dickson v. Wyman, which is also binding upon this court, may be in more or less disagreement with some cases decided by other federal courts. See Mills v. Lewis, 49 C. C. A. 131, 110 Fed. 512; In re Teslow (D. C.) 104 Fed. 229. In several other cases, where the facts are not stated fully in the report, the decisions may be actually in conflict with Dickson v. Wyman. See In re Ft. Wayne Electric Corp., 39 C. C. A. 582, 99 Fed. 400; In re Arndt (D. C.) 104 Fed. 234; In re Conhaim (D. C.) 97 Fed. 923; In re Bashline (D. C.) 109 Fed. 965. On the other hand, McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923, and Peterson v. Nash (C. C. A.) 112 Fed. 311, reach a decision like that reached in Dickson v. Wyman, but by different reasoning, viz., by treating section 60c as applicable to section 57g as well as to section 60b. In re Abraham Steers Lumber Co. (C. C. A.) 112 Fed. 406, it was held that the payment need not be surrendered, if made on a distinct and independent debt. In the argument made in the case at bar, counsel for the trustee attempted to distinguish between some of the cases just cited and Dickson v. Wyman, and to reconcile them accordingly; but I do not conceive it to be the duty of this court, in the interpretation of the confessedly ambiguous provisions of a recent enactment, to seek to establish a fictitious agreement between several courts by drawing fanciful distinctions between the decisions they have made. A better result will be reached by recognizing the existing disagreement, and by trying to follow loyally the course of reasoning and the fair intent of Dickson v. Wyman, a fully considered case decided by an appellate court which this court is bound to obey. In due time the difference of opinion between the several courts of appeals will be settled by the supreme court.

The creditor further contended that, under the provisions of section 60c, he was entitled to offset the payments made by him to the bankrupts. It has been held in several cases that the set-off given by section 60c is not applicable to section 57g. See In re Oliver (D. C.) 109 Fed. 784; In re Steers Lumber Co. (C. C. A.) 112 Fed. 406; In re Christensen (D. C.) 101 Fed. 802; In re Arndt (D. C.) 104 Fed. 234; In re Keller (D. C.) 109 Fed. 118; Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171; Dickson v. Wyman, 49 C. C. A. 574, 112 Fed. 726. Other courts have held that the set-off given by section 60c is applicable to section 57g; McKey v. Lee,

45 C. C. A. 127, 105 Fed. 923; Peterson v. Nash (C. C. A.) 112 Fed. 311; In re Seckler (D. C.) 106 Fed. 484. Moreover, McKey v. Lee decided that, in order to be set off, the further credit given to the debtor need not be subsequent to the preference. It does not seem to have been observed that, if section 60c be inapplicable to section 57g, and be limited to section 60b, it will have scant application. Section 60b is confined to cases where the creditor has reasonable cause to believe a preference was intended. Clause "c" is confined to cases in which the debtor has acted "in good faith." How a creditor who has knowingly received a preference can afterwards give credit to the debtor in "good faith" is hard to imagine. It is not necessary to express an opinion on this point, as the decision of this case is left to rest upon Dickson v. Wyman.

Judgment of the referee reversed, and proof of claim allowed.

In re LYON.

(District Court, S. D. New York. February 7, 1902.)

BANKRUPTCY—PREFERENCES—SURRENDER.

A bankrupt on January 2d gave a check to a creditor on the A. Bank, dated January 20th, and became insolvent on the latter date. On that day the creditor deposited the check with the N. Bank, which on the following day received the money through the clearing house, and the amount was charged by the A. Bank against the bankrupt's account. *Held*, that the creditor had received a preference, though the payment was made to him through the medium of the N. Bank, and not directly, and that it would have to be surrendered before he could prove other claims.

In Bankruptcy. On appeal from order of referee expunging claim. The following is the opinion of WISE, Referee:

The verified schedules of the bankrupt disclose the fact that the indebtedness of the company amounts to $16,239.82, and the assets of the company, according to said schedules, amount to $4,174.27. The claims proved before the referee amount to $14,893.81. It is also conceded that the sale of the bulk of the assets, consisting of the stock in trade of the bankrupt company, was had on January 20, 1900. In the opinion of the honorable district judge, made January 4, 1901, he found as a fact as follows: "By its sale to the Lyon Umbrella Company, the Amasa Lyon Company transferred all its tangible property and ended its business. All it did thereafter was to collect in some outstanding accounts, and make payment to various creditors. It was insolvent." The finding of fact of the insolvency of the bankrupt corporation is an adjudication of fact in this case, which has not been reversed, and therefore stands as binding upon all parties. It certainly binds with particular force the creditors George Batten & Co., who took part in and secured the adjudication of the bankrupt by the establishment of this very fact. When the bankrupt devested itself of what the learned district judge found was all its tangible property, it did not remain possessed of property which, at a fair valuation, was sufficient in amount to pay its debts; and as this took place on January 20, 1900, it is very evident that the insolvency of the bankrupt must be established as of that date. It may possibly be that the company was really insolvent prior to January 20, 1900, but the burden of proving this fact was upon the trustee, and as no satisfactory value of assets transferred on January 20, 1900, by the company, was established, it would not be just or right to assume as a fact that which was not properly established by sufficient evidence; hence from the evidence, as well as from

the previous finding of the honorable district judge, January 20, 1900, must be fixed as the date whereon the bankrupt became insolvent.

The fact that on January 2d the bankrupt delivered to the firm of George Batten & Co. a number of postdated checks, the last one bearing date January 20, 1900, for $210.15, did not, under the authorities, operate as a payment on January 2, 1900. A postdated check becomes, in effect, a note, and in many of the states would be entitled to days of grace, the same as a note (1 Edw. Bills & N. [3d Ed.] 396); and therefore the decision in Re Abraham Steers Lumber Co., 6 Am. Bankr. R. 315, 110 Fed. 738, and affirmed by the circuit court of appeals (7 Am. Bankr. R. 332, 112 Fed. 406), to the effect that the giving of a note does not constitute a payment at the time it was delivered, negatives the proposition that such payment was made on January 2, 1900, at the time the said postdated check was delivered to the creditor. Had the check never been paid, no preference would have been received by the creditor. A creditor receives a preference when there is actually transferred to him, either in money or in other value, part of the debtor's property. The transfer herein to the creditor took place either on January 20, 1900, or thereafter; and as such transfer took place on or after the day the bankrupt became insolvent, and as the law does not consider fractions of a day, the result naturally follows that, under the authorities, the said firm of George Batten & Co. did, on January 20, 1900, while the bankrupt was insolvent, receive a preference to the extent of $210.15, and which preference must be surrendered before the said creditors can participate in a distribution of the estate of the bankrupt. The evidence and record show that the postdated check payable on January 20, 1900, amounting to $210.15, was part of a running account for advertising furnished by the said creditors to the bankrupt company, and the proof of debt filed herein by the creditors in the sum of $546.62 is for advertising furnished subsequently; so that we have before us all the elements of a continuous business transaction and a running account, and no alternative is therefore left, under the decision of the United States supreme court in Pirie v. Trust Co., 21 Sup. Ct. 906, 45 L. Ed. 1171, but to require a surrender of the said sum of $210.15 as a prerequisite to allow the creditor's claim to stand against the bankrupt estate.

The order of the referee expunging the claims was affirmed February 26, 1902.

Kneeland, LaFetra & Glaze, for petitioner.
Perry D. Trafford, for the trustee.

ADAMS, District Judge. It appears that the bankrupt became insolvent January 20, 1900. On the 2d of January, 1900, it delivered to the petitioner a check on the Astor Place Bank, dated January 20, 1900, for $215. On that day the petitioner deposited the check with the National Shoe & Leather Bank. On the following day the latter received the money in the ordinary course of business through the clearing house, and the amount was charged by the Astor Place Bank against the account of the bankrupt.

The claim is that when the deposit was made the Shoe & Leather Bank became the absolute owner of the check, and the preference was to it, and not to the petitioner. I am unable to coincide with such view. The effect of the delivery of the check to the petitioner was to diminish the assets of the bankrupt, when insolvent, to the detriment of its other creditors. The money was within the control of the bankrupt up to the 21st of January, 1900, and if it had been drawn from the bank before the check was presented there would have been no payment, and the petitioner would have occupied the same position as other unpreferred creditors. There was therefore a payment when

insolvent, and it was a payment directly for the benefit of the petitioner, through the medium of its bank. I do not see any merit in the other suggestions.

The order of the referee expunging the claim is affirmed.

In re DE GOTTARDI et al.

(District Court, S. D. California. February 20, 1902.)

No. 1,547.

1. BANKRUPTCY—JURISDICTION OF COURT—COMPELLING PRODUCTION OF ASSETS.

A court of bankruptcy has jurisdiction, on issues properly joined, to determine whether or not a bankrupt has in his possession or under his control money or other property belonging to his estate in bankruptcy, and, if the issues be found against him, to make an order requiring him to pay or deliver such money or property to his trustee and to force obedience to such an order by commitment as for contempt.

2. SAME—COMMITMENT FOR CONTEMPT—PROCEDURE.

In proceedings for the enforcement of such an order two rules are to be observed: First, that the answer of respondent to the rule to show cause is not conclusive, but traversable; and, second, that the power of commitment should be cautiously exercised, and only when its propriety is beyond reasonable doubt.

3. SAME—HEARINGS BEFORE REFEREE—EVIDENCE.

Upon an issue before a referee as to the truth or falsity of a claim made by bankrupts that their store was entered by burglars on a certain night, shortly before their bankruptcy, and a large amount of money was taken from their safe, it was not error to admit the testimony of witnesses that they saw no strangers or suspicious characters in the small town where the store was situated on the day preceding the alleged burglary, although such testimony is entitled to little weight.

4. SAME.

Various rulings of a referee upon the hearing of a petition by a trustee to compel bankrupts to turn over money alleged to be in their possession or under their control considered, and *held* erroneous, as admitting testimony which was incompetent as hearsay or as the opinions or conclusions of the witnesses.

5. SAME—PRACTICE ON HEARING BEFORE REFEREE—REVIEW.

A hearing before a referee, under Bankr. Act 1898, is in the nature of a hearing in equity, and is governed by the rules of equity practice of the federal courts, both as to the hearing itself and as to the review by the judge. Orders in bankruptcy No. 22, providing that "the examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law," is substantially copied from equity rule 67, and it does not have the effect, in connection with Rev. St. § 721, of rendering such hearings and proceedings for review subject to the laws of the state governing trials and appellate procedure in actions at law, but, on the contrary, indicates the practice as that prescribed by the rules in equity. Applying such rules, it is the duty of a referee, although he must pass on objections to testimony, to cause all testimony excluded to be taken down and made a part of the record, with the ruling and exceptions noted; and upon a review the judge is not required to reverse the decision because of the erroneous admission or exclusion of evidence, but it is his duty to determine the issues de novo upon the competent evidence in the record, or he may recommit the case for further hearing as the circumstances may require.

6. SAME—TESTIMONY OF BANKRUPT—CONSIDERATIONS AFFECTING CREDIBILITY.
Where bankrupt partners, on their examination, by pre-arrangement with their counsel, refused to answer a large number of competent and material questions with reference to their property and business, such as the capital they had when they established the business, whether they took inventories, etc., in effect refusing to give any information respecting their affairs, on the ground that their answers might tend to incriminate them, reading their refusal and the grounds from a slip of paper given them by their counsel, such action showed a disposition not to be fair and candid with their creditors, and a purpose to conceal their transactions, which may properly be taken into consideration in determining the weight to be given to their testimony in subsequent proceedings to compel them to turn over money and property which they are alleged to have concealed.

7. SAME—FAILURE OF BANKRUPT TO ACCOUNT FOR PROPERTY—BURDEN OF PROOF.
Where a bankrupt admits having had money or property a short time before his bankruptcy, which is not shown by his schedules, it is incumbent upon him to clearly account for the same to the satisfaction of the court; otherwise, he must be held to still have it in his possession, and to be able to turn it over to his trustee.

8. SAME—EVIDENCE CONSIDERED.
The assets of a bankrupt partnership were shown to have decreased several thousand dollars within three months prior to the bankruptcy, without any apparent business reason therefor. On the examination of the partners they refused to answer questions with reference thereto, but in a proceeding by the trustee against them to compel them to turn over to him certain sums of money, aggregating about $14,000, alleged to be in their possession or under their control, they testified that a short time before the bankruptcy burglars had entered their store and taken $7,500 in cash from the safe. One of the partners, who was shown to have drawn $6,500 out of the business, accounted for the same by testifying that he had paid $6,000 of it to a woman with whom he got into a "scrape," and $425 to a doctor in connection with the same; but he refused to give the name of either the woman or the doctor. There was no evidence to corroborate such testimony; but, on the contrary, circumstances tended to discredit it, and to show a purpose on their part to defraud their creditors. At the time of the alleged burglary their accounts in the banks with which they did business were, and had been for some time, largely overdrawn, and they had been asked to make the deficit good; also, a few days later, when threatened with attachments by the banks, they turned over to an attorney drafts amounting to over $2,700,—a part in alleged payment for past services which could not be explained, and $2,000 of it as a retainer for services to be rendered in connection with the capture and conviction of the burglars. *Held*, that the testimony of the bankrupts was an admission that they had the sums of money at the times stated, but was wholly insufficient to account for the same satisfactorily, in view of the discredit cast upon it by the circumstances and by their past conduct, and that a finding by the referee that the alleged burglary and the payment to the woman were fictitious, and his order requiring the bankrupts to turn over the money to their trustee was fully justified, and such order would be enforced.

9. SAME—SCOPE OF HEARING—COLLATERAL QUESTIONS AFFECTING CREDIBILITY OF BANKRUPTS.
In a proceeding by a trustee against bankrupts to compel them to turn over to him certain sums of money alleged to be in their possession, where the principal issues are whether an alleged burglary and payment of money, by which the bankrupts attempted to account for such sums, were real or fictitious, and parts of a scheme to defraud creditors, the question of the good faith of a transaction occurring about the same time, by which they transferred a large sum to their attorney, is per-

tinent to said issues, and one which the court of bankruptcy has power to investigate, notwithstanding a prior consent order made by a referee requiring the attorney to turn over the money so received to the trustee, but reciting that it was not based upon any finding of fraud, and the compliance of the attorney with such order.

In Bankruptcy. On review of order of referee requiring the bankrupts to turn over to the trustee certain sums of money found to be in their possession or under their control, and on a rule to show cause why they should not be adjudged in contempt for failure to obey such order.

Rothschild & Ach, for creditors.
Hunsaker & Britt, for bankrupts.

WELLBORN, District Judge. The creditors' petition in this matter, asking that the respondents be adjudged bankrupts, was filed May 18, and the adjudication had June 21, 1901. On September 3d next following, the trustee in bankruptcy and one of the creditors filed with the referee a petition alleging, in substance, that the bankrupts were wrongfully withholding from the trustee a large amount of assets not reported in their schedules, and charging specifically upon both the concealment of $7,500, and upon De Gottardi the concealment of $6,500, and asking an order requiring them to pay such assets to said trustee. The bankrupts made answer to said petition, denying, in the main, its allegations; and thereupon evidence was taken, and the findings and order now under review were made by the referee. Thus it will be seen that the proceeding before the referee was not an examination of the bankrupts and other witnesses for the purpose of acquiring information generally as to the bankrupts' estate, but was a hearing on specific issues duly raised by appropriate pleadings. To account for the two amounts of money which they were specifically charged with concealing, the bankrupts claimed that, within a few weeks prior to their bankruptcy, De Gottardi became involved in an intrigue with a woman, in consequence of which he paid to the woman $6,000, and to a doctor, for services in connection with the same matter, $425. They further claimed that on the night of the 30th of April, 1901, their store at Cayucos, Cal., was burglariously entered, and a large amount of money ($7,500 or $8,500) abstracted from their safe by the burglars. Both of these claims the trustee contested.

The findings and order of the referee were as follows:

"That from December, 1900, the bankrupts had been engaged in buying produce on commission for Loeb, Fleishman & Co., of Los Angeles, and others, and that until about April 24, 1901, it had been their practice to receive payments from Loeb, Fleishman & Co. through the mail, by checks of that firm, drawn on the Farmers' & Merchants' Bank of Los Angeles, which checks, until the last-named date, they had regularly deposited with their bankers in San Luis Obispo. On said April 24th they had overdrawn their accounts at two banks in San Luis Obispo, and on the same day they requested Loeb, Fleishman & Co. to send them $5,000 in coin by express, which that firm declined to do. Loeb, Fleishman & Co., in answer to the request of the bankrupts for coin by express, said they would send them checks for all they owed, but would not send coin, and that if they wanted coin they must come and get it. Within 25 days before that time (April 24th) the bankrupt De Gottardi had drawn out of the firm $6,500. Three days afterwards (April

27th) De Gottardi, one of the bankrupts, left Cayucos, taking with him a check of Loeb, Fleishman & Co., payable to the order of De Gottardi & Righetti, for $3,375.10. He arrived that night at San Luis Obispo, stopping at the French Hotel, and early next morning (April 28th) left for Los Angeles. He remained in Los Angeles Sunday, and on Monday forenoon, the 29th of April, obtained the coin on the Loeb, Fleishman & Co.'s check, and also the cash on another check, dated April 29, 1901, for $2,628.91, making in all $6,004. This money he claims to have put in his satchel or dress suit valise, and with it left Los Angeles for Cayucos on the afternoon of the same day. He arrived at San Luis Obispo that night, and took a room at the Commercial Hotel, where he slept. He left San Luis Obispo early in the morning of the 30th of April for Cayucos, without calling on his bankers, loitered on the road, and arrived at Cayucos about 2 or 3 o'clock p. m. of the same day. He also claims to have taken the six thousand and odd dollars to his home at that place. No one saw the money after he obtained it, so far as the evidence discloses, except his wife. He also claims to have taken this money, and an additional $1,500 which he asserted he had had at his home since the latter part of March, to the store of the firm at Cayucos, and placed the whole amount in the safe, and left it there; that on the night of April 30th some person or persons effected a violent entry into the store and robbed them of the money. In fact, the evidence shows that the amount alleged to have been stolen was eighty-five or eighty-six hundred dollars. It also appears that the bankrupt De Gottardi drew out from the funds of the firm of De Gottardi & Righetti, in cash, the following sums: On March 21st, $3,000; on April 11th, $2,000; and on April 16th, $1,500; making the $6,500 hereinbefore mentioned. De Gottardi says that $6,000 of this money he paid to a woman with whom he got into a scrape, and $425 to a doctor for services rendered said woman in connection with said scrape, but he does not account for the remaining $75 of the $6,500 already mentioned. It will be seen that the said bankrupts have attempted to account for the money brought from Los Angeles, and the $1,500 that De Gottardi had at home, by the alleged burglary of the store on the night of April 30th, and for the $6,500 drawn by De Gottardi from the store by the alleged payment of the same to a woman and a doctor in settlement of De Gottardi's 'scrape.' These explanations, in the light of the evidence, are, to say the least, unsatisfactory. The firm of De Gottardi & Righetti were overdrawn at the Commercial Bank of San Luis Obispo on April 29th to the extent of about $3,000, and at the Andrews Banking Company, of San Luis Obispo, in the sum of nearly $1,500. They had been requested to at once settle these overdrafts, and it was then, in my judgment, they concocted the scheme of obtaining possession of large sums of money and defrauding their creditors. Shortly after these requests were made it appears that the firm must have had in its possession the following checks: Loeb, Fleishman & Co., on Farmers' & Merchants' Bank of Los Angeles, dated April 17, 1901, $3,375.10; Loeb, Fleishman & Co., on same bank, dated April 24, 1901, $2,058.18; and one of Hilmer & Bredhof, dated April 27, 1901, for $685.76. Neither of these checks was applied towards the payment of the overdrafts, yet on May 1st, the day after the alleged robbery, the last two named checks, aggregating $2,743.94, were given to Mr. F. A. Dorn in payment for alleged past services, $800, and the balance as a retainer in the matter of the alleged burglary. It appears further that no person other than the bankrupts were aware that the money brought from Los Angeles had been collected or placed in the safe. There are also a number of other suspicious circumstances tending to show that no burglary in fact was committed, which I deem unnecessary to detail.

"The bankrupt De Gottardi declined to answer certain questions propounded to him with the object of ascertaining the names of the woman and doctor to whom he claims he paid money, as well as the place of their respective residences. While De Gottardi's refusal to disclose the name of the woman might be commended in a social sense, as an act of gallantry, it cannot in law be excused. This denial being based on the ground that his answers might tend to incriminate him, it must be taken as a mere subterfuge, for the reason that, whether his meretricious relations with the

woman constituted a public crime or not, it could make no difference; for, if they did not, then this privilege of immunity from punishment would be useless and unnecessary, while, if the said relations made it a crime, the crime itself being admitted, the admission must be taken as a waiver of the constitutional privilege, and, the names and residences of the parties neither magnifying nor lessening the offense, this privilege would not avail, and therefore he could not shield himself from disclosing the facts sought by the questions asked. I am fully persuaded and satisfied, and therefore find, that no burglary was perpetrated, and that De Gottardi did not pay the moneys he asserts that he paid to the woman and doctor. I do further find that said bankrupts have now in their possession or under their control the sum of $7,500 in money and property of their estate, and that they have been and are concealing the same from their creditors and the said trustee in bankruptcy. And it is ordered that said bankrupts, Natele De Gottardi and David E. Righetti, do pay over and deliver to Edward Vollmer, the duly elected, qualified, and acting trustee of the estate of said bankrupts, within twenty-four hours after service hereof, the sum of $7,500 in money. I do further find that the sum of $6,500 drawn out as aforesaid by the said Natele De Gottardi from the funds of the firm of said De Gottardi & Righetti is now in his possession or under his control, and that the same is now being concealed by him from the creditors and the trustee aforesaid, less the sum of $1,500 claimed by De Gottardi to have been returned on April 30, 1901. Therefore it is ordered that said Natele De Gottardi do pay over and deliver to Edward Vollmer, the trustee aforesaid, within twenty-four hours after service hereof, the sum of $5,000 in money; the same being the property of the estate of said bankrupts.

"As to the other specifications set forth in the petition, I find that they have been satisfactorily explained. * * *"

The bankrupts failed to comply with said order, and thereupon, at the instance of the trustee, were cited to show cause why they should not be adjudged guilty of contempt. They have filed exceptions to said order, and, in response to said citation, have appeared and answered that said order was erroneously made, and is now under review, and, further, that they are wholly without means to pay over the amounts of money, or any part thereof, named in said order. Both of these matters—the review of the order and the rule to show cause—have been heard together, and, as they are closely connected, can be conveniently and without confusion considered in this opinion.

That a bankruptcy court has jurisdiction, on issues properly joined, to determine whether or not a bankrupt has in his possession or under his control money or other property belonging to his estate in bankruptcy, and, if the issues be found against the bankrupt, to make an order requiring him to pay or deliver to the trustee in bankruptcy the money or other property so found to be in his possession or under his control, and to enforce obedience to such an order by commitment as for contempt, are well-settled propositions. In re Rosser, 1 Nat. Bankr. N. 469, 96 Fed. 308; Id., on review in court of appeals, 41 C. C. A. 497, 101 Fed. 562; In re Purvine, 1 Nat. Bankr. N. 326, 37 C. C. A. 446, 96 Fed. 192; In re Salkey, 21 Fed. Cas. 235 (No. 12,253); In re Tudor, 1 Nat. Bankr. N. 476, 96 Fed. 942; In re Mayer, 98 Fed. 839; In re Tudor, 2 Nat. Bankr. N. 168, 100 Fed. 796; In re McCormick, 2 Nat. Bankr. N. 104, 99 Fed. 566; Knitting Works v. Schreiber, 2 Nat. Bankr. N. 899, 101 Fed. 810, affirmed on review in 104 Fed. 1006; In re Deuell, 2 Nat. Bankr. N. 597, 100 Fed. 633; In re Schlesinger, 2 Nat. Bankr. N. 169, 97 Fed. 930; Id., on review, 3 Nat. Bankr. N. 177, 42 C. C. A. 207, 102 Fed. 117;

In re Miller, 3 Nat. Bankr. N. 329, 105 Fed. 57; In re Levin, 3 Nat. Bankr. N. 1011, 113 Fed. 498; Branden. Bankr. 332, 458. In the exercise of the jurisdiction above outlined, two rules—one relating to a matter of pleading, and the other to a matter of evidence—are to be observed: First. The answer of the respondents to a rule to show cause is not conclusive, but traversable. Knitting Works v. Schreiber (D. C.) 101 Fed. 810; In re Salkey, supra; In re Rosser, supra; In re Purvine, supra; In re Schlesinger, supra; In re McCormick, supra. Second. The power of commitment should be cautiously exercised, and only when its propriety is beyond reasonable doubt. In re Salkey, supra; In re Purvine, supra; In re McCormick, supra; Knitting Works v. Schreiber, supra.

The jurisdiction of the court being thus established, the matters next to be considered are the alleged errors and misconduct on account of which the bankrupts attack the referee's order. The only error specified in the petition for review is insufficiency of the evidence to justify the findings and order of the referee. Attorneys for the bankrupts, however, now contend in argument that errors were committed by the referee in the admission and exclusion of testimony; also that there was misconduct on the part of attorneys for the trustee, and that said errors and misconduct were gross, and require the setting aside of the referee's order, although, upon an inspection of the whole record, the judge should be satisfied that it contains enough competent evidence to justify the order.

General order in bankruptcy No. 27 is as follows:

"XXVII. Review by Judge. When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Ordinarily, I take it a review by the judge of an order made by the referee will be confined to the error pointed out in the petition for review. On account, however, of the peculiar nature of the pending proceeding, I have concluded to examine the grounds of error and misconduct—at least the salient ones—complained of in argument, as well as the one set out in the petition for review. To avoid repetition, I will state generally that objections and exceptions to all of the rulings complained of were duly made and taken, and, in order that the objections to testimony may be readily comprehended, will repeat what has already been made to appear, namely, that one of the main issues before the referee was whether the claim made by the bankrupts, in accounting for their assets, that on the night of the 30th of April, 1901, their store at Cayucos was entered by burglars and large sums of money abstracted therefrom, was true or false.

The ruling first complained of was the admission of the testimony of several witnesses to the effect that they saw no strangers or suspicious characters on the 30th of April, 1901, in the little town of Cayucos. While such testimony is entitled to but little consideration, I am not prepared to hold that it was incompetent.

The next ruling complained of was the admission of the testimony of William Hermann to the effect that Louis Padraita told him that on the 1st day of May, 1901, at the shop of Louis Padraita, in Cayucos, between the hours of 7 and 9 a. m., he met David E. Righetti in front of his (Righetti's) store; that he asked him why he did not go into the store; and that Righetti replied that he could not do so; that he didn't have any key, and was waiting for his clerk, Mr. Brockseib, to open the store. Previous to the admission of this testimony the trustee had introduced Louis Padraita as a witness, who testified, in substance, that he had no recollection of such conversation, but anything that he may have stated to Hermann was true. The testimony of Hermann, detailing statements made to him by Padraita, being hearsay, ought to have been rejected. It was incompetent for the purpose of impeachment, because, while Padraita probably did not testify as the trustee expected him to testify, still he had not, up to that time, given any damaging testimony against the trustee, and hence there was no reason for the trustee to attack his credibility. People v. Jacobs, 49 Cal. 384; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. Nor was the testimony of Hermann admissible because of the previous testimony of Padraita that anything he may have said to Hermann was true. Hermann's testimony was still hearsay, its effect being to get before the referee the naked declarations of Padraita as independent evidence. People v. Jacobs, supra. Nor was the testimony of Hermann admissible on the ground as further contended by counsel for the trustee, that the declaration of a conspirator is competent against a co-conspirator, for the reason that, up to the time Hermann testified, whatever may have been proven afterwards, there was no evidence that Padraita had conspired with the bankrupts to defraud the creditors of the latter.

The ruling next complained of relates to the testimony of John Tonini, who kept a saloon and lunch house on the road from San Luis Obispo to Cayucos, at which place De Gottardi stopped for about half an hour on the 30th of April, 1901. Tonini had testified that De Gottardi did not bring into the house with him a satchel, or anything of that sort; that he tied his team to the fence at a point where it could not be seen from the saloon. This evidence was in line with other evidence offered by the trustee of certain actions of De Gottardi on his return trip from Los Angeles,—leaving his grip in one car, and going into another for dinner, and into another to play cards, loitering the next day along the road to Cayucos, stopping at different places, where the grip was out of his sight or immediate control; the inference sought to be drawn from all of these actions being that he did not have a large amount of money in his grip. The witness was permitted to answer the following question: "He didn't impress you as being very anxious about what was going on out on the road, did he?" This question called for the opinion and conclusion of the witness, and was manifestly incompetent.

The next ruling complained of is the admission of certain testimony of E. C. Ivins, who was the sheriff of San Luis Obispo county, and on the 2d day of May went to Cayucos with writs of attach-

ment against De Gottardi & Righetti. This witness, sometimes in response to leading questions, was permitted to testify that the impression he gained from his conversations with De Gottardi was that the alleged robbery did not weigh heavily on the latter's mind, and that he did not want to talk about it, and, further, that he (Ivins) could find nothing to indicate that there had been a robbery, and that he reached the conclusion that De Gottardi and Righetti knew more about the alleged crime than they told him. The language of the referee in passing upon the objection was as follows: "The Court: He was the sheriff, and had conversations with Mr. De Gottardi, and viewed the premises. Objection overruled." This testimony was peculiarly objectionable. The issue being tried was whether the alleged robbery was a reality or a mere simulation,—a trick to account for assets which the bankrupts were concealing. The witness Ivins was then, and for two years prior thereto had been, sheriff of San Luis Obispo county,—presumably a man of high character, whose utterances commanded respect; and he was permitted to testify, substantially, that after conversations with the bankrupts, and an examination of the premises, his conclusion was that a robbery had not been committed, and that the bankrupts knew more about the alleged crime than they told him. How attorneys of experience and learning could urge or offer, as legal evidence, matters of pure opinion, so obviously and absolutely incompetent, I am at a loss to understand.

The next ruling of the referee complained of is of the same character as the one last mentioned, and relates to the testimony of Mr. A. M. Hardie, postmaster at Cayucos, with whom the bankrupts had often consulted on matters of business, and with whom they advised touching the alleged robbery and what they should do. Mr. Hardie testified to the conversation he had with the bankrupts. They were both together, and one or the other of them (he thinks, Mr. De Gottardi) first called his attention to the condition of the door and the confusion about the safe (that is, the papers and things scattered around in front of the safe), and asked him what he thought of it. He replied that it was a raw piece of work. He then asked them what they had called him over for. They said they wanted to talk to him,—were in a bad fix, left without anything, didn't know what to do, and wanted to advise with him. They said they were left with nothing, and they thought it was too bad at this time, and did not propose to be left with big families on their hands without anything, and asked him if he would be left that way if he could help it. They then asked him how it would do for him to put in his safe and keep for them some papers and things. He said he guessed that would be all right; that he thought the best thing would be to put the papers and things in a package, addressing it to some friends,—naming Silvia Righetti as a good man; and that he (Hardie) would see that it was delivered to him when he called for it. They asked other questions of the witness, and he told them that the questions were beyond him; that he was not a lawyer, and thought the best thing they could do was to send for their lawyer as quick as they could,—suggesting Mr. Dorn as a

good lawyer. Something was said also by the bankrupts about their creditors being after them. The examination then proceeded as follows:

"Q. Mr. Hardie, from the conversation you had with them, and what they said to you, was it papers and things that they wanted to hide from their creditors? Mr. Dorn: Object to it as irrelevant, incompetent, and immaterial, outside of the issues, and calling for the opinion and conclusion of the witness, without a foundation. The Court: Overruled. Mr. Dorn: Exception. A. I looked upon the thing just simply this way, at a glance,—that there was going to be a grand complication of affairs, and I didn't wish to have my foot in it. That is the reason that I refused to have anything to do with those papers. Q. Well, did you say anything to them to this effect: That you were not lawyer enough to tell them how to evade the law and still have the law protect them? A. Yes, sir, I did; something just to that effect. Q. From what they said, were they trying to evade the law? Mr. Dorn: Object to it as irrelevant, incompetent, and immaterial, outside of the issues, and calling for the opinion and conclusion of the witness, without a foundation. The Court: Overruled. Mr. Dorn: Exception. A. I took it for granted, from the conversation, that there was certain things that they had in their possession that they didn't wish to be attached, and that they simply wished to make my safe a depository. Mr. Dorn: I move to strike out the answer as not responsive, being the opinion and conclusion of the witness. The Court: Denied. Mr. Dorn: Exception."

The questions objected to were certainly intended to elicit and did elicit from the witness his own conclusion, drawn from his conversation with the bankrupts, that they intended to conceal from their creditors certain papers, and wished to deposit the same in his safe. This conclusion, it may be, is fairly deducible from the facts previously testified to by the witness; still it was a conclusion to be drawn by the court, not by the witness.

Another error complained of was the admission of the evidence of P. Tognazini to the effect that he had made investigations in the neighborhood of Cayucos to ascertain whether or not there were dairymen trading with De Gottardi & Righetti who had demanded cash from them instead of checks, and that he had found one. Tognazini previously testified that he had lived in that community for 30 years, and was a director of the Commercial Bank at San Luis Obispo. In order that the bankrupts' objections to this testimony may be understood, it should be stated that the bankrupts claimed that they had accumulated at the store the large amount of money of which they said they were robbed because some of their customers had demanded payment in cash, rather than checks, and if they were not able to comply with such demands the customers, to whom they might give checks would go over to Cass & Co.'s (a competing store) for the purpose of cashing the checks there, and would then transact other business with Cass & Co. To meet this claim of the bankrupts the above-mentioned testimony of Tognazini was offered. The testimony was clearly incompetent, being mere opinions and conclusions of the witness, and, what is worse, opinions and conclusions drawn necessarily not from facts within the knowledge of the witness, but from hearsay statements made to him by other parties.

Another ruling complained of is the striking out of the testimony of Righetti as to what De Gottardi told him about putting $1,500 into

the safe on the 30th of April. Righetti had just testified that he saw De Gottardi put money in the safe; that he did not count it, but that De Gottardi told him he had $1,500, and put it in the safe. The referee, on motion of the trustee's attorney, struck out what De Gottardi said, as incompetent, irrelevant, and immaterial. This ruling was erroneous. Whether or not De Gottardi had placed $1,500 in the safe was one of the matters in dispute, and his statements at the time were competent as a part of that transaction.

The misconduct charged against attorneys for the trustee consists mainly in asking incompetent and improper questions, insisting upon answers where the referee had sustained objections to the questions, and a transaction, which I will notice later on, with the witness Mary Malvate, a girl 17 years of age, who at the time of the alleged robbery was a domestic in the home of Mr. Righetti. That incompetent testimony, prejudicial to the bankrupts, was offered and admitted, appears from what I have already said. Besides the instances thus enumerated, an examination of Mrs. Tognina Righetti, wife of one of the bankrupts, is complained of as having been unfair to the witness and highly improper. Mrs. Righetti was born in Italy, and came to California when she was about 12 or 13 years old. Before marriage she lived with Mr. Padraita, her brother-in-law, at Cayucos, and went to school about one month at that place. She can write English a little, but not well. She is able to read printing to some extent, and plain writing. In the latter part of 1900 the witness declared a homestead on certain property in Cayucos, and it was to this matter that the objectionable questions related. Some of the questions and answers were as follows:

"Q. Well, you remember putting the homestead on this property, don't you? A. Yes, sir. Q. You remember signing the paper? Mr. Dorn: Object to that as irrelevant, incompetent, and immaterial, and outside the issues. The Court: Overruled. Mr. Dorn: Take an exception. A. Yes, sir. * * * Q. And you knew what was in the paper that you signed? Mr. Dorn: Same objection. The Court: Same ruling. Mr. Dorn: Exception. A. Well, I read it. Q. What was in it? A. Oh, I don't remember,—it been so long. Q. Did it say anything about a horse? A. I don't remember if it said anything about a horse. Q. Did it say something about farming implements and chickens? Mr. Dorn: Object to it as irrelevant, incompetent, and immaterial, not the best evidence, and calling for the contents of a written instrument. The Court: Objection sustained. Mr. Ach: Answer the question. A. I don't remember,—it has been so long since. Q. Well, don't you know that it spoke about furniture and beds and carpets and clothes and so forth, in that paper? Mr. Dorn: Object to it as irrelevant, incompetent, and immaterial, not the best evidence of the contents of a written instrument, and an improper mode of interrogating a witness,—unfair to the witness. The Court: Objection sustained. A. I suppose it did, but it been such a long time that I can't remember."

Counsel for bankrupts insist that the fact that the last two questions were held by the referee to be objectionable in no way mitigates their impropriety, that counsel for the trustee was interrogating an illiterate woman, and that by adroitly insinuating, through his questions, as true, matters which he knew to be untrue, he finally succeeded in getting the witness to affirm the false matters. This method of examination, which counsel for the bankrupts sharply criticise, I cannot myself look upon otherwise than with disapproval.

Another charge of misconduct against attorneys of the trustee is that they persistently repeated questions and insisted upon answers where the referee had sustained objections to the questions. This charge is without foundation. The correct practice, as I shall show later on, is to take down the answers to questions, without regard to the referee's rulings. The incident relating to Mary Malvate, complained of by the bankrupts, was brought out on the cross-examination of that witness by Mr. Dorn, as follows (the Mr. Gregg mentioned by the witness was associate counsel with Mr. Ach):

"Q. Since you were here before, have you talked with anyone besides Mr. Gregg about your testimony? A. Since I was here before? Q. Yes? A. No, sir; I guess I did with Giubbini. Q. I mean since you were here as a witness the last time you were here,—a week or so ago,—as a witness? Since that time have you talked with any one besides Mr. Gregg? A. No. Q. You haven't received any present or anything of that kind, have you? A. Yes, sir. Q. Well, who from? A. Mr. Ach. Q. Mr. Ach? A. Yes, sir. Q. What did you get? A. A box of candy. Q. Who delivered the present to you? A. This fellow over here. (Pointing.) Q. Mr. Gregg? A. Yes, sir. Q. So, since you were here as a witness before Mr. Gregg delivered for Mr. Ach to you a box of candy as a present? A. Yes, sir. Mr. Ach: That is objected to as assuming that Mr. Gregg delivered it for Mr. Ach. Mr. Dorn: Q. So, since you were here before, then, Mr. Ach has made you a present of a box of candy, and Mr. Gregg delivered the present to you? A. Yes, sir. Q. And was that the time that you talked with Mr. Gregg at Cayucos? A. Yes, sir. Q. Is that the only present you got? A. Yes, sir."

On re-direct examination by Mr. Ach the witness testified as follows:

"Q. Now, you say that you got a box of candy? A. Yes, sir. Q. Was it good candy? A. Fine. Q. You say Mr. Gregg brought it over to you? A. Yes, sir. Q. Well, did you tell Mr. Gregg anything more about the case than you told me on the witness stand before? A. He was asking me something, but I told him I didn't know any more. Q. Was that before or after he give you the candy? A. I don't remember. Q. He told you it come from Mr. Ach, did he? A. Yes, sir. Q. Just Mr. Gregg give you candy, and said Mr. Ach sent it to you? A. Yes, sir. Q. You thought Mr. Ach was a real nice fellow, didn't you? A. Yes, sir."

This gift of candy, counsel for bankrupts, in argument, while disavowing any purpose to charge bribery, characterized with marked severity as indiscreet and violative of the duties of an attorney. In a written opinion heretofore, on the 7th day of January, 1902, read in open court, I fully indorsed said criticism. After said opinion had been read, Mr. Ach, counsel for the trustee, at his own request, and without objection, was sworn as a witness, and thus disclaimed any connection with or knowledge of the transaction until after its occurrence. The following order was then made:

"Thereupon it is ordered that the opinion just heretofore rendered, in so far as this matter is concerned, be held in abeyance for further consideration, and that the same be not filed of record until the further order of the court."

Mr. Ach's testimony shows satisfactorily that he was in no way connected with said gift of candy, and relieves him of any responsibility therefor. On January 25, 1902, Mr. Ach submitted in open court (counsel for bankrupts being present and offering no objection thereto) the affidavit of Mr. Gregg, stating, in substance, that on the 7th day of September, 1901, he drove to the town of Cayucos

to attend and direct the sale of a stock of goods belonging to the estate of the bankrupts, and for no other purpose, and that Mary Malvate was then, and for some time prior and subsequent thereto had been, a waitress at the Exchange Hotel, in said town; that on said day affiant, while visiting at said hotel, did, in the presence of several persons, whose names are unknown to him, give to her a small box of candy, which was then passed around among and eaten by the persons present; that he was not in the presence or hearing of said Mary Malvate for a longer time than 10 minutes, nor at any time away from the presence of others and that he did not see, nor attempt to see, her again until she again appeared as a witness in this proceeding; that the only reference made at the time to the testimony of said Mary Malvate was that affiant asked her if she knew anything more about the facts in said matter than appeared in her testimony, and she replied that she did not; that said question and answer arose out of a general conversation among those present as to the probability of an investigation being made by the federal grand jury, and that affiant did not then know or expect that she would be called again as a witness in said bankruptcy proceedings; that the candy was not given for the purpose of affecting her testimony or attitude towards any of the parties interested, or of inducing her to testify against said bankrupts, and was not given at the request or under the direction of Henry Ach or any other person; and that said gift was intended by this affiant solely as a personal courtesy. The object of the visit which Mr. Gregg says, in his affidavit, he made to the Exchange Hotel, was testified to by Miss Malvate, in that part of her testimony immediately preceding the questions and answers above quoted, as follows:

"Q. Since you were here as a witness before, did you ever talk with Mr. Gregg about this matter? A. I guess I did. Q. How many times? A. Once. Q. Where was that? A. I don't know when was it. That time he came up to Cayucos. Q. Well, where were you when you talked with Mr. Gregg about it? A. The Exchange. Q. The Exchange Hotel? A. Yes, sir. Q. I suppose he had lunch there? A. No, sir. Q. Called there to see you? A. He came to pay my expenses. Q. You mean your witness fees? A. Yes, sir. Q. Did you have any talk with him about what you knew about this case? A. I don't remember. I guess I did."

With Mr. Gregg's affidavit in the record, the following facts remain undisputed: That Mary Malvate was called as a witness twice by the trustee,—the first time several days before, and the second time a few days after, the gift of the candy; that Mr. Gregg went to said hotel to pay the girl her witness fees, and on that occasion gave her the candy, representing it as a gift from Mr. Ach, the leading counsel for the trustee, and asked her if she knew anything more about the facts in said matter than appeared in her testimony, and she replied she did not. That the transaction, as first shown in evidence, called for severe rebuke, will not admit of controversy, and, even in the light of Mr. Gregg's affidavit, it was a blamable indiscretion.

The foregoing rulings and matters, adverted to by me with disapproval, unquestionably disclose prejudicial errors by the referee, and misconduct on the part of the attorneys for the trustee, some

of which may, without exaggeration, be denominated gross, and present for settlement the proposition of law strenuously insisted upon by counsel for bankrupts, that for errors and misconduct such as above indicated a referee's order ought to be set aside, regardless of what the competent evidence in the record may establish. In support of said proposition it is argued, among other things, that a referee under the present bankruptcy law differs from a register under the bankruptcy act of 1867 in this: that the former is clothed with important judicial powers, which the latter did not possess, and that among these powers is that of passing upon the competency, materiality, and relevancy of testimony; that No. 22 of the general orders in bankruptcy and section 721 of the Revised Statutes of the United States, together and in effect, establish as the procedure to be observed by a referee where witnesses are examined, and by the judge on review of an order made as the result of such examination, that which obtains in the courts of law of the state wherein the bankruptcy court is located; and that under the laws of the state of California the appropriate remedy for errors in the admission and exclusion of testimony and misconduct on the part of attorneys is a new trial. The order in bankruptcy and the section of the Revised Statutes above mentioned are respectively as follows:

"XXII. Taking of Testimony. The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination and cross-examination, which shall be had in conformity with the mode now adopted in courts of law. A deposition taken upon an examination before a referee shall be taken down in writing by him, or under his direction, in the form of question and answer. When completed it shall be read over to the witness and signed by him in the presence of the referee. The referee shall note upon the deposition any question objected to, with his decision thereon; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

"Sec. 721. The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The first proposition stated in the bankrupts' argument, that a referee is clothed with important powers,—among them, that of determining objections to testimony,—has been approvingly adopted by text writers (Coll. Bankr. [3d Ed.] 503; Loveland, Bankr. 502), and is unquestionably sound. Jurisdiction to hear and determine issues of fact necessarily implies power to pass upon the admissibility of testimony. The last proposition of said argument, namely, that, under the state practice of California, for errors and misconduct such as appear in this record a new trial is the appropriate remedy, also seems to be well sustained by authority, and the rule is applied in civil as well as criminal cases. Smith v. Westerfield, 88 Cal. 383, 26 Pac. 206; People v. Wells, 100 Cal. 460, 34 Pac. 1078; People v. Jacobs, 49 Cal. 384; In re James' Estate, 124 Cal. 653, 57 Pac. 578, 1008. The intermediate proposition of said argument, that No. 22 of the general orders in bankruptcy and section 721 of the Revised Statutes of the United States establish as the procedure before a referee, where witnesses are examined, that of courts of law of the

state wherein the referee is sitting, is vulnerable. Its infirmity consists in this: that it unduly enlarges the scope of general order No. 22. I am inclined to think that the provision of said order requiring the examination and cross-examination to conform to the mode adopted in courts of law simply means that the witness, after being duly sworn, shall be first examined by the party introducing him, and then cross-examined by the adverse party, and that such examination and cross-examination shall be oral, and not upon written interrogatories. Whatever may be the precise limits, however, of that general order, it is sufficient to say here that it does not affect the practice on a review by the judge of an order made by the referee, nor the record which the referee should cause to be made up for the purpose of such review. Section 38a of the bankruptcy act of 1898 provides that "referees respectively are hereby invested, subject always to a review by the judge, * * * with jurisdiction," etc. The unlimited power of review here conferred upon the judge includes matters of fact as well as questions of law. There is nothing in the act prescribing the manner in which this review shall be had, nor is there any general order relating in terms to the subject, except No. 27, already quoted; and that simply requires the person desiring a review to file his petition therefor, setting out the error complained of, and the referee to forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee. The supreme court of the United States, however, has said:

"Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words 'at law,' in the opening sentence conferring on the courts of bankruptcy 'such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,' may have been inserted to meet clause 4, authorizing the trial and punishment of offenses, the jurisdiction over which must necessarily be at law, and not in equity." Bardes v. Bank, 178 U. S. 535, 20 Sup. Ct. 1000, 44 L. Ed. 1175.

General order in bankruptcy No. 37 is as follows:

"In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the supreme court of the United States shall be followed as nearly as may be. * * *"

A proceeding before a referee, such as the present one, is essentially of an equitable nature. Issues of fact are to be determined by him without the intervention of a jury, and his order, if affirmed on review, is enforceable, not after the manner of courts of law, but by the process of commitment. General order No. 22 affects the equitable nature of this proceeding only to the extent of prescribing a common-law mode of taking testimony, which had previously been introduced by rule into equity practice. The pregnant fact here suggested, that said order is imitative, has, it seems, escaped the attention of counsel for bankrupts; and consequently they have overlooked authoritative interpretations, directly pertinent, which the supreme court has placed upon the archetype. I find, upon careful research, that general order No. 22 is taken largely, if not in its entirety, from No. 67 of the rules of practice for United States courts

of equity, and this fact of itself is a recognition by the supreme court of the equitable nature of the proceeding. That part of general order No. 22 on which counsel for bankrupts mainly rely, namely, "The examination of witnesses before the referee may be conducted by the party in person or by his counsel or attorney, and the witnesses shall be subject to examination annd cross-examination, which shall be had in conformity with the mode now adopted in courts of law," has its corresponding provision in that part of said equity rule No. 67 relating to the examination of witnesses before an examiner, as follows:

"Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in the common law courts." 144 U. S. 689, 12 Sup. Ct. iii., 36 L. Ed. 1143.

Now, what is the practice at the hearing and on appeal in equity? There, as is well known, at the examination of witnesses, questions, objections, rulings, exceptions, and answers are all taken down, so that the appellate court, rejecting incompetent testimony, even though it may have been considered below, and considering competent testimony, even though it may have been rejected below, may render such final decree as the equities of the case require. Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521; Ruckman v. Cory, 129 U. S. 387, 9 Sup. Ct. 316, 32 L. Ed. 728; Mining Co. v. Doe, 27 C. C. A. 50, 82 Fed. 51; Ridings v. Johnson, 128 U. S. 212, 9 Sup. Ct. 72, 32 L. Ed. 403; Johnson v. Harmon, 94 U. S. 371, 24 L. Ed. 271; Beach, Mod. Eq. Prac. §§ 978, 980.

In Blease v. Garlington, supra, the court, speaking through Chief Justice Waite, says:

"Since the amendment of rule 67, in 1861, there could never have been any difficulty in bringing a case here upon appeal, so as to save all exceptions as to the form or substance of the testimony, and still leave us in a condition to proceed to a final determination of the cause, whatever might be our rulings upon the exceptions. The examiner before whom the witnesses are orally examined is required to note exceptions, but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court, with the objections noted. So, too, when depositions are taken according to the acts of congress or otherwise, under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony, as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus both the exceptions and the testimony objected to are all before the court below, and come here upon appeal as part of the record and proceedings there. If we reverse the ruling of that court upon the exceptions, we may still proceed to the hearing, because we have in our possession and can consider the rejected testimony. But under the practice adopted in this case, if the exceptions sustained below are overruled here, we must remand the cause in order that proof may be taken. That was done in Conn v. Penn, 5 Wheat. 424, 5 L. Ed. 125, which was decided before the promulgation of the rules. One of the objects of the rule, in its present form, was to prevent the necessity for any such practice. While, therefore, we do not say that, even since the Revised Statutes, the circuit courts may not, in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so, and that, if such practice is adopted in any case, the testimony presented

in that form must be taken down or its substance stated in writing and made part of the record, or it will be entirely disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might, on examination, be of the opinion that the objection to it ought not to have been sustained."

The fourth paragraph of the syllabus in Ruckman v. Cory, supra, also a decision by the supreme court of the United States, is as follows:

"Although incompetent evidence be received in an equity case, yet, if the decree can be sustained by such evidence in the record as is competent and relevant, this court will not disturb the decree."

In the body of the opinion, the court says:

"(3) Reference is made to the depositions of several witnesses, including the plaintiff, who testified in his own behalf, in which are detailed statements made by Ruckman at different times after 1862 in reference to the title to these lands. This evidence, it is contended, and properly so, was incompetent, under the well-established rule that 'a grantee in a deed is not affected with the declarations of the grantor made after the execution and delivery of the deed, unless, with full knowledge of such declarations, he acquiesces in or sanctions them.' * * * But the question remains whether the decree cannot be sustained by such evidence in the record as is competent and relevant. We think it can. At any rate, after a careful sifting of the proof, and giving due weight to all the facts and circumstances that may properly be considered, we do not see our way clear to disturb the decree."

In Mining Co. v. Doe, supra, the circuit court of appeals of this circuit held (quoting from the syllabus):

"3. Appeals in Equity—Findings of Fact. On an appeal in equity, findings of fact made by the court below are entitled to some weight, but are not binding on the appellate court. The whole case is before the latter court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits."

It is true that an examiner in equity does not pass upon objections to evidence, while a referee in bankruptcy must do so. This, however, furnishes no reason why the record made up by the latter should be less complete than that made up by the former. The necessity for a full transcript is the same in each case,—in the one case, that the decree of the appellate court, and in the other that the order of the judge on review, may finally determine all matters at issue. Moreover, where the examination of witnesses is had orally in open court, as may be done under the amendment to equity rule No. 67, promulgated by the supreme court May 15, 1893 (149 U. S. 793, 13 Sup. Ct. iii., 37 L. Ed. 1235), the judge does pass upon the admissibility of testimony; and in that case a hearing in equity and a proceeding (such as the present one) before a referee in bankruptcy are substantially alike. The judge and referee, it is true, do not occupy towards each other the relation of an appellate to an inferior court, but are both officers of the bankruptcy court. This circumstance, however, does not weaken, but, rather, confirms, the conclusion which I have reached as to the power and duty of the judge on review of an order of the referee. If, in equity, an appel-

late court, regardless of errors and irregularities at the hearing, exercises complete supervision over the decree of the lower court,—the two being distinct tribunals,—and confirms, reverses, or modifies the decree so as to administer final relief upon the competent evidence in the record, for a much stronger reason ought the judge, in a bankruptcy proceeding, to exercise equally as full control over the order of the referee, where both judge and referee are not only of the same court, but each for the time being constitutes the court, and where, therefore, a review by the judge of the referee's order is theoretically a review by the court of its own decision.

In re Nugent, 44 C. C. A. 620, 105 Fed. 181, and Smith v. Belford, 45 C. C. A. 526, 106 Fed. 658, cited by the bankrupts, do not, I think, support their contention. In each of those cases it was expressly held by the court of appeals that the district court was without jurisdiction to make the orders complained of, and, of course, there was nothing the appellate court could do but set aside the orders. In re Keller (D. C.) 109 Fed. 118, also cited by the bankrupts, is, according to my view of the case, favorable to the procedure which I have outlined, rather than to that contended for by the bankrupts. There the trustee in bankruptcy contested the right of a creditor to prove up his claim on the ground that, within four months next preceding the filing of the petition in bankruptcy, bankrupt had made payments to the creditor, and that at the times of such payments the bankrupts were insolvent. Thus it will be seen that one of the issues before the referee was the alleged insolvency of the bankrupts, and the referee found that the bankrupts were insolvent, as alleged by the trustee. With reference to the finding of the referee on this issue, Judge Shiras says:

"As I understand the certificate of the referee, this conclusion was reached upon consideration of the facts appearing of record in the bankruptcy proceedings, and of the testimony given upon the examination of the bankrupt and other parties before the referee in connection with other proceedings had in the case; and upon part of the present claimant it is excepted that this evidence was introduced when the claimant was not present and was not represented."

This exception was held to be good, and, since there was no other evidence to support the finding, the judge referred that particular issue back to the referee for further testimony; affirming, however, the report of the referee in other respects. If the practice were as contended for by bankrupts' counsel,—that error in the admission of testimony wholly vitiates the order made by the referee,—then the referee's entire order in the case last cited would have been reversed, and the whole matter referred back to him, whereas only one issue was sent back to the referee, and the balance of the order affirmed.

Marks v. Fox (C. C.) 18 Fed. 713,—another citation of bankrupts' counsel,—seems, on casual reading, to hold that on the coming in of a master's report in an equity cause, showing the admission of incompetent testimony and the exclusion of competent testimony, the matter should be referred back to the master to take additional testimony, reconsider the proofs, and report conclusions. A more careful reading of that case, however, indicates that the excluded

testimony was not in the record before the judge. The following paragraph occurs in the opinion of the court:

"The master erroneously sustained the objections to interrogatories 20, 28, 34, 38, 47, 49, 50, 51, and 52, propounded to the witness Henry King, and to interrogatories 17, 21, 44, 46, 65, 72, 75, 76, and 81, propounded to Aaron Grant. While some of these interrogatories do not seem to have been of much importance, others were, and the general result of the master's rulings has been to deprive the defendants of testimony which was clearly competent and material. It is for the master to determine what weight should be given to this testimony when it is in the case. It may be that his conclusions will not be affected by it, but upon this review of his findings it cannot be determined that they were not influenced by the absence of the evidence which the defendants sought to introduce."

If the interrogatories which the master held to be incompetent were not answered, then, of course, there was nothing else the judge could do, except send the matter back to the master to take the testimony which had been erroneously excluded.

Equitable procedure before the referee, and by the judge on a review of the referee's order, such as I have outlined, is approvingly epitomized by a well-known text writer on bankruptcy as follows:

"It would therefore seem that referees have power to pass upon the competency, relevancy, or materiality of any question in the course of an examination, subject to have the question reviewed by the judge upon certificate. The more convenient practice would seem to be for the referee to make his rulings, and thereupon require the question to be answered. If his ruling be against the question, and the court should reverse his finding, it would not be necessary to have a re-examination of the witness. If the court should affirm such ruling, the answer may properly be disregarded. The examination should continue, and the question be certified after the deposition is completed, to prevent delay." Loveland, Bankr. 502.

My conclusions on this branch of the case are: First, that in a proceeding before a referee, such as the present one, a record should be made of all that transpires on the examination of witnesses,—questions, objections, rulings, exceptions, and answers should all be taken down; second, that, on a review of the order made by the referee, the judge should look through the whole record, and, considering only competent and material evidence, affirm, modify, or reverse, with suitable directions, the referee's order, accordingly as the circumstances of the case require. If, as in the present case, the order be one whose enforcement may call into exercise the power of commitment, and the judge is not satisfied beyond a reasonable doubt of the sufficiency of the evidence to justify the order, he should set it aside, and either put an end to the proceeding, or refer the matter back to the referee, with appropriate instructions. If, however, there is in the record enough of competent and relevant evidence to justify the order, either wholly or in part, it should be accordingly affirmed or modified, notwithstanding there were errors and misconduct such as shown in the present case on the hearing before the referee.

The jurisdiction of the court being established, and the rules of procedure for its exercise determined upon, I now come to a consideration of the facts. The evidence is voluminous, covering more than a thousand pages, and its review now is impracticable. A few only of the salient points can be mentioned. The recitals of facts

made in the referee's findings are fully sustained by the evidence. In addition to those recitals, a few other matters will be stated.

The bankrupts began business as merchants and partners, under the firm name of De Gottardi & Righetti, in the year 1896, at Cayucos, in this state,—a village of two or three hundred inhabitants,—and continued the business until May 2, 1901, when the store was attached. On the 23d of January, 1901, the bankrupts, as appears from the books of the firm, took an inventory of their property and indebtedness, from which it appeared that the former was $19,018.18, and the latter $2,050.06. The schedules of the bankrupts, filed herein on the 1st day of July, 1901, but which exhibit the condition of the estate at the time of the attachment, May 2, 1901, represent their assets at $28,964.37 and their debts at $22,824.70. The deficiency of assets shown by the schedules in bankruptcy ($6,039.67), added to the surplus of assets shown by the inventory of January 23, 1901, makes a total loss between January 23, 1901, and the 2d day of May, 1901 (a period of a little more than three months), of $23,007.82. The startling change thus exhibited led to judicial inquiry; and an examination of the bankrupts and other witnesses, for the purpose of acquiring information generally concerning the bankrupts' estate, was begun, at the instance of the creditors, before the referee, August 11, 1901. At this examination, which was prior to the present proceeding, one of the bankrupts (Natele De Gottardi) declined to answer competent and material questions touching the business and property of the bankrupts, on the ground that his answers might incriminate him. As showing the disposition of the bankrupt at that time, I quote from his examination the following questions and answers:

"Q. When you started into business with David E. Righetti, did you have any money? A. I decline to answer that question on the ground that my answer might tend to criminate me, and might be made the foundation of a criminal action against me, and might have a tendency to subject me to punishment for a crime."

This answer witness read from a piece of paper previously prepared and handed to him by his attorney, Mr. Dorn.

"Q. Did you make an inventory of the assets of your business (the business of De Gottardi & Righetti) in January, 1901? A. I decline to answer to that on the same ground I did before. Q. What ground is that, Mr. De Gottardi? A. I decline to answer that question on the ground that my answer might tend to criminate me, and might be made the foundation of a criminal action against me, and might have a tendency to subject me to punishment for a crime. * * * Q. Mr. De Gottardi, on the 27th day of April, 1901,—the day being Saturday,—did you not, for your firm of De Gottardi & Righetti, receive some money at Cayucos? A. I decline to answer on the same ground. Q. Did you not on that date receive $360 in money from Peter or Paul Maddona? A. I decline on the same ground. Q. Did you not upon that date receive from Peter Maddona the sum in addition, of $600, or about that amount of money, in a check or draft? A. I decline to answer on the same grounds. Q. Did you not take that money, and appropriate it to your own use, and withhold it from your creditors, and conceal the money? A. I decline to answer on the same grounds. Q. On the 27th day of April, 1901, did you not have in your possession at your store in Cayucos a sum of money in coin in excess of one thousand dollars? A. I decline to answer on the same ground. Q. Mr. De Gottardi, did you not have in your possession at your house in the city or town or place called 'Cayucos,' in the

county of San Luis Obispo, on the 30th day of April and the 1st day of May, 1901, the sum of fifteen hundred dollars in money? A. I decline to answer on the same ground. Q. Did you not prior to the 27th day of April, 1901, to wit, about the 25th day,—the 26th day of April, 1901,—receive communications from various of your creditors, and particularly the Commercial Bank of San Luis Obispo and the Andrews Banking Company of San Luis Obispo, calling attention to the fact that the account of De Gottardi & Righetti was overdrawn, and requesting you to remit? A. I decline to answer on the same ground. Q. Did you not on the 27th day of April, in the afternoon or evening of that day, leave Cayucos,—1901? A. I decline to answer on the same ground. Q. Did you not on the 27th day of April, 1901, when you left Cayucos, have in your possession drafts and coin belonging to the firm of De Gottardi & Righetti in excess of $4,000? A. I decline to answer on the same ground. Q. Did you not while in the city of Los Angeles receive from the firm of Loeb, Fleishman & Co. in excess of six thousand dollars belonging to the firm of De Gottardi & Righetti? A. I decline to answer on the same ground. Mr. Ach: Haven't you that money now? A. I decline to answer on the same ground. Q. Haven't you that money in hiding and in your possession at this time? A. I decline on the same ground, sir, to answer. Q. What did you do with that money? * * * A. I refuse to answer that question on the same ground. Q. Mr. De Gottardi, did you not have in your possession on Wednesday, the 1st day of May, 1901, and in the possession of the firm of De Gottardi & Righetti, checks payable to De Gottardi & Righetti, or a check payable to De Gottardi & Righetti, in excess of two thousand dollars? A. I refuse to answer that question on the same ground. Q. Did you not have such check, and did you not give it to Mr. Dorn, the gentleman who appears here for you as counsel? A. I refuse to answer that question on the same ground. Q. Did you not on the morning of the 1st day of May, 1901, telephone to Mr. Dorn, in the town of San Luis Obispo, to come over to Cayucos? A. I decline to answer on the same ground, sir. Q. You mean all the time, when you say the same ground, the same ground that you read from that piece of paper that you carry with you? A. Yes, sir. Q. Did you not ask the advice, before the arrival of Mr. Dorn, of some person in the city or town of Cayucos, as to what you should do with the collaterals and the moneys that you had? A. Decline to answer on the same ground. Q. Do you now know that David Righetti has in his possession at this time moneys belonging to the firm of De Gottardi & Righetti? A. I decline to answer that question on the same ground. Q. Do you now know that at this time the attorney, Mr. F. A. Dorn, has in his possession moneys or property belonging to the copartnership—the firm—of De Gottardi & Righetti? A. I decline to answer that question on the same ground."

Without quoting further from said examination, it is sufficient to say that whole pages of questions, competent and material, were propounded to the witness, which he persistently refused to answer on the grounds stated. The refusals of De Gottardi were certified to the judge, who ruled that the questions must be answered. Before said ruling was announced an examination of David E. Righetti, one of the bankrupts, was had; and he also refused, on the same ground, to answer a great many competent and material questions concerning the bankrupts' estate. He also declined, on the same ground (that is, on the ground that it might tend to criminate him), to answer questions as to his whereabouts during the night of the alleged robbery, April 30, 1901, as follows:

"Mr. Ach: Q. Mr. Righetti, were you in Cayucos on the 30th of April, 1901? A. I decline to answer that question. Q. Why? A. On the same ground stated before. * * * Mr. Ach: Q. Mr. Righetti, did you not go into your store on the night of the 30th of April, 1901, after the store was closed, and open the safe? A. I decline to answer that question on the same ground, sir. * * * Mr. Ach: Q. What time did you go to bed on the

night of the 30th of April, 1901? A. I decline to answer that question on the same grounds. * * * Mr. Ach: Q. After you left the store on the night of the 30th of April, 1901, did you have a meeting with Mr. De Gottardi anywhere in Cayucos? A. I decline to answer that question on the same ground, sir. * * * Mr. Ach: Q. Don't you know what became of the money that Mr. De Gottardi brought up from Los Angeles? A. I decline to answer that question on the same ground. * * * Mr. Ach: Q. Did anybody tell you to decline to answer these questions? A. Yes, sir. Q. Who? A. My lawyer. Q. What is his name? A. Mr. Dorn."

Subsequently, in the pending proceeding, the bankrupts appeared before the referee and expressed their willingness to answer the questions which they had previously declined to answer, but counsel for the trustee did not see fit to call them as witnesses. They took the stand, however, in their own behalf, and explained their previous refusals by saying, in substance, that they thought, from the actions of some of the creditors and their attorneys, that the examination was not a fair one, and that the creditors and their attorneys were simply seeking grounds to charge them with a crime, and were trying to confuse them, and would take advantage of any mistake they might make. The apprehensions thus avowed by the bankrupts are not usually attendant upon a course of fair dealing, and their refusals to answer proper questions, so unsatisfactorily explained, together with the facts that such refusals were the result of an agreement between the bankrupts and their attorney, made before the examination begun, ill comport with an honest failure in business, or truthful accounting for assets. De Gottardi's claim that he gave $6,000 to a woman and $425 to a doctor involves the admission that he did have that amount of money in his possession, belonging to the estate of the bankrupts. This fact, however, is also testified to by Righetti, as well as evidenced by the books of the firm. The only question, therefore, to be determined on this branch of the case, is whether or not De Gottardi's statement of his disposition of the money is to be believed. It has been said by high authority:

"The bankrupt, when on examination, after admitting the possession of property, must clearly account for the same to the satisfaction of the court; otherwise he must be held to still have it in his possession, and be able to hand it over to his assignee, and, on failing or refusing to account in a reasonable manner for the disposition of assets which have been traced to him, must be held to be acting in contempt of the jurisdiction of the court." In re Salkey, 21 Fed. Cas. 238 (No. 12,253).

Can it be claimed that De Gottardi has accounted in a reasonable manner for the $6,500 which he admits to have been in his possession but a short time before the petition in bankruptcy was filed, by asserting that he gave $6,000 to a woman and $425 to a doctor, when he refuses, on cross-examination, where there is no immunity from self-criminatory evidence, to name the woman or the doctor to whom he says the money was given? Such a claim would be preposterous. If his testimony in this regard had been true, its corroboration would have been within his power. In the absence of such corroboration, under all the circumstances of this case, the issue cannot be otherwise found than against him.

The claim of the bankrupts that they were robbed of $7,500 is likewise an admission of the fact that they did have in their possession

that amount of money belonging to their estate. Here, again, the question to be determined is whether or not the testimony of the bankrupts in regard to the alleged robbery is to be accepted as true, or rejected as false. It has been said:

"A bankrupt should have the disposition to comply with the law,—candidly to account for his property. The law requires it. He is entitled to fair consideration from the court and its officers. The case is very different where the bankrupt is contumacious, as this man was in the first instance, and as he probably has been in some degree all along. In that case, where the bankrupt fails to testify fully and fairly and truthfully, the court or the referee is at liberty to accept his testimony as it may seem to be supported by other witnesses. If at any point it is found that his testimony is unworthy of credit, it may be rejected altogether." In re Tudor (D. C.) 100 Fed. 796.

On this issue of the alleged robbery, as on the one already disposed of, the referee's finding is fully justified by the evidence. There is no room for controversy but that the bankrupts accumulated the large amount of money, of which they claim they were robbed, for the purpose of in some way concealing it from their creditors. This and the other facts enumerated by the referee are sufficient to determine said issue against the bankrupts. Furthermore, the immediate circumstances of the alleged robbery confirm its improbability. Forcible means were not employed in opening the safe. Neither drill nor explosive was used. The safe was opened by some one familiar with the combination, or else the combination was not turned on the night of the robbery. There was no indication of a forcible entry into the house, other than an auger hole through the back door, designed, apparently, to reach a bolt which fastened the door; and this hole was so located with reference to the bolt and a defective and unused lock as to show that the hole was bored by one who knew of the situation and use of the bolt, as well as the disuse of the lock. To my mind, the boring of this hole was a mere artifice on the part of the bankrupts to divert suspicion from themselves.

Upon the competent evidence in the record, there can be no reasonable doubt but that there was on the part of the bankrupts a deliberate scheme to defraud their creditors, and that the alleged payments to a woman and doctor and the alleged robbery were fictitious, and parts of said scheme. These conclusions are fully warranted by the facts which the referee enumerates in his findings, and strengthened by the further facts that the bankrupts have at other times made or attempted dispositions or arrangements of different pieces of property, which, if successful, will place those pieces of property beyond the reach of their creditors. To some of these dispositions and arrangements I will make hurried reference:

De Gottardi claims to have sold his half interest in the store March 15, 1901, to his brother-in-law, Giorgi, for $1,500 cash, a part of which he says he gave to the woman, and the other part was abstracted from the safe. Righetti in the latter part of the year 1900 drew out of the partnership money, with which he bought a residence in Cayucos, upon which his wife afterwards declared a homestead. Righetti also claims that in October or November, 1900, he gave his wife a note for $2,025, which she still holds. The evidence relat-

ing to these transactions reveals such badges of fraud as to throw serious doubt upon the integrity of each.

The last and most remarkable of the various dispositions of property by the bankrupts charged to have been in fraud of creditors was the transfer on May 1, 1901, to their attorney, F. A. Dorn, of two checks,—one for $2,058.18, and the other for $685.76,—upon an alleged agreement that $2,000 was a retainer for services to be rendered in searching for the burglars, and their prosecution, if found, to final conviction, and the balance to be applied on a past indebtedness of $800. Mr. Dorn, in one part of his examination before the referee, testified to this agreement as follows:

"Q. What did they give you this $2,800 for, Mr. Dorn? A. Well, they gave it to me because they owed me considerable money, and because I demanded it,—I was weary of working on jawbone,—and because I wanted a retainer for my work I expected to do with reference to the robbery. In fact, I was employed to investigate this robbery, trace it out, and discover the robber or burglar, if possible, and prosecute him to a finish if he was found. The whole matter was placed in my hands, and this money was given as a retainer, and on account of what they owed me prior to that time. Two thousand dollars was a retainer, and the balance was applied on an indebtedness which existed in my favor against them at that time."

In another part of his testimony Mr. Dorn stated the agreement thus:

"The understanding was that $2,000 was a retainer in the burglary matter, and anything that might arise out of it, and the balance would be applied on the indebtedness that existed prior to that time. Of course, the two thousand dollars retainer was to cover any services that might be rendered in the robbery or burglary case, whichever you might call it, and any other litigation that might arise out of it."

From other evidence in the case it appears that, early on the morning of the day the two checks were transferred to Mr. Dorn, the bankrupts consulted with Mr. A. M. Hardie, the postmaster at Cayucos, with whom they had frequently advised before in confidential matters. They told Mr. Hardie, in substance, among other things, that they did not propose to be left without anything. The fair inference from Hardie's testimony about his interview with the bankrupts is that they sought him for the purpose of placing in his hands certain papers and other things, so as to get them beyond the reach of their creditors and secure the same to themselves. He told them, in substance, that it was difficult to keep within the protection of the law and yet evade its provisions, and that they had better consult with their lawyer. They immediately telephoned to Mr. Dorn, who for a number of years had been their attorney in different matters, and requested him to come out to Cayucos, which he did. The bankrupts and Mr. Dorn testified concerning this matter. Neither of them was able to specify a single employment or service to make up the alleged past indebtedness which Mr. Dorn told them was $800, and on which they claim nearly that amount was paid. Three cases begun in justices' courts were mentioned by Mr. Dorn, but in one case the testimony expressly showed that he had received his fee, while the inference is a fair one, from all the evidence, that the fees had also been paid in the other cases. Mr. Dorn testified: That

prior to his partnership with Mr. Green, November 15, 1900, he did not keep books of account, and that he had no books showing any services rendered to, or charges made against, De Gottardi & Righetti, prior to that date, and could not remember that he had any business transactions with them from the 15th day of November, 1900, to the 25th day of April, 1901, "unless it was consultations of some sort;" and, when asked if he remembered any consultations, he replied: "No; I don't recall definitely any consultations. In all likelihood, they did consult the firm,—one or the other of the members,—but I have no recollection of any particular transaction." That he never made any demand upon De Gottardi & Righetti for the $800, or any part of it, before the time said checks were turned over to him, nor was any bill ever rendered for the same, or any part of it, and that he had never called on De Gottardi & Righetti for money without getting it. He was asked if the bankrupts made any objection to his claim of $800, and answered:

"Yes, sir; they kicked about it a little bit. They thought it was too much. Something to that effect. I know I learned, from either the expressions on their faces or from what they said, that they thought it was a pretty steep charge. I didn't think they liked it very well."

The cross-examination of Mr. Dorn was as follows:

"Mr. Ach: These are statements in cross-examination by Mr. Dorn without objection by Mr. Ach. The Witness: Referring to the check for $2,058.18, concerning which the witness had testified, and the check or draft for $685.76, marked 'Exhibit H3,' concerning which the witness had been interrogated after the proceedings before the present referee had been commenced, the following order was made by the referee and served on me, after the title of the court and cause: 'The parties hereto being this day in open court; trustee appearing by Henry Ach and Paul M. Gregg, as attorneys; F. A. Dorn in proper person; said parties having stipulated in open court that all testimony taken and produced in the matter of the bankrupts above named, and on the examination of the bankrupts, stand as testimony in this matter, neither of said parties hereto desire to submit any further testimony, and said parties in open court waiving the making and filing of findings of facts herein, and the matter stand submitted upon said testimony. It is hereby ordered that the said F. A. Dorn has in his possession, belonging to the estate of the bankrupts, the sum of $2,743.94; and it is ordered that the said F. A. Dorn pay said money, and all thereof, to Edward Vollmer, trustee in bankruptcy, within five (5) days from and after the date hereof. This order is not made, however, upon the ground or theory that said F. A. Dorn has been guilty of any fraud. That said firm of De Gottardi & Righetti at the time the money above mentioned was received by said Dorn was insolvent, but said Dorn had no knowledge thereof. This order is made without prejudice to the attorneys of the bankrupts making any application for an order allowing them attorney's fee in the matter of said bankrupts' estate. Dated this 3d day of September, 1901, Louis Lamy, Referee in Bankruptcy.' That order was served on me, or, rather, a copy of it; and I turned over to one of the attorneys for the trustee, Mr. Vollmer, the amount specified in the order, to wit, $2,743.94,—being the amount of the two drafts concerning which the witness has testified."

The foregoing is a brief summary of the evidence appearing of record when my opinion was read in open court on the 7th of last month, as hereinbefore stated. Said opinion then contained strictures upon Mr. Dorn different in some particulars from those herein expressed; and, at the conclusion of its reading, Mr. Britt, counsel for bankrupts, requested that said strictures be held in abeyance "un-

til said Dorn may appear before this court, if he may so choose, and exculpate himself from any complicity in an intention to defraud the creditors in this case." Whereupon it was ordered that said opinion, so far as concerns said matter, be held in abeyance for further consideration, and that said opinion be not filed until the further order of the court. On January 25, 1902, Mr. Britt, pursuant to said request and order, submitted in open court (Mr. Ach, counsel for the trustee, being present and making no objection thereto) an affidavit of Mr. Dorn as follows:

"On May 1, 1901, I received from De Gottardi & Righetti, at Cayucos, a telephone message requesting me to go at once to Cayucos. I complied with the request, and reached Cayucos about 12 m. the same day. I did not know of the alleged burglary until I met some parties on the road about ten miles from the city of San Luis Obispo, who informed me that the safe of De Gottardi & Righetti had been robbed the night previous. On reaching Cayucos I was informed by De Gottardi that their safe had been robbed, and that some of their creditors were already threatening attachment. They also made statements to me to the effect that they were entirely solvent, and that pressure from their creditors would only result in loss to the firm and their temporary embarrassment. I believed them to be entirely solvent, even after the loss of the sum alleged to have been stolen, and continued in that belief until some time thereafter, as hereinafter stated. They desired to employ me to trace out the burglary, recover the money, if possible, hire detectives, if necessary, and prosecute to the end the guilty party. Also to represent them in dealing with their creditors, preventing suits, if possible, and appearing for them until payment could be made in case suits were brought. I appreciated the fact that an employment of this kind might involve a great deal of labor and expense. The burglar must first be detected; the evidence found to convict; the trial; the probable appeal to the supreme court; the possibility of a new trial being granted, and a new trial or trials being had. Also that, in their first excitement, creditors might attach and that meetings of creditors would have to be attended. They told me that they had but a small sum of cash in their immediate possession, but that they had several thousand dollars due them from Loeb, Fleishman & Co., of Los Angeles, and they had in their possession the two drafts or checks aggregating $2,743.94, which are in evidence. I asked them to transfer to me the two drafts. They did so, and I accepted the employment. I did not know, and had never heard of the 'Giorgi transaction,' the note transaction with Mrs. Righetti, or the 'Maddona transaction,' at that time. I employed Mr. C. R. Soberanes to work on the case as a detective, and paid him for his services and expenses the sum of $350. I went with Mr. De Gottardi to see the officers of the Commercial Bank, one of their main creditors, who had attached, endeavored to arrange with them for a release of the attachment, and offered to allow any one the creditors might select to take charge of the property for their protection until all creditors were paid. Arranged and attended, by my partner, Mr. Green, at our own expense, a meeting of the San Francisco creditors; and the reception there accorded, by whom, and the manner of accusation, is disclosed by the record. The report of that meeting was my first information of the payment by Mr. De Gottardi to a woman or doctor of any sum of money. I appeared in five different suits brought by creditors, and advanced the necessary costs, aggregating $10. After the adjudication in bankruptcy, a proceeding was instituted before Referee Lamy to set aside the transfer to me of the two checks or drafts in question. I fully appreciated the fact that neither the referee nor the courts in bankruptcy had jurisdiction of this matter, but I appeared, denied any improper motives or intent on my part in the transaction, and tacitly consented to the order being made as disclosed by the record. The order was made, and I paid to the trustee the entire sum received by me, to wit, $2,743.94. I was convinced at that time that De Gottardi & Righetti were bankrupt when they paid me the money, and that it was an unauthorized preference, though I am

still convinced that enough could have been realized from their assets, by judicious management, to have paid their creditors in full. I felt that my honor was involved in this proceeding, and though I was entitled to retain a reasonable fee for services rendered and to be rendered in the bankruptcy matter, and possibly all sums expended, I made no effort to do so; and the order was made, as hereinbefore stated, to pay over the entire sum. That order exonerated me from any blame or wrongful participation in the transaction, though it required me to give up money which I was entitled to retain. No request was made by any of the interested parties that said order, or any part thereof, be certified to this honorable court for review.

"Former Indebtedness. The firm of De Gottardi & Righetti was indebted to me when I made the trip to Cayucos. The amount, extent, or particulars of that indebtedness are not fully disclosed by the record before this court. There was no effort made to collect that fee from this money, and I deemed it not necessary or proper to go into that matter fully before the referee, when it was not at issue. (There is a mass of testimony on this subject taken on the original examination of the bankrupts, though even then no effort was made to present my side of the question.) A claim will probably be presented in this matter on that indebtedness, and, if it is contested, all of the facts in relation thereto will be at issue, and may come before this court for review.

"Reasonableness of Fee. I have been actively engaged in practicing my profession before the state courts for over fifteen years, and am familiar with fees charged and paid for legal services in San Luis Obispo county. The employment might have resulted in appearing and even trying a great number of civil cases; attending an indefinite number of creditors' meetings at different places, so that the business might be carried on to their satisfaction: the possible recovery from the burglar of a large sum of money; the detection of the burglar; finding evidence to convict him; his trial before a jury, which would ordinarily take ten days or more; one or more appeals to the supreme court; and the possibility of one or more new trials. Had these services been rendered, and the whole sum received been paid for the same, the fee would not, in my opinion, have been extravagant or unreasonable.

"Secret Trust. There never was an understanding or intimation that this money, or any part thereof, should be held for the bankrupts, or either of them, or that any of it should at any time be returned to them, or either of them, or held in trust for them in any manner.

"Notice of Decision and Opportunity to be Heard. Had I anticipated that my connection with this matter was under consideration by the court, I would have been present and endeavored to make matters plain to the court. It may be said that I am charged with knowledge of that which the record contains; but I am not a party to this proceeding; my acts have been adjudicated by the referee; his judgment has been complied with, and has not been certified here for review. Under these circumstances, I assumed that the referee's decision was final; that, so far as an adjudication against me was concerned, that the referee's decision stood until certified to this court; that the question of past indebtedness was one which could only arise when a claim was presented; that the amount of a reasonable fee or retainer could only arise on a claim being presented therefor. For these reasons, among others, I have not heretofore explained my connection with this matter to the court."

After a careful review of all the evidence in the case, I am forced to the conclusion that the bankrupts were not indebted in any amount whatever to Mr. Dorn at the time the checks in question were turned over to him. A retainer of $2,000 as a reasonable professional employment to investigate the alleged robbery, and prosecute the thief if found, is too preposterous for serious comment, and even its bona fides might well be questioned. It is true that Mr. Dorn, in his affidavit, states the scope of his retainer much more broadly than he stated it on the witness stand before the referee. Whether or not his

last version, however, if accepted as the correct one, would better the situation it was designed to improve, is doubtful. The bankrupts would not, under the circumstances which surrounded them, have used a large amount of their assets—practically all the cash they had on hand—in the employment of attorneys to negotiate with and obstruct the legal remedies of their creditors, but would have promptly applied the money thus wrongfully used to their just debts, where it equitably belonged, if their purposes had been honest and their dealings upright. One or the other of two things is true,—either the bankrupts transferred said checks to Mr. Dorn with an understanding that he should return to them the money collected thereon, between $2,700 and $2,800, or a part of it, or else the bankrupts were so perturbed and alarmed at their situation that they weakly submitted to an unrighteous exaction. Said transfer would be, under the former alternative, in direct line with, and, under the latter, a natural outgrowth from, the scheme, otherwise shown, to defraud creditors, and is therefore, in either event, corroborative evidence of the falsity of the bankrupts' stories of a robbery and an intrigue with a woman. Mr. Dorn's connection with said transfer cannot be passed over in silence. Although not admitted to the bar of this court, he is a practicing attorney at law, and represented the bankrupts before the referee in the proceedings now under review. If, however, he sustained no professional relation whatever to said proceedings, his participation in a disposition of property by the bankrupts, which the trustee has challenged as fraudulent, would be inseparable from the case; and it is temperate animadversion to say that, giving him the benefit of the least prejudicial of the two alternatives above mentioned, his agency in said transaction cannot be otherwise than grossly offensive to a court of justice.

While I shall not review all the contents of Mr. Dorn's affidavit, there are some things stated therein, which require notice. He says that, when he received the checks in question from De Gottardi & Righetti, he believed they were entirely solvent. How he could have entertained that belief, without closing his eyes to circumstances then apparent, it is difficult for me to understand; and, furthermore, how, in face of the facts that De Gottardi & Righetti were sorely distressed for money to satisfy their creditors, and for many years had been his regular clients, always faithful in the payment of fees, he could, at the most critical emergency of their business career, have exacted from them, partly on past accounts, but mainly as a retainer for future services, over $2,700,—practically all the money they had on hand,—if he believed them to be entirely solvent, is a question to which I can find no satisfactory answer. That part of Mr. Dorn's affidavit devoted to the matter of past indebtedness only confirms the conclusion I first announced on that question, and which was precisely the same as herein stated, namely, "that the bankrupts were not indebted in any amount whatever to Mr. Dorn at the time the checks in question were turned over to him." The statement of his affidavit presumably responsive to this finding is that:

"The firm of De Gottardi & Righetti was indebted to me when I made the trip to Cayucos. The amount, extent, or particulars of that indebtedness are

not fully disclosed by the record before the court. There was no effort made to collect that fee from this money, and I deemed it not necessary or proper to go into that matter fully before the referee, when it was not at issue."

It will be observed that, while he says the firm of De Gottardi & Righetti was indebted to him, he does not name or intimate any amount whatever, and an indebtedness of only $1 would fulfill literally every requirement of his statement. The explanation, of course, is clearly evasive, and a virtual admission of the correctness of the finding. But he says further:

"A claim will probably be presented in this matter on that indebtedness, and, if it is contested, all of the facts in relation thereto will be at issue, and may come before this court for review."

Why does he use the word "probably"? If the claim is just, why should there be any doubt or hesitancy as to its presentation? Moreover, at the time of filing his affidavit, January 25, 1902, nearly five months had elapsed from the date of the referee's order directing him to pay over to the trustee the money ($2,743.94) he received from the bankrupts. This long failure to present the claim, unexplained, and in view of the other evidence relating thereto, ill comports with the idea of its justness. Mr. Dorn's suggestions of lack of notice and opportunity to be heard are without force. On the 22d day of June, 1901, a general reference of this case was made to Wm. D. Stephens, since deceased, but then referee for Los Angeles county, on affidavits alleging, among other things, that said Dorn was attorney for the bankrupts, and charged by the creditors of said De Gottardi & Righetti with having assets in his hands belonging to said firm, and that Louis Lamy, referee for San Luis Obispo county, was so prejudiced in favor of said Dorn that an impartial hearing of the matters to be investigated could not be had before said Lamy. Thereafter, on the 5th day of July, 1901, a notice of motion to vacate said order was filed at the instance of said Lamy, and to this notice, with the names of other attorneys for said Lamy, appears that of said Dorn. In opposition to said motion an affidavit by numerous creditors was filed July 11, 1901, to the effect: That, in the opinion of affiants, the matter of De Gottardi & Righetti, bankrupts, was replete with fraud committed by the bankrupts, and that affiants were informed and believed that Mr. Dorn had been a party to said fraud. That on an examination before some of his creditors at San Francisco, immediately prior to the institution of said proceedings in bankruptcy, De Gottardi declared that he gave about $2,700 to Mr. Dorn on the 1st day of May, 1901; that Dorn claimed $800 for services rendered before that date; "and that he had told Dorn about the robbery, and that he gave Dorn two thousand dollars retainer, to employ detectives, if necessary, and for his advice as to what to do." That said Dorn would be charged with fraud in obtaining said money, and otherwise, and that, owing to the intimate relations between him and said Lamy, the latter could not impartially inquire into and determine said matters. Thus it will be seen that Mr. Dorn, in the earliest stages of these bankruptcy proceedings, was fully advised that searching inquiries were to be prosecuted by the creditors into his dealings with

the bankrupts, and particularly concerning the two checks they transferred to him. Furthermore, the subsequent examination of Mr. Dorn as a witness by the trustee's attorney, in furtherance of said inquiries, was protracted and thorough, and invited from and gave to him every opportunity for full explanations. Mr. Dorn's assumption that the questions of past indebtedness and reasonableness of retainer were not legitimately before the court on this review, but could arise only when claims are made, respectively, therefor, was unwarranted. The chief issues on this review are whether the alleged payments by De Gottardi to a woman and a doctor, and the alleged burglary of the bankrupts' store, were real, or only parts of a scheme to defraud creditors. Manifestly, any fraudulent disposition of property by the bankrupts is pertinent to said issues. When, therefore, the trustee introduced in evidence the transfer of checks to Mr. Dorn, claiming the same to have been a fraud, and the bankrupts sought to justify said transfer on the grounds of past indebtedness to him and a retainer for his future services, these matters became not only proper, but necessary, subjects of inquiry. Mr. Dorn's further assumption that the decision of the referee, ordering him to pay to the trustee, within five days, $2,743.94, money adjudged to be in his possession and belonging to the estate of the bankrupts, and stating that said order was not made upon the ground or theory of fraud, and that at the time Mr. Dorn received the money from the bankrupts he had no knowledge of their insolvency, because unreviewed and final, would be, in the pending proceeding, conclusive of the character of his relations to said money, was unwarranted. The trustee by said decision obtained all the relief he sought, and certainly could not have asked a review on the ground, that, while the order itself was good, the reasons given therefor were unsatisfactory. Besides, the decision expressly recites that findings of fact were waived by the parties, but without that recital the referee's remarks negatory of the ground or theory of fraud could have no greater or other effect than would have been given to an affirmative statement by him, had it been made, of his reasons for the order. Such a statement might be persuasive, but could hardly work an estoppel. Giving to said remarks of the referee, however, the force of an adjudication, they are inoperative here, further than above indicated, for the reason that a judgment in one action cannot be conclusive in another unless the parties to both are the same.

Orders conformably to the views herein announced, affirming the referee's decision, and committing the bankrupts to jail until they comply with the same, or until otherwise ordered by this court, having been already made, the clerk will now enter only an order for the filing of this opinion.

THE FALLS OF KELTIE.

(District Court, D. Washington, N. D. February 18, 1902.)

1. ADMIRALTY JURISDICTION—SUIT BY CITIZEN AGAINST FOREIGN SHIP—RULE OF COMITY.

   An admiralty court of the United States has no right to refuse its process when demanded by a citizen of the United States against a foreign ship for the purpose of having the rights of the parties determined under a maritime contract, such as shipping articles, and to remit the controversy to the determination of the consular representative of the country to which the ship belongs. The right to invoke such jurisdiction is one which belongs to every citizen, and of which he cannot be deprived even by treaty or legislation.

2. SAME.

   While a court of admiralty of the United States will not entertain a suit by foreign seamen against a British ship to determine their rights under shipping articles, yet where one of the libelants is an American citizen, and the court is obliged to take jurisdiction to determine his rights, it will incidentally hear and decide the case as to his co-libelants.[1]

3. SEAMEN—CONSTRUCTION OF SHIPPING ARTICLES—TERMINATION OF TERM OF SERVICE.

   Shipping articles described the voyage for which the seamen became bound as from New York to Shanghai; "thence, if required, to any ports and places within the limits of seventy-five degrees north and sixty-five degrees south latitude, trading to and fro for a period not to exceed three years; voyage to end at a port in the United States, the United Kingdom, or the continent of Europe." *Held*, that the contract was for a voyage, and not for a term of three years, and that such voyage terminated, and the seamen were entitled to discharge, on the return of the ship to a port of the United States.

4. ADMIRALTY—PLEADING—SUFFICIENCY OF LIBEL.

   A libel in rem should state the nationality of the vessel proceeded against, but such allegation is not indispensable when jurisdiction is invoked by a libelant who alleges that he is a citizen of the United States.

5. SAME—MISJOINDER.

   A claim by seamen for damages on account of alleged assaults by the master cannot be litigated in a suit in rem, but, where the libel contains other allegations stating a cause of action in rem, those relating to such claim may be disregarded, as surplusage, and the misjoinder will not be fatal.

In Admiralty. Suit in rem against a British ship by seamen to recover wages. On exceptions to libel.

J. L. Waller, for libelants.

Hastings & Stedman, for claimant.

HANFORD, District Judge. This is a suit by four seamen, one of whom alleges that he is a citizen of the United States, against the British steamship Falls of Keltie, to recover wages earned on a voyage from New York to Shanghai, and thence to Seattle. The shipping articles containing the contract under which they served were signed at the city of New York, before the British consul, and describe the voyage for which the libelants became bound as follows:

From New York to Shanghai, "thence, if required, to any ports and places within the limits of seventy-five degrees north and sixty-five degrees south

[1] Admiralty jurisdiction of suits between foreigners, see note to Fairgrieve v. Insurance Co., 37 C. C. A. 193.

latitude, trading to and fro for a period not to exceed three years; voyage to end at a port in the United States, the United Kingdom, or the Continent of Europe, with liberty to call for orders if required."

The libelants' claim that, by the plain words of their contract, it was fully performed on their part when the ship arrived at Seattle. The British vice consul at Seattle has decided that they are bound by their contract to continue in the service of the ship for a term of three years, and has refused to discharge them, or to order payment of their wages. Notwithstanding his determination, this court granted leave to the libelants to file their libel, and to have process in rem against the ship for the purpose of adjudicating the controversy, in case the proof establishes the claim that one of the libelants is a citizen of the United States. The case has been argued and submitted upon exceptions to the libel, whereby the claimant contests the jurisdiction of this court, and the sufficiency of the allegations of the libel to justify the suit.

The rule of comity which should be observed in dealing with controversies between alien seamen and masters of foreign ships was stated in the decision of this court in the case of The New City (D. C.) 47 Fed. 328; but that rule is not applicable where a party to the controversy is a citizen of the United States. In the treaty between the United States and Great Britain providing for the apprehension and surrender of deserters from the ships of either country while in the ports of the other, an exception was made, exempting from its provisions "citizens or subjects of the country where the desertion shall take place" (27 Stat. 961), so that the local authorities cannot be required to arrest and deliver up a citizen who may desert from a British ship in an American port. The same consideration for the rights of citizens must control when courts are urged to leave a dispute as to the true construction of a shipping contract, and a claim for wages between a citizen and the master of a foreign ship, to be determined by the consular representative of the country to which the ship belongs. I do not think that the courts of any nation will refuse to hear the complaints and enforce the rights of its own citizens or subjects against foreign ships. Certainly this court has no right to refuse its process when demanded by any citizen of the United States. By the constitution of the United States, the people have ordained that judicial power shall be vested in the supreme court, and in inferior courts to be established by law, and that the judicial power shall extend to all cases of admiralty and maritime jurisdiction. The manifest purpose of these provisions is to insure to citizens of the United States means for the redress of wrongs and the enforcement of legal rights. In some branches of jurisprudence the jurisdiction of the federal courts is concurrent with that of the local courts created by and existing under state laws, but the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and cognizance thereof is given to the national courts exclusively. The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; The Glide, 167 U. S. 606–624, 17 Sup. Ct. 930, 42 L. Ed. 296. The executive and legislative branches of the government have no power to remit cases of admiralty and mari-

time jurisdiction for adjudication to any tribunal other than a court established and organized pursuant to the constitution. Jurisdiction of this class of cases cannot be conferred upon state courts by any law enacted by any state, nor by congress; and, a fortiori, no citizen of this country, having a cause cognizable in a court of admiralty, can be required by any law or treaty to seek an adjudication thereof in any foreign country, nor be denied the right to invoke the jurisdiction of the courts specially established pursuant to the constitution for the purpose of rendering justice in such cases. I consider that this court is bound to take cognizance of this case for the purpose of deciding the disputed question whether the libelant Swanson is or is not a citizen of the United States, and, if the court shall find in his favor on that issue, then it must proceed to a final adjudication of all questions which are properly alleged in the libel. The libelants who are not citizens of the United States would not be permitted to sue in this court independently; but, if the court has to entertain the case for the determination of the controversy as to the rights claimed by Swanson, it will incidentally hear and decide the contentions of his co-libelants.

It is my opinion that the contract must be construed as a contract for a voyage, and not for a term of three years. The agreement certainly binds the libelants to continue in the service of the ship, if required, after her arrival at Shanghai, and while trading to and fro within the limits mentioned, for a period not to exceed three years. This period is in addition to the time required for making the run from New York to Shanghai and return to a port in the United States, United Kingdom, or continent of Europe; but the phraseology of the contract excludes the idea that the libelants became bound for a term of three years, unless required to serve while the vessel should be engaged in trading to and fro between Shanghai and ports other than any port of the United States, United Kingdom, or continent of Europe. The contract is explicit that the voyage is to end at a port in the United States, United Kingdom, or continent of Europe; and, as there are many ports in the countries named, and no one in particular is designated as the port at which the voyage should end, the master or owner could choose any port in either of those countries, but could only choose one port; and upon arrival of the ship at a port in the United States the voyage specified was terminated, and the contract was fully performed on the part of the libelants, so that they became entitled to claim their discharge and payment of their wages.

A libel in rem ought to state the nationality of the vessel proceeded against. I consider the libel in this case to be not as perfect a specimen of good pleading as it would be if the nationality of the Falls of Keltie were alleged therein, but the allegation is not indispensable when jurisdiction is invoked by a libelant who alleges that he is a citizen of the United States.

In addition to the wages sued for, damages are claimed for assaults alleged to have been committed by the master. This claim cannot be litigated in a suit in rem, but it is not necessary to file a new or

amended libel on account of this misjoinder. The court will ignore the claim for damages, as surplusage.

The exceptions are sustained as to the claim for damages, and overruled in all other particulars.

In re STORCK LUMBER CO.

(District Court, D. Maryland. March 6, 1902.)

BANKRUPTCY—CORPORATIONS—DISSOLUTION BY STATE COURT—EFFECT.

The sole stockholder of a Maryland corporation filed a bill in a state court alleging its insolvency, and praying the court, under Code Md. art. 23, and amendments, to declare the dissolution of the corporation and appoint receivers. The corporation answered, admitting the allegations of the bill, and the court on the same day entered its decree granting the relief prayed. Thereafter creditors filed a petition asking to have the corporation adjudged bankrupt. *Held*, that a motion to quash the petition in bankruptcy on the ground that the state court had full jurisdiction when it entered its decree dissolving the corporation, and that, therefore, the corporation had no existence when the petition was filed, should be denied, the action in the state court being in the nature of an insolvency proceeding, and the bankrupt act superseding state insolvency laws.

In Bankruptcy.

John E. Semmes, Stephens & Lincoln, and Charles M. Leslie, for petitioning creditors.

William S. Bryan, Jr., for respondent Storck Lumber Co.

MORRIS, District Judge. The Storck Lumber Company, of Baltimore city, is a Maryland corporation, and is one of a large number of trading corporations which Charles E. Corkran caused to be incorporated for the purpose of helping him to carry on his business plans. He held and owned all of its capital stock, and on August 19, 1901, he filed a bill of complaint in equity in the circuit court No. 2 of Baltimore city on behalf of himself and its creditors, alleging that it was unable to pay its debts as they matured in the ordinary course of business, and was insolvent. He prayed that court to exercise the powers given to it by the Maryland Code, art. 23, and the amendments thereto, to declare the dissolution of the corporation, and to appoint receivers of its estate and effects, who should be trustees for the benefit of the creditors and stockholders, and who should act under the direction of the court. The corporation filed its answer at once, admitting the truth of the allegations in the bill of complaint, and consenting to the appointment of the receivers; and on the same day the court entered its decree appointing receivers, adjudging that the corporation was dissolved, and that it be deemed to have surrendered its corporate rights, privileges, and franchises. The receivers were given power to take possession of all its assets, collect the outstanding debts due to it, and to convert all its property into money, and bring the same into court for distribution among the creditors and stockholders according to their legal rights and priorities, and to wind up the affairs of the corporation in conformity to the

provisions of the Maryland law applicable to the winding up of insolvent corporations. The receivers qualified, and were proceeding with their duties, when, on November 18, 1901, certain petitioners, claiming to be creditors of the corporation, filed their petition in this court alleging certain acts of bankruptcy, and asking to have the corporation adjudged bankrupt under the provisions of the national bankrupt law of 1898. The receivers appointed by the state court have appeared in answer to the petition, and have moved to have it quashed upon the ground that the state court had full and complete jurisdiction on August 19, 1901, when it entered its decree dissolving the corporation, and adjudging that it had surrendered its corporate rights, privileges, and franchises, and appointing receivers, and that on November 18, 1901, when the petition in bankruptcy was filed, the defendant corporation was no longer in existence, and all its property was vested in the petitioners.

The question raised by this motion to quash is not clear of difficulty, but it seems that it must be solved by applying the broad principle that the national bankrupt law is to govern the administration of the estate of all insolvent debtors who are within its provisions, and supersedes all the state laws having the like object, when its provisions are invoked by the requisite creditors, and acts of bankruptcy are proven. The Maryland statute for winding up insolvent corporations is in the nature of a proceeding in insolvency. Chapter 263, art. 23, § 264, Act 1894, provides that the bill for the dissolution of an insolvent corporation may be filed by any stockholder, shareholder, or creditor, or by the attorney general of Maryland, or by the state's attorney of the city or county. Chapter 349, § 264a, Act 1896, provides that, when any corporation has been declared insolvent under section 264, all payments, conveyances, and assignments, and all preferences which, if made by a natural person, would have been void or fraudulent under the state insolvency laws, shall, to the like extent, be void or fraudulent, and all its property and assets distributed to creditors as the property and assets of an insolvent debtor are distributed under the provisions of the state insolvent laws; and that the date of the filing of the bill against the corporation shall be taken for the purpose of determining the validity of preferences and for all other purposes as the date of the filing of the petition in insolvency by or against a natural person. The national bankrupt act of 1898 superseded the state insolvent laws, and now, when commercial and manufacturing corporations are so numerous, and are sometimes used, as in this case, more as a cover from individual liability than for more legitimate uses, it can scarcely be supposed, as the bankrupt act especially provides for proceedings against commercial corporations, that it was intended that such a corporation could commit acts of bankruptcy, and escape the provisions of the bankrupt act by applying to be wound up under the state statute, and thus defeat the operation of the bankrupt law. In re Independent Insurance Co., Holmes, 103, Fed. Cas. No. 7,017; Platt v. Archer, 9 Blatchf. 559–569, Fed. Cas. No. 11,213; State v. Superior Court of Kings Co., 2 Am. Bankr. R. 92, 56 Pac. 35; Boese v. King, 108 U. S. 379, 2 Sup. Ct. 765, 27 L. Ed. 760; In re Lengert Wagon Co., 6 Am. Bankr. R. 535, 110

Fed. 927; Scheuer v. Stationery Co. (C. C. A.) 112 Fed. 407; Coll. Bankr. p. 431.

Upon the best consideration I have been able to give the question, I think the motion to quash the proceedings must be overruled.

BEVIN BROS. MFG. CO. v. STARR BROS. BELL CO. et al.

(Circuit Court, D. Connecticut. February 22, 1902.)

1. PATENTS—DESIGNS—INVENTION.
The fundamental question in determining the validity of a design patent is whether the inventive faculty has been exercised to produce something which is original and pleasing to the eye.

2. SAME—IDENTITY OF DESIGNS.
In design patents, the test of identity on questions of anticipation and infringement is the eye of the ordinary observer; and in determining such question the court may avail itself of such common knowledge as is possessed by the general public.

3. SAME—NOVELTY—DESIGN FOR BELL.
The Scranton design patent, No. 33,142, for a design for a bell, is void for lack of patentable novelty. Also *held* not infringed.

In Equity. Suit for infringement of letters patent No. 33,142, granted to Frederick A. Scranton August 28, 1900, for a design for a bell. On final hearing.

Chas. L. Burdett, for complainant.
Simonds & Hart, for defendants.

TOWNSEND, District Judge. At final hearing on bill and answer, defendants deny the validity and their infringement of complainant's patent, No. 33,142, granted to Frederick A. Scranton August 28, 1900, for a design for a bell. The specification says:

"As shown in the drawings, the leading or material feature of my design consists of a body part, a, in the form of an oblate spheroid, and having at one end a circular base, b, joined with the body portion, a, by a smaller neck portion, c, which flares out from the point of union with the body part to its point of connection with the base, b. The body portion of the bell, in the form of an oblate spheroid, has its end approaching a form nearly flat, as shown in the drawings."

The drawings show such an oblate spheroid and neck, and the claim covers "a bell as herein shown and described."

The complainant and defendants are located at East Hampton, Conn., and are rival manufacturers of bells. Up to February, 1901, complainant had sold over 1,700 embodiments of its patent. The bells in question are intended for use on automobiles. The patented design is unlike any other form of automobile bell previously produced.

In support of their denial of patentable novelty, defendants claim to have shown prior designs for door knobs and bells and other devices which so closely resemble the form shown in the patent as to deprive it of all claim to novelty. The answers to defendants' contention as to patentable novelty are as follows: (1) The uncertain and questionable character of the testimony as to the prior existence of the alleged an-

ticipating exhibits; (2) differences of ratio between neck and base in the alleged anticipations and in the patented design, and other differences in configuration; (3) differences in construction and character of use. The objections are well founded in fact as to several, but not all, of the exhibits. Among others, defendants have an old tea bell, which is substantially the same as that of the patent, except that the drawing of the patent shows a central bead on the oblate spheroid. The defense is well taken that the patentee has not only carefully avoided all mention of or reference either to said bead in his specification or claim, or to the fact that the spheroid is in two parts, but, as if out of abundant caution, has specified that "the leading or material feature" is the body portion, "in the form of an oblate spheroid," and the neck.

But irrespective of prior patents and other sufficiently proven exhibits, the defense of lack of patentable novelty stands on a broader foundation than the proof produced in court. In design patents the test of identity, on questions of anticipation and infringement, is the eye of the ordinary observer. And in determining this question the court may avail itself of such common knowledge as is possessed by the general public. The fundamental question is whether the inventive faculty has been exercised to produce anything which is original and pleasing to the eye. Gorham Co. v. White, 14 Wall. 511, 20 L. Ed. 731; Manufacturing Co. v. Odell (D. C.) 18 Fed. 321; Wooster v. Crane, 2 Fish. Pat. Cas. 583, Fed. Cas. No. 18,036; Dukes v. Bauerle (C. C.) 41 Fed. 778; Cahoone-Barnett Mfg. Co. v. Rubber & Celluloid Harness Co. (C. C.) 45 Fed. 582. The eyes of the court cannot be closed to the fact that in the court room itself are electric light fixtures, placed there long before the date of the patent, which show a sphere with a neck and rim so nearly identical with those of the patent that the difference is a mere matter of immaterial proportions. Nor can the andirons of our grandfathers, the door knobs from time immemorial, the old chime bell of the sleigh, the conventional cuspidor, be overlooked. The court must take judicial notice of the oblate spheroid and neck common to the whole field of everyday arts, and must hold that this design is merely a double use,—is, at most, the adaptation of an old form to a new purpose. The defense of want of patentable novelty is sustained.

On the question of noninfringement, as well as patentable novelty, defendants refer to the door knob,—Exhibit No. 5. It is objected that this exhibit is not sufficiently proved, but I think pages 249 and 256a of the Russell & Erwin catalogue have not been successfully discredited. Complainant's oblate spheroid is substantially the same as this door knob; the only material difference in shape being that between the neck portions, for which reason plaintiff's patent should be limited to a design having the neck portion which flares substantially like that shown in the patent. The shape of defendants' bell differs from plaintiff's more widely than plaintiff's differs from the door knob, and therefore defendants' construction does not infringe the patent.

Let the bill be dismissed.

ATLANTA MACH. WORKS v. UNITED STATES.

(Circuit Court, N. D. Georgia. February 10, 1902.)

No. 1,541.

SALE—ACTION FOR PRICE—FAILURE TO MAINTAIN DEFENSE—WITHDRAWAL OF COUNTERCLAIM—EFFECT.

In an action against the United States to recover the contract price of lighthouse lanterns constructed for it by plaintiff, defendant set up in defense an amount claimed to have been paid to third persons, who had a contract to build one of the lighthouses, for damages caused to them by plaintiff's delay in furnishing the lanterns for that particular lighthouse, and introduced in evidence a voucher for the amount paid, but no proof to show the justness of the claim, or how and in what manner the third persons were damaged. The court thereupon suggested that the evidence so offered would be insufficient to prove the defense, and counsel for the government withdrew its counterclaim and pleas setting up the same. *Held*, that plaintiff was entitled to judgment for the amount claimed.

John L. Hopkins & Sons, for plaintiff.

E. A. Angier, U. S. Dist. Atty., and Geo. L. Bell and W. L. Massey, Asst. U. S. Dist. Attys.

NEWMAN, District Judge. This is a suit to recover $3,369, alleged to be the contract price of three lighthouse lanterns constructed by the plaintiff for the United States under a contract with the lighthouse board, represented by Col. D. P. Heap, engineer of the Third lighthouse district. The lanterns appear to have been constructed according to contract, were examined and approved by an inspector duly appointed, were shipped and delivered at the proper destination, and were put in place and used by the United States. It appears that there was some delay in the construction of the lanterns, and while they were, according to the contract, to have been completed by the 15th of October, 1899, they were not, in fact, shipped until November 10, 1899. The failure to deliver the lanterns according to the contract was set up by the United States as a defense to this suit. The only damage claimed on behalf of defendant, however, was an amount alleged to have been paid by the government to Toomey Bros. & Co., who had a contract to build one of the lighthouses in which the lanterns constructed by the plaintiff were to be placed, by reason of damage to them caused by the delay of the Atlanta Machine Works in constructing the lanterns to be placed in that particular lighthouse. The only evidence offered by the government to prove that such damage resulted was a voucher for the amount of $1,728.99 paid by the lighthouse board to Toomey Bros. & Co. apparently on this account. This voucher being offered without any evidence whatever to show the justice of the claim made by Toomey Bros. & Co., or how and in what manner they were damaged, and counsel for the United States stating that he had nothing whatever to support it, the court suggested that the evidence so offered would be insufficient to support the defense, whereupon counsel for the government withdrew its counterclaim, and, by leave of the court, the pleas setting same up were withdrawn. The voucher referred to was paid on April 1, 1901,—more

than seven months after this suit was instituted by the Atlanta Machine Works against the United States. The materiality of this fact, however, it is unnecessary to discuss, in view of what has been stated above. Counsel for the plaintiff have contended in this case that there was really no delay on the part of the plaintiff which cannot be justified under a proper view of the facts. They say the plaintiff had no notice until September 28, 1899, that there was any urgent need for the lantern to be placed in the lighthouse at New Haven, and that there was delay on the part of the government in appointing an inspector, and some few days lost by the inspector in getting the opinion of the officers of the lighthouse board in Washington. Some other interesting questions are raised by the evidence, but it is unnecessary to consider any of them, for the reason that the case is controlled by the entire failure of the government to maintain its defense, as hereinbefore stated, and by its withdrawal of its pleas, as has also been mentioned. It is agreed by the parties that there should be a credit of $25 on the amount sued for, because of that amount having been paid by the government for freight, which was properly chargeable to the plaintiff.

Conclusions of Law.

The conclusion, therefore, necessarily is that the United States are indebted to the plaintiff in the amount of the contract price of these lanterns, less the amount of the freight item referred to, which would entitle it to a judgment for $3,344 principal, with legal interest thereon from December 2, 1899; and judgment is consequently rendered in favor of the plaintiff, the Atlanta Machine Works, against the defendant, the United States of America, for said sum of $3,344 principal, with legal interest from December 2, 1899, with costs of suit.

It is ordered that a transcript of the testimony and a certified copy of the proceedings be transmitted to the attorney general, as required by law.

In re YATES.

(District Court, N. D. California. February 24, 1902.)

No. 3,774.

BANKRUPTCY—WHO MAY BECOME VOLUNTARY BANKRUPTS—DEBTS.

The word "debts," as used in Bankr. Act 1898, § 4, providing that "any person who owes debts, except a corporation, shall be entitled to the benefit of this act as a voluntary bankrupt," must be construed in accordance with the definition given in section 1, subd. 11, as limited to a "debt, demand, or claim provable in bankruptcy," and an unliquidated claim for damages for a personal tort is not such a debt. Where the only debt scheduled by a voluntary bankrupt was a judgment rendered against him by a state court, and it is shown that such judgment was for a personal tort, and that an appeal therefrom had been taken and was pending at the time of the filing of the petition, the effect of which, under the laws of the state, was to supersede the judgment, the adjudication will be set aside and the proceedings dismissed.[1]

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

In Bankruptcy. On motion by creditor to vacate adjudication.

T. B. Hutchinson, for creditor.
Edw. S. Bell, for bankrupt.

DE HAVEN, District Judge. This is a motion by one S. H. Risdon to vacate the decree of this court made January 2, 1902, by which Enoch Yates was upon his voluntary petition adjudicated a bankrupt, and for the dismissal of the petition in bankruptcy. The only debt mentioned in the schedule filed with the petition for adjudication is described as a judgment in favor of said Risdon for the sum of $894, rendered by the superior court of the state of California in and for the county of Napa, on August 31, 1901. The ground of the motion is that Yates is not a bankrupt, within the meaning of the bankruptcy act. It appeared upon the hearing of the motion that the judgment referred to was obtained in an action for a willful and malicious injury to the person of Risdon, the plaintiff therein; that after its rendition, and before the decree of adjudication in bankruptcy, an appeal was taken from that judgment to the supreme court of the state, and such appeal is now pending.

1. It was said by the supreme court of California, in the case of Harris v. Barnhart, 97 Cal. 550, 32 Pac. 589:

"It has been repeatedly held by this court that the operation of a final judgment is suspended by an appeal therefrom, and that pending such appeal the judgment is not admissible in another case as evidence, even between the same parties."

And section 1049 of the Code of Civil Procedure of this state provides:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

The appeal, therefore, from the judgment in the action of Risdon v. Yates suspended its operation, and may result in its reversal; and from this it follows that at the date of the adjudication in bankruptcy there was not, nor is there now, any certainty that the plaintiff in the action referred to will succeed in the recovery of any judgment against Yates. Such being the status of the claim for damages involved in that action, it is clear that Yates was not at the date of the filing of his voluntary petition a bankrupt, within the meaning of the law. Section 4 of the bankruptcy act provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." In subdivision 11 of section 1 of that act the word "debt" is defined as "any debt, demand, or claim provable in bankruptcy"; and subdivision "a" of section 63 of the bankruptcy act enumerates five different classes of debts which may be proved against the estate of the bankrupt, in one of which is included "a claim for a fixed liability as evidenced by a judgment or instrument in writing, absolutely owing by the bankrupt at the time of the filing of the petition against him"; but a cause of action against him for unliquidated damages for a personal tort, such as is involved in the

action of Risdon v. Yates, before referred to, is not within either of the classes named. Subdivision "b" of the same section provides:

"Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

This subdivision is not to be construed as authorizing the proof of claims not declared in subdivision "a" to be provable. Its object is simply to provide that unliquidated claims which fall within the scope of subdivision "a" are to be liquidated in such manner as the court shall direct. Lowell, Bankr. p. 487; and see, also, the well-considered opinion of Judge Marshall in the case of In re Hirschman, 4 Am. Bankr. R. 716, 104 Fed. 69. In the case of In re Maples, 5 Am. Bankr. R. 426, 105 Fed. 919, it was held that the bankruptcy proceeding should be dismissed, where the only debt scheduled was a judgment for willful and malicious injury to the person,—a debt which, although provable under the provisions of the bankruptcy act, would not be affected by a discharge. With much stronger reason should the decree adjudging Yates a bankrupt be vacated, and the proceeding instituted by him be dismissed, because at the date of the filing of his voluntary petition there was no existing provable debt against his estate under the bankruptcy act. It will be time enough for him to apply for relief under the bankruptcy act, and to ask the court to pass upon the many questions which may arise in such a proceeding, when it shall be ascertained that he is indebted to some person upon a claim provable under the bankrupt act.

The order of adjudication is vacated, and the petition in bankruptcy dismissed.

THE SLEEPY HOLLOW.

(District Court, D. Connecticut. March 19, 1902.)

Nos. 1324, 1325.

ADMIRALTY—PRIORITY OF LIENS.

An admiralty lien for towage is inferior to a statutory lien for repairs, the towage having been performed more than six months before, without effort to collect therefor till after, the repairs.

In Admiralty. On exceptions to commissioner's report.

Samuel Park, for Palmer & Son Co.
Wing, Putnam & Burlingham, for L'Hommedieu and others.

TOWNSEND, District Judge. In this case two libels were filed against the house boat Sleepy Hollow. One was for $1,849.84, for services rendered and materials furnished said boat at the shipyard of the libelant, Robert Palmer & Son Company, at Groton, between November 27, 1900, and January 5, 1901,—a certificate of lien for said services being duly filed in the town clerk's office at Groton, as required by the Connecticut statute. The other libel was for $80 for towage service rendered by the libelants, L'Hommedieu et al., on June 25 and 26, 1900. The vessel was sold for $850.

The commissioner finds that the service of towage constitutes a good and valid lien against the vessel; but as the service was rendered nearly six months prior to the time the repairs were made, and as there is nothing in the evidence to show any cause for the delay in collecting the amount due for towage, the claim of the libelant, Robert Palmer & Son Company, for repairs, should take precedence of the claim for towage, and, as the avails of the sale are insufficient to pay both claims, the whole sum should be paid to libelant, Robert Palmer & Son Company.

Libelants, L'Hommedieu et al., except to the report of the commissioner on the following grounds:

"(1) Because the commissioner finds that the libelants' claim is not entitled to payment from the proceeds of the Sleepy Hollow. (2) Because the commissioner finds that the libelants' claim must be postponed in favor of the claim of the Robert Palmer & Son Ship Building & Marine Railway Company, and that the whole of the proceeds must be paid to said company. (3) Because the commissioner finds that the payment of a maritime lien must be postponed in favor of a claim of a lien not maritime, but acquired by virtue of a statute of the state of Connecticut. (4) Because the commissioner did not find that the libelants' claim was entitled to be paid in full, with interest and costs, prior to all other claims."

In the earlier decisions it was held that an admiralty lien took precedence of a statutory maritime lien, but it is now settled that they are of equal rank. The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; The Guiding Star (D. C.) 9 Fed. 521; Id. (C. C.) 18 Fed. 264; The Wyoming (D. C.) 35 Fed. 548. Claims for materials and supplies and for towage are usually considered, in the absence of special equities, of equal rank. Saylor v. Taylor, 23 C. C. A. 343, 77 Fed. 476; Hughes, Adm. p. 339. In these circumstances, as the libelants, L'Hommedieu et al., made no effort to collect their claim for towage service until after the commencement of this action,—nearly six months after the service was rendered,—the whole of the proceeds of sale should be paid to libelant, Robert Palmer & Son Company.

The report of the commissioner is affirmed.

DARNOLD et al. v. SIMPSON.

(Circuit Court, W. D. Missouri, W. D. April 2, 1902.)

No. 2,504.

1. CREDITORS—REMEDIES AGAINST SURETIES—LIMITATIONS.

Though ordinarily creditors will be allowed to proceed against property conveyed by their debtor to secure his sureties, such action must be taken on their part within the statutory period of 10 years, or will be barred.

2. SAME—IGNORANCE OF SITUATION—EFFECT.

The mere fact that the debtor concealed his fraudulent conduct, and that the creditors knew nothing of the situation until a short time before bringing the action, is insufficient to take the case out of the statute of limitations, where diligence on the part of the creditors to discover the situation would have enabled them to secure the property in payment of their debts.

8. SAME—LACHES.

Regardless of the statute of limitations, laches on the part of the creditors in delaying their action 10 years or more may defeat the right.

J. D. Shewalter, for complainants.

Lipscomb & Priest, and Lovelock & Kirkpatrick, for defendant.

McPHERSON, District Judge. This is quite a lengthy bill of complaint, with much immaterial matter therein. In addition thereto, there is an unwarranted and unprovoked attack upon a judge of a state court of the state of Missouri, a gentleman with whom I have no acquaintance, but I have not the slightest doubt is a judge of character and purity. If his rulings were wrong, then why was there no appeal, a course much the better than that of abuse, and allowing a ruling to remain which may or may not be an estoppel? This bill ought to be stricken from the files because of the unseemly language of and concerning the state court of Missouri. But I content myself with making this statement to show my own condemnation of such attacks.

One of complainants is a citizen of Kentucky, and the other of Illinois. and the defendant of Missouri, and the amount in controversy more than $2,000. In 1858 William Hudgins conveyed certain lands in Ray county, Mo., to James Hudgins and Thos. Bayliss, in trust for Mary Darnold, for life, and at her death to her heirs. James Hudgins died in 1862, and Mary Darnold, 1871. Bayliss, as he had the right to do, under said trust deed, sold and conveyed the lands, receiving therefor $1,500. In 1873 the probate court of Ray county, Mo., required said trustee to give bond in the sum of $3,000 for the faithful performance of said trust. William Donaldson, John Harmony, and William Holman signed that bond as sureties. In 1877, Bayliss, the trustee, gave a mortgage or trust deed conveying certain Missouri lands to indemnify said sureties on his bond. Mary Darnold died in 1871. The plaintiffs are two of the four (by inference of the three) heirs of Mary Darnold, deceased. The other heir was settled with many years ago by the trustee. Bayliss, the trustee, died many years ago, but just when does not appear. The sureties on said bond are all dead, and have been for several years. The land covered by the trust deed to secure the sureties was, in 1889, conveyed to defendant Simpson. And this deed is attacked as having been made fraudulently. The prayer is to subject the land covered by the trustee's trust deed given to secure the sureties of the trustee. To this bill there is a demurrer, on the grounds, generally, of the statute of limitations, and that complainants are guilty of laches. Ordinarily, creditors such as complainants are will be allowed to proceed against property conveyed by the debtor to secure his sureties who have agreed to stand good to the creditor for the debtor. I need not fortify this proposition by argument or authorities. But on the face of the alleged cause of action it was barred by the statute of limitations of Missouri, under any phase of those laws. Any date that may be chosen for any act of Bayliss that can be complained of was more than 10 years prior to bringing this action. The only allegations seeking to take the alleged cause of action out from the statute of limitations are that Bayliss concealed his fraudulent conduct, and that complainants knew nothing of

the situation until a short time before bringing the action. But they knew their relationship to the parties to whom the trust was originally created. They knew her residence. The slightest examination of the records of the probate court of Ray county, Mo., would have put them on the track which would have led to the unearthing of the whole situation. The only allegation is that they did not know until recently. This is not sufficient. I do not have before me the exact wording of the Missouri statute. But Indiana, and many other states, have statutes which provide that the party has 10 years in which to bring action after the discovery of the fraud. In Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, was a case in which it was alleged that complainant, only a few months since, had discovered the fraud. But the supreme court held this not sufficient. The court held the bill defective, in that there should have been allegations showing diligence,—showing what had been done to discover the situation. See School Dist. v. Deweese (C. C.) 93 Fed. 602, and Id., 100 Fed. 705–712. In the case at bar it was within complainants' knowledge of who their ancestors were, where their estates were situated, and what courts took jurisdiction over their estates, and the records of such courts were open to their inspection. Had they gone there, they would have ascertained all facts, and the sureties, and property given to indemnify them, would have been subjected to the payment of complainants' claim. The case of Wood v. Carpenter, has been followed with approval many times: Pearsall v. Smith, 149 U. S. 233, 13 Sup. Ct. 833, 37 L. Ed. 713; Felix v. Patrick, 145 U. S. 331, 12 Sup. Ct. 862, 36 L. Ed. 719; Bates v. Preble, 151 U. S. 162, 14 Sup. Ct. 277, 38 L. Ed. 106; Ware v. Galveston City Co., 146 U. S. 116, 13 Sup. Ct. 33, 36 L. Ed. 904; Johnston v. Mining Co., 148 U. S. 370, 13 Sup. Ct. 585, 37 L. Ed. 480,—and by a great many state supreme courts and federal trial courts.

I therefore hold that the alleged cause of action is barred by the statute of limitations, which statute it is the duty of this court to follow.

I do not discuss the question of laches, but, regardless of the statute, I believe and so hold, that the bringing of the action has been so long delayed that complainants ought not maintain the action. There has been no judgment rendered against the debtor, Bayliss. Neither his heirs nor representatives are made parties. Neither the grantor to the alleged fraudulent conveyance nor his heirs are made parties defendant. Complainants content themselves with making the grantee to the alleged fraudulent conveyance, and him alone, a defendant. See Gaylord v. Kelshaw, 1 Wall. 81, 17 L. Ed. 612.

In the absence of reasons for not making the other parties defendant, there are many authorities which hold that the bill is fatally defective.

But these questions I do not decide, as for the other reasons which I have given the demurrer must be sustained. And the demurrer of defendants to complainants' bill is sustained.

In re PURSELL.

(District Court, D. Connecticut. March 18, 1902.)

BANKRUPTCY—PRIOR PROCEEDINGS UNDER STATE INSOLVENT LAWS—EXAMINATION OF TRUSTEE IN INSOLVENCY.

Under Bankruptcy Act, § 21, providing that a court of bankruptcy may require any designated person who is a competent witness under the laws of the state to appear to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under the act, a trustee in bankruptcy could require the examination of a trustee in insolvency appointed in Connecticut more than four months before the commencement of the bankruptcy proceedings, concerning the disposition made by him of the bankrupt's assets.

In Bankruptcy.

A. D. Penney, for the petitioners.

TOWNSEND, District Judge. The question raised herein concerns the power of a trustee in bankruptcy in regard to property assigned to a trustee in insolvency under the Connecticut Statutes more than four months before the commencement of proceedings in bankruptcy. The trustee in bankruptcy attempted to examine the trustee in insolvency as to the disposition of the assets. The trustee in insolvency under the state law filed a petition that all proceedings in regard to the assets in his hands as trustee be stayed and dismissed, and that all examinations regarding said matters should proceed no further.

The facts and the rulings of the referee thereon are stated by him as follows:

"Bankrupts made an assignment in insolvency in the probate court on March 9, 1900, and on March 16, 1900, Willis G. Braley was appointed and qualified as trustee in insolvency of their estate. October 25, 1900, Braley filed an account purporting to be a final account showing that the assets had been entirely consumed in the expenses and charges of the trustee, leaving nothing for the creditors. The hearing on this account has been continued from time to time in the probate court, and that court has never adjudicated upon it. June 18, 1901, the Pursells were adjudicated bankrupt in the United States court, and a trustee was thereafter appointed. The trustee in bankruptcy has summoned Braley to appear before the referee in bankruptcy for an examination as to the disposition of the assets received by him under the assignment in the probate court, and claims that Braley has failed to take part of the assets into his possession, and has sold part of them, through a third party, to himself, and disposed otherwise of part, for the benefit of his family. Braley insists that the probate court only has jurisdiction of his doings under the assignment, and that the district court has no right to examine him in regard to it.

"The main question here is whether a trustee in bankruptcy would have a right to recover judgment against Braley, if it should be found that he has not acted properly and in good faith in respect to the property assigned by the Pursells. A suit for this purpose can only be brought in the state court. Will the state court sustain such a suit? Several cases have been cited in which the proceeding in bankruptcy followed an assignment in a state court. But in each of them the proceedings in bankruptcy were instituted within four months of the assignment. In the present case they are instituted more than a year after. The effect of the United States bankrupt act of 1898 upon the operation of the state insolvent law was carefully considered by the supreme court of errors of Connecticut, its highest appellate court, in Ketcham v. McNamara, 72 Conn. 709, 46 Atl. 146. That was a suit brought by a trustee

in insolvency to set aside a conveyance made in actual fraud of creditors. The court holds that the insolvent law of Connecticut has been suspended by the United States bankrupt act. Referring to the suit by the trustee in insolvency, the court says (page 713, 72 Conn., and page 148, 46 Atl.): 'His only right to maintain such an action comes from the decree by which he was appointed or confirmed. Congress has seen fit to provide a different means of impeaching such transactions, and one that leads to different results, both as to the debtor and his creditors. That no resort to this means has ever been had is not important. It was, after four months from the passage of the act, at latest, the only means that could be pursued to set aside fraudulent conveyances, which, like that in the case at bar, were thereafter executed.' And the following language, although obiter, seems intended to express the opinion of the court upon the point in question: 'Any different construction of the act of congress would often lead to frittering away insolvent estates in legal expenses. One creditor would resort to the state insolvent court. Another, later, would institute bankruptcy proceedings in the district court of the United States. Costs would accrue in each tribunal, and in suits brought under orders of each. Creditors proving claims in the state court would have to present them again in that of the United States, and yet the proceedings there, if taken more than four months after the act of bankruptcy, might result in nothing more than a barren decree adjudicating the debtor, in deed, a bankrupt, but affording no means of reclaiming property which he had previously made way with or placed in the hands of a trustee in insolvency.' The last sentence quoted implies that under the construction of the act of congress adopted by the court, to wit, that the state law has been totally suspended, the trustee in bankruptcy may reclaim property which the bankrupt had previously placed in the hands of a trustee in insolvency, even though the proceedings in the state court were begun more than four months before the proceedings in the United States court. The motion of Braley is overruled, and the examination as to his disposition of the assets placed in his hands by the bankrupt will proceed."

The question is apparently a novel one. No precedents bearing directly upon it have been cited. The statement of the referee also shows that "most of the claims filed with the referee were proved before the commissioners and in the probate court, but ten of the claims filed with the referee, aggregating $591.30, were not so filed."

There is not, as yet, any attempt to set aside any conveyances made in good faith by the trustee in the probate court. Although the account of the trustee in that court was filed considerably more than a year ago, the court has never adjudicated upon it, and it seems most probable that in view of Ketcham v. McNamara, 72 Conn. 709, 46 Atl. 146, cited by the referee, it will proceed no further in the matter. Whether the creditors of the bankrupt can have any remedy in the state courts if the trustee has really abused his position is very doubtful.

It is not necessarily impossible that the property assigned to him may not have been of sufficient value to pay all the claims proved in the probate court, and leave a balance to be recovered by the trustee in bankruptcy. It seems probable that the highest courts in Connecticut would hold an attempt at an assignment in the probate court to be void, except in so far as those who have joined in it or assented to it are estopped from contesting it. If the probate court has jurisdiction, it was the duty of the trustee in insolvency to press the hearing of his account in that court to conclusion.

The bankruptcy law (section 21) provides that a court of bankruptcy may require any designated person who is a competent witness under

the laws of the state to appear to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act. The provisions of this section are apparently broad enough to cover the examination in question. The trustee in bankruptcy should be allowed to test his rights in the state court, and should be allowed to use all means which the bankrupt act places at his command for obtaining the information necessary for the purpose.

The decision of the referee is affirmed.

In re RYAN.

(District Court, M. D. Pennsylvania. April 4, 1902.)

No. 57.

INVOLUNTARY BANKRUPTCY—AMOUNT OF CLAIMS—JURISDICTION.

Payments made by a bankrupt to certain of the petitioning creditors, reducing the aggregate amount of the petitioning creditors' claims below the statutory limit, does not defeat the jurisdiction of the bankruptcy court, where subsequently enough other creditors come in to raise the amount above the jurisdictional limit.

In Bankruptcy. Exceptions to report of referee.

W. J. Young, for exceptions.

C. M. Culver and H. K. Mitchell, for petitioners.

ARCHBALD, District Judge. At the date of filing the petition, October 11, 1901, the claims of the petitioning creditors amounted to $513.80. Subsequently, and before the adjudication, the bankrupt made certain small payments to two of them, amounting in all to $38, which reduced the aggregate amount of the claims as they then stood below the statutory limit. Within a few days afterwards, however, two other creditors, holding claims to the amount of $78.60, petitioned to join in the proceedings. Is this sufficient to sustain the jurisdiction of the court, or was it ousted by the reduction of the claims of the original petitioners below the sum of $500? The referee has found in favor of the proceedings, and I am satisfied that this is a correct conclusion. The petition was good when it was filed, and the proceedings which were thus instituted inured to the benefit of all parties. By the express provisions of the bankrupt act (section 59f), other creditors were entitled to come in at any time and join in them, and the petition could not be withdrawn or dismissed without consent or for want of prosecution until notice had been given them. Section 59g. The purpose of the latter provision undoubtedly is to prevent collusion, and enable creditors to exercise the right to come in if they desire. The payments made by the bankrupt in the present instance, in the evident attempt to oust the jurisdiction of the court, were therefore of no effect, enough other creditors having now joined in the proceedings to raise the amount above the jurisdictional limit.

The report of the referee is confirmed, and an adjudication ordered as prayed for.

CLARK v. ALLEN, Marshal.

(District Court, W. D. Virginia. April 4, 1902.)

1. JUDGMENTS IN CRIMINAL CASES—ENFORCEMENT.
Rev. St. § 916, providing that the party recovering a judgment in any common-law cause in a federal circuit or district court shall be entitled to similar remedies on the same as are provided in like causes by the law of the state, does not apply to judgments in criminal cases.

2. SAME—CONSTRUCTION OF STATUTE.
Rev. St. § 1041, providing that judgments in criminal and penal cases as to the fine or penalty may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced, means only that the government in enforcing judgments for fines and penalties is not restricted to mere imprisonment of the defendant, but may proceed also by execution against his property.

3. SAME—HOMESTEAD EXEMPTION—ASSERTION AGAINST FINE.
Rev. St. § 1042, provides that a poor convict, who has been imprisoned because of the nonpayment of a fine, may be released on making oath that he has no property (exceeding $20 in value), except such as is by the state law exempt from being taken on "civil precept for debt." There is no United States statute expressly making a homestead in Virginia subject to fines imposed by the government. *Held* that, though the homestead laws of Virginia apply only to contract debts, and the exemption cannot be claimed against a fine due to the state, or even against a judgment for tort obtained by a private individual, the exemption may be asserted against a fine due to the United States government.

A. I. Harless, for complainant.
J. C. Blair, Asst. U. S. Dist. Atty.

McDOWELL, District Judge. At a former term J. B. Clark was tried on an indictment charging him with retailing liquor without license (Rev. St. § 3242), found guilty, and sentenced to 30 days' imprisonment and to pay a fine of $100 and costs. He served out his term of imprisonment, and, after having served 30 days on account of the nonpayment of the fine, he made the oath under Rev. St. § 1042, and was released. Thereafter fieri facias was issued directing the marshal to make the fine of $100 and $96.40 costs out of the goods, chattels, and real estate of the convict. Under this execution the marshal levied on certain real estate belonging to Clark and advertised it for sale. After the levy, but before sale, Clark filed a homestead deed, whereby he set apart as a homestead the real estate levied on, as well as certain personal property. He then applied for an injunction restraining the marshal from selling the land. On August 25, 1900, a temporary injunction was granted. The petition praying for the injunction alleges that Clark is a householder and head of a family, and that his entire estate is less in value than the amount exempt under the Virginia homestead laws. The case is before the court on a demurrer to the petition.

The only question presented by counsel is whether or not the homestead exemption can be claimed as against a judgment for a fine in favor of the government. The homestead laws of this state are unlike those generally in force, in that they apply only to contract debts. Article 11 of the state constitution reads: "Every householder or head of a family shall be entitled * * * 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, * * * to the value of not exceeding two thousand dollars to be selected by him." Then follow certain exceptions not now of importance. The statute (section 3630, Code 1887) reads, " * * * on any demand for any debt or liability on contract * * *." The right to select property and set it apart as a homestead after judgment, but before a sale, by filing a homestead deed, is not questioned. In Whiteacre v. Rector, 29 Grat. 714, 26 Am. Rep. 420, the court of appeals of Virginia decided that the homestead exemption cannot be claimed against a fine due the commonwealth, imposed for a violation of the criminal laws. So far as I am advised, this decision, rendered in 1878, has never been overrruled, or ever questioned, by the court of appeals. I am compelled to treat it as the proper construction of the state law. In Frazier v. Baker (1881) 5 Va. Law J. 565, the court of appeals held that the homestead exemption could not be claimed against a judgment for a tort. In Burton v. Mill (1884) 78 Va. 468, the same court made the same ruling as to a judgment for damages for breach of promise to marry, holding such damages to be, not a debt contracted, but a quasi tort. It is true that the late Judge Hughes, United States district judge, Eastern district of Virginia, in Radway's Case (1877) 3 Hughes, 609, Fed. Cas. No. 11,523, held to the contrary. But the rulings of the state court of appeals (the court of last resort) are, I conceive, of higher authority on the construction of the state law. By Rev. St. § 1042, a poor convict who has been imprisoned 30 days, solely because of the nonpayment of a fine, or fine and cost, may be released on making oath that he has no property (exceeding $20 in value) except such as is by the state law exempt from being taken on civil precept for debt. This language clearly includes the property exempt from sale for a judgment on a contract debt. The bearing of this section on the question will be considered later. At present the point of most interest is to learn where, if at all, congress has shown an intent to give to the federal government in the enforcement of fines imposed in Virginia the same rights that are exercised by the state of Virginia in enforcing fines imposed by the state courts for violations of the state criminal laws. By section 916, Rev. St., the party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same as are now provided in like causes by the laws of the state. It is settled that the language—"the party recovering a judgment"—includes the government. Green v. U. S., 9 Wall. 655, 19 L. Ed. 806; Fink v. O'Niel, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196. But this section in terms applies only in "common-law causes." If no similar statutes had been construed, we might be at liberty to treat the term "common-law causes" as including all causes, civil and criminal, other than equity or admiralty causes. But section 721, Rev. St., providing that the laws of the several states shall be regarded as the rules of decision in trials at common law in the courts of the United States, has been construed as not applying to criminal trials. U. S. v. Reid, 12 How. 361, 13 L. Ed. 1023. Section 858, Rev. St., which, after providing cer-

tain rules as to the competency of witnesses, reads, "In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty,"—has also been held not to include criminal trials. Logan v. U. S., 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429; U. S. v. Hall (D. C.) 53 Fed. 352. In view of the similarity of the language used in the three statutes, and of the construction put upon this language by the supreme court, I do not feel at liberty to construe section 916 as applying to judgments in criminal cases.

In this connection section 1041, Rev. St., has given me some trouble. It provides that judgments in criminal and penal cases, as to the fine or penalty, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. But the best conclusion I can reach is that this section means nothing more than that the government in enforcing judgments for fines and penalties is not restricted to mere imprisonment of the defendant; that it may proceed also by execution against the defendant's property, as in civil cases. It would seem, therefore, that congress has not seen fit to provide any greater rights for the federal government when collecting fines imposed in criminal cases by execution than are given individuals in the collection of private debts. It follows that the mere fact that the state of Virginia in collecting fines is not hampered by the homestead laws does not necessarily give the same right to the federal government. It is true that in this state an individual recovering a judgment for a tort has the right to subject the homestead. But nothing follows from this fact except that, when the government recovers in Virginia in a civil action for tort, its judgment can be enforced against the tort feasor's homestead. It does not follow that the government's judgment in a criminal case can likewise be enforced against the convict's homestead. The analogy between a fine and a judgment in tort is strong; but it is only an analogy. If congress had intended that the government should have greater rights in the states where the homestead is not exempt from torts, or in the two states (Thomp. Homest. § 386) where commonwealth fines are not subject to the exemption, than in other states, it would have made some specific provision for such cases.

It is rather startling to be led to the conclusion that in this state the federal government has not as great rights in collecting fines as has the state, and that it has not even as great rights as has an individual recovering a judgment in tort. But I am forced to this conclusion, not only because of the absence of any federal legislation specifically giving the government such rights, but also because of the intent evidenced by section 1042. This section provides for the discharge from prison of a convict if he has no property, exceeding $20, except such as is exempt from civil precept for debt. This implies that the exemption is allowed the convict notwithstanding that his homestead is not by the state law exempt from process for the collection of a state criminal judgment. Otherwise, why "civil precept" for debt? Again, imprisonment for debt, or for the nonpayment of a fine, was ever imposed merely to coerce payment thereof. It would be anomalous to discharge one imprisoned for nonpayment

of a fine, if the very affidavit made to effect his release showed that he had, or might have, property subject to the payment of the fine. If it had been the intent of congress to subject the homestead in Virginia and Georgia to fines, because those two states subject it, I think some special and specific provision would have been made as to those two states. The absence of any such provision leads to the belief that congress, whether to have uniformity throughout the United States in the collection of fines, or because it adopted the view that the homestead was intended for the benefit of the family, and as a shield against the improvidence, indolence, or criminality of the head of the family, intended that in all the states the government should have no greater rights against the homestead than the state law gives to the least favored individual judgment creditors. It is certain, as seen by its own homestead statutes, that congress has adopted the view that the general policy of the homestead exemption laws is a wise one. It is also certain, as is shown by section 1042, that, at least in the majority of the states, congress does not intend that the homestead shall be subjected to the payment of fines imposed for violations of the federal statutes. The federal government is great enough and wealthy enough to make very plausible the contention that congress intended that in every state having any sort of homestead exemption laws the families of poor convicts should have the benefit of such exemptions. These views, which, I must confess, are not entirely satisfactory, are in some measure strengthened by the following language used in the opinion in Fink v. O'Niel, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196:

"Nothing can be more clear than this [referring to section 1042, Rev. St.] as a recognition by congress that in case of execution upon judgments in civil actions the United States are subject to the same exemptions as apply to private persons by the law of the state in which the property levied on is found; and that, by this provision in favor of poor convicts, it was intended, even in cases of sentences for fines for criminal offenses against the laws of the United States, that the execution against property for its collection should be subjected to the same exemptions as in civil cases."

It follows that the demurrer must be overruled.

No opinion is expressed as to the legality of a levy of execution on real estate in this state, since it is unnecessary to determine this question.

WADE v. NATIONAL BANK OF COMMERCE OF TACOMA et al.

(Circuit Court, D. Washington, W. D. March 21, 1902.)

MALICIOUS PROSECUTION OF CIVIL ACTION.

Action will lie to recover for injuries to reputation and business caused by malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter.

At Law. Action to recover damages for alleged malicious prosecution of a civil action, in which the pleadings contained slanderous accusations, injurious to the present plaintiff. Demurrer to complaint overruled.

Stiles & Nash, for plaintiff.

Bogle & Richardson, for defendants.

HANFORD, District Judge. The demurrer to the complaint in this case raises the question whether an action can be maintained to recover damages for injuries to the plaintiff's reputation and business caused by the malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter; there having been in said action no arrest or detention of the plaintiff, nor seizure of or interference with his property by any form of process. Upon the argument the demurrer was well supported by citations from text-books and adjudged cases. Some of the authorities hold that it is contrary to public policy to permit litigants to reverse their positions, and consume the time of the courts in a mere prolongation of disputes which have been once adjudicated. Others maintain that the taxable costs recovered by a defendant in an action is the legal measure of compensation which he may claim for whatever injuries he may have suffered by being compelled to appear in court and defend an action prosecuted wrongfully; and others hold that the courts of justice must be kept open and free to all who may invoke their protection, and that a plaintiff who submits his controversy for adjudication to a lawfully constituted tribunal should not be subjected to the peril of being sued for damages if he fails to secure a judgment in his favor. By other authorities the rule is established that the allegations of a pleading which are relevant to the issue are privileged, in the sense that, although defamatory and false, an injured person cannot maintain an action to recover compensation for any injury caused thereby. On these several grounds, and upon the authorities referred to, the defendants contend that this action cannot be maintained. For the sake of brevity I will give only a list of authorities cited, without arranging them with reference to the several propositions supported, or commenting thereon: Wetmore v. Mellinger, 64 Iowa, 741, 18 N. W. 870, 52 Am. Rep. 465; McNamee v. Minke, 49 Md. 133; Supreme Lodge v. Unverzagt, 76 Md. 104, 24 Atl. 323; Smith v. Buggy Co., 175 Ill. 619, 51 N. E. 569, 67 Am. St. Rep. 242; Tribune Co. v. Bruck (Ohio) 56 N. E. 198, 76 Am. St. Rep. 433; Terry v. Davis, 114 N. C. 31, 18 S. E. 943; Ely v. Davis, 111 N. C. 24, 15 S. E. 878; Mayer v. Walter, 64 Pa. 283; Mitchell v. Railroad Co., 75 Ga. 398; Bitz v. Meyer, 40 N. J. Law, 252, 29 Am. Rep. 233; Potts v. Imlay, 4 N. J. Law, 377, 7 Am. Dec. 603; Rice v. Day, 34 Neb. 100, 51 N. W. 464; Commerce Co. v. Levi (Tex. Civ. App.) 50 S. W. 606; Biering v. Bank (Tex. Sup.) 7 S. W. 90; Johnson v. King, 64 Tex. 226; Tunstall v. Clifton (Tex. Civ. App.) 49 S. W. 244; Eberly v. Ruff, 90 Pa. 259, 1 Am. Lead. Cas. (4th Ed.) 210; Willard v. Holmes, Brook & Haydens Co., 142 N. Y. 492, 37 N. E. 480; Cooley, Torts (1st Ed.) 188, 189; Id. (2d Ed.) 217, 220; Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; Abbott v. Bank, 20 Wash. 552, 56 Pac. 376; Id., 175 U. S. 409, 20 Sup. Ct. 153, 44 L. Ed. 217; Ray v. Law, Fed. Cas. No. 11,592; Luby v. Bennett (Wis.) 87 N. W. 804.

The defendant also contended that, if the action can be maintained, the recovery must be limited to the amount of the actual pecuniary loss, in the way of expenses necessarily incurred in defending the former suit, over and above the taxable costs (Closson v. Staples, 42

Vt. 209, 1 Am. Rep. 316; Eastin v. Bank, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77; Brown v. City of Cape Girardeau, 90 Mo. 377, 2 S. W. 302, 59 Am. Rep. 28; 19 Am. & Eng. Enc. Law [2d Ed.] 652), and that as the complaint alleges expenditures amounting to only $500, and no greater sum can be recovered in any event, the amount involved is not sufficient to make a case cognizable in this court.

On the main question,—as to whether the action will lie to recover damages for injury to reputation and business prospects, there is a conflict of authorities; and, as the point has not been decided by an appellate court having jurisdiction to review the decisions of this court, it is necessary to consider the reasons as well as the authorities. The common law of England, so far as it is applicable to existing conditions in this country, furnishes the rule of decision for the courts in this state; and by the ancient common law cases of this nature were controlled by the elementary principle that a wrongful act causing injury entitled the injured party to compensation in money, and there was no rule barring such an action as this on any theory that the rights of an individual may be sacrificed out of regard for public policy or convenience, or any notion that the prosecution of an action in bad faith, and for the mere purpose of inflicting an injury, is a matter of right or privilege. The first departure from this rule of the common law has been traced to an English statute, referred to in the books as the "Statute of Marlbridge" (52 Hen. III.), which gave a successful defendant the right to recover damages as well as costs in the original action. 19 Am. & Eng. Enc. Law (2d Ed.) 652. There being no statute or rule of practice in this state by which a defendant can claim damages for malicious prosecution without bringing an independent action, we are not required to blindly follow English decisions based upon the statute of Marlbridge. All the arguments which may be drawn from the public policy idea, and from consideration of the evil consequences which may result from making one lawsuit the foundation for another, are proper only for consideration of the legislature. The courts are not authorized to create rules changing the law and denying substantial rights for any such reasons. The gravamen of the wrong charged against the defendants is their bad faith, in misusing judicial process, intentionally, to oppress and injure the plaintiff; and I am unable to accept as a right principle the proposition that to employ the judicial power of the government as an instrument to inflict a wanton injury is any man's privilege. It is my opinion that the true doctrine is affirmed in the text-books and decisions denying that a case such as this must be excepted from the general rule making a wrongdoer liable for damages to a party suffering injury as a consequence of his wrongful act. See Cooper v. Armour (C. C.) 42 Fed. 215, 8 L. R. A. 47, and cases therein cited; Newell, Mal. Pros. §§ 23, 24, 26, 28; Eastin v. Bank, 66 Cal. 123, 4 Pac. 1106; Machine Co. v. Willan (Neb.) 88 N. W. 497; Kolka v. Jones (N. D.) 71 N. W. 558, 66 Am. St. Rep. 615.

Demurrer overruled.

MOORE v. NEW ORLEANS WATERWORKS CO.

(Circuit Court, E. D. Louisiana. March 14, 1902.)

No. 12,973.

1. DRAINAGE COMMISSION—WATERWORKS COMPANY—PROTECTION OF POLICE POWER.

   Both the drainage commission of New Orleans and the New Orleans Waterworks Company are agencies of the state and city in providing for the public health and safety, and both are entitled to the support and protection of the police power in executing their respective functions.

2. WATERWORKS COMPANY—PROPERTY—WATER MAINS AND PIPES.

   The water mains and pipes, as laid in the public streets of New Orleans and forming part of the waterworks system, are the property of the New Orleans Waterworks Company.

3. SAME—REMOVAL OF MAINS AND PIPES BY DRAINAGE COMMISSION—POLICE POWER—PAYMENT OF COMPENSATION—INJUNCTION.

   The drainage commission, in prosecuting its drainage works in the city of New Orleans, cannot require the removal of mains and pipes belonging to the New Orleans Waterworks Company, thereby interfering with the latter's legitimate business by cutting off the water supply through many large tracts of the city, without previously making just and adequate compensation, as required by Const. La., art. 167, declaring that private property shall not be taken or damaged for public purposes without just compensation being first made; and if it attempts to do so, an injunction pendente lite should issue to protect the company's rights.

4. SAME—AGREEMENT BY WATERWORKS COMPANY—VALIDITY AS AGAINST RECEIVER.

   An agreement made by the waterworks company with the drainage commission respecting the removal of the pipes at the former's expense, and the settlement of the rights of the parties in a subsequent amicable suit, not supported by any consideration, however binding on the waterworks company itself, could not bind a receiver afterwards appointed for the company and holding the property for the bondholders under a paramount title.

In Equity.

Robert Moore, an alien, filed the bill in this case on November 14, 1901, praying for the appointment of a receiver for the New Orleans Waterworks Company, a corporation organized under the laws of the state of Louisiana. Frank T. Howard was appointed receiver of said corporation on said date, and duly qualified as such receiver. On February 17, 1902, the receiver filed a petition in the receivership proceeding, praying for an injunction against the drainage commission of New Orleans and the National Contracting Company, to prevent them from interfering with or trespassing upon the property, or disturbing the mains and connections therewith, of the New Orleans Waterworks Company, and praying, further, for reference to a master to take an account of damages already inflicted. A rule nisi was entered on the petition, directing the drainage commission and the contracting company to show cause why an injunction should not issue. The drainage commission filed a return and answer to the rule. The contracting company filed no return or answer to the rule. The matter was heard upon the pleadings, affidavits, exhibits, and arguments of counsel.

Rouse & Grant, for the receiver.

J. R. Beckwith, for the New Orleans Waterworks Company.

Carleton Hunt, for the drainage commission of New Orleans.

PARDEE, Circuit Judge. A full statement of this case covering the pleadings and questions argued and presented is unnecessary, be-

cause on the present application only action pending the litigation is wanted, and the reasons which control my action can be shortly given.

The case has been argued as though the drainage commission of New Orleans was vested with full possession of the police power of the state, to the exclusion of all and any rights of the New Orleans Waterworks Company, while the fact is that both the commission and the waterworks company are agencies of the state and city in providing for the public health and safety, and that both are entitled to the support and protection of the police power in executing and performing the functions respectively assigned; and the work of each would seem to be of equal importance from the sanitary standpoint, as the one is intended to bring a sufficient supply of water into the city for the supply of the inhabitants, and the other to expel from the city the overflow and surface water. If there were only room for one of these agencies, it might be argued with great force that the waterworks company, being prior in time and in possession with its mains and pipes laid, would have the supreme right; but, fortunately for all, there is room for both, and the condition is that with certain removals and transfers of water mains and pipes the plans of drainage as determined by the city and intrusted to the commission can be fully carried out; and the matter in hand here is to determine at whose expense shall be the removal and replacement of the water mains and pipes. It is to be noticed that the commission has been provided with large funds to carry on and execute its work, and to pay the costs and expenses of the same, and this presupposes that, for work done and property taken necessary and proper to the construction, compensation is to be made. Are the water mains and pipes, as laid in the public streets of the city of New Orleans, and forming a part of the waterworks system, the property of the New Orleans Waterworks Company? Unquestionably; because the case shows that many of them as laid were directly purchased from the city under state authority, and the balance have been laid under a contract with the state and city, which contract has been declared valid beyond the impairment by state legislation in Waterworks Co. v. Rivers, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525. Does the waterworks company own this property subject to the legitimate exercise of the police power of the state? Unquestionably; but the waterworks company also owns the property under the protection of constitutional principles, and as declared in the constitution of the state of Louisiana, article 167, which provides "that private property shall not be taken or damaged for public purposes without just and adequate compensation being first made." In prosecuting its drainage works in the city of New Orleans, the drainage commission requires the removing of certain mains and pipes of the waterworks company, with the result that the mains and pipes are taken or damaged, the legitimate business of the waterworks company interfered with and damaged by cutting off the supplies of water through many and large tracts of the city. If carried out, is this the taking or damaging of the waterworks property for public purposes, within the meaning of article 167 of the constitution above quoted? It certainly is a taking and damaging of the property. If part of the

mains and pipes can be removed, why not all? Why cannot the drainage commission go through every street in which there are mains and remove the same? It is no answer to say, "We do not take your property, we just remove it;" for, when removed, it is nothing but iron pipes, and no longer a part of the system. Nor is it an answer to say that after we have removed your mains you may replace them somewhere else out of our way; for this all requires expense, subjects the waterworks company to damage, and is equivalent to saying, "We do not take or damage your property, for after we have removed your mains and pipes you can get others placed elsewhere." This question seems too plain for further discussion.

Is such taking or damaging warranted as a legitimate exercise of the police power of the state without compensation is first made? The question covers a very large field. Many cases have been, and can be, cited, where, in the legitimate exercise of the police power, property has been incidentally, more or less remotely, and, perhaps, even directly, damaged through the exercise of the police power, without requiring compensation to be made to the owners of property so damaged; but I have found no well-considered case, and none has been cited to me, where private property has been actually taken or physically damaged that the owners were held not to be entitled to damages. In National Waterworks Co. v. City of Kansas (C. C.) 28 Fed. 921, there was no such contract as here, and there was a reservation in favor of the city as to the designation of streets, etc., where pipes might be laid. Under a constitutional provision of the state of Illinois, which is very similar to the constitutional provision of the state of Louisiana, the supreme court of the United States, in City of Chicago v. Taylor, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638, have discussed and decided the matter, with the result that the owner was entitled to compensation in all cases where private property has "sustained a substantial injury from the making and using of an improvement that is public in its character, whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential, as in a diminution of its market value." Other interesting cases in this respect are Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L. Ed. 557; Ponchartrain R. Co. v. Board of Com'rs of Orleans Levee Dist., 49 La. Ann. 576, 21 South. 765; Eaton v. Railroad Co., 51 N. H. 504, 12 Am. Rep. 147. See, also, Chicago, B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 978, wherein it is held that "since the adoption of the fourteenth amendment, compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution." In the light of these authorities, and under the facts of this case, I am disposed to hold at this time, and for this case, that the police power of the state, so far as vested in the drainage commission under the legislation which creates the commission, goes to the extent of, and no further than, the right to the joint occupancy of the streets of the city with the waterworks

company, and the right to remove and replace, provided the same can be replaced, the mains and pipes of the waterworks company, wherever necessary to secure such joint occupancy and construct works in accordance with the plans for drainage adopted by the city; but that so far as it may be found necessary in prosecuting the drainage work to appropriate, expropriate, take, or damage the property of the New Orleans Waterworks Company, including the removal and replacing of waterworks mains and pipes, it can only lawfully proceed by previously making just and adequate compensation.

The correspondence introduced in evidence between the president of the waterworks company and the president of the drainage commission with regard to the matter of removing and relaying water mains and pipes, as might be necessary to give the drainage commission right of way, and to the effect that the waterworks company, reserving its rights, would, as notified and required, remove its mains and pipes and replace them elsewhere at the expense of the waterworks company, the same to be adjusted and settled in an amicable suit at the conclusion of the work, is very creditable to the public-spirited waterworks' officials, but it resulted, so far as it was an agreement at all, in an agreement without consideration, and not binding on the waterworks company beyond the pleasure of its board of directors. And, however binding it may have been on the waterworks company, it is not binding at all upon the receiver in this case, who holds for the bondholders under a paramount title. Besides this, the receiver is not in funds nor condition to advance the necessary expenses, and it is somewhat as counsel asserts that the drainage boards and drainage commissions and other temporary public agencies are of a transitory nature, with no certainty of being in existence to meet demands of a receiver, who is also a temporary officer, to be settled at the end of a litigation.

So far as the present suit seeks a relief for outlays and expenses and damages incurred before the appointment of the receiver, it may be left to the termination of the litigation herein in due course. So far as the interferences are made by the drainage commission with the property in the hands of the receiver, and since his appointment, either the drainage commission must remove the waterworks mains and pipes as found in its way and relay the same at its own expense, and without unnecessary hindrance or delay, or must make arrangement with the receiver to do the said work, either by advancing the funds necessary, or by giving satisfactory security to pay the same in due course; or, an injunction pendente lite may issue for the protection of the receiver and the property in the custody of the court.

PEOPLE'S GASLIGHT & COKE CO. v. CITY OF CHICAGO et al.

(Circuit Court, N. D. Illinois, N. D. January 15, 1902.)

No. 25,780.

1. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACT—ORDINANCE REGULATING PRICE OF GAS.

Under the Illinois constitution of 1870, and the general incorporation act adopted in conformity therewith, there is a reserved power in the state to regulate from time to time, within reasonable limits, the rates to be charged by gas companies incorporated under such act, in the absence of explicit contracts created by ordinance fixing such rates. Act June 5, 1897, authorizes gas companies doing business in the same city or town to consolidate into a single corporation, which shall be one of the merging companies, but provides that the consolidated corporation shall be subject to the legal obligations resting upon each of the constituent companies, none of them being, in the contemplation of the act, extinguished. Complainant, a Chicago gas company, was incorporated in 1855 by special act, which, as subsequently amended, gave the city the right to regulate its charges, but provided that it should not have authority to compel the company to furnish gas at a less rate than $3 per thousand feet. Subsequently complainant acquired by consolidation, under Act 1897, the lines of other companies organized after 1870, and later brought suit in a federal court against the city to enjoin the enforcement against it of an ordinance limiting the charge to be made for gas by any corporation or person furnishing the same to 75 cents per thousand feet, the bill alleging that as applied to complainant such ordinance was unconstitutional as impairing the obligation of the contract made by its charter, as denying it the equal protection of the laws, and as depriving it of its property without due process of law. *Held* that, in the absence of allegations showing that the rate fixed by the ordinance was unreasonable, complainant was not entitled to the relief demanded on either of such grounds; that the limitation upon the power of the city to fix rates contained in its original charter did not extend to the lines it acquired, without the consent of the city, by the absorption of other companies; but that it took such lines, under the provisions of the consolidation act, subject to all rights which the city or the state possessed as against the original companies.

2. FEDERAL COURTS—JURISDICTION—CONSTRUCTION OF STATE LAWS.

Whether an ordinance is within the powers delegated to a city by the laws of the state is a question the decision of which belongs primarily to the courts of the state, and a federal court will not determine it, in a suit between citizens of the same state in which its jurisdiction is invoked for the decision of a federal question, unless necessarily involved in such decision.

In Equity. On demurrer to bill.

Meagher & Whitney, for complainant.
C. M. Walker, Corp. Counsel, for defendants.

GROSSCUP, Circuit Judge. The bill is to restrain the city of Chicago from putting in force an ordinance passed October 15, 1900, providing that corporations, companies or persons manufacturing, selling or distributing gas in the city of Chicago for illuminating or fuel purposes shall not charge individual consumers more than seventy-five cents per thousand cubic feet, provided the same is paid within ten days from the rendering of the bill, or eighty-five cents per thousand feet if payment be postponed. The ordinance provides penalties against the company, corporation or person violating its provisions.

It is a general ordinance, relating to all manufacturers and distributors of gas in the city, and applicable to the complainant only because complainant happens to be such a manufacturer and distributor of gas in the city.

The bill, in substance, avers that the complainant is now furnishing such gas at the net rate of one dollar per thousand cubic feet, and that the enforcement of the ordinance in question, compelling a reduction, would be in violation of the contract embodied in the charter of complainant under which its plant was installed and expanded, and, therefore, in contravention of the first paragraph of section 10, article 1, of the constitution of the United States, providing that no state shall pass any law impairing the obligation of contracts; also that its enforcement would be in violation of the fifth amendment to the constitution, providing that no person shall be deprived of life, liberty or property without due process of law; also in violation of the fourteenth amendment to the constitution, providing that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person the equal protection of the laws. Unless, however, the complainant's charter constitutes a contract, it is difficult to see how the ordinance would result in depriving the complainant of its property without due process of law, or be a denial to complainant of the equal protection of the laws. The whole case, therefore, in its constitutional aspect, turns upon the question whether the ordinance violates any contract right of complainant as embodied in its charter.

The complainant's charter was by special act of the legislature, approved February 12, 1855, creating it a corporation with the usual powers and liabilities, with a capital stock not to exceed five hundred thousand dollars, and providing in section 4 that the company should furnish to the city of Chicago, for its public uses, gas at a rate not exceeding two dollars per thousand, and to the inhabitants of said city at a rate not exceeding two dollars and fifty cents per thousand.

February 7, 1865, this act was amended, allowing an indefinite increase of capital stock; repealing expressly the fourth section relating to the limit upon price, and providing that "ten years after the passage of the act the common council of the city of Chicago may by resolution or ordinance regulate the price charged by said company for gas, but said common council of the city of Chicago shall in no case be authorized to compel the said company to furnish gas at a less rate than three dollars per thousand feet." Laws 1865, p. 590.

The contention of the complainant is that no matter what may now be the general power of the city in the way of regulating the price of gas, under the constitution of 1870, and the corporation acts coming into force thereafter, the city may not, without impairing the obligation of complainant's contract, fix for complainant, a price at less than three dollars per thousand feet; and the decree invoked is to maintain this supposed constitutional right of inviolability of contract.

The city contends that in the absence of a clear provision in the charter in maintenance of complainant's contention, the general right of cities to regulate the price of gas is applicable to complainant, as well as to other manufacturers or distributors; and that the clause

in question embodies no such clear prohibition or limitation as to interfere with the city's general right of regulation of rates. It is insisted that the clause was intended, not as a limitation upon the powers of the city, but as a restriction laid upon the legislature itself in respect of further legislation on the subject involved.

The interpretation of the clause is not free from considerable difficulty. It is not easy to see why the legislature should have intended it as a restriction upon itself or its successors; for, however precisely or emphatically such attempted restriction may have been formulated, it would have been an empty phrase when the succeeding legislature came into existence. Nor is it easy to see how the legislature intended that the prices of 1865, measured by the then depreciated dollar standard, should be made perpetual in favor of complainant, in face of the certainty that the legal tender dollar would some time rise to its true value, and that, in the course of events, the cost of manufacturing gas would decrease. But in view of the conclusion to which I have come, it is needless to pivot this case upon the interpretation to be put upon this clause.

The supreme court of the United States in Freeport Water Co. v. City of Freeport, 180 U. S. 587, 21 Sup. Ct. 493, 45 L. Ed. 679, ruled that under the Illinois constitution of 1870, and the subsequent acts, relating to municipalities and the incorporation of companies, there is reserved in the state the power to prescribe in the government of corporations such regulations as it may deem advisable; and that such right of regulation extends to the fixing, from time to time, of reasonable water rates, unless, possibly (and on this the court refrains from ruling), there be an explicit limitation to the contrary in the ordinance or contract under which the works are installed. It is clear, in the application of this decision to the case under consideration, that, as between the state and any gas companies organized under the constitution of 1870, and the act of the legislature in pursuance thereof, under ordinances containing no explicit contract relating to minimum rates, there is a reserved power in the state to regulate, within reasonable limits, the rates from time to time. Whether such power has been delegated to the city is an inquiry, that, for reasons stated later, I need not enter upon. In considering the phase of the case I now approach, it is a matter of indifference whether the general power of regulation be in the general assembly, or in the city as an agent of the state. It is sufficient to the argument that it is lodged somewhere in the instrumentalities of the state.

It was disclosed at argument in answer to inquiries of the court—though not set forth in the bill—that the complainant originally manufactured and distributed gas upon the West side only, and that its South and North side system was acquired through merger or purchase of other gas companies under the consolidation act of 1897.

Two of these companies, the Equitable Gas Company and the Consumers' Company, were organized under the constitution of 1870 and the acts in pursuance thereof. The Chicago Gaslight & Coke Company was organized under a special act of February 12, 1849, amended February 9, 1855; but contains no restriction upon the right of the general assembly, or the city, to regulate from time to time the

prices of gas; nor, so far as disclosed, is there, in any ordinance or contract between these companies and the city, any restriction upon its general right of regulation from time to time.

The act under which the merger of the companies took place, approved June 5, 1897, provides that gas companies organized in Illinois are authorized and empowered to sell, transfer, convey or lease their real and personal property, rights, franchises and privileges, in whole or in part, to any other gas company doing business in the same city, and that such other gas company is authorized to purchase, lease, hold and enjoy such property; also, that gas companies doing business in the same city, town or village may lawfully consolidate and merge into a single corporation (to be one of the merging companies) by complying with a certain procedure therein specified. A further section of the act provides that the consolidated corporation thus organized shall be subject to the legal obligations now resting upon each of the companies so merged, respectively, under their several charters and ordinances, in the same manner and to the same extent as if the companies had remained individual and distinct,—none of said companies being, in contemplation of the act, extinguished.

In answer to an inquiry of the court at argument, counsel for the complainant contended that the merger of the other gas companies with the complainant was the equivalent of the complainant's extension, by original installation, of its works and pipes into the field occupied by the other companies. Were this so, the supposed restriction contained in the charter of 1855 would follow the merger, and extend to the entire system now operated by the consolidated company.

But a little reflection shows this position unsound. The act of 1855 authorizes complainant to erect its works and lay its pipes in the streets and alleys of the city, subject to the consent of the city council. In the absence of consent, no pipes could have been laid. It is possible that the city may not, in mere arbitrariness, withhold its consent, where the consent asked for was in the ordinary development of the complainant's plant; but absence of consent, founded on refusal to extend the field for the application of complainant's three-dollar minimum rate, would not be arbitrary. The city council was, therefore, from the organization of the complainant company, in contemplation of complainant's charter, a necessary party to any substantial extension of its plant, carrying the charter restriction as to regulation of rates. No consent of the city has been given to the merger, and, therefore, no consent has been given to the enlargement of complainant's franchise, as affected by the limitation in the charter of 1855 relied upon. I do not see how the complainant can, in the absence of such consent, carry over to the territory acquired under the merger its supposed charter exemption from regulation of price. A contrary holding would enlarge the subject-matter of this exemption without the consent of the city,—a result which the act of 1855 does not contemplate, but clearly negatives.

The terms of the merger act of 1897 reinforce this conclusion. It specially provides, as already stated, that the consolidated corporation shall be subject to the legal obligations now resting upon each of the

companies absorbed. One of these obligations is (in the absence of a contrary contract provision) to submit to the state's right of reasonably regulating the price of gas from time to time. In this respect, the consolidated company stands precisely where each of the merged companies stood, and, as we have seen, neither of these was exempt from the state's general right of regulation. In respect to the system acquired through the merger, therefore, the complainant has no contract of exemption under the charter of 1855.

It is obvious then from what has been stated, as against the state's power to reasonably regulate rates from time to time, the complainant, to the extent, at least, that it is successor to the merged companies, enjoys under the act of 1855 no exemption from regulation. But it is urged that the powers of the general assembly, in this respect, are not delegated to the city, and, therefore, however this reasoning might apply to the powers of the general assembly, it is inapplicable to any claim of such power upon the part of the city.

I refrain at this time from entering into so far-reaching a question,—a question involving the policy of the state respecting the custody of some of its greatest powers. The question thus raised, growing out of the interpretation of state statutes, is one primarily belonging to the state courts. My jurisdiction of the case under consideration does not extend to that question, unless its decision, one way or the other, is a necessary predicate to the constitutional question involved. I do not see that it is. If I hold that, under existing legislation, the city has not been delegated with the state's power to regulate rates, it is manifest that the real and adequate reason for annulling the ordinance complained of would be, not any provision of the federal constitution, but this lack of power, as shown in the state legislation. On the other hand, if I should hold that the state's power had been delegated to the city, then, according to the reasoning already stated, the injunction prayed for would be refused. Whichever way one looks at this phase of the case, it turns, not on federal constitutional law, but upon the interpretation of the state statutes, and is not, therefore, within the meaning of the judiciary act, a case involving the construction of the laws or the constitution of the United States. If complainant's substantial remedy against the ordinance complained of is lack of power in the city, its relief must be found in the state courts.

Whether, by the merger, the complainant has lost its right to exemption from regulation, to the extent that the consent was given to the installation of its original system, it is not necessary to decide, for the bill asks for no divisional relief. Nor is it necessary to consider the reasonableness of a seventy-five cent rate, as provided in the ordinance, for no facts challenging the ordinance as unreasonable are set forth in the bill.

I realize that this case is one of great importance, both to the city and to the gas company, and that it may finally be brought under the review of the supreme court, and have, therefore, considered it upon a larger survey of the facts than the pleadings before me justify. I suggest that the bill be amended to bring in these facts, or that the demurrer be withdrawn and an answer filed, bringing them in, reserving

the right of demurrer to the bill as it now stands. If the facts thus disclosed are as I apprehend them, an order will then be entered in accordance with the conclusions of the law already stated.

FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. v. NORFOLK & W. R. CO. (HAMPTON, Intervener).

(Circuit Court, W. D. North Carolina. March 20, 1902.)

1. RAILROADS—EFFECT OF RECEIVERSHIP—JUDGMENT AGAINST COMPANY.
A railroad corporation does not go out of existence because of the appointment of receivers for its property, and may be sued, and a judgment obtained against it, notwithstanding the receivership; but, where the cause of action arose before the appointment of the receivers, such judgment does not constitute a debt of the receivership whether the receivers were parties to it or not.

2. SAME—FORECLOSURE SUIT—PREFERENTIAL DEBTS.
A judgment obtained against a railroad company after its property has been placed in the hands of receivers in a suit to foreclose a mortgage thereon for a tort committed by the company prior to the receivership is not entitled to priority of payment over claims of the mortgage bondholders from the earnings of the receivership.

3. SAME—NORTH CAROLINA STATUTE.
Code N. C. § 1255, which provides that the giving of a mortgage by a corporation shall not exempt its property or earnings from execution for the satisfaction of a judgment against the corporation for a tort, can operate only on property within the state; and where the property of a railroad company in the state consisted solely of a lease of the property and franchises of another company, taken subject to a mortgage given by the lessor, and which had been displaced and superseded by the appointment of receivers in a suit to foreclose such mortgage and the subsequent sale of the property therein prior to the rendition of a judgment by a state court against the lessee company for a tort, there were at the time of the rendition of the judgment no property or earnings of the defendant within the state to which such statute can apply, and it does not affect the rights of the judgment creditor with respect to other property or funds of the defendant.

In Equity. Suit for foreclosure of a mortgage. On petition of intervention of Gideon D. Hampton.

The petition of the intervener was as follows:

"The petition of Gideon D. Hampton respectfully showeth to the Court: (1) That on the 22d day of February, 1897, he recovered judgment against the defendant, the Norfolk & Western Railroad Co., in the superior court of the county of Forsyth and state of North Carolina, for the sum of one thousand dollars and costs in an action for tort against the said railroad for personal injuries inflicted by the said railroad upon the said Gideon D. Hampton. That the said judgment remains wholly unpaid and unsatisfied, although demand had been made upon defendant and the receivers hereinafter referred to for the payment thereof. (2) That by an order made in the above-entitled cause on the 7th day of February, 1895, Frederick J. Kimball and Henry Fink, Esqs., were appointed receivers of the properties and franchises of the defendant, the Norfolk & Western Railroad Co. That as such receivers there came into their hands large sums of money, and, as your petitioner is informed, advised, and believes, there are still in the hands of said receivers large sums of money, more than enough to satisfy the judgment of your petitioner; and your petitioner insists that there ought now be paid by the said receivers to your petitioner enough of said funds to satisfy the said judgment and costs. (3) That your petitioner is informed and be-

lieves, and so avers, that from the properties and franchises aforesaid, besides the mortgage properties coming into the possession of the said receivers, there also came into the hands of the said receivers a large amount of properties of the said railroad not covered by any lien or mortgage, the exact amount of which your petitioner is unable to ascertain; but your petitioner avers, as aforesaid, that the same would be more than enough to satisfy his judgment, and therefore asks that the said receivers be ordered to account with petitioner, and show what funds and properties not subject to the mortgage sought to be foreclosed came into their hands. (4) Your petitioner further alleges that the purported lease of the Roanoke & Southern Railway Company to the Norfolk & Western Railroad Company for nine hundred and ninety-nine years was, in effect, a sale; that, although the aforesaid lessee at the time of the injury complained of was nominally operating said road as such lessee, that it was in reality the owner thereof. (5) Your petitioner further prays that an order be passed by this honorable court directing that any property, franchises, leasehold interests, or other property whatever, subject to the lien of petitioner's judgment, be applied to the satisfaction of the same. (6) And your petitioner further prays for such other and further relief in the premises as may be just and proper.

"J. S. Grogan,
"Jones & Patterson,
"Holton & Alexander,
"Attorneys for Petitioner."

"To Watson, Buxton & Watson, Attorneys for Defendant: You will take notice that on the 27th day of January, at 12 o'clock m., 1902, before his honor the circuit judge of the United States circuit court presiding at the city of Greensboro, N. C., at the special term, to be holden, beginning on the 20th day of January, 1902, a motion will be made in the above-entitled cause for the relief demanded in the accompanying petition.

"This January 9th, 1902.

J. S. Grogan,
"Jones & Patterson,
"Holton & Alexander,
"Attorneys for Gideon D. Hampton."

Indorsed on back:

"Executed by delivering a copy of this writ to J. C. Buxton, of the firm of Watson, Buxton and Watson, attorneys for the N. & W. Railroad Co.

"January 13th, 1902.

J. M. Millikan, U. S. Marshal,
"Per A. O. Griffin, D. M."

[Seal United States Circuit Court, Western Dist. of N. C., at Greensboro.]

"A true copy. Test: Sam'l L. Trogdon, Clerk."

J. S. Grogan, Jones & Patterson, and Holton & Alexander, for intervener.

Watson, Buxton & Watson and Jos. I. Doran, for defendants.

SIMONTON, Circuit Judge. This case comes up by petition of intervention in the main cause, of the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company. On 6th February, 1895, under proceedings instituted in the circuit court of the United States for the Eastern district of Virginia by the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company, the defendant company was placed in the hands of F. I. Kimball and Henry Finck as receivers of all of its property and assets. On 7th February in the same year, by auxiliary proceedings had in this court, the appointment of said receivers was recognized and confirmed, and they were made receivers in this jurisdiction. Before the appointment of said receivers, and whilst the Norfolk & Western Railroad Company was operating the

Roanoke & Southern Railway under a lease of 999 years, the petitioner, Gideon D. Hampton, on 21st December, 1894, was injured on the track of the Roanoke & Southern Railway in or near the town of Winston, N. C. On the 6th March, 1895, subsequent to the appointment of said receivers, Hampton instituted a suit in tort in the superior court for Forsyth county, N. C., against the Norfolk & Western Railroad Company, the lessee, for injuries sustained on this leased road. On 22d February, 1897, he obtained a verdict against the defendant in the sum of $1,000, and entered judgment therefor, which judgment was affirmed on appeal by the supreme court of North Carolina on 21st April, 1897. Hampton v. Railroad Co., 120 N. C. 534, 27 S. E. 96, 35 L. R. A. 808. The summons and complaint in this case were served upon H. H. S. Handy, who had been an official of the defendant company at Winston, and who also had been appointed by this court the agent of the receivers, upon whom process might be served. In the suit the firm who were counsel for the receivers appeared and defended the action in the name and on behalf of the railroad company. Some discussion arose in the argument of the present cause upon the question if the suit in the state court was a suit against the receivers. In its terms it was a suit against the Norfolk & Western Railroad for a tort committed by that company before the cause in which the receivers were appointed was instituted. The railroad company did not go out of existence when the receivers were appointed. First Nat. Bank v. Pahquioque Nat. Bank, 14 Wall. 383, 20 L. Ed. 840. It still remained a legal entity, and could be sued, no injunction forbidding it having been passed. Ex parte Bates (C. C.) 84 Fed. 67. The act complained of was not the act of the receivers or their agents. Nor did the receivers make themselves parties to the suit on the record. It may be—no doubt it was—the fact that they instructed defense to be made to the suit. This it was their duty to do. Bosworth v. Association, 174 U. S. 186, 19 Sup. Ct. 625, 43 L. Ed. 941; Davis v. Gray, 16 Wall. 217, 21 L. Ed. 447. But in doing this they did not assume the obligation of the corporation; nor was the judgment against them as receivers for things done in the receivership; nor could it rank as such judgment, even were the judgment against the receivers eo nomine. Conclusive as it might be as to the existence and amount of the plaintiff's claim, the time and manner of its payment must be controlled by the court appointing the receiver. Dillingham v. Hawk, 9 C. C. A. 101, 60 Fed. 494, 23 L. R. A. 517. Having obtained and entered his judgment, Hampton intervened in a cause entitled "Mercantile Trust & Deposit Company v. Roanoke & Southern Railway Company and Norfolk & Western Railroad Company. This cause was instituted to foreclose a mortgage upon the property of the Roanoke & Southern Railway Company, and had ripened into an order for foreclosure, and a sale thereunder; the purchaser being the Norfolk & Western Railway Company. The order for sale had provided as follows:

"The purchaser shall, as part consideration for the railroad property and franchises purchased, take the same, and receive the deed therefor, upon the express condition that, to the extent that the assets or the proceeds of assets in the receivers' hands not subject to any other lien or charge shall be in-

sufficient, such purchaser, his successors or assigns, shall pay, satisfy, and discharge (a) any unpaid compensation which shall be allowed by the court to the receivers; (b) any indebtedness and obligations or liabilities which shall have been contracted or incurred by the receivers before delivery of possession of the property sold in the management, operation, use, or preservation thereof; and (c) also all unpaid indebtedness or liability contracted or incurred by the defendants, or either of them, in the operation of said railroad and property sold, which is prior in lien or superior in equity to said mortgage, except such as shall be paid or satisfied by the receivers, upon the court adjudging the same to be prior in lien or superior in equity to said mortgage, and directing payment thereof."

The intervention sought to subject the property so purchased to the lien of his judgment. The prayer of the intervention was refused. The intervener had based his claim on the provisions of section 1255 of the Code of North Carolina. This section gives priority to a judgment in tort over any mortgage executed by a corporation. The court held that, as the property sold was the property of the Roanoke & Southern Railway Company, lessor, a judgment against the Norfolk & Western Railroad Company, the lessee, did not take priority, under this section, of the mortgage creditors of the lessor, to whose rights the Norfolk & Western Railway Company had succeeded. 90 Fed. 175. Mr. Hampton now files his intervention in the case of the Fidelity Insurance, Trust & Safe Deposit Company against the Norfolk & Western Railroad Company, claiming to be paid out of the earnings and assets which came into the hands of the receivers of the defendant railroad company. It is evident that this is a different proceeding from the first intervention. That sought to subject the purchaser of the property of the Roanoke & Southern Railway Company to the payment of this judgment, which had been obtained against the Norfolk & Western Railroad Company. This intervention seeks to subject funds which came into the hands of the receivers of the Norfolk & Western Railroad Company, during their receivership, to the payment of the judgment. The matter is not res judicata.

Under the decisions of the supreme court of the United States the earnings in the hands of receivers derived from the management of property in their hands are devoted to the payment of claims arising during the receivership, and expenses necessarily incurred in the management. Besides this, when there has been, before or during the receivership, a diversion of earnings to the payment of interest upon the mortgage debt, or to the improvement of the security of the mortgage debt, the courts have required the receivers to restore the amounts so diverted, and to apply them to certain claims for supplies furnished within a limited period before the receivership, which were necessary to keep the railroad company a going concern. Sometimes the necessity to this end for these supplies has been such as to warrant the court in subjecting the corpus of the property to their repayment. This doctrine has been established by a long line of cases, beginning with Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 399, down to Southern R. Co. v. Carnegie Steel Co., 176 U. S. 273, 20 Sup. Ct. 347, 44 L. Ed. 458. And in applying this doctrine the courts are not disposed to enlarge it in any way. They realize the necessity of a court of equity confining itself within very restricted limits in the ap-

plication of the doctrine that in certain cases a court having a road or fund under its control, may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to the receivership. Kneeland v. Trust Co., 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379; Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663. In the Kneeland Case it is said that such priority has been given in a few specified and limited cases. In all the long line of cases referred to, in not one is this extraordinary preference allowed to a judgment obtained, after the receivership, on a tort of the corporation committed before the receivership. After a road has been placed in the hands of a receiver, and is managed and controlled by him, the receivership is responsible for all lawful contracts of the receiver, and for the negligent acts and torts of him or of his agents. A judgment against a receiver for any of these causes of action binds the receivership, and must be paid out of its earnings in the hands of the receiver; and, if these be deficient, then out of the corpus of the property of the proceeds of its sale. Cowdrey v. Railroad Co., 93 U. S. 352, 23 L. Ed. 590; Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672; McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796. But this doctrine is confined to cases in which the act complained of occurred during the receivership. It does not apply to a tort or to an ordinary contract of the corporation before the receivership began. A receiver is not bound by such torts or contracts. Oil Co. v. Wilson, 142 U. S. 313, 12 Sup. Ct. 235, 3 L. Ed. 1025. He cannot be compelled to assume the obligations of a lease made by the company. Railroad Co. v. Humphreys, 145 U. S. 105, 12 Sup. Ct. 795, 36 L. Ed. 690; Railroad Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787, 36 L. Ed. 632. In Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, it is declared that indebtedness for necessary supplies can seldom be allowed priority to the mortgage debt, and, whilst that case allowed priority to claims for rental of cars by and during the receivership, it disallowed such priority to rental of cars prior to the receivership. In Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625, the supreme court refused priority out of proceeds of the sale of a railroad to one who had advanced money to pay operating expenses of a railroad prior to the receivership. If contracts of this character have no priority, surely damages for tort have none, unless such priority is secured by the statute laws of the state.

This brings us to the discussion of section 1255, Code of North Carolina. This section is in these words:

"Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in the courts of the state against such incorporation, for labor performed, nor for materials furnished such incorporation, nor for torts committed by such incorporation, its agents or employés, whereby any person is killed or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

This statute, being a statute of the state of North Carolina, can only operate upon property within that state. It will be noted that this

section gives priority over a mortgage executed by a corporation to a judgment obtained against the mortgagor corporation, and declares that neither the property nor earnings of such mortgagor corporation are exempt from execution for the satisfaction of a judgment. It appears that in the case at bar the Norfolk & Western Railroad Company had a lease of the Roanoke & Southern Railway, its property and franchises. Prior to this lease all the property and franchises of the Roanoke & Southern Railway Company had been mortgaged to the Mercantile Trust & Deposit Company of Baltimore, this mortgage bearing date March 16, 1892. The lease was subordinate to the mortgage. On 29th May, 1896, the Mercantile Trust & Deposit Company of Baltimore filed its bill for foreclosure of this mortgage against the Roanoke & Southern Railway Company, the mortgagor and lessor, and the Norfolk & Western Railroad Company, the lessee; and on the same day F. J. Kimball and Henry Fink were appointed receivers of the Roanoke & Southern Railway Company, and were put in possession of all its property and franchises, thus displacing and superseding the lease. This bill of foreclosure culminated in a decree for sale. Under this decree all the property and franchises of the Roanoke & Southern Railway Company were sold, the sale was confirmed by the court, and on the 25th November, 1896, a deed sextipartite was executed, Messrs. Bowden and Sharp, special masters of the court, being of the first part, Kimball and Fink, receivers of the Roanoke & Southern Railway Company, of the second part, the Mercantile Trust & Deposit Company, of Baltimore, trustee under said mortgage, of the third part, the Roanoke & Southern Railway Company, of the fourth part, certain other persons (Glyn and others), of the fifth part, and the Norfolk, Roanoke & Southern Railroad Company, of the sixth part; whereby the whole of the property and franchises of the Roanoke & Southern Railway Company was conveyed to the party of the sixth part in fee. So that it appears that when the judgment of Gideon Hampton against the Norfolk & Western Railroad Company was obtained (February 22, 1897) the lease of the Norfolk & Western Railroad Company had been displaced by the proceedings for the foreclosure of a mortgage prior to the lease, and that on the day the judgment was entered the whole property of the Roanoke & Southern Railway Company had for nearly six months been conveyed to another wholly distinct corporation, in whose property and earnings at the date of the judgment the Norfolk & Western Railroad Company had no interest whatever. There was, therefore, no property upon which this section of the Code could operate, over which the Norfolk & Western Railroad Company had given a mortgage, or in whose earnings it shared,—nothing which could be taken in execution. The record does not disclose any other property of the Norfolk & Western Railroad in North Carolina, covered by mortgage, to which section 1255 of the Code of North Carolina can apply. The only other property in North Carolina in which the Norfolk & Western Railroad Company had an interest,—the Durham Division,—like the Roanoke & Southern, was held under a lease from the Lynchburg & Durham Railroad Company to the Norfolk & Western Railroad Company, subsequent to and subordinate to a mortgage of the lessor

company. This mortgage was foreclosed in 1896. So at the entry of this judgment the Norfolk & Western Railroad Company had lost all estate and interest in the Durham Division and its earnings.

The petition of intervention is dismissed.

MUTUAL LIFE INS. CO. OF NEW YORK v. PEARSON.

(Circuit Court, D. Massachusetts. March 28, 1902.)

No. 1,486.

1. EQUITY—JURISDICTION—ADEQUACY OF LEGAL REMEDY—DISCRETION OF COURT.
The application of the rule that equity jurisdiction cannot be invoked where there is an adequate remedy at law depends on the circumstances of the particular case, and rests in the sound discretion of the court, where there are any circumstances which show that the legal remedy may not be perfect and complete.

2. CANCELLATION OF INSURANCE POLICY—FRAUD—CONCEALMENT OF ILLNESS.
Insured applied for a life policy, his application reciting that the insurance should not take effect "until the first premium shall have been paid during my continuance in good health." On January 6th thereafter, insured became suddenly ill with appendicitis, and the following day his private secretary paid the first premium to the agents, and received the policy from them, concealing the fact of insured's illness. On January 8th insured died. It appeared that the insurance company and insured's executors were citizens of different states, and also that the policy as issued did not call for the payment of a stipulated sum of money, but for the delivery of 240 bonds, of $1,000 each, payable 35 years from date, with interest coupons annually. *Held*, that the company's remedy by way of defense to an action at law was inadequate under the facts, and that it could sue in equity for the cancellation of the policy.

In Equity.

Lewis S. Dabney, Edward Lyman Short, and Reginald Foster, for complainant.

Alfred Hemenway and Charles T. Gallagher, for defendant.

COLT, Circuit Judge. This bill in equity seeks the delivery and cancellation of a life insurance policy on the ground of fraud and conspiracy, and an injunction against bringing any suit upon the policy. The defendant has demurred to the bill. The principal grounds of demurrer are that the bill does not state such a cause of action as entitles the complainant to relief in equity, and that it appears from the bill that the complainant has a plain, adequate, and complete remedy at law.

The inherent power of a court of equity to set aside a contract obtained by fraud is ancient, familiar, and elementary; and the only serious question raised by the demurrer is whether, upon the state of facts set forth in the bill, the complainant has an adequate and complete remedy at law.

The material facts disclosed by the bill are as follows: On December 27, 1900, James C. Pearson applied to the Mutual Life Insur-

ance Company of New York, complainant, for a contract of insurance. The application contained the provision that this contract "shall not take effect until the first premium shall have been paid, during my continuance in good health." A few days later, after Pearson had been examined by the medical examiner of the company, the application was approved. A contract of insurance was then made out for 240 bonds, of $1,000 each, payable in 35 years from their date, bearing interest at the rate of 4 per cent. per annum, payable semiannually. On January 8, 1901, the policy was handed to Fowler & Streich, agents for the company, to be delivered to Pearson upon the payment by him of the first annual premium of $15,594.90. On January 6, 1901, Pearson, while on his way from New York to Boston, suddenly became ill with appendicitis, and on arrival in Boston was taken to a private hospital. On January 8th an operation was performed, and he died about noon the next day. On January 7th, Oliver H. Story, the private secretary of Pearson, after an interview with him at the hospital, and with full knowledge of his illness, went to New York, and on January 8th obtained possession of the policy from Fowler & Streich by the payment of the first premium. Story fraudulently concealed from Fowler & Streich the fact that Pearson was in the hospital and dangerously ill. This fact was not known to the company, or to any of its officers or agents. If known, the premium would not have been received, or the policy delivered. Pearson died before Story could deliver the policy to him, and before Fowler & Streich had paid over to the company the premium. The company, upon learning of Pearson's sickness, refused to receive the premium from Fowler & Streich, and at once tendered Story the premium, and demanded the return of the policy, which was refused. Upon the probate of the will of Pearson, and the appointment of the executrix, the company again tendered the premium, and demanded a return of the contract, which was again refused.

The application of the rule that equity jurisdiction cannot be invoked where there is an adequate remedy at law depends upon the circumstances of each case. Watson v. Sutherland, 5 Wall. 74, 79, 18 L. Ed. 580. In a broad sense, the application of the rule rests upon the sound discretion of the court, where there are any circumstances which show that the remedy at law may not be perfect and complete. Boyce v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655; Sullivan v. Railroad Co., 94 U. S. 806, 811, 24 L. Ed. 324. In view of the circumstances under which the defendant gained possession of the policy, the complainant is clearly entitled to a prompt and complete remedy. It appears from the bill that, pending negotiations, or before the contract had been perfected by the payment of the first premium, the assured had become suddenly ill of appendicitis, and that this fact was fraudulently concealed from the complainant; in other words, that the delivery of the policy was procured by the fraudulent concealment of a material fact affecting the subject-matter of the contract. It may be said, therefore, that the minds of the parties never met with relation to the subject-matter of the contract, for the reason that, before the completion of the contract, the subject-matter had changed; and it follows that the

contract is absolutely void ab initio. The bill is not founded upon breach of warranty, but states a case in which the possession of the policy was obtained by fraud of a character which goes to the very essence of the contract, and prevents the existence of any contract except in form. The case presented would not have differed in principle had the bill alleged that the assured had died before the completion of the contract, and that this fact had been fraudulently concealed from the company at the time the first premium was paid and the policy delivered. The complainant having stated a case which entitles it to the speedy surrender and cancellation of the policy, the remedy at law is not perfect and complete, for the following reasons: If the relief prayed for be denied, and the bill be dismissed, the complainant must wait until the defendant brings an action at law in some court. The defence to an action at law, the bringing of which is dependent upon the will of the defendant, does not afford the complainant that prompt and efficient relief which it may justly claim, under the bill.

In Bank v. Stone (C. C.) 88 Fed. 383, 391, Judge Taft said:

"It would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law cannot be adequate if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.'"

In that case, Mr. Justice Harlan and Judge Lurton sat with Judge Taft.

In Schmidt v. West (C. C.) 104 Fed. 272, 275, the court said:

"It may well be doubted whether a defense at law is an adequate remedy in any case in which it cannot be used until the wrongdoer, or one claiming under her, sees proper to put the machinery of the law in motion to enforce her pretended right. For there would be, not only no adequate remedy, but no affirmative remedy whatever, available to the complainant, unless a court of equity may entertain jurisdiction and grant appropriate relief for the wrong."

In Insurance Co. v. Cable, the circuit court of appeals for the Seventh circuit, in overruling the demurrer to a similar bill for the cancellation of a policy, on the ground that the remedy at law was not adequate and complete, said:

"The remedy open to the plaintiff is one not under its own control, but in the control and discretion of the opposite party." 39 C. C. A. 264, 98 Fed. 761, 763.

It further appears that the complainant is a citizen of New York, and the defendant a citizen of Massachusetts, and that consequently the complainant is entitled to litigate in the federal courts, and that it should not be obliged to answer to a threatened suit in the state courts of Massachusetts, and especially if it be true, as alleged in the bill, that the complainant would thereby be prevented from putting in Pearson's application as evidence, or having it considered as part of the contract. Insurance Co. v. Cable, 39 C. C. A. 264, 98 Fed. 761, 763.

Again, the policy does not call for the payment of a certain sum of money, but for the delivery of 240 bonds, of $1,000 each, payable 35 years from their date, with interest coupons payable semiannually. Under this contract, the defendant might sue upon each coupon as it became due, and thus put the complainant to the trouble and expense of defending for many years a multiplicity of actions brought in various jurisdictions. Buzard v. Houston, 119 U. S. 347, 352, 7 Sup. Ct. 249, 30 L. Ed. 451.

It is true,—where a contract of insurance for the payment of a definite sum of money has been perfected and one or more premiums paid, and the amount payable has become due, and the defense is the ordinary breach of warranty,—that a court of equity will refuse, as a general rule, to take jurisdiction upon a bill brought by the insurance company to cancel the policy, both on the ground that the defense at law is adequate, and because such issues of fact are more properly triable by jury; and this is especially true where an action at law is already pending in the same court. Insurance Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Hoare v. Bremridge, 8 Ch. App. 22. But in cases like the present bill, where possession of the policy has been obtained by gross fraud, intentional or otherwise, and there are special circumstances showing that the remedy at law will not be "as practical and efficient to the ends of justice and its prompt administration," a court of equity will entertain jurisdiction of the bill. Insurance Co. v. Cable, 39 C. C. A. 264, 98 Fed. 761; Id., 49 C. C. A. 216, 111 Fed. 19; Insurance Co. v. Dick (Mich.) 72 N. W. 179, 43 L. R. A. 566; Trail v. Baring, 4 Giff. 485; British Equitable Ins. Co. v. Great Western Ry. Co., 38 Law J. Ch. 132, 20 Law T. (N. S.) 422.

Demurrer overruled.

In re MONROE.

(District Court, D. Washington, N. D. April 7, 1902.)

1. BANKRUPTS—DISCHARGE—EFFECT.

A bankrupt's discharge will not release him from any debt omitted from the schedule annexed to his petition, where the omitted creditor had no notice or knowledge of the bankruptcy proceedings in time to have proved his claim.

2. SAME—SETTING ASIDE.

The omission is not ground for setting aside the discharge because not prejudicing the creditor.

Voluntary Bankruptcy.

Heard upon an application by the Capital Brewing Company, a creditor, to vacate an order discharging the bankrupt from his debts, the creditor alleging in its petition that it was not listed in the schedule of creditors annexed to the petition filed by the bankrupt, and did not have notice or knowledge of the proceedings, until after the time allowed for making proof of debts had elapsed, and charging that the bankrupt has been guilty of fraud in concealing valuable assets, which should have been scheduled.

Pierre P. Ferry, for petitioner.

Hugh A. Tait, for bankrupt.

HANFORD, District Judge. One of the fundamental principles in the jurisprudence of this country is that no man can be deprived of any legal right by a judicial proceeding to which he is not a party, and of which he has not received lawful notice or had actual knowledge. Upon this principle, I hold that the bankrupt in this case has not obtained a discharge from any debt which was omitted from the schedule annexed to his petition which may be due to a creditor who did not have notice or knowledge of the bankruptcy proceedings in time to have proved his claim. Creditors who have not been notified of the proceedings in the manner prescribed by the bankruptcy law are not estopped from asserting their rights by reason of mere failure on their part to be diligent in discovering the insolvency of their debtors or their resort to a court of bankruptcy. As the petitioning creditor has not lost any rights by the order of the court discharging the bankrupt from his liabilities, this proceeding to vacate that order is unnecessary.

Demurrer to petition sustained.

In re MANHATTAN ICE CO.

(District Court, S. D. New York. July, 1901.)

BANKRUPTCY—PROVABLE CLAIMS—REQUISITE AMOUNT.

An ice company agreed to deliver ice to the petitioning creditors in bankruptcy for specified terms, and at a specified price, and afterwards broke the agreement. The current damages sustained by petitioners up to the time of the filing of their petition did not aggregate $500, but the ruling market price of ice was such that new contracts could not be made for the terms covered by the old contracts without such loss to petitioners as would in the aggregate exceed that sum. *Held*, that the loss for the entire term was provable, and not merely the current damages, and therefore petitioners were creditors for an amount sufficient to give the court jurisdiction.

Moritz Frank, for petitioners.
Samuel H. Wandell, for Manhattan Ice Co.

THOMAS, District Judge. This is a proceeding instituted May 4, 1901, to adjudge the Manhattan Ice Company, a corporation organized under the laws of New Jersey, but doing business in the state of New York, an involuntary bankrupt. Each of the petitioning creditors entered into a written contract with the company, whereby the latter agreed to deliver to such creditor all ice to be consumed on its premises for a specified term, at the price of two dollars per ton, with weekly payments, for the following terms: Stern Bros., from January 1, 1901, to January 1, 1903; Yaretsky, March 13, 1901, to March 13, 1903; Mendelowitz, January 1, 1901, to January 1, 1906; Pannamacoor, March 13, 1901, to March 13, 1903. Shortly thereafter attachments were levied against the property of the bankrupt, and temporary receivers were appointed by the state courts in New Jersey and New York. This resulted in a failure on the part of the company to make delivery, and the creditors have been compelled to make other arrangements for the future delivery of ice, at higher prices.

Upon a previous hearing it was urged on the part of the respondent, as the claim of each of the creditors was unliquidated, it was not provable in bankruptcy, so as to give the several petitioners standing as creditors. This objection was overruled by Judge Brown, and a reference was ordered for the purpose of determining whether the claims were sufficient in amount to meet the requirements of the act. The conclusion of Judge Brown will not be reconsidered.[1] From the evidence taken before the referee, it appears that the current damages sustained by the petitioners up to the time of filing of the petition did not aggregate $500, but that the ruling market price of ice during the time intervening between the failure of the respondent to meet its contract and the time of the filing of the petition was such that new contracts could not be made for the terms covered by the old contracts without such loss to the petitioners as would amount to the sum requisite to give the court jurisdiction. Therefore the question is whether the whole damages for the term are provable in bankruptcy, or only such sum as the petitioners were obliged to pay in excess of the contract price up to the time of the filing of the petition. The petitioners owned contracts which bound the respondent to furnish them ice for ther business through specified terms. That contract was broken. The petitioners were obliged to pay, for the time intermediate the breach of the contracts and the filing of the petition, prices in excess of that reserved by the contracts, and could not replace the contracts at prices as favorable as those provided by the contracts. Such evidence tends to show that the petitioners could not replace the contracts without suffering a direct loss much in excess of $500. Whatever such loss was, that they were entitled to recover, without awaiting the expiration of the time for which the contracts were to continue. Baker Transfer Co. v. Merchants' Refrigerating & Ice Mfg. Co., 12 App. Div. 260, 42 N. Y. Supp. 76; Lavens v. Lieb, 12 App. Div. 487, 42 N. Y. Supp. 901; Wakeman v. Manufacturing Co., 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676; Sulzbacher v. J. Cawthra & Co., 14 Misc. Rep. 545, 36 N. Y. Supp. 8, affirmed in court of appeals 148 N. Y. 755, 43 N. E. 990; Dart v. Laimbeer, 107 N. Y. 664, 14 N. E. 291.

The petitioners are creditors for the requisite amount.

[1] The following is the opinion referred to, which was handed down May 21, 1901, by Brown, District Judge: "The practice in this district is that a creditor having a provable debt may be a petitioning creditor, though the debt is unliquidated. These creditors evidently have a present fixed debt to some amount. Only a trial can determine the amount of the debts. If insufficient in amount, the petition will be dismissed, unless others join. The defense must be taken by answer. Motion denied."

GABRIEL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. April 10, 1902.)

CUSTOMS DUTIES—LITHOPHONE.

The decision of the board of general appraisers that "lithophone" was assessable as "sulfid of zinc, white," within Tariff Act July 24, 1897, par. 57, and not as "white paint or pigment containing zinc, but not containing lead," within the same paragraph, where amply supported by evidence, will not be disturbed by the circuit court on appeal.

Appeal from a Decision of the Board of United States General Appraisers.

W. Wickham Smith, for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

COXE, District Judge. The imported merchandise in question consists of "lithophone." The collector assessed duty at one and one-fourth cents per pound as "sulfid of zinc, white," under paragraph 57 of the schedule for "paints, colors, and varnishes" of the tariff act of July 24, 1897. The importers protested, insisting that it should have been classified under the same paragraph as a "white paint or pigment containing zinc, but not containing lead." Paragraph 57 is as follows:

"Zinc, oxide of, and white paint or pigment containing zinc, but not containing lead, dry, one cent per pound; ground in oil, one and three-fourths cents per pound; sulfid of zinc white, or white sulphide of zinc, one and one-fourth cents per pound; chloride of zinc and sulphate of zinc, one cent per pound."

The question before the board was one of fact, namely, was "lithophone" commercially known as "sulfid of zinc white, or white sulphide of zinc," on the 24th of July, 1897, and prior thereto?

The board have written an elaborate and carefully considered opinion reviewing the testimony of the 19 witnesses examined and have reached the following conclusion:

"We find that the article before us, while known as lithophone or lithofone, is also commercially known as sulfid of zinc, white, and hold that it is properly assessable for duty as such at the rate of 1¼ cents per pound."

Additional testimony was taken in this court, but it only strengthens the conclusion of the board.

Their finding on the facts is not against the weight of evidence. On the contrary, it is amply supported by evidence, and should not be disturbed, within the well-known rule so often followed in this court.

The decision of the board is affirmed.

THE TURQUOISE.

(District Court, E. D. Pennsylvania. April 9, 1902.)

No. 46 of 1900.

INJURY TO STEVEDORE—LIABILITY OF SHIP—CREW WORKING FOR ANOTHER THAN THE SHIP.

A ship is not liable for injury to a stevedore in unloading the ship, through negligence of the winchmen, though they were members of the ship's crew, they at the time being under a special contract of hire, either for the consignee or the head stevedore.

In Admiralty.

Eugene Raymond, for libelant.
Horace L. Cheyney, for respondent.

J. B. McPHERSON, District Judge. This is a suit to recover damages for personal injuries suffered by the libelant while assisting to unload the steamship Turquoise in March, 1900. He was a stevedore engaged in unloading asphalt from the hold, and was hurt by the falling of a heavy iron bucket; the fall being due, as he asserts, to the negligence of one or both of the two winchmen that were helping to hoist and lower. It is unnecessary, however, to determine the correctness of this assertion, because, even if the negligence of the winchmen be assumed, it appears clearly that they were not the servants of the vessel, but were the servants either of the Barrett Manufacturing Company, the consignee of the cargo, or of the head stevedore who was employed by the company to unload. Against which of these persons the libelant should have proceeded is not now material, but the testimony makes it plain to me that the ship, at least, is not liable. It is true that the winchmen were the second mate and a seaman from the vessel's crew, but during the night when the accident happened they were working under a special contract of hire, either for the consignee or for the head stevedore. They were paid for their services by an agent of the consignee, and for the time being were not the servants of the ship. The libelant has apparently brought his action against the wrong person, and the libel must therefore be dismissed.

In re PHILADELPHIA & LEWES TRANSP. CO.

(District Court, E. D. Pennsylvania. April 8, 1902.)

BANKRUPTCY—CORPORATIONS SUBJECT THERETO—CARRIERS—TRADING OR MERCANTILE PURSUITS.

A carrier corporation is not engaged in trading or mercantile pursuits, so as to bring it within Bankr. Law 1898, subjecting thereto corporations "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits." [1]

Motion to Dismiss Petition.

Horace L. Cheyney and John F. Lewis, for petitioning creditors.
Ira Jewell Williams, for alleged bankrupt.

J. B. McPHERSON, District Judge. The petition avers that the bankrupt is "a corporation engaged in the business of carriage by water of passengers and goods for hire, between the city of Philadelphia and Lewes, Delaware." The bankrupt moves to dismiss, upon the ground that a corporation of this character is not "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits," and is therefore not within the provisions of the act. It is apparent that the corporation cannot be embraced within the clause just quoted, unless it is found to be engaged principally in "trading or mercantile pursuits," and to this point the argument has been addressed. The construction of these words that is contended for on behalf of the petition makes them equivalent to "commerce" or "commercial pursuits," and would require the court to hold that every other kind of corporation engaged in commerce was also included within the act. The railroad and steamship lines of the country, the insurance companies, the telephone and telegraph companies, the express and transfer companies, and perhaps other corporations having something to do with the movement of persons or commodities, would all be embraced within the words if they should be thus construed. In my opinion, this result is sufficient to condemn the proposed construction. I feel sure that, if congress had intended to subject such well-known and important classes of corporations as railroad, steamship, express, telegraph, and other companies engaged in commerce, to the operation of the bankrupt act, they would have been named directly and specifically, or else the act would have contained such all-embracing terms as were used in the act of 1867,—"all moneyed, business or commercial corporations and stock companies." But to specify the narrower classes of manufacturing, printing, and publishing corporations, and then to add "trading or mercantile corporations," indicates to my mind that these latter words are to have a restricted meaning, and are not to be so broadened as to cover the whole field of commerce or commercial pursuits. See In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co. (D. C.) 96 Fed. 757; In re New York &

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

W. Water Co. (D. C.) 98 Fed. 711; In re Elk Park Min. & Mill. Co. (D. C.) 101 Fed. 422; In re Woodside Coal Co. (D. C.) 105 Fed. 56; In re Keystone Coal Co. (D. C.) 109 Fed. 872.

The question is not, I think, whether some one or more of the dictionary meanings of the words "trading" or "mercantile" may be broad enough to embrace such a business as is done by the bankrupt. In the construction of a statute, the effort must always be to determine in what sense the words were used by the legislature; and, while it is true that the natural and ordinary meaning of language is to be followed, it may often happen, as I think it has happened in the present case, that a word may have several natural and ordinary meanings. In that event, the court is obliged to determine by the help of other considerations which meaning the word was intended to convey. For the reasons given, I do not believe that congress intended the words "trading or mercantile" to carry the meaning that is contended for by the petitioning creditors, and accordingly the petition will be dismissed.

MURPHY v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, D. Indiana. March 19, 1902.)

No. 10,020

LIFE INSURANCE—ACTION ON POLICY—SUFFICIENCY OF ANSWER.

An answer in an action on a life insurance policy setting up as a defense that the policy had lapsed by reason of the failure of the insured to pay an assessment must affirmatively show that such assessment was legally made; and, where it does not appear that the amount was fixed either by the policy or the constitution or by-laws of the company, facts must be alleged showing that it was duly made by the board of directors, or other corporate body, pursuant to an authority conferred upon them by the constitution or by-laws. A general allegation that the insured was duly notified of the assessment, and failed and refused to pay it within the time limited, is insufficient.

At Law. Action on a policy of life insurance. On demurrer to answer.

Rowland Evans, for plaintiff.

Guilford A. Deitch, for defendant.

BAKER, District Judge. The plaintiff has interposed a demurrer to the second, third, and fourth paragraphs of the answer of the defendant. The suit is upon a certificate or contract of insurance on the life of John W. Murphy for the benefit of his wife, Ann E. Murphy. The certificate was executed December 8, 1884, and the assured died on July 15, 1900. Due proof of death was properly made. The amended complaint avers due performance of all the conditions of the certificate by the assured. The certificate, a copy of which is made part of the amended complaint, provides that:

"In further consideration of the dues for expenses to be paid on or before the 8th day of December in every year during the continuance of this certificate, and of the further payment of all mortuary assessments payable at the

home office of the association, in the city of New York, within thirty days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of this certificate (or from such other periods as the board of directors may from time to time determine), and within thirty days from the day of the date that each assessment is ordered, the Mutual Reserve Fund Life Association, from and after the delivery hereof, with a receipt for the payment of the first annual dues, signed by the president, secretary, or treasurer of the association, does hereby receive John W. Murphy, of Indianapolis, county of Marion, state of Indiana, as a member of said association."

The certificate contains no agreement or statement of the amount of annual dues for expenses, nor of the amount of the bimonthly mortuary assessments. There is found indorsed upon the certificate, but constituting no part of the written contract, a statement that the annual dues for expenses are limited to $2 for each $1,000, payable annually, in advance. There is also indorsed thereon an "assessment rate table," showing the rate of assessments on each $1,000, commencing with the age of 15 years, and ending with the age of 65 years. The answer consists of a general denial, and of three special paragraphs in confession and avoidance. The second paragraph admits the execution of the certificate of insurance, and that it was issued to the plaintiff's husband, and it further avers:

"That the consideration for said policy was the application for membership, the admission fee paid, and dues for expenses to be paid on or before the 8th day of December in every year during the continuance of said policy, and of the further payment of all mortuary assessments payable at the home office of the defendant, in the city of New York, within thirty days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of said policy. A copy of said certificate is filed with the amended complaint herein, and is hereby referred to, and made a part of this answer. The defendant says that the said John W. Murphy was duly notified, by notice dated the 1st day of April, 1898, that an assessment was made on him in the sum of $141.90, and that the same was to be paid within thirty days from said date, in accordance with the conditions of said policy. The defendant says that the said John W. Murphy neglected, failed, and refused to pay said assessment call, or any part thereof, within said thirty days from said 1st day of April, 1898, or at any time thereafter, and that the same was never paid by the said John W. Murphy, or by any one acting for or on his behalf, or for or on behalf of the plaintiff herein. Defendant further says that after the said thirty days had elapsed from the said first day of April, 1898, the defendant notified the said John W. Murphy that said policy might be reinstated and put in full force and effect upon the payment of said assessment, but that said John W. Murphy neglected, failed, and refused to reinstate said policy or to pay said assessment."

It is a fundamental rule in the law of insurance that a policy shall be construed most strongly against the insurer, and liberally in favor of the assured. Such a construction is manifestly just. The conditions embodied in modern policies are carefully prepared for the insurance companies by counsel learned in the law, and it is plainly right that every doubt should be resolved against those who have caused the doubt. The policy does not fix the amount of the bimonthly mortuary assessments. Nor is there anything contained therein from which the assured can determine the amount of any such assessment. There are but three conceivable ways in which the

amount of such assessments can be fixed and determined, namely: (1) By an agreement as to the amount, stated in the policy; or (2) by the amount of such assessments being fixed in the constitution or by-laws of the association; or (3) by an assessment duly made by the board of directors of the association pursuant to authority conferred on such board by the constitution or by-laws. The certificate does not fix the assessment. The table of rates of assessment constitutes no part of the certificate. And if it did, it would show that the assessment mentioned in this paragraph of answer was wholly unauthorized. It is not alleged that the amount of the assessment which the assured was required to pay was fixed either by the constitution or by-laws. Hence no authority is shown, either in the certificate or in the constitution or by-laws, authorizing the assessment of $141.90 upon the assured. If the assessment was a lawful one, it must be because it was authorized by the constitution and by-laws, and because the same was duly made by the board of directors or other corporate body pursuant to an authority conferred upon them by such constitution and by-laws. The answer wholly fails to allege how, in what manner, or by what authority the assessment of which the assured was notified was made. It does not even allege that it was duly made. The defendant must, by averment and proof, show that the assessment of $141.90 was lawfully made by some competent body authorized thereto, pursuant to an authority which was binding at the time upon the assured. The rule is well stated in 2 Joyce, Ins. § 1310:

"The act of making an assessment is a ministerial, and not a judicial, one. Therefore no presumption can arise in favor of the regularity or legality of assessments; and it is an affirmative matter, both of pleading and evidence, necessary to establish a forfeiture for nonpayment of an assessment, that the assessment should appear to have been made in the manner, mode, and in conformity with the authority given, and for a proper purpose. A general allegation that it was duly made is insufficient."

There is no direct averment that an assessment was made upon the assured. It is simply stated that he was notified on the 1st day of April, 1898, that an assessment was made upon him for the sum of $141.90; but when, by whom, for what purpose, and under what authority, is not shown by this paragraph of the answer. Forfeitures are not favorites of the law, and whoever seeks to make out a case of forfeiture must do so by pleading every essential fact with certainty and precision. This paragraph of answer is fatally defective. The same reasons apply with equal force to the third and fourth paragraphs of answer, and each must be held insufficient.

The demurrer to the second, third, and fourth paragraphs of answer is sustained, and the defendant is given an exception. The defendant has leave, if so advised, to amend these paragraphs of answer within 15 days.

THOMAS & SONS CO. v. ELECTRIC PORCELAIN CO. et al.

(Circuit Court, D. New Jersey. March 12, 1902.)

No. 190.

PATENTS—INTERLOCUTORY DECREE FOR INFRINGEMENT—MOTION FOR MODIFICATION.

An interlocutory decree having been entered, sustaining the validity of a patent and directing the defendant to account, a motion to modify the decree, so as to obtain a decision whether a special article made by the defendant infringes, will be refused where that question was not raised by the pleading or made the subject of proof. It is not the province of the court to advise a defendant what he can or what he cannot do, under such a decree, to avoid being charged with contempt, nor to determine in advance on motion questions which may subsequently arise before the master in the accounting.

In Equity. On motion to vacate and modify interlocutory decree.

H. P. Denison, for the motion.

Hubert Howson, opposed.

ARCHBALD, District Judge (orally).[1] There is no doubt in my mind as to my authority on a proper occasion to modify an interlocutory decree such as has been entered in this case, but I am not moved to do so by the affidavits and exhibits which have been laid before me. The question now sought to be raised is not one that was made by the pleading or evidence upon which the case was previously disposed of. 111 Fed. 923. It was touched upon, it is true, at the final hearing, where it was suggested by counsel for the defendants that some of the insulators which he there produced were not of an infringing character, because they had been made by dipping the shells into glaze, and were fastened together in that way, and not by pouring extra glaze between them. But this was at the very close of the argument, and counsel for the plaintiff protested against their being considered because they had not been offered in evidence before the examiner, and were entirely outside of the case as it had been made up, giving notice also that in case the patent was sustained they would be regarded as an infringement.

The only question at the hearing was with regard to the validity of the plaintiff's patent, the insulators manufactured by the defendants being conceded to be an infringement. What I am really now asked to do therefore is to dispose of something brought into the case anew, entirely outside of any issue made or evidence offered leading up to the final disposition of it. The defendants' counsel is, no doubt, acting in entire good faith, and confesses to have two purposes in view—First, to avoid any possible proceedings for contempt, he having advised his client that the character of the insulator that he produces here to-day does not infringe the plaintiff's patent according to his understanding of the opinion of the court upon the subject; and, second, to meet the same question which is likely to

[1] Specially assigned.

come up before the master if the case goes to an accounting. The motion to modify is made on the authority of a case in the Ninth circuit (Bowers v. Reclamation Co. [C. C.] 99 Fed. 745), which I have examined in a general way, but not critically. My remembrance is that the use now made of it is based, not upon anything directly decided, but upon an incidental remark advanced by the court by way of argument. Speaking of the want of good faith on the part of the defendant, as evidence of it, it is said that he went ahead and took the chances of infringing, acting upon the advice of counsel, without obtaining, as he might have done, the opinion of the court by an application for a modification of the decree which had been entered; that is to say, the court assumed, without really deciding it, that there could properly be a modification of the decree in that way. How far this view of the practice is called in question by the cases which have been cited in this circuit (Edison Electric Light Co. v. Westinghouse Electric & Mfg. Co. [C. C.] 54 Fed. 504; Sprague Electric R. & Motor Co. v. Steele Motor Co. [C. C.] 105 Fed. 959) I will not undertake to say. A serious objection to it is that it practically makes the court advise the defendant what he can and what he cannot do, and that is exactly what defendant's counsel frankly says he desires in the present instance. He wants the court to tell in advance what the defendant has a right to do. The courts are established to decide cases, and not to advise parties. That is a matter for counsel, which courts cannot assume without entirely reversing the established order. They can only pass upon such matters as are brought before them in a due and regular way, and cannot anticipate.

So far as any charge of contempt which may hereafter be made in the present case is concerned, I shall have to meet it when it comes up, and in the way it comes up; and, with regard to the accounting before the master which has been ordered, all questions that pertain thereto must, in the first instance, be disposed of by him, acting on his own views, and to that time and place they must for the present be relegated. It is true there is a method by which questions which arise can be certified by the master to the court for determination, but that is resorted to only after due proceedings have been taken and the issues fully developed, which differs very much from such ex parte affidavits and exhibits as are now brought forward.

It is evident from these observations, which are necessarily hasty, that I am not inclined to sustain this motion, and I will overrule it, leaving the defendant to take such action with regard to these insulators as he may be advised by counsel is proper, for which he must assume the responsibility, without calling upon the court for guidance. Did I attempt to tell him now that a certain line of action was open to him, I might be compelled, when both sides have been fully heard, to take the contrary view, which would lead to considerable embarrassment.

The motion to vacate and modify the interlocutory decree is dismissed.

THE FLEETWING.

THE MAJOR BARRETT.

(District Court, E. D. Pennsylvania. March 22, 1902.)

No. 72.

1. COLLISION—OVERTAKING VESSEL—DUTY TO GIVE SIGNALS.
   It is the duty of an overtaking vessel to see to it that she does not come so near the overtaken vessel as to cause danger of collision; and, if she does come within the line of danger, it is her duty to warn the other vessel by signals, whether she intends to pass or not.

2. SAME.
   A steamship which overtook, ran down, and sank a small tug in the Schuylkill river in the daytime, and without giving any signal of her approach, was in fault, and is liable for the damages, in the absence of evidence clearly showing that the collision was caused by some fault of the tug.

In Admiralty. Suit for collision.

J. Warren Coulston and Alfred Driver, for the Fleetwing.

John G. Johnson, Horace L. Cheyney, and John F. Lewis, for the Major Barrett.

J. B. McPHERSON, District Judge. This is an action for a collision that took place in the Schuylkill river on October 2, 1900. The injury occurred about 5 o'clock in the afternoon; the tide being about half flood, and the day clear, with little or no wind. The Fleetwing —a small wooden vessel, 47 feet long, 13 feet wide, drawing about 4½ feet of water—had come down the Delaware river, had turned into the mouth of the Schuylkill, and was proceeding up the eastern side of the channel. The Major Barrett—a steamship 185 feet long, 35 feet wide, drawing 13 feet of water—had come up the Delaware river, and turned into the Schuylkill, two or three hundred yards astern of the tug. The Fleetwing was proceeding at her full speed, which was about seven miles an hour, and I think the evidence shows that, while the Major Barrett may not have been going at her full speed, she was nevertheless going faster than the tug. She certainly overtook the tug before either vessel had gone far from the mouth of the river, struck her a blow upon her port quarter near the stern, turned her over, and sank her, drowning two of the crew. The Major Barrett gave no signals whatever, because, as she argues, she had no intention of passing the tug, and therefore was under no obligation to give the signals required by the inland regulations. Whether or not she was bound to give the passing signals in the absence of an intention to pass, does not seem to me to be important to decide, for the evidence makes it abundantly clear that the steamship had come dangerously near the tug; and, under such circumstances, I think she was clearly at fault for having failed to give some signal that would have made her presence known, so that the tug might have been distinctly notified that the steamship was in the immediate neighborhood. As the steamship was the overtaking vessel, it was

her business to see to it that she did not come so near the tug as to make a collision probable, or, if she did approach within the line of danger, to give the tug such signals as would warn her that the steamship was at hand, and thus require her to be as vigilant as the circumstances called for. It seems to me that the case is on all fours with the decision of Judge Benedict in The Osceola (D. C.) 30 Fed. 383. I quote his opinion, substituting the names of the vessels involved in this suit:

"If, as the libelants contend, the Fleetwing made no sheer, the liability of the Major Barrett is clear. If, on the other hand, the Fleetwing did sheer, still the Major Barrett was in fault; for she was the overtaking vessel, and approached dangerously near to the Fleetwing without giving the signals required by the inspectors' rules. Had the signal been given, or had it been proved that the Fleetwing had been otherwise informed of the position of the Major Barrett, the Fleetwing would have been in fault for changing her course when she did; but, in the absence of such signal or such knowledge, her change was not a fault."

I do not think the evidence establishes satisfactorily that the tug did make a sudden sheer to port, as is claimed by the respondent. That she changed her course slightly to the westward may be true, but I am satisfied that, under the circumstances, she was not in fault, even if a change in some degree was made.

The libelant is entitled to a decree, and upon the proper application a commissioner will be appointed to assess the damages.

THE ATKINS HUGHES.

THE ALSENBORN.

(District Court, E. D. Pennsylvania. March 22, 1902.)

No. 16.

TOWAGE—VALIDITY OF CONTRACT—SERVICES IN THE NATURE OF SALVAGE.

An agreement fixing the price to be paid for towing a vessel into port will not be set aside as exorbitant, although the price is considerably in excess of customary towage rates, where, owing to the perilous situation of the tow, which was unable to make headway against the seas, and the fact that there was no other tug in the vicinity which could have rendered assistance, the service was in the nature of a salvage.

In Admiralty. Suit to recover on a contract for towage services.

Horace L. Cheyney and John F. Lewis, for the Atkins Hughes.

Thomas Leaming, for the Alsenborn.

J. B. McPHERSON, District Judge. This suit is brought to recover the sum of $600, which the master of the steamship Alsenborn agreed to pay for the services of the tug Atkins Hughes in towing the steamship from a point upon the Atlantic Ocean, several miles north of the Capes of the Delaware, to the city of Philadelphia. The service was performed on February 7, 1901, when ice in considerable quantity was running down the river, and at some places interfered a good deal with navigation. The Alsenborn was coming down the

coast, bound for the port of Philadelphia. Her precise dimensions do not appear in the evidence, but it is manifest that she was not a large ship. She was high out of the water, drawing a foot or two forward, and about seven feet aft, and was carrying very little, if any, cargo. She encountered a high wind from the northwest on the night of February 6th, and was obliged to anchor in order to avoid being blown out to sea. Her engines were not powerful enough to enable her to keep up to the wind. On the morning of February 7th she lost her ground tackle, and the wind was carrying her steadily away from the land and from the mouth of the river. It is conceded that, if her movement seaward had not been stopped, she would speedily have been in great danger, perhaps of being overturned, but certainly of being injured, and probably wrecked, by the violence of the wind and waves. In this situation she signaled to the tug, which is a large, powerful, sea-going vessel, and was cruising about looking for ships to tow up the river, to come and give her aid. The tug responded, and when she came within hailing distance of the steamship the captains of the respective vessels began to bargain. The Alsenborn desired to be towed to Philadelphia, and offered $100 for the service. The captain of the tug asked $600, and this sum was finally accepted, after the steamship had offered $500 and this offer had been refused. By the agreement the tug was to furnish the hawser. The service was performed, the Alsenborn assisting by the use of her own steam; and the voyage lasted about 15 or 16 hours, which is the usual time required for towing from the breakwater to the city. At one place in the river the vessels were fast in the ice for some time, and, in consequence of the injury to the hawser done by the ice, a loss was thereby inflicted upon the tug of about $100. After the steamship came to her dock, her master approved a bill for the sum agreed upon, but payment was afterward refused upon the ground that the amount charged was exorbitant, and that the agreement was made under circumstances which left the steamship no choice. This is the only question for determination, and upon this point my conclusion is in favor of the libelant. Undoubtedly, if the service is to be regarded as no more than ordinary towage, the sum is much too large; for, while there appear to be no established rates for towage in the Delaware river during the winter months, enough has been proved concerning the amounts usually paid for towing to enable the court to say that, for an ordinary tow, $600 would be much in excess of the proper sum, even in the month of February. But when the danger to which the Alsenborn was exposed is taken into account, and the further facts that there was no other tug in the neighborhood by whom assistance could be rendered; that, even if she had been able to enter the Delaware, she had so little power that she could not have proceeded to Philadelphia under her own steam alone; and that the tug has suffered a loss of $100 in performing the service by reason of the injury to her hawser,—I think that the sum of $600 is not too large for the work that was done. The service may not have been technically salvage, but it certainly approached it closely, and I am clearly of opinion that the peril-

ous situation of the steamship is proper to be considered in deciding what compensation should be paid to the tug: The Elfrida, 172 U. S. 186, 19 Sup. Ct. 146, 43 L. Ed. 413.

A decree will therefore be entered in favor of the libelant for $600, with interest and costs.

PACIFIC STATES SAV., LOAN & BUILDING CO. v. GREEN et al.

(Circuit Court, D. Oregon. March 12, 1902.)

BUILDING AND LOAN ASSOCIATIONS—CONTRACT WITH BORROWING STOCKHOLDER—VALIDITY.

By a contract between a building and loan association and a stockholder the latter sold, assigned, and transferred the 110 shares of stock owned by her, of the par value of $100 each, and which she obtained at the same time, to the association, absolutely, in consideration of its advancement to her of $5,500, "by way of anticipation of the value at their maturity" of the 110 shares. It was further provided that $5,500, being the par value of 55 shares, was given to the association as a premium. The bond required the borrower to repay the loan within 7 years, together with interest, and the full amount of the premium, provided the stock had at the time matured and become worth par, and, if not, so much of the premium as had then been earned, or, in default of such payment, to keep up the dues on the 110 shares until they matured, in addition to the payment of interest. *Held*, that the transaction was merely one of loan, the borrower retaining no interest as a stockholder in any case, and that, since the association would receive, in case the stock was paid out until it reached par value, as contemplated, double the amount loaned, besides interest thereon, the contract was unconscionable, and would not be enforced by a court of equity by a foreclosure of the mortgage given to secure it, for the sum claimed to be due thereunder, amounting to $2,600, after the borrower had paid to the association a sum exceeding the amount borrowed, with interest.

In Equity. Suit to foreclose mortgage. On demurrer to bill.

G. W. Baker and G. W. Allen, for plaintiff.
Lionel R. Webster, for defendants.

BELLINGER, District Judge. This is a suit to recover $2,594.90, and to foreclose a real estate mortgage given, as is alleged, to secure said sum. The complaint alleges, in effect, that on February 23, 1893, the defendant Lizzie A. Green was the owner of 110 shares of the capital stock of plaintiff, of the par value of $100 per share, for which she agreed to pay 60 cents per month per share, or $66 per month, until said shares, "by said payments and the accumulations allotted to the same by reason of profits earned, would become matured, and of the par value of $100 each;" that on the same day said defendant applied for a loan of $5,500, and accompanied such application with a bid for the loan, which bid was as follows:

"Amount of money desired as loan, $5,500. Applied for Feb'y 23rd, 1893. I hereby agree to hold 110 shares of stock in the Pacific States Savings, Loan and Building Co., and to continue payments of installments on said stock until the same shall mature, or until the loan is otherwise paid. I also hereby agree to pay said company a bonus of fifty-five shares of the stock above

referred to, as a consideration for the loan of $5,500 applied for. Lizzie A. Green [Signature of applicant]. February 23rd, 1893. Witness: I. C. Hicks."

—That the plaintiff company, upon or prior to March 10th, accepted said bid, and agreed to loan Lizzie A. Green the sum of $5,500 in accordance with the terms and conditions mentioned, and according to the terms and conditions of a certain indenture of bond which was, on the 15th of March, 1893, executed by Lizzie A. Green and James W. Green, her husband, a copy of which is made a part of the complaint. This bond was secured by a mortgage upon certain real estate, represented in the application for the loan to be of the cash value, with improvements, of $12,000. The bond recites that whereas the company only loans its money to its stockholders, and only in proportion to the amount of stock held by such stockholders, and that whereas Lizzie A. Green is the owner of 110 shares, and has bid the sum of $5,500, being the par value of 55 shares of said stock, "as and for a premium for the advancement by said company of $5,500 by way of anticipation of the value at their maturity of 110 shares of the capital stock of said company now owned by said Lizzie A. Green, and whereas the said company, in consideration of said premises, and by way of said anticipation, has this day advanced to said Lizzie A. Green and James W. Green $5,500, now, therefore," etc. Then follows the obligation of the bond, which will be referred to later.

From what is stated so far, it appears that the transaction was one of loan, and that the stock subscription was merely a mode adopted by the parties of making the loan. According to the recital in the bond, the $5,500 loaned was an "advancement" by the company in anticipation of the value at their maturity of the 110 shares of stock subscribed for by Lizzie A. Green. In other words, the 110 shares of matured stock were valued at $5,500, and by way of anticipation of such value there was an "advancement" of that sum. One-half of the 110 shares of stock were, as a part of the transaction by which they were acquired, given back to the company as a "bonus" for the loan or advancement. The remaining 55 shares are treated as pledged to the company, but by the terms of the bond executed on March 10th the entire 110 shares were "sold, assigned, transferred, and set over" to the company absolutely, no right or interest whatever remaining in the subscriber. This is in keeping with the theory of an "advancement" by the company of the value of the 110 shares at their maturity, but if the defendant is obligated to pay the $66 per month until the 110 shares become, by such payments and earnings, fully paid, and of the par value of $100 per share, together with interest on such loan or advancement, the contract becomes one of unusual hardship, and such as a court of equity will not enforce.

The obligation of the bond is that the Greens are to pay, on or before seven years, the sum of $5,500 and the full amount of the premium, if said 110 shares shall have matured and become worth par, or, in case said stock has not matured, then so much of said premium as may have been earned at the time the whole of the sum advanced is repaid, together with interest, etc., or, in default of such

payment, then the alternative is to pay the $66 each month, "as and for the monthly dues on said one hundred and ten shares, now owned by said Lizzie A. Green, and by her hereby sold, assigned, transferred, and set over to said company," together with $27.50 each month as interest, and also all fines and charges until said stock becomes fully paid in and of the par value of $100 per share, and shall then surrender said stock to the company. If by the word "premium" in the provision in this bond requiring the Greens to pay the sum of $5,500 and the full amount of the premium, if the said 110 shares shall have matured and become worth par, or in case said stock has not matured, then so much of said premium as may have been earned at the time the whole of the advance is repaid, is meant the par value of the 55 shares bid as a bonus, or the amount of the installments paid at the time the loan is repaid, the stock not having matured, it results that, if the stock has matured, the full value of $5,500 is required to be paid as a premium in addition to the repayment of the sum of $5,500 loaned or advanced, or, if the stock has not matured, then whatever has been paid in installments on account of this stock must go to the company in addition to the repayment of the money loaned and interest. The other alternative of the bond is the payment of the monthly installments, together with interest installments, until the entire 110 shares are matured, or are of par value, and the surrender of the 110 shares to the company. Between these alternatives, there is no choice. In either case the company will receive double the amount advanced.

The proviso in the bond by which, upon a six months' default in the payment of installments, the company may elect to declare the loan and the premiums then earned due, and recover the same, less the withdrawal value of said 110 shares, allows nothing to the borrower for the withdrawal value of the 110 shares above the debt. This is consistent with the recital in the bond that the $5,500 was an advancement by the company by way of anticipation of the value at their maturity of 110 shares of the capital stock owned by Lizzie A. Green. This recital, as well as the condition in the bid by which the defendant borrower agreed to hold 110 shares and to continue payments of installments thereon until the same shall mature, or until the loan is otherwise paid, shows that all installments paid on the 110 shares were so much paid on the loan, or on account of it. If the loan was "otherwise paid" the obligation to pay installments ceased. It was not intended that the loan would be "otherwise paid," and yet this phrase is cumulative of what is plain enough without it,—that the stock subscription and holding and the payments to be made nominally on that account were merely the means of repaying the loan and of securing an unconscionable bonus besides. In this connection consider this allegation in the complaint: That thereupon, upon the execution of the bond by Lizzie A. Green and her husband, the said plaintiff advanced to said Lizzie A. Green the said sum of $5,500, "which was to be repaid by the maturing of the shares which she held in said plaintiff corporation by making the monthly payments thereon as specified in her said application and

the indenture of bond executed by her and her said husband." The monthly payments to be made as specified in the bond and in the bid which accompanies the application are required to be on the 110 shares. The allegation that the $5,500 was an advancement by way of anticipation of the value at maturity of 110 shares of the company's capital stock is in keeping with what elsewhere appears,—that the defendant Lizzie A. Green was to have merely a borrower's, not a stockholder's, interest in the company; that the stock subscribed for by her at par value would only repay the advancement which had been made to her.

Upon what pretense of fair dealing the company intended that $5,500 advanced by it, and upon which it had received interest, was to represent the value of shares actually worth $11,000, does not appear. It is argued that the defendant Lizzie A. Green became a stockholder, and that the payments made by her and sought to be enforced against her in excess of her debt are in the nature of a stock investment. But the facts as they already appear do not support this contention. Her so-called stock conferred no rights upon her. It merely imposed an obligation upon her, which the most guileless right-minded person in the world could not be expected to assume in any transaction less devious and complicated than that in question. And so it transpires that although she "sold, assigned, transferred and set over," absolutely and unconditionally, to the company the 110 shares of stock which she is described as holding, although neither the conditions of the bond nor the allegations of the complaint admit of any present interest, or of any possible interest at any time, on her part in the company, and although she has paid $5,544 on the principal sum of $5,500 advanced or loaned, or, what amounts to the same thing, has paid installments to that amount to mature stock by which the sum advanced or loaned was to be repaid, and has paid interest meanwhile on the unpaid balance of the principal debt at the rate of above 12 per cent. per annum, yet a decree is sought against her in a court of equity for $2,594.90, with $250 additional as an attorney's fee, for which a foreclosure is prayed upon property stated in the application for the loan to be worth $12,000.

The question of usury was discussed at some length on the argument, and a recent decision of an Eastern court, in which a contract like the one in suit was enforced, was cited. In that case the contract was held not to be usurious. That question is not necessary to be considered here. If it was a mere question of an interest charge, and the rate appeared to me to be unconscionable, there could be no relief in this court that included it.

The fact is that this so-called stock subscription is not in any proper sense a stock subscription at all. It is a mere expedient to secure unconscionable terms in a money-loaning transaction. The penalty in a bond may be avoided by a performance of the condition upon which the penalty depends, but in this case there was no such avenue of escape for the hapless borrower. By prompt repayment of the advancement—a payment otherwise than by maturing the stock—she would still lose the installments that had been paid in the meantime

and were then due. But if unable to make prompt payment the exaction would be increased, and might, according as the company saw fit to act, equal the principal sum advanced, not taking into account the interest payments made. Among the earliest exercises of the equity jurisdiction was the relief it afforded against penalties and forfeitures, and so far there is no case in which its jurisdiction has been invoked to enforce either. What is asked in this case is something quite as unconscionable as a penalty,—a thing that equity will not enforce, and will not permit, in any case coming within its jurisdiction.

The complainant credits the defendant Lizzie A. Green with the value of 55 shares of so-called pledged stock, at $4,214.10. The remaining 55 shares are of course donated or premium stock. There is, therefore, no pretense that this defendant has, or is to have, any interest as a stockholder on account of payments made and sought to be enforced against her in excess of the loan and interest. As a matter of fact, there is no distinction between pledged and other stock. The fiction adopted by the company is that 55 shares were given to the company as a bonus and the remaining 55 shares were given as a pledge, but it all went to the company by absolute assignment and transfer. There is nothing in the conditions of the bond that admits of any interest in Lizzie A. Green in the so-called pledged stock. The transaction was one of loan, and nothing else, and equity, which looks to the intent, not the form, must so regard it. The installment payments of $66 per month were payments on the loan. These payments continued for seven years, during which interest installments were also paid. There has thus been paid, as already stated, $5,544 and interest.

The complainant is entitled to its loan or advancement, and interest. More than this it has had. More than this it is not entitled to. It cannot, in a court of equity, collect installments in the nature of premiums upon stock, subscribed for merely to qualify the subscriber to borrow from the company, and which, by the terms of the agreement between the parties, was to be, and was in fact, transferred to the company, and of which the company has at all times been and now is the absolute owner.

Demurrer to the bill of complaint is sustained.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

1. APPEAL—REVIEW—ACTION TRIED TO COURT.
   It is settled law in the federal courts that, where an action at law is tried to the court, its findings upon questions of fact are conclusive, and that the only matters reviewable in the appellate court are the rulings on questions of law, when properly presented by bill of exceptions, and, when special findings are made, whether the facts found are sufficient to sustain the judgment.
2. MINING CLAIMS—VALIDITY OF LOCATION—EXTRALATERAL RIGHTS.
   Extralateral rights of a lode mining claim apply only to what is beneath the surface, and never operate to enlarge surface rights which, under the statute, are limited to 300 feet in width on each side of the center of the ledge or lode; and where the ledge or lode is of greater width, so that the outcroppings extend beyond a side line, another claim may be located thereon which will carry all surface rights within its boundaries, and underground extralateral rights, subject to those of the older claim; and where the end line planes of the two claims are not parallel, or do not coincide, the second locator may follow the vein in its dip between the planes of his own end lines wherever not included between the end line planes of the senior location, as against any subsequent locator along the lode beyond an end line of the first claim.

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

For opinion below, see 106 Fed. 471.

W. B. Heyburn and E. M. Heyburn, for plaintiff in error.

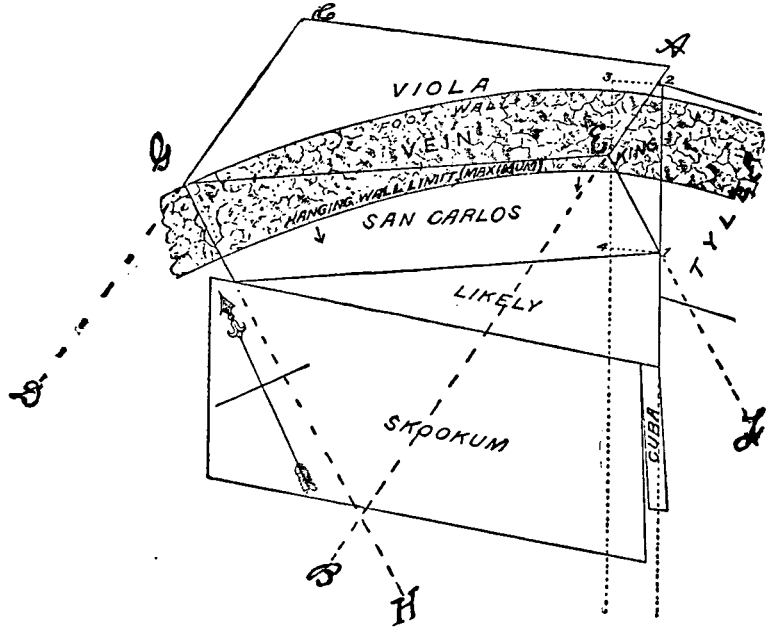
Curtis H. Lindley and John R. McBride, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action of ejectment, in which the defendant in error was plaintiff in the court below, brought for the recovery of certain underground portions of a vein or lode alleged to have its apex within the surface lines of a mining claim called the "King," which vein or lode, it is alleged in the complaint, in its course crosses the end lines of that claim. The incidental question of damages, for which the plaintiff also sued, has been, by stipulation of the respective parties, withdrawn from present consideration. The case was tried without a jury, and resulted in certain findings of fact made by the court, and a judgment thereon in favor of the plaintiff to the action. The record contains a bill of exceptions embracing, among other things, various assignments of error, the 2d, 3d, 4th, and 5th of which are to the effect that the trial court erred in making certain of its findings of fact, which findings of fact so complained of these assignments of error respectively set out at large. The 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th assignments of error are to the effect that the court below erred in refusing to make certain findings of fact requested by the defendant to the action. It is very clear that these assignments are unavailing. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive in the appellate court. Only rulings upon matters of law, when properly presented in a bill of exceptions,

can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. Stanley v. Supervisors, 121 U. S. 535, 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Distilling & Cattle Feeding Co. v. Gottschalk Co., 13 C. C. A. 618, 66 Fed. 609; Cable Co. v. Fleischner, 14 C. C. A. 166, 66 Fed. 899; Consolidated Coal Co. of St. Louis v. Polar Wave Ice Co., 45 C. C. A. 638, 106 Fed. 798.

The remaining assignments of error embodied in the record relate to the question of the sufficiency of the findings of fact made by the court below to sustain the judgment given by it, which is the real, and, indeed, the only, question in the case. Annexed to the opinion of the court below, as illustrative of its views, is the following diagram:



It appears from the findings that the defendant to the action (the plaintiff in error here) is the owner of the Viola mining claim, located February 20, 1886, and patented April 13, 1895; the San Carlos, located April 24, 1886, and patented April 22, 1895; the Skookum, located April 5, 1886, and patented August 10, 1891; the Likely, located April 24, 1898; and the Cuba, located May 7, 1898,—neither of which last two have been patented. The King, according to the findings, was located June 22, 1898, and is owned by the defendant in error (plaintiff in the court below). The ore bodies in controversy, and which were awarded to the defendant in error by the judgment of the court below, lie beneath the surface of the Likely, Skookum, and Cuba claims. As these three claims are also, according to the findings, the property of the plaintiff in error, prima facie the ore bodies in question belong to it. Cheeseman v. Shreeve (C. C.) 37 Fed. 36;

Mining Co. v. Murray (Mont.) 23 Pac. 1022. They are also embraced by vertical planes drawn down through the end lines of the San Carlos claim, extended in their own direction, which claim has been patented by the government, and is also owned by the plaintiff in error. The court below held that the King claim, which was not located until long subsequent to all of the others mentioned, was so located as to entitle its owner to the underground bodies of ore found under the surface of the Likely, Skookum, and Cuba, and within the end line planes of the San Carlos, extended in their own direction. At the time of the location of the King claim the only unappropriated piece of surface ground in the vicinity, according to the findings, was the triangular piece lying between the Tyler claim and the Viola and San Carlos. The same vein or lode of mineral bearing rock that outcropped in the Viola, San Carlos, and Tyler outcropped in this triangle, and it was therefore open to location, subject, of course, to all preexisting rights. In making the location of the King, the entire westerly and southerly lines, and almost all of the northerly line, were laid within the patented claims of the plaintiff in error, all of which was done, according to the findings of the court below, "without the consent or knowledge of the owners of said Viola and San Carlos lode claims." And the contention of the plaintiff to the action, which was sustained below, was, and here is, that lines so laid (being otherwise also in accordance with law) confer extralateral rights upon the locator as against the owner of the patented ground so entered upon. It is the settled law that, for the purpose of acquiring the extralateral rights conferred by statute, a locator may place his lines on a prior mining location with the consent of such prior locator, or, when it is done openly and above board, without objection on his part (which in reality constitutes consent); and perhaps the same thing may be done on patented claims, where the lines are established openly and peaceably. It was so held by the secretary of the interior in the case of the Hidee Gold Mining Company (decided January 30, 1901). But it is equally well settled that no such right can be acquired by any forcible, fraudulent, or clandestine entry upon the possession or ownership of another. Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. A.) 112 Fed. 17; Cowell v. Lammers (C. C.) 21 Fed. 202; Nevada Sierra Oil Co. v. Home Oil Co. (C. C.) 98 Fed. 680; Hosmer v. Wallace, 97 U. S. 579, 24 L. Ed. 1130; Mower v. Fletcher, 116 U. S. 385, 6 Sup. Ct. 409, 29 L. Ed. 593; Nickals v. Winn, 17 Nev. 188, 30 Pac. 435; McBrown v. Morris, 59 Cal. 72. Under which of these conditions the findings of the court below place the entry of the King locator upon the patented claims of the plaintiff in error need not be determined, for the reason hereinafter appearing.

The findings and diagram annexed to the opinion of the court below show that the vein or lode in question is a very wide one, and crosses both end lines of each of the plaintiff in error's patented claims, Viola and San Carlos, the common side line of these two claims being entirely on the vein or lode. The Viola, being the older of the two locations, would, under the doctrine of St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co., 44 C. C. A. 120, 104 Fed. 664, and like decisions there cited, be entitled, in the pursuit of its extralateral

rights, to the entire width of the vein underground within its bounding planes. But extralateral rights apply only to what may be found beneath the surface within the limits fixed by the statute, and never operate to enlarge or contract surface rights. Surface rights are limited by the statute to 300 feet in width on each side of the center of the ledge or lode, yet such ledge or lode may extend beyond such side lines, and, in the case at bar, did extend southerly of the southerly side line of the Viola claim, and into unappropriated public land. The locator of the San Carlos claim, finding it outcropping there, made the San Carlos location upon it, as he had the right to do, and as the government recognized by issuing its patent in confirmation thereof. The ledge or lode crossing both of the end lines of that claim, the extralateral rights conferred by the statute thereupon arose, subject, however, to the extralateral rights of the prior Viola location, which were, as all such rights are, confined between vertical planes drawn down through its end lines, extended indefinitely in their own direction, which gives to the Viola, as against all of the claimants here appearing, the underground portion of the vein or lode on its dip between vertical planes drawn down through the lines A E and C G of the diagram, extended indefinitely in their own direction. But where the prior extralateral rights of the Viola cease, namely, at the line E B of the diagram, those of the next locator—that is to say, the locator of the San Carlos—commence, and embrace that portion of the dip of the vein or lode not included within the rights of the Viola, and embraced within vertical planes drawn down through the end lines of the San Carlos extended indefinitely in their own direction. These lines include the ore bodies in controversy. They were therefore not subject to inclusion by the extension of the end lines of the subsequent location of the King claim, even if it be conceded that its lines were so laid as to entitle its locator to extralateral rights.

The judgment is reversed, and cause remanded to the court below, with directions to enter judgment for the defendant on the findings.

EMPIRE STATE-IDAHO MINING & DEVELOPING CO. et al. v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING CO.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1902.)

No. 704.

MINING CLAIMS—CONCLUSIVENESS OF PATENT—CONFLICT OF SURFACE LINES.

Issuance of a patent, after due notice, for a mining claim, conclusively determines its priority, as to the surface and the incident extralateral rights, over claims whose surface lines conflict therewith.[1]

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

W. B. Heyburn, for plaintiff in error.

Curtis H. Lindley and John R. McBride, for defendant in error.

[1] Conclusiveness of patents to mining claims, see note to Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 48 C. C. A. 674.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. These were cross writs of error sued out by the defendant to the action of ejectment brought in the court below by the defendant in error as plaintiff, based upon its ownership of the Stemwinder mining claim. The case was tried without a jury, and resulted in certain findings of fact, annexed to which, as illustrative of them, was a diagram showing, among other things, the underground segment of the ledge for which the court below gave the plaintiff to the action judgment. The plaintiff brought the case here by writ of error, and we held that the underground segment for which the court below awarded the plaintiff judgment constituted a part of the Last Chance mining claim, of which the findings showed the defendant Last Chance Mining Company to be the owner, and, being awarded more than it was entitled to, the then plaintiff in error had no just cause of complaint. The judgment thus brought under review was accordingly affirmed. Bunker Hill & S. Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 48 C. C. A. 665, 109 Fed. 538. The then plaintiff in error thereupon filed a petition for a rehearing of the cause solely upon the ground that this court erred in holding, as it did, that the owner of the Stemwinder claim was estopped from claiming anything embraced by the Last Chance patent, by reason of the failure on the part of the Stemwinder to contest the application of the Last Chance for its patent. The defendants to the action having meanwhile sued out the present cross writs of error, the respective parties requested the court to hear and consider the petition for rehearing along with the cross writs, which has been done. A careful re-examination of the questions considered in the opinion of the court above cited satisfies us of its correctness, although to avoid the misconception of that opinion taken by counsel for the then plaintiff and present defendant in error, and make it more clearly express its meaning, we here so alter the clause of the opinion, as reported at the top of page 547 of volume 109 of the Federal Reporter, and page 674, 48 C. C. A., as well as the original, as to make it read as follows:

The application for the patent for the Last Chance was, as has been seen, for the whole claim, as indicated in the diagram hereinbefore set out, and carried with it, as has been said, the implied, if not the expressed, allegation that the location was made upon land at the time open to location, and was therefore prior to any location thereof by any one else. The issuance by the government of its patent, after due notice to all the world of the application, and ample notice to every one to contest it, conclusively determined, as against every one whose surface lines conflicted therewith, the priority of that location over every other, including the Stemwinder, and conferred upon the patentees and their successors in interest not only the entire surface of the claim, but, as against every one whose surface lines conflicted with those of the Last Chance, the extralateral rights conferred by section 2322 of the Revised Statutes to follow on their dip outside of the side lines, and within vertical planes drawn through the parallel end lines extended in their own direction, all veins, lodes, or ledges the tops or apexes of which lie inside the surface lines of the claim. As a mat-

ter of course, in the absence of a surface conflict, there would be no ground for an adverse claim, and no question would arise of which the land department could take cognizance. Conflicts in respect to extralateral rights growing out of locations whose surfaces do not conflict, and which are therefore beyond the purview of the proceedings in the land department, are matters solely for the determination of the courts when brought before them.

The necessary result of an adherence to that opinion is that on the present writs the judgment of the court below awarding to the plaintiff to the action the underground segment above indicated, and which the findings show constitute a part of the Last Chance claim, must be reversed. And as the findings fail to show that the defendant Empire State-Idaho Mining & Developing Company has infringed upon any right of the plaintiff, judgment must be directed in favor of both of the defendants. In the brief of counsel for the present defendant in error we are asked to now adjudicate between the extralateral rights of the Stemwinder claim and the Viola claim, shown in a suit just decided by this court to be the property of the defendant Empire Company. But the judgment roll upon which the present writs must be disposed of presents no such question. The bill of exceptions embodied in the record cannot be considered, for the reason that the assignment of errors, save only the one challenging the sufficiency of the findings of fact to support the judgment, relate only to questions which cannot be considered by the appellate court. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (just decided) 114 Fed. 417.

The judgment is reversed, and cause remanded, with directions to the court below to enter judgment for the defendant on the findings.

UNION CASUALTY & SURETY CO. v. GRAY.

(Circuit Court of Appeals, Third Circuit. February 20, 1902.)

No. 18.

1. AGENCY—CONTRACT—LIABILITY OF PRINCIPAL TO SUBAGENTS.

A principal cannot be made liable to a subagent appointed by his general agent, where such principal in the contract with his general agent has expressly stipulated that such general agent is to be responsible to the principal for the acts and conduct of his subagents, and that in no case and under no circumstances shall the principal be liable for commissions or compensation to such subagents.

2. SAME—CONSTRUCTION OF CONTRACT.

By a contract between an insurance company and its general agent, appointed for certain territory, the latter was authorized to appoint or employ all subagents reasonably necessary for the proper transaction of the business contemplated by the contract, "and for the fulfillment of his agreements hereunder." It further provided that the general agent should be directly accountable to the company for all moneys, premiums, etc., belonging to the company, and liable in respect to all acts, doings, and agreements of the subagents, and should pay all salaries, commissions, or compensation earned by them, "and said company shall under no circumstances nor in any manner be liable for the same or any part thereof." *Held*, that a contract made by the general agent in his own

name, appointing a subagent for a definite term, who was required to give bond, and to account to him alone, did not create a contract of agency between the subagent and the company which could be enforced against the latter after the general agent had been removed in accordance with the terms of his own contract.

3. PLEADING—EFFECT OF ADMISSIONS.
An admission in an affidavit of defense made by an officer of defendant corporation that plaintiff was appointed a subagent of defendant by its general agent, who had authority to make such appointment, is not inconsistent with the defense that under the contract between defendant and its general agent the authority of the latter was limited to the appointment of subagents subordinate to his own agency, and that the subagency was terminated by the termination of the general agency.

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

Samuel B. Huey, for plaintiff in error.
John G. Johnson, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. The record brought before us by this writ of error, discloses a suit instituted in the court below by Delbert B. Gray, plaintiff below, defendant in error here, against the Union Casualty & Surety Company, defendant below, plaintiff in error here. The cause of action, as set out in the statement of claim, was the alleged breach of a contract contained in a certain agreement in writing, executed on the 2d day of September, 1893, between David Black, general agent for the Middle states of the Union Casualty & Surety Company, of St. Louis, Mo., and Edward P. Carpenter, Delbert B. Gray and George A. Hincken, partners under the firm name of Carpenter, Gray & Hincken, of Philadelphia. By this agreement, it is alleged, said firm entered into contractual relations with the said company, by which they were to act as its subagents, for a term of five years, in certain territory comprised within eastern Pennsylvania, New Jersey and Delaware, covenanting that they, on the one hand, would perform certain designated services as agents, or subagents, for the said company, in the insurance business; the said company on the other hand, becoming bound that opportunity for the performance of such services should be continued for said term of five years, at and for the compensation stipulated, by way of commissions, in said articles of agreement.

By assignments from his partners, the said Gray became vested with all the rights and responsibilities created by this contract, and has been recognized as standing for said partnership, by the defendant below, throughout this litigation. He will be spoken of hereafter as sole subagent under the contract. The plaintiff below alleged in said suit, and contends here, that a breach of this contract, as construed by him, was made by the defendant below, by refusing to recognize his right to act as agent for said company, for the remainder of the term of five years, after the discharge of David Black, its general agent, from its employment, and by discharging him, Gray, from its service within the term aforesaid. The defendant below, on the other hand, contends, that it was not privy to any contract with

plaintiff below, and that the contract, the breach of which is stated as the cause of action in the said suit, was a contract with David Black, its general agent, and bound him, and not it, by its stipulations and covenants. The parts of the said contract pertinent to our present inquiry, are substantially as follows:

"This agreement made and entered into this second day of September, 1893, by and between David Black, general agent for Middle states of the Union Casualty and Surety Company of St. Louis, Mo., hereinafter designated 'Said General Agent' of New York, party of the first part, and Edward P. Carpenter, Delbert B. Gray and Geo. A. Hincken, partners under the firm name and style of Carpenter, Gray and Hincken, hereinafter designated 'Said Agents,' parties of the second part. It is understood and agreed that the Union Casualty and Surety Company of St. Louis, Mo., will be designated throughout this agreement as 'Said Company.' That upon the terms and conditions, and in consideration of the several covenants and agreements to be kept and performed by said agents, parties of the second part, hereinafter set forth, said general agent, party of the first part, has this day appointed, and does by these presents make, constitute and appoint said parties of the second part agents of said company for the procuring of business for the said company in the following described territory, that is to say: Eastern Pennsylvania, southern New Jersey and Delaware, said territory being more particularly defined in a map filed in each of the offices of the parties to these presents. The term of the agency hereby created, the said agents faithfully performing their duties hereunder, shall be and continue for five years from the date thereof, to wit, until the second day of September, A. D. 1898. Said agents, parties of the second part, are and shall be authorized and empowered, but only upon the terms and conditions and fulfilling the agreements on their part hereinafter set forth, to issue and countersign all descriptions of policies of insurance procured by them within the territory above mentioned which are now or may during said term be issued by said company and to make necessary and proper indorsements upon the same, provided that the insurance of all such policies and all indorsements made thereon shall be subject to the approval of said general agent, and said agents, keeping and performing their said agreements, shall be authorized as such, during said term to collect, for the benefit of said general agent, the premiums paid upon and for all policies issued by them, said agents, and to give proper receipts for the same. In consideration of, and as full compensation for all services rendered and disbursements made by them under and pursuant to this contract during said term, said party of the first part, agrees to allow the said agents commissions on all gross premiums, by the said agents, collected during said term upon policies for the several kinds or classes of insurance procured and issued by said agents during said term, which commissions may be deducted by said agents from said premiums collected by them at the following rates or percentage thereon respectively, that is to say: * * * Said general agent will from time to time, furnish said agents, for the purposes aforesaid, with such forms of policies of insurance and such manuals as may be requisite for the use of said agents in securing business and procuring the issue of policies of insurance such as herein contemplated, and with such other documents and supplies as said general agent shall deem necessary for the proper transaction by said agents of the business of said company within said territory."

Said Gray agrees that he will make prompt collection of all premiums, and duly account for the same to the said general agent, and keep books and accounts showing all premiums collected by him "subject to full and convenient inspection by said general agent whenever required." He also agrees that he, and all his subagents employed by him, will make to the said general agent, from day to day, true and complete daily reports of all policies issued, etc., and on the 1st day of each month, will render to him, the general agent, a true

and complete statement, in form such as the party of the first part may require, showing the number, description and amount of all policies written or issued by authority of said Gray during the preceding month, and that on the 12th day of each month, will pay or remit to the said general agent, the balance of all premiums collected by him during the last preceding month. By a provision, identical in language with one contained in the contract between said general agent and the said company, which will hereafter be referred to, it is stipulated, that the said Gray may appoint and employ, subject to the rules and regulations prescribed by said general agent, any and all subagents reasonably necessary for the proper transaction of the business contemplated by the contract, and for the fulfillment of his agreement thereunder; but it is expressly understood and agreed, that said Gray shall be directly accountable to the said general agent, for all policies issued and moneys collected under the provisions of said contract, and shall be directly liable to said general agent, for the acts and doings of said subagents in and about the transaction of said business, and that all salaries and commissions and compensation earned by such subagents, shall be paid by said Gray, and that "said general agent shall, under no circumstances, nor in any manner, be liable for the same or any part thereof." Said agreement further provides that, in default of the performance by said Gray, of the conditions and agreements in said contract set forth, the "said general agent, party of the first part, shall have the right, without further demand or notice, to cancel the contract and terminate the agency hereby created." And at the close, it is stipulated as follows:

"It is a further expressed condition of this contract that said agents, parties of the second part, shall and they hereby jointly and severally agree that they will within thirty days from the date hereof deliver to said general agent at his office in New York a bond in the penal sum of ($5,000) five thousand dollars, duly executed by said agents and by the American Surety Company or other good and sufficient surety or sureties, and containing such conditions for the payment of said penal sum to said party of the first part as obligee therein as shall be satisfactory to the said general agent, party of the first part," etc.

To this contention of the defendant company, that the contract sued upon was res inter alios acta, the plaintiff below replies, that the contract was made by Black, as general agent of the company, by authority and in behalf of the said company, and created such contractual relations between the said plaintiff below and said company, as to make the stipulations as to term of service and compensation, obligatory upon said company. In support of his position, he refers to the provision of the contract between the said company and its general agent, Black, with reference to the prospective appointment by Black, of subagents. This contract, which was dated September 2, 1893, both in form and general provisions, is almost identical with that between Black and the plaintiff below, as above set forth. The authorization referred to and relied upon by plaintiff, is contained in the beginning of the following paragraph of this agreement:

"Such agent is authorized as such to appoint and employ, within and for the territory aforesaid, but subject always to such rules and regulations as may be prescribed in respect thereof by said company, any and all subagents,

subordinates, and employés reasonably necessary for the proper transaction of the business contemplated by this contract and for the fulfillment of his agreements hereunder; but it is expressly understood and agreed that said agent, party of the second part, is and shall be directly accountable to, and shall and will on demand therefor, at all times account to and with said company for all moneys, premiums, policies, supplies, documents, and other property belonging to said company, or for or in respect of which it may from time to time be entitled to an account under the provisions of this contract, and shall be directly liable to this company for and in respect of all acts, doings and agreements of any and all solicitors, agents, special agents, canvassers, clerks, and other employés appointed or employed by said agent party of the second part, in or about the transaction of said business, but all salaries, commissions and compensations of any kind earned by or which may become payable to such solicitors, special agents, canvassers, clerks, or employés, or either of them, shall be paid by said agent, party of the second part, and said company shall under no circumstances nor in any manner be liable for the same or any part thereof."

As we have before said, it is identical in language with a corresponding paragraph in the articles of agreement, by which Black appoints Gray his subagent. In addition to this authorization of the appointment of subagents, the plaintiff below refers to testimony tending to show, that his contract with the general agent was due to his application made directly to the company, and to correspondence with one Huff, general manager of said company; that during the time that he was acting as subagent, he had numerous letters directly from the office of the company in St. Louis, and that after the termination of Black's service with the company, he was recognized for a period of nearly three months as an agent by the executive officers of the company. We are also referred by counsel of the said plaintiff below, to the following language in the affidavit of defense, made in this cause by the secretary of the said company:—

"It is true, that on the 2nd day of September, 1893, the said defendant, acting by David Black, its then general agent for the Middle states, did appoint the plaintiff, Delbert B. Gray, Edward P. Carpenter and George A. Hincken, partners trading under the firm name of Carpenter, Gray and Hincken, subagents for the company, with an office in Philadelphia, and that the said David Black, general agent as aforesaid, was at that time duly authorized to make such appointments."

The plaintiff, as a witness, testified that he had always considered the contract he had made with Black as one made with the company, and that he had a right to hold the said company to the performance of the agreements in said contract contained, for a period of five years, and that the obligations of the said company in that behalf did not cease with the termination of its contract with Black, and that he so told the president of the company, in an interview had with him after Black's discharge. Ellerbe, president of the company, on the other hand, denies this statement of the plaintiff below, and says that the continuance of the plaintiff below as an agent of the company, after Black's discharge, was provisional only, and until other arrangements could be made; that after the notification from him as president of the company, dated July 31, 1894, that the contract with Black, as general agent, had terminated, and directing him to make all remittances for premiums collected to Huff, general superintendent, in New York, and to put his accounts in shape for exam-

ination, had been acknowledged by plaintiff below, in a letter dated August 1, 1894, the said plaintiff below, under date of August 2d, wrote to said Huff, as general manager of the Union Casualty & Surety Co., as follows:

"Dear Sir:—We should like very much, now that our arrangements with David Black & Co. are terminated, to have the agency direct, the same to include all of Pennsylvania, inasmuch as Pittsburgh and Clearfield county are closely identical with Philadelphia in all the leading industries and manufactures. Yours very truly, D. B. Gray & Co., General Agents."

Ellerbe also testifies that, neither at the final interviews in the last of October, in which he says an account was stated between the said plaintiff below and the company, and in which finally the said plaintiff below was informed that his services were dispensed with, did he, the said plaintiff below, nor at any other time, claim that his contract made with Black continued with the company after Black's discharge. Upon this state of the testimony, the case went to the jury under the charge of the court. The exceptions to the said charge are somewhat meagre, but are sufficient to support such of the assignments of error as, in our view of the case are important.

The construction of the contract sued upon, was especially the function of the court, and the charge of the learned judge in that respect, is properly before us for review, upon the exceptions taken by the defendant to the court's refusal to answer certain of its requests to charge, and the assignments of error founded thereupon. It is perfectly plain that, if the suit of the plaintiff below can be maintained against the defendant company below, it is because the said company was a privy to the written contract, by which Black constituted Gray a subagent, thereby entering into a contractual relation with the said Gray as to the term of his employment, and as to the affording him opportunity to earn, and the allowance of, his commissions. The principal question before us is, whether this is or is not a correct interpretation of the said contract. The interpretation of the contract, as made by the learned judge of the court below, is comprised in the following statements made by him in his charge to the jury:

"Let us see what was the relation between these parties at the beginning. As you have heard, a man named David Black was appointed the general agent for this company for certain territory, the Middle states. He was given power by his contract to appoint subagents within that territory. These subagents, while sustaining a certain relation to him, were of course agents for a certain territory of the Union Casualty and Surety Company of St. Louis. Black's own appointment was for the purpose of obtaining business for the company, and these appointments he was authorized to make were for the same purpose. He, and those he might appoint under him, were all engaged in the same business, to further the business and advance the interests of the company, and to get business for it. His appointment was to last for five years. After his appointment was made he appointed a firm of which the plaintiff was a member, and about which I need not specially concern myself—we will treat it as an appointment of Mr. Gray himself, because the rights which the other members of the firm got under that appointment afterwards became vested in Mr. Gray, and there is no occasion to distinguish between the firm and Mr. Gray himself—we will consider the appointment as having been made of Mr. Gray himself, for convenience sake. Black appointed Gray, and by one of the provisions of the contract it was

to last for a term of five years. It is at that point that the first dispute arises. Early in August, I think, of the following year, Black was dismissed from the service of the company, and we shall assume, since we know nothing to the contrary, that he was properly dismissed. One of the contentions of the defendant is that by the dismissal of Black, the severance of his relations with the company, Gray's relation with the company was also severed; that his contract made with Black, as general agent of the company, fell at the same time that Black's own contract was terminated by the company's action. I instruct you that was not the case; that when Black made his contract with Gray, and appointed him for a term of five years, he had power to make that appointment. He himself was entitled to serve the company as general agent for five years, subject of course to their right to dismiss him for cause, and when he made the contract with Gray, he had the power to make it, and to make it for five years; and we instruct you, therefore, that the fact that the company dismissed Black did not operate to dismiss Gray from the company's service and put an end to his relations with them. He had a valid contract which was to last for five years, unless sooner terminated for good and sufficient reason."

We are compelled to dissent from this construction of the contract sued upon. On its face, the contract was signed and sealed by David Black individually, and not in the name of the company defendant, nor on its behalf. It is true, that in the caption of the articles of agreement, Black is described as general agent for the Middle states of the Union Casualty & Surety Company of St. Louis, and is designated throughout the subsequent provisions of the contract as "said general agent." This, however, was a proper and, considering the subject-matter of the contract, a natural, designatio personæ. The business in which Gray was to be employed was that of assisting Black in his business as general agent of the Casualty Company, by soliciting insurances, issuing policies and collecting premiums for him, and under his supervision. It is true, of course, that this business was for the benefit of the company, and that the premiums collected, less the commissions of himself and Black, belonged to the company, and he was in certain respects a subagent of the company, as Black had been expressly authorized in his contract with the company to appoint such subagents. But this classification of his position, as that of subagent, does not necessarily bring him into contractual relations with the company, without express stipulation to that effect. The authority to Black, in his contract with the company, to appoint subagents, and relied upon by plaintiff below, as making said company privy to his contract with Black, cannot, without straining the language used, from its natural meaning, have the effect contended for. Black was about to engage as general agent of the company for the Middle states, and it was obvious, from the extent of territory over which he was to preside, that the work of procuring and conducting the business he had undertaken, could not be transacted personally by him over so extensive a territory. This fact being obvious, the parties to the contract, by the clause in question, recognized the necessity that a general agent would be under, of calling to his assistance subagents, who could act under his direction and control. He, however, by the terms of the contract and of its provisions, was the general agent for the whole territory. He was not required to appoint any particular number, or indeed any, subagents, unless he chose so to do. If such should be appointed, they were to be selected and

appointed by him, absolutely, and what he should do by them, he would be doing by himself. By the contract, he alone was made responsible to the company, and was expressly accountable to it for the acts and conduct of his subagents. It was evidently a recognition of this well-settled mode of transacting the business of a general agency, that caused the authorization to appoint subagents to be inserted in the contract. Otherwise, there might be a question as to the company's being liable upon the contracts made for Black by such subagents. This authority to appoint them for the purposes mentioned, removed all question as to the company's liability for contracts so made. So far, and in this qualified sense as to third parties holding policies of the company, it may be said to have been privy to the contract between Black and Gray. That is, the company was bound thereby to recognize policies duly issued within the scope of his authority, by Black, or his subagents, as liabilities of the company.

The use of subagents by Black, in the transaction of his business as general agent, having thus been sanctioned in the contract appointing him, we find nothing therein which required, or even seemed to contemplate, that they should be appointed in the name or on behalf of the said company. If there had been such requirement, the contract between Black and Gray should have been in different form. It should, on its face, have purported to be a contract made by the company, or on behalf of the company, through David Black, as its agent, and should have been signed and sealed for the said company by the said Black. This, however, is not the case. It is true that, in some cases, where the contract does not purport, on its face, to be so made, evidence dehors the contract itself, may establish the fact that it was made on behalf of an undisclosed principal. In such cases, however, the evidence for that purpose must be clear, and the provisions of the contract must not be inconsistent therewith. In his contract with the said company, Black was expressly made responsible for all moneys collected, or acts performed, by subagents, and there is not a word in the contract from which it could be inferred that he could relieve himself from such responsibility. Consistently with his contract with the company, as we understand it, the contract with Gray was signed and sealed by David Black, individually, and not in the name of the company, nor on its behalf. The obligations it imposed upon Gray were obligations to Black, although their due performance was in furtherance of what he had contracted with the company to do and perform. Gray worked for him and was compensated, therefor, by him. It was expressly for the benefit of Black, that Gray was authorized, under his contract, to collect the commissions allowed to the general agent by the company, and it was expressly for the benefit of Black, that Gray was authorized by his contract here sued upon, "to collect the premiums paid upon and for all policies issued by him," and for which Black was accountable to the company. It was to Black that Gray bound himself by the terms of his contract to render, on the 1st day of each month, a statement of moneys received, and on the 12th of the same month, to pay or remit the same. It was to Black that Gray, by his contract, bound himself to be liable, for any acts of his employés or subagents, and it is Black that is ex-

empted from liability for the compensation of any of Gray's employés. It is also provided that the general agent, Black,—not the company—shall have power to terminate the agreement; and the bond required to be given by Gray, was to be given to the general agent—not the company—and the general agent, and not the company, had the right to cancel the contract, in default of the giving of such bond. All the covenants in Gray's favor also, were to be done and performed by Black, and not by the company. And so we find that, in the long contract sued upon, all the stipulations or covenants therein contained, are expressly mutual ones between Black, the general agent, and Gray. No one of them purports to have been made for or on behalf of the company, and there is nothing in the character of any one of them, that is not appropriate to an individual contract between the general agent and Gray, or that does not concern individual interests of the said general agent, which it was natural for him to protect, and the duties imposed upon Gray are such as he appropriately should perform for that purpose.

In considering the contract thus clear and unequivocal upon its face, the evidence disclosed in the record, as to correspondence between Gray and the executive officers of the company, and the conduct of such company in dealing with him after the discharge of the general agent, even if it were more pointed than it is, is totally irrelevant. That after the discharge of the general agent, the company should have received from Gray the premiums already collected by him, or that it even should have allowed him, for the time being, to continue his work as subagent, cannot alter his status under his contract with Black, as Black's subagent. The most that could be inferred or result from such dealings of the company with Gray, after the discharge of Black, is, that a new contract might be implied therefrom, covering the situation in which Gray and the company found themselves after Black's discharge. Under such implied contract, Gray probably became the agent for the time being of the company. As no term of service attached thereto, it was a contract terminable at the will of either party, and with which, in this case, we have nothing to do.

So far, we have considered the contract sued upon, and the case made in support of it by the counsel for the plaintiff below, as they have presented it. We have not called attention to a carefully worded provision, contained in the paragraph already quoted from the contract between the company and its general agent, by which said company, ex industria, by express terms, exempts itself from all liability for compensation to the subagents, who may be appointed by its general agent. It logically relates to this part of the authorization clause. After providing that the said general agent shall be directly liable to the company "for and in respect of all acts, doings and agreements of any and all solicitors, agents, special agents, canvassers, clerks, and other employés appointed or employed by said agent, party of the second part, in or about the transaction of said business," it proceeds as follows:—

"But all salaries, commissions and compensation of any kind, earned by, or which may become payable to, such solicitors, subagents, canvassers

clerks, or employés, or either of them, shall be paid by said agent, party of the second part, and said company shall, under no circumstances, nor in any manner, be liable for the same or any part thereof."

This express stipulation for exemption must be taken in connection with the authorization to appoint subagents, upon which plaintiff below so much relies. Out of abundant caution, apparently, it clears up all doubt, if any could have existed without it, that whatever contractual relations may, under certain circumstances, exist between a principal and subagents appointed by his general agent, none such as those here guarded against, can exist in this case. It makes perfectly clear, what we think was clear independently of it, that the contract of subagent Gray, with the general agent, Black, expired with the termination of the latter's contract with the company, and the relations to the business of the company on Gray's part, which commenced with and sprang from his contract with the general agent, ceased when the latter's general agency ceased. What implication of a contractual relation in this respect, between the company and a subagent appointed by Black, can exist, in the face of this express provision forbidding it? Any business connection thereafter existing between Gray and the company must depend, as we have said, upon authority implied from the conduct of the parties, subsequent to the discharge of Black, and terminable at the will of either. The suit in this case is ex contractu, and the defendant, it is contended, is privy to the written contract upon which it is founded. Whatever argument has been made for the contention of plaintiff below, apart from this exemption clause, none, it seems to us, can be made when it is taken into consideration. It would be doing violence to the law of the contract, if it were ignored. In view of this clause, it is hardly worth while to discuss the authorities and cases cited by counsel. We have examined them all, both text-books and cases, and find no support for the proposition, that a principal can be made liable to a subagent, appointed by his general agent, where such principal, in his contract with his general agent, has expressly stipulated that such general agent is to be responsible to the principal for the acts and conduct of his subagents, and that in no case, and under no circumstances, shall the principal be liable for commissions or compensation to such subagents. In the view we take of the contract upon which this suit purports to be founded, the interpretation put thereupon by the learned judge of the court below, in his charge to the jury, was erroneous, and we cannot, therefore, agree with his instruction to the jury, founded upon that interpretation, which was as follows:—

"And we instruct you, therefore, that the fact that the company dismissed Black did not operate to dismiss Gray from the company's service, and put an end to his relations with them. He had a valid contract which was to last for five years, unless sooner terminated for good and sufficient reason."

On the contrary, we think he should have instructed the jury, that the contract sued upon, taken in connection with the clauses quoted from the contract between the company and its general agent, was not a contract between the defendant company and the plaintiff, and no liability, on the part of the said defendant to the said plaintiff,

was created thereby. Such an instruction as this, which we think should have been given, would be equivalent to a binding instruction to find a verdict for the defendant.

Counsel for plaintiff below make a point of the statement in the affidavit of defense, sworn to by the secretary of the company, and duly filed, that it was true that, on the 2d day of September, 1893, the said defendant, acting by David Black, its then general agent for the Middle states, did appoint the plaintiff and his partners, subagents for the company, with an office in Philadelphia, and that the said David Black, general agent as aforesaid, was at that time duly authorized to make such appointments. How far the admission of a fact stated in an affidavit of defense could be used against the defendant in a trial upon the issues subsequently formed by the pleadings, may be a question. In the present case, the affidavit containing the allegation referred to, was made by the secretary of the company, in compliance with the requirements of law, to prevent judgment being had by default against the defendant at the appearance term. The case subsequently went to issue upon the pleas of non assumpsit, payment and set-off, and upon these issues, was tried. The contract sued upon was in writing, and was set out in totidem verbis, by the plaintiff, in his statement of claim. The due interpretation of said contract was the province of the court, as a question of law, and not of the jury, as a question of fact. The statement referred to in the affidavit of defense, made by the secretary of the company, was not a statement of a fact, but an interpretation of the written contract upon which the suit was expressly brought, and, therefore, cannot be used as an admission of fact upon any sound theory, and does not come within the reasoning of the decision of the court, in the case of Bowen v. De Lattre, 6 Whart. 434, referred to by counsel for defendant in error. But be this as it may, the most that can be made of the statement in question, as an admission, is, that Gray was duly appointed by the defendant company, as a subagent of Black. Taking this to be true, it by no means follows, that the company was liable to him as subagent, for his compensation as such, in face of the express condition in his written appointment by Black, that he was to look to Black for payment, and the express condition in the defendant company's authorization of his appointment, that said company should, under no circumstances, nor in any manner, be liable for the said compensation, or any part thereof. Nor does it at all follow, that an admission that Gray held the office of subagent under Black, would give him a tenure of office extending beyond that of Black himself. A subagency cannot rise higher than the general agency to which it is subordinate, and when that general agency ceases to exist, of necessity, no subagency, with reference to it, can continue. If this were not true, we should have the anomalous condition of a subagency with no principal agency in existence, and if Black had so chosen, we might have had, at the termination of his general agency, his whole territory filled with subagents, holding terms of five or more years, which the company would have been powerless, according to the contention of plaintiff below, to terminate or control. If it be true that Gray was appointed subagent of Black, by

the company, still, the appointment must be taken as made subject to the express conditions set out in the letter of appointment, and to the limitations inherent in the nature of the office. These express conditions are, that Black may appoint subagents "for the fulfillment of his agreements" with the company. Here is a clearly defined purpose for the appointment in question. No other and independent purpose can be attached thereto. If the appointment is made by the company, it is made, in order that the subagent may assist Black in transacting the business that he is under contract with the company to perform. The company did not authorize Black to appoint for any definite term, and Black clearly transcended his power of appointment in behalf of the company (conceding that he was acting for the company), by presuming to attach a term to the office of subagent, that might, by possibility, transcend the period of the existence of his own general agency.

Conceding, therefore, for the sake of the argument, that the effect of the statement in the affidavit of defense was conclusive upon the defendant, and that Gray was appointed a subagent of Black, by the defendant company, we are still brought to the same conclusion, that the instruction of the learned judge of the court below to the jury in the premises, was erroneous. The proper construction of the contract should have been, in this regard, directly contrary to that which was given, and above quoted, to wit;—that the appointment of Gray by Black, for a term of five years, was not binding upon the company, and that Gray had no valid contract with the company which was to last for five years, and that when the company dismissed Black for good and sufficient reason, it did operate to dismiss Gray from the company's service, and put an end to his relations with it under his appointment as subagent. Such an interpretation of the contract would also have put an end to the suit, and be equivalent to a binding instruction to find for the defendant.

The judgment, therefore, of the court below is reversed.

GUARANTY TRUST CO. OF NEW YORK v. GROTRIAN et al.

(Circuit Court of Appeals, Second Circuit. February 4, 1902.)

No. 37.

DRAFTS—CONDITIONAL ACCEPTANCE—ACCOMPANYING FORGED BILLS OF LADING.

A draft directed the drawee to pay, and to charge the same to account of certain flax seed, forged duplicate bills of lading for which were attached to the draft. The acceptance was, "Accepted * * * against indorsed bills of lading" for the flax seed. Before arrival of the steamship on which was the flax seed, according to the bills of lading, and without knowledge that it was not there, or that the bills of lading were forged, the acceptor paid the draft. *Held*, that acceptance was conditioned on delivery of genuine bills of lading, and that this condition was not waived by payment without knowledge of the facts; so that, in the absence of special equities, the acceptor could recover the money paid.

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

This cause comes here upon a writ of error by defendants below to review a judgment overruling a demurrer to the complaint and directing judgment for the plaintiff. 105 Fed. 566.

Julian T. Davies, for plaintiff in error.

Arthur J. Baldwin, for defendants in error.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

TOWNSEND, District Judge. John Glen, of New York City, drew a draft upon Grotrian & Co., plaintiffs, in these words:

"Frederick B. Grotrian & Company, New York. 1911.
"Exchange for £1,518. 8. 7 stg. 11 Nov., 1898.
"Sixty days after sight of this first (second unpaid) pay to my order in London fifteen hundred and eighteen pounds 8. 7 sterling, value received, and charge the same to account of 8,417.50 bush. flax seed.
"John Glen.
"To F. B. Grotrian & Co., Hull."

To this draft he attached forged duplicate bills of lading for the flax seed mentioned in the draft, and on the same day he cashed the draft with defendant. The defendant, 10 days later, presented to the plaintiffs for acceptance the draft accompanied by the forged bills of lading and an insurance policy. The plaintiffs accepted the draft in these words:

"Hull, 21st Nov., 1898.
"Accepted, payable at Lloyd's Bank, Ltd., London, against indorsed bills of lading for 8,417 bushels of flax seed per Buffalo S. S. at New York & Certificate of Insurance $8,500.
"Fred. B. Grotrian & Co.
"Due 22nd Jan., 1899."

There was no representation as to the genuineness of the bill of lading. At the time of the presentation of the draft for acceptance the steamship Buffalo had not arrived at Hull, England, but was in transit. A few days before her arrival the plaintiffs, in order to procure possession of the goods immediately upon arrival, took up the draft, and paid to the defendant, Glen's assignee, $7,319.29. Plaintiffs, at the time of said acceptance and payment, believed the bills of lading to be genuine, and that the flax seed was on the steamship. There was no such flax seed on the steamship, and immediately upon discovering the fraud plaintiffs notified the defendant, and have since duly tendered to defendant the draft, bills of lading, and insurance policy, and have demanded repayment of the $7,319.29. Defendant insists that the acceptance of the draft bound the plaintiffs absolutely without regard to the genuineness of the bills of lading, and that, whether or not defendant could have recovered judgment against plaintiffs if payment of the draft had been refused, the money paid by them cannot be recovered back. It is not disputed that the unconditional acceptance of a draft accompanied by a paper purporting to be a bill of lading, but fictitious, binds the acceptor in ordinary cases, as between him and the payee, where both parties are ignorant of the fraud, even though the payee has cashed the draft for the drawer before presenting it for acceptance to the drawee. In the case at bar, however,

plaintiffs rely on the direction in the draft to charge the amount to account of the flax seed, and the acceptance "against indorsed bills of lading." The defendant insists that by "bills of lading" in the acceptance is to be understood the papers in the form of a bill of lading accompanying the draft, and that, even if the plaintiffs had delayed payment of the draft until its maturity, whereby the fraud would have been discovered before payment, defendant could nevertheless have sued and recovered judgment; and this preliminary question is of vital importance. No case precisely in point has been cited. In Smith v. Vertue, 30 Law J. C. P. 59, it was said that an acceptance substantially like that of the plaintiffs was conditional, and that the bill of lading must be delivered to enable payee to recover; but no question of genuineness was involved, and the statement is obiter. The principal cases on this subject in the United States courts are Hoffman v. Bank, 12 Wall. 181, 20 L. Ed. 366; Goetz v. Bank, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515. In Hoffman v. Bank bills of exchange accompanied by forged bills of lading were discounted by a bank, and subsequently accepted by the drawees. The drawers of the bills had been accustomed to ship flour to the plaintiffs, who, at the request of the drawers, and on their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale, promised to accept them, and did accept them on presentation. The acceptors paid the bills, and, on learning of the forgery of the bills of lading, tendered the same, with the bills of exchange, to the bank, and, repayment being refused, brought suit. The court refers to the argument that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same, and says:

"It is not perceived that the concession, if made, would benefit the plaintiff, as the bills of exchange are in the usual form, and contain no reference whatever to the bills of lading; and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine." And again: "Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was credited by the pecuniary standing of the parties to the same; but it is clear that they are not a part of those instruments, nor are they referred to, either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange."

In Goetz v. Bank—a similar case—the court cites with approval the doctrine in Hoffman v. Bank that, supposing the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached, that fact would not benefit them, as the bills of exchange were in the usual form, and contained no reference whatever to the bills of lading. In most of the cases of acceptance of drafts accompanied by forged bills of lading, cited by defendant, there were special circumstances influencing the equities between the parties, as that the acceptor was the regular correspondent of the drawer, and had been accustomed to accept such drafts from him, or had authorized the making or discounting of the drafts, and in all of said cases the acceptance was unconditional. In the present case, no facts are alleged which establish an equity in favor of the payee against the acceptor. Defendant might have refused to receive any acceptance

other than an absolute one. In fact, Glen had given it a written assignment of the draft, in which it was particularly stated that it might exercise this option. The request to pay was conditioned upon the delivery of the flax seed, and plaintiff's acceptance of the draft was conditioned upon the delivery of the indorsed bills of lading for it. The payment of the draft before the arrival of the steamer does not justify a construction of the entirely intelligible words "indorsed bills of lading" as importing "documents purporting to be indorsed bills of lading," or as importing documents in the form of bills of lading attached to this draft.

It is contended that the equities are equal, and therefore that the party having the money should retain it. This would have been the case if the acceptance had been unconditional. Defendant first paid the money and received the forged documents. But, under their conditional acceptance, plaintiff had a right to genuine documents and to rely on the genuineness of those delivered upon the discharge of their obligation. The precedents cited by defendant of waiver of condition by payment without performance of the condition are cases where the party paying knew at the time of payment that the condition had not been performed. Here both parties supposed that it was performed, and no such waiver can be inferred. There was no relinquishment of any right, for the parties were ignorant of the facts. A waiver is an intentional relinquishment of a known right. Transfer of valid bills of lading would have been equivalent to delivery of the flax seed.

Finally, defendant contends that this is a case where a pledgor had given an order to a third party to receive the security upon payment of the debt, and that the party paying cannot recover back the money from the pledgee on the ground that the security was found to be valueless; and cites Ketchum v. Stevens, 19 N. Y. 499; Baker v. Arnot, 67 N. Y. 448; and Aiken v. Short, 37 Eng. Law & Eq. 592. In each of these cases the court held that under the particular circumstances the plaintiff paid the debt as the agent of the original debtor, and that the transaction was, in effect, a redelivery of the security to the original pledgor, and a subsequent transfer by him to the plaintiff. But in the present case the plaintiffs qualified their acceptance so as to make it dependent upon the shipment of the flax seed and the genuineness of the bill therefor. They paid the money, not on the original contract of the drawer, but upon the new contract created by their conditional acceptance, and the assent thereto of defendant. In Aiken v. Short, cited at length in Ketchum v. Stevens, which is relied on in Baker v. Arnot, Baron Bramhall said:

"It seems to me that the right to recover money paid under a mistake of fact must have reference to a belief in the existence of a fact which, if true, would have given the person receiving a right against the person paying the money."

The case at bar falls within this rule. The acceptance herein was conditioned upon receipt of bills of lading, which, however, were forged, and therefore nullities, unless some intervening right should arise,—as by estoppel, agency, or otherwise. It is true, the payment was prematurely made, but no intervening rights or liabilities were acquired or imposed. Defendant had no rights under the forged papers,

and, if he had any, they would not have been prejudiced. Munger v. Shannon, 61 N. Y. 251; Brill v. Tuttle, 81 N. Y. 454, 37 Am. Rep. 515.

The judgment is affirmed.

In re PAQUET.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1902.)

No. 1,116.

CIRCUIT COURTS OF APPEALS—JURISDICTION—WRIT OF PROHIBITION.

Under section 6 of the act creating the circuit courts of appeals (26 Stat. 826), which provides that such courts "shall exercise appellate jurisdiction to review by appeal or writ of error final decisions," and section 12, which gives them power to issue "all writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law," such writs are to be issued only when necessary to the appellate jurisdiction of the court, and the court has no power to issue a writ of prohibition to stay proceedings in a circuit court in a case in which its appellate jurisdiction has not been invoked either by an appeal or writ of error.

On Application for Writ of Prohibition.

The relator presents the following:

"To the Honorable United States Circuit Court of Appeals for the Fifth Circuit: The petition of Louis P. Paquet, a citizen of the state of Louisiana and a resident of the city of New Orleans, respectfully shows: That he is an attorney at law, duly admitted to practice in the courts of the United States, and that he has recently had occasion in his professional capacity to appear in the United States circuit court for the Northern district of Florida in a cause pending therein, entitled 'Mrs. Florida McGuire vs. The Pensacola City Company et al.,' No. 71 of the docket of said court, and that said cause, on motion of counsel for the plaintiff, discontinued at her costs on Monday, November 11, 1901. That previously, to wit, on Saturday, the 9th day of November, 1901, plaintiff in said cause had instituted an action in ejectment in the circuit court of Escambia county, Florida, against Chas. Swayne for certain property, of which the said Florida McGuire claimed to be the owner, and of which she charged that the said Chas. Swayne was in possession. That your petitioner, while not of counsel in said cause for the reason that he had not been admitted as a practitioner in the state courts of Florida, assented to and advised the institution of the same as counsel for the plaintiff generally. That on the 14th day of December, 1901, the Hon. Chas. Swayne, judge of the United States circuit court for the Northern district of Florida, issued and signed an order, a copy of which is hereto annexed and made a part of this petition as an exhibit, marked 'Exhibit A,' in which he directed that this petitioner 'be, and he is hereby, cited to appear before me, Chas. Swayne, judge of this court, at 10 o'clock a. m., on Saturday, December 21, 1901, to show cause why he should not be punished for contempt, upon the grounds and for the reasons set forth in said motion (i. e., the motion of W. A. Blount, Esq., an attorney and counselor of said court, for a citation to the said defendant, etc.), which is now of record in the records of said court, and a copy of which is to be attached by the clerk to the copy of this order to be served upon the said Louis Paquet;' and that said citation, together with a statement of the said judge attached thereto and the motion of the said Blount, all of which are attached to and made a part of this petition, marked 'Exhibit B,' were served upon your petitioner on the 16th day of December, 1901. That upon the 21st day of December, 1901, your petitioner, in obedience to the said citation, appeared

before the said judge at Pensacola, and then and there objected to the jurisdiction of the said judge to proceed with the said citation and motion upon the grounds set forth in the demurrer then filed by petitioner, a copy of which is hereto annexed and made a part of this petition, marked 'Exhibit C.' That said judge thereupon overruled the demurrer and objections of this petitioner, and declared that he would proceed with the trial of said motion; whereupon petitioner filed an answer thereto, in which answer he expressly disavowed any intention to commit any contempt against the authority of said court, and averred that the acts which he had done and as charged in said motion were done in the exercise of his rights as a citizen of the United States, and pursuant to the laws and constitution of the state of Florida, and constituted no contempt against the authority of said court, which answer was duly verified by the affidavit of this petitioner, and filed in the records of said court; and petitioner thereupon objected to the introduction of any evidence to controvert the facts stated in said answer, and demanded his discharge, which objection was overruled by the said judge, who thereupon declared his intention to hear evidence upon the said motion, and after hearing the same to decide whether or not your petitioner was guilty of contempt of the authority of his said court, and the said proceeding was continued for further hearing until the 4th day of January, instant. Now, your petitioner shows that all the acts, doings, and proceedings of the said judge, hereinafter recited, are wholly without jurisdiction or authority or warrant in law; that the same are oppressive, and that your petitioner will be deprived of his liberty, unless this honorable court will prohibit further proceedings therein; and that petitioner has no other remedy except the writ of prohibition which can prevent the said judge from unjustly, unlawfully, and without any jurisdiction so to do, depriving your petioner of his liberty, and condemning him to pay a fine or be imprisoned in default thereof, or to be imprisoned, as the said judge may determine. Petitioner further shows that upon identically the same state of facts the said judge has passed sentence upon E. T. Davis and Simeon Belden, attorneys and counselors at law, who were associated with petitioner in the prosecution of the case of Florida McGuire against the Pensacola City Company, hereinbefore referred to, and who filed the suit hereinbefore referred to against Charles Swayne, who is the presiding judge of the United States circuit court for the Northern district of Florida. Petitioner further shows that the offense charged against him in the motion of W. A. Blount, Esq., heretofore annexed, is that he, as attorney and counselor of the said United States circuit court for the Northern district of Florida, caused and procured to be issued, as attorney of the circuit court of Escambia county, state of Florida, a summons in ejectment, wherein Florida McGuire was plaintiff and the Hon. Chas. Swayne was defendant, and caused the same to be served on the said judge of the United States circuit court to recover the possession of block 91 of the Cheveaux tract in the city of Pensacola, Florida, a tract of land involved in a controversy in ejectment then depending in the said United States circuit court, wherein the said Florida McGuire was plaintiff and the Pensacola Company et al. were defendants, and in the motion of the said Blount it is alleged: That the said action in ejectment against the said judge was instituted after a petition had been presented to the said judge to recuse himself in the case of Florida McGuire, referred to, and after the same had been submitted and overruled, because the said judge had stated in the presence of this petitioner and the other counsel in the case that the allegation that he or any member of his family was interested in or owned the property in controversy in said suits was untrue, and that he had refused to permit a member of his family to buy the said land, because the suit of Florida McGuire, involving the title of said tract, was then in litigation before him. That after this declaration by the judge the counsel were aware that neither he nor any member of his family were interested in any part of the said tract, and had no reason to believe that they were so interested, and could easily have known that the said block was not in the possession of any one, but was entirely unoccupied. That the said suit against the said judge was instituted on Saturday, the 9th of November, 1901, after six o'clock, and after the court had overruled a motion to postpone the trial

of the case of Florida McGuire vs. The Pensacola City Company for a week or more, and after the judge had announced that he would call said cause for trial on Monday, November 11, 1901, and would proceed to try it, unless the plaintiff made a sufficient showing why he should not do so, and that counsel had announced that they would make such showing. Your petitioner shows that, according to the foregoing charges contained in said motion, he is now summoned before a judge of the United States circuit court to show cause why he should not be punished for contempt for disregarding a verbal statement made by said judge, and for filing a suit against him individually in one of the courts of the state of Florida, by which said suit he contradicted the verity of the declaration made by said judge. Petitioner shows that, while the statement of the said judge was conclusive so far as it affected the question then pending before him, to wit, the motion to recuse him by reason of his interest in the cause, it was not conclusive in his favor in any matter personal to him, and was not bound to be accepted by a party in interest elsewhere, or for any other purpose than so far as the same formed part of a ruling of the said judge in a cause then pending before him, and that petitioner's client had the constitutional right to test the question of the interest of the said Charles Swayne in the said property by a suit in the courts of the state of Florida. That under the statute of the United States in such case made and provided the said judge has jurisdiction to punish for contempt (1) in case of misbehavior of persons in the court or so near to the place where it is held as to obstruct the administration of justice; (2) in case of the misbehavior in official transactions of officers of court; and (3) in case of obstruction to the process of the court. And that jurisdiction to try for such offenses does not extend to acts committed elsewhere, not embraced in any of the foregoing definitions, and especially not to acts committed in an official capacity in another court, which is one of concurrent jurisdiction. Now, your petitioner is advised and believes, and so believing avers, that the said judge, under the jurisdiction which he has usurped herein, will deprive petitioner of his liberty or property, unless restrained by process of this honorable court; that such imprisonment or fine will be in violation of petitioner's rights as a citizen of the United States, and that the same will work him an irreparable injury, for and against which there can and will otherwise be no redress. Wherefore, the premises considered, your petitioner prays that your honors will grant a writ of prohibition herein directed to the said Charles Swayne, presiding judge of the United States circuit court for the Northern district of Florida, restraining and prohibiting the said judge from further proceeding with the trial of the said motion to punish your petitioner for contempt as aforesaid; that a writ of certiorari issue to the said judge, requiring him to cause to be made and to be sent to this honorable court a true and complete transcript of the proceedings aforesaid, the same being entitled 'In re Contempt Proceedings against Louis Paquet'; that upon trial hereof the said writ of prohibition may be confirmed and made perpetual. Petitioner prays for all such other and further orders and decrees as the nature of the case may require, and for general and equitable relief.

"Boatner, Dodds & Boatner, Attorneys.

"Before me, the undersigned authority, personally came and appeared Louis P. Paquet, who, on being duly sworn, deposes that all the facts stated and allegations made in the foregoing petition, so far as they are made on his own knowledge, are true, and that, so far as they are made on information obtained from others, he believes them to be true.

"Louis P. Paquet.

"Sworn to and subscribed before me, this 2d day of January, 1901.
"[Seal.] Martin H. Harrison, Not. Pub."

This petition has attached exhibits showing proceedings had in the circuit court of the United States for the Northern district of Florida in the matter of the contempt proceedings against Louis P. Paquet, to wit, the rule to show cause, the written charge for contempt, and the demurrer of Louis P. Paquet.

In this court, on behalf of the respondent judge, a demurrer has been filed as follows:

"The respondent, the said Charles Swayne, by his attorney, William A. Blount, demurs to the said petition and the said rule upon the following grounds, to wit: (1) That this honorable court has no jurisdiction to issue a writ of prohibition in the cause and under the circumstances set forth in said petition and rule; (2) that the said petition and rule do not show that the respondent has not jurisdiction to do each and every of the things which it is alleged in said petition that he has done and is about to do, and does not show that he has exceeded, or is about to exceed, his jurisdiction."

J. C. Boatner, for relator.

W. A. Blount, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. This court is an appellate court, and depends entirely for its powers upon the statute of March 3, 1891 (26 Stat. 826), and statutes amendatory thereof. Its power to issue writs is derived from section 12 of that act, which gives the court the power specified in section 716, Rev. St. U. S., to issue writs of scire facias, and "all writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law." Further than this, the appellate jurisdiction appears to be limited by the act creating the court to two methods of review,—by appeal and writ of error. Section 6 provides that the courts of appeal established by this act "shall exercise appellate jurisdiction to review by appeal or writ of error final decisions," etc., and no other method of review is provided. In issuing writs not specially provided for by statute, it appears by the letter of the law that such writs are to be issued when necessary for our jurisdiction, and it would seem that, by the intent of the law, only when necessary to such jurisdiction; and this is supported by Ex parte Gordon, 1 Black, 503, 17 L. Ed. 134; Ex parte Christy, 3 How. 296, 322, 11 L. Ed. 603; In re Bininger, 7 Blatchf. 159, Fed. Cas. No. 1,417. See, also, U. S. v. Williams, 14 C. C. A. 440, 67 Fed. 384. In the case referred to in the petition herein the appellate jurisdiction of this court has never been invoked, perhaps never may be, and, on reason and authority, we have no jurisdiction at this time to issue any writ. Whether or not, after final decision in the circuit court, a writ of error will lie to this court is perhaps open to some question. Certainly the supreme court, through a long line of decisions ending in Chetwood's Case, 165 U. S. 443, 462, 17 Sup. Ct. 385, 41 L. Ed. 782, held that "judgments in proceedings in contempt are not reviewable here on appeal or error,"—citing Hayes v. Fisher, 102 U. S. 121, 26 L. Ed. 95; In re Debs, 158 U. S. 564, 573, 15 Sup. Ct. 900, 39 L. Ed. 1092; Id., 159 U. S. 251, 15 Sup. Ct. 1039.

But in Tinsley v. Anderson, 171 U. S. 101, 105, 18 Sup. Ct. 805, 43 L. Ed. 91, referring to the statement in Chetwood's Case, the supreme court said:

"But that statement was made in regard to such judgments in independent proceedings for contempt in the circuit courts of the United States, and the reason is, as in cases referred to in Hayes v. Fisher, above cited, such judgments were considered as judgments in criminal cases in which this court had no appellate jurisdiction of those courts."

Now, it may be that under the act of March 3, 1891, creating the circuit courts of appeals, wherein appellate jurisdiction is conferred upon this court to review by appeal or writ of error final decisions of the district and existing circuit courts in criminal cases, a writ of error will lie from a judgment of conviction and the imposition of a fine or imprisonment in an independent proceeding for contempt in one of the circuit courts of the United States in this circuit, but, if this be so, it cannot avail the petitioner herein at this time. The general rule is that where relief can be obtained through the usual course by writ of error extraordinary writs will not issue. In re Tampa Suburban R. Co., 168 U. S. 583, 587, 18 Sup. Ct. 177, 42 L. Ed. 589.

Writ of prohibition denied.

PERKINS COUNTY, NEB., v. GRAFF.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,619.

1. ISSUE OF BONDS—ELECTION—OFFER OF EMPLOYMENT NOT BRIBERY.
   In an election to determine whether or not bonds shall be issued to aid the construction of a work of internal improvement, an offer in the proposition submitted to employ bona fide residents upon the work is not an offer of an unlawful inducement, and will not invalidate the bonds.

2. SAME—"ISSUE"—INTERPRETATION OF.
   The verb "issue" means to emit or send forth, and it does not embrace the preliminary acts of signing and dating, but is confined to the delivery of bonds.

3. CONTRACT—NOTICE—CONSTRUCTION.
   Where the proposition accepted called for the delivery of bonds in installments of $1,000 upon presentation of certificates of performance of work of the value of $1,000, a notice that the county will deliver the same in accordance with the terms of the proposition is a notice that the bonds will be issued at the times when the certificates are presented.

4. SAME—CONSIDERATION—LOSS TO OBLIGEE.
   A loss of property or money by the obligee is as valid a consideration for an obligation as a gain by the obligor. A company agreed to construct and complete a canal, for bonds to be delivered in installments as the work progressed. Work of the value of $25,000 was performed, and bonds to this amount were delivered; but the work was never completed, and the county issuing the bonds derived no benefit from them. *Held*, the work performed by the company was a valid consideration for the bonds, though the county derived no advantage from the work.

5. COUNTY BONDS—PUBLIC PURPOSE—INTERNAL IMPROVEMENT.
   A canal constructed for the purpose of irrigating lands in the state of Nebraska is an internal improvement, and bonds issued by a county in that state to aid it are sent forth for a public purpose, although its waters are drawn from a river or from other sources without the state.

6. IRRIGATION—DRAWING WATER FROM ANOTHER STATE—LEGALITY OF ACT.
   Drawing water through a canal from one state into another for the purpose of irrigating lands in the latter state is not necessarily a violation of the constitution, laws, or policy of the former state, although that state reserves all the waters for itself and its citizens, so far as they are necessary for the beneficial uses to which the state and its citizens apply them.

(Syllabus by the Court.)

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

This was an action on coupons cut from bonds of Perkins county, Neb. The county defended on various grounds, which are noticed in the opinion. The material facts established at the trial were these: On July 12, 1894, the Equitable Irrigation & Water Power Company, a corporation, submitted to the board of county commissioners of Perkins county, Neb., a proposition to construct a canal for the purpose of irrigation, the development of water power, and other useful purposes, from a point on the Platte river about eight miles west of Julesburg, in the state of Colorado, to and through Perkins county, to the east line thereof, on the condition that the county would donate to the company its 6 per cent. coupon negotiable bonds for $90,000, dated September 1, 1894, due 20 years thereafter; that these bonds should be delivered to the fiscal agency of the state of Nebraska, in the city of New York; and that this fiscal agency should deliver them to the company, in installments of $1,000, upon presentation of certificates of the engineer in charge of the work, attested by the president and secretary of the company, and approved by the board of county commissioners of Perkins county, that work to the amount of $1,000 had been completed upon the canal. The company also proposed, in consideration of receiving the proposed aid in this way, to commence work upon the canal on or before August 20, 1894, to complete it on September 1, 1895, and to give employment in its construction to bona fide residents of Perkins county so far as this course should not conflict with the completion of the work at the time proposed. The board of county commissioners of the county submitted the question of the issuing of the bonds in pursuance of this proposition to a vote of the electors of the county on August 17, 1894, and more than two-thirds of them voted to accept the proposition and issue the bonds. On August 21, 1894, the board of county commissioners of the county caused the proposition and the result of the vote to be entered upon the records of the county, and caused a notice of its adoption to be published for two successive weeks in the Woolly West, a newspaper published in the county. The company entered upon the construction of the work, and, from time to time as it progressed, certificates of the amount of work completed, in the form and signed by the parties named in the proposition, aggregating altogether $25,000, were issued; and, in pursuance of the contract, bonds to the amount of $25,000 were issued upon these certificates to the irrigation company. At the time of the commencement of this action the plaintiff was the owner of the coupons in suit, which were cut from these bonds. None of the bonds were issued until after October 30, 1894. The canal has never been completed. Upon this state of facts the court below instructed the jury at the close of the trial to return a verdict for the plaintiff for the amount of the coupons he owned and interest. The writ of error has been sued out to reverse the judgment based upon this verdict, and the county assigns as error the ruling of the court admitting the coupons in evidence, and its instruction to the jury to return a verdict for the plaintiff.

Frank H. Gaines (J. E. Kelby, J. A. Storey, and B. F. Hastings, on the brief), for plaintiff in error.

C. B. Keller and J. M. Johnson, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The first ground upon which the validity of the bonds and coupons in issue is challenged is that the voters of the county were bribed to vote for their issue, because the proposition of the irrigation company, which they voted to accept, contained the offer "to give employment in the construction of said canal to bona fide residents of

Perkins county, Nebraska, so far as it shall not conflict with the completion of the work at the time herein stated." But there was no corrupt or illegal inducement in this proposal. When electors are called upon to choose between great moral or political principles or between candidates for official positions, the use of any pecuniary inducement to sway the choice of the voter is illegal and corrupt. But there was no choice of principles or of persons involved in the question whether or not this county should aid the construction of this canal. When the question to be determined is whether or not public aid shall be given to the construction of an internal improvement within a county, city, or other political division of a state, the primary question is whether or not the improvement will be of pecuniary benefit to the political subdivision and its people. The very purpose of the submission of the question to the voters is to enable them to balance in their own minds the pecuniary advantages and disadvantages which their county, city, or precinct will derive from the improvement, and the taxation which must follow the aid to its construction proposed; and it is both lawful and proper that they should consider and be influenced by the gain or loss which, in their judgment, its construction will entail upon themselves and their county or city. Farmers along the line of this proposed canal were undoubtedly influenced to vote for it by the belief that the water it would conduct would enable them to raise larger crops and obtain larger incomes. The inhabitants of villages were probably induced to vote for it because it would furnish water power and water to their communities, and thus enable them to employ, and be employed in, the use of the machinery it would operate. These were proper inducements to influence the action of the voters of this county upon the question of the issue of these bonds. They were the very inducements which it was the intent and purpose of the legislature that they should consider and be governed by in their action upon the proposition to aid the project submitted. The consideration that the building of this work would give to the residents of the county employment and wages during its construction was of the same character as the consideration that its waters, when it was constructed, would irrigate farms, drive factories, and furnish water for domestic purposes, and thereby increase the income and the comfort of the residents along its line. This inducement was offered to every resident of the county. The offer was not restricted to any individuals or classes. It was not limited to the voters. This offer was neither a corrupt nor an illegal consideration, and there is no reason why the county should be relieved from its just and voluntary obligations because this consideration may have had its legitimate influence in inducing the voters to accept the proposition which offered it.

The second objection to the bonds is that there was no consideration for their execution, because the canal was never completed. But the contract between the county and the irrigation company was that the former would aid the latter in the construction of the canal by delivering to it a bond for $1,000 as often as the irrigation company completed work upon the canal of the value of $1,000, evidenced by the certificate of its engineer and of the board of county

commissioners of the county. The company completed work of the value of $25,000, obtained the proper certificates, and secured bonds to that amount. It is said that there was no consideration for these bonds, because the county has received no benefit from the canal. But a loss to the party who receives the obligation is as legal and valuable a consideration as a benefit to the party who makes it, and the evidence of these certificates is conclusive that the irrigation company incurred a loss of $25,000 by the performance of work of the value of $25,000 in consideration of the delivery of these obligations. There was, therefore, no lack of consideration for the issue of the bonds.

Another objection to the judgment is that the bonds were void because the statutes of Nebraska under which they were issued required the county commissioners to publish a notice of the adoption of the proposition of the irrigation company by the vote of the county for two successive weeks in some newspaper before they issued the bonds (Comp. St. 1899, p. 727, § 3509), and the bonds contain a recital that the board of county commissioners "on the 21st day of August, A. D. 1894, while in regular session, by an order duly made, caused a notice to be published that on September 1st, 1894, they would execute said bond, and deliver the same in accordance with the terms of the proposition voted upon, and this bond has been issued in pursuance of said order." The bonds bear the date of September 1, 1894. The objection is that the date of the bonds (September 1, 1894) shows that they were issued before the notice of two weeks was published, inasmuch as there were only ten days between August 21, 1894, when the notice was directed to be published, and the date of the bonds, September 1, 1894. But the date of the bonds does not evidence the date of their issue. The recital in the bonds is that the commissioners directed a notice that they would execute the bonds and deliver the same in accordance with the terms of the proposition voted upon. The terms of the proposition voted upon prohibited the delivery of any bond until it was earned by the completion of work to its amount upon the canal, and the stipulation of the parties is that none of the bonds were issued prior to October 30, 1894. The result is that the publication of the two-weeks notice of the adoption of the proposition by the vote of the people was completed long before any of the bonds were issued. It was commenced on August 23, 1894, and it was completed on September 7, 1894. No bond was issued until after October 30, 1894. The objection that the bonds were prematurely issued, or that the commissioners of the county had no authority to issue them when they were delivered, is therefore without support in the evidence, and cannot be sustained.

In the argument of the objection which has been considered, it was suggested that the term "issue," in the statute under consideration, included not only the delivery of the bonds, but all the preceding acts of signature and preparation. The meaning of this term in statutes of this character was considered with some care by this court in Corning v. Board, 42 C. C. A. 154, 102 Fed. 57; and the conclusion was there reached that, in the absence of other definition, it must be given its usual significance to persons of ordinary intelligence, and

that that significance was to send forth; to emit. The bonds in this case were in the absolute control of the county commissioners, in the hands of the fiscal agency of the county, in the city of New York, until they executed the certificates that the requisite amount of work had been done to entitle the irrigation company to receive them. The company could not obtain them or apply them to any use until it first obtained these certificates from the board of county commissioners. The bonds, therefore, were neither actually nor legally issued until the commissioners certified that the work had been done, and upon the presentation of those certificates the fiscal agency delivered the bonds to the company.

Another objection to the bonds is that this canal was not a work of internal improvement, within the meaning of the statutes of Nebraska which authorize the issue of bonds to aid in such a work (Comp. St. 1899, c. 45, § 3506), because the water for it was not to be taken out of any of the rivers or lakes in the state of Nebraska. Counsel for the county concede that the construction of an irrigation canal for the purpose of drawing water from any of the rivers or lakes of the state of Nebraska is a work of internal improvement, within the meaning of this statute, under both the legislative and the judicial interpretation of its terms. Id. § 5491; Cummings v. Hyatt, 54 Neb. 35, 42, 74 N. W. 411; Paxton & Hershey Irrigating Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co., 45 Neb. 884, 64 N. W. 343, 29 L. R. A. 853, 50 Am. St. Rep. 585; Clark v. Improvement Co., 45 Neb. 798, 64 N. W. 239; Board v. Collins, 46 Neb. 411, 64 N. W. 1086. Their contention is that although an irrigation canal, which derives its water from the rivers or lakes of the state, is an internal improvement, and bonds issued to aid its construction are sent forth for a public purpose, a canal which derives its water from a private source, or from the rivers or lakes of another state, and conducts it into or through the state of Nebraska, is not a work of internal improvement, and bonds issued to aid it are emitted for a private purpose, and are therefore void. Their argument is that the only ground upon which bonds to aid in the construction of an irrigation canal have been or can be held to have been issued for a public purpose is that they were issued to improve the rivers or water ways of the state from which they derive their water, and that, as the construction of this canal would not improve any of the rivers of Nebraska, the reason of the rule, and therefore the rule itself, cease to operate, and the bonds here in question were issued for a private purpose. The argument is certainly ingenious, but it is not persuasive. Its major premise can neither be conceded nor sustained. The controlling reason why canals for irrigating purposes are works of internal improvement, and why municipal aid in their construction is for a public, and not for a private, purpose, is not that they improve the rivers or water ways of the states in which they are constructed, but because they redeem waste places, make barren, arid lands fruitful, and thereby increase the actual value of the property and of the products of precincts, towns, and counties far more than the amount of taxes required to assist in their construction. It is the general benefit to the entire property of the com-

munity, and not the mere improvement of the rivers or lakes from which the waters of the canals are drawn, that stamps the purpose of their construction as public, rather than private. There is no legal distinction in purpose between a canal whose waters are drawn from the rivers or lakes of the state in which it is constructed, and one whose waters are drawn from private sources, or from the rivers or lakes of other states. The construction of the latter is as public a purpose as the construction of the former, and these bonds cannot be defeated because they were issued to aid the construction of a canal whose waters were to be taken from the Platte river in the state of Colorado.

Finally it is said that the bonds are void because they were issued to assist the irrigation company in violating the constitution and laws of Colorado, and the comity between the states. Section 10 of article 16 of the constitution of Colorado provides that "the water of every stream is hereby declared to be the property of the public and is dedicated to the use of the people of the state as hereinafter provided." The proposition of the irrigation company was to construct a canal which should take the waters of the Platte river from a point in the state of Colorado about eight miles west of Julesburg, and conduct them thence easterly to and through Perkins county, Neb. It is contended that the acceptance and execution of this proposal would violate the constitution and laws of Colorado, because the waters of the river in that state were reserved by its constitution and laws for its people. But the constitution, the statutes, and the judicial decisions of Colorado limited the power of its citizens to use the waters of the rivers of that state to the amounts which are necessary for the beneficial uses to which they apply or intend to apply them. Emigration Co. v. Gallegos, 32 C. C. A. 470, 89 Fed. 769, 772; Thomas v. Guiraud, 6 Colo. 530, 532; Railroad Co. v. People, 8 Colo. 614, 616, 9 Pac. 794. The constitution and laws of that state have been in force for many years, and yet there is a surplus of the waters of the Platte river, which flows from the state of Colorado into the state of Nebraska. No reason is perceived why the irrigation company might not lawfully withdraw this surplus water from the river at such place in the state of Colorado as it should select, and lead it through a portion of that state into the county which issued these bonds, to irrigate the arid lands in that region. Corporations of other states are not prohibited from transacting business in the state of Colorado. There is no law of that state to which our attention has been called which prohibits such corporations from obtaining by purchase the right of way through private property, and no reason is perceived why the scheme of the irrigation company was not both rational and lawful. The construction and maintenance of canals for the purpose of irrigating arid lands is both permitted and promoted by the legislation and the public policy of the state of Colorado. It was undoubtedly a part of the scheme of this company to irrigate the lands in the state of Colorado which should be adjacent to its canal. When this had been done, no injury could result to the state or to the citizens of the state of Colorado from leading the surplus waters of the Platte river through the canal

beyond the limits of that state into the county of Perkins, because these surplus waters would flow beyond the borders of that state, and into the state of Nebraska, along the natural channel of the river, if they were not drawn into it through the canal. When the proposition of the irrigation company is carefully and rationally considered, it is not obnoxious to the constitution, the laws, or the public policy of the state of Colorado, and these bonds cannot be defeated because the intention of the company was to draw the waters to irrigate the lands of this county from without the state of Nebraska.

There was no error in the trial of this case, and the court below properly instructed the jury to return a verdict against the county for the amount of the coupons in suit, with interest. The judgment based on that verdict is accordingly affirmed.

C. S. MOREY MERCANTILE CO. v. SCHIFFER.

(Circuit Court of Appeals. Eighth Circuit. March 24, 1902.)

No. 1,611.

1. BANKRUPTCY—PAYMENTS ON ACCOUNT CURRENT—PREFERENCES.
   The receipt by a creditor of payments upon an account current in the usual course of business, which are followed by new credits for property delivered to the debtor, which becomes a part of his estate, for which the creditor is not paid, and which equals or exceeds in amount and value the payments, does not constitute a preference, under section 60a, and does not require the creditor to surrender such payments, as a condition of the allowance of his claim, under section 57g of the bankrupt act of 1898.
2. SAME—CREDITOR'S CLAIM ON ACCOUNT CURRENT NOT DIVISIBLE.
   The claim of a creditor for a balance due upon an account current with the bankrupt is one single claim, and in determining its allowance, and the existence of alleged preferences arising out of the acts it evidences, it must be so considered. It may not be divided into its items or into separate claims for that purpose.
3. SAME—SURRENDER OF PREFERENCES—NEW CREDITS.
   A creditor who comes within the provisions of section 60c of the bankrupt act may set off the amount of his new credits therein mentioned against the amount he would otherwise be required by section 57g to surrender before proving his claim, although he did not have reasonable cause to believe that the transfer of the property to him was intended as a preference, and although the property so transferred is not recoverable by the trustee under section 60b.

(Syllabus by the Court.)

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

W. Scott Bicksler, Lester McLean, and Edmon G. Bennett, for appellant.

George A. H. Fraser, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Walter F. Pierce was a merchant engaged in conducting a retail business in Colorado. The C. S. Morey Mercantile Company was engaged in the business of selling groceries

at wholesale, and it sold and delivered to Pierce small amounts of groceries, on a credit of 60 days, for some months before he was, on January 21, 1901, adjudged a bankrupt. There was owing upon this account between $300 and $400 on September 23, 1900. Between that day and October 2, 1900, Pierce paid the mercantile company $221.26 on account. After these payments were made, and before Pierce was adjudged a bankrupt, the mercantile company sold and delivered to him, upon a credit of 60 days, goods of the value of $444.03, which became a part of his estate. At the close of the transactions between them there remained due from Pierce to the mercantile company the sum of $550.23. The court below ordered the disallowance of this claim unless the creditor should surrender to the trustee the $220.63 which it had received upon its account within four months of the adjudication in bankruptcy. This is the order challenged by this appeal.

This order is based on section 57g of the bankrupt act, which reads:

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

But there are two reasons why the order in question is not warranted by this section. Section 60a reads:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The payment of money is the transfer of property, within the meaning of this section. But it is only a payment or transfer the enforcement of which will enable one creditor to obtain a greater percentage of his debt than any other creditor of the same class that constitutes a preference. Before the enforcement of the payment of the $220.63 which this creditor received about October 1, 1901, can be held to create a preference in his favor, it must appear in some way that this payment enabled it to obtain a greater percentage of its debt than any other creditor of its class. The facts of this case disclose nothing of this kind. The amount owing by the debtor just before these payments were made was less than $400. When the account subsequently closed, it was $550.23. The payment of the $220.63 was followed by the sale and delivery of goods to the debtor of the value of $444.03, on account of which nothing has ever been paid. The net result, therefore, of the payments, and the subsequent sales of the goods upon credit, was that the estate of the bankrupt was increased $223.40, and the amount owing to the creditor was increased by the same amount. How, then, can it be said that the enforcement of these payments enabled this creditor to obtain a greater percentage of his debt than any other creditor of his class? Courts cannot be, and ought not to be, blind to the habits, practices, and motives of business men, which are a part of the common knowledge of mankind. Payments upon current account constitute the inducement for further sales and credits. Let them be refused,

and the sale and delivery of goods cease. It was doubtless the payment of this $220.63 in September and October, 1900, that induced this creditor to make its subsequent sales, and to increase the indebtedness of Pierce to it $223.40 above its amount before the payments were made. The enforcement of such payments does not enable the creditors who receive them to obtain greater percentages of their debts than any other creditors of the same class. It has the opposite effect. It decreases their percentages by as much as the goods sold after the payments exceed the payments, and it increases the percentages of the other creditors correspondingly. The items of debit and credit upon a running account, where goods sold are charged, and payments are credited, are not separate claims. They constitute a single claim. When it is asserted that payments made upon such a claim, followed by goods subsequently delivered on credit, for which no payment has been made, constitute preferences of the creditor, the question is whether the net result of those payments and of the subsequent credits has been an increase or a diminution of the claim. If, taken together, they decrease the claim, their enforcement effects a preference. If, taken together, they increase the claim, they work no preference of the creditor who has received them, but confer a benefit upon the other creditors who share in the estate of the bankrupt, because that estate is increased by the excess of the value of the goods subsequently sold above the payments made. The circuit court of appeals of the First circuit, in treating this subject, well says:

"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." In re Dickson, 49 C. C. A. 574, 111 Fed. 726, 728.

The result is that the payments challenged in this case worked no preference, because the net result of these payments and the subsequent sales of goods on credit to the debtor increased, and did not diminish, the claim, so that their effect was not to enable the mercantile company to obtain a greater percentage than any other creditor of its class, but it was to increase the percentage of every other creditor. The receipt by a creditor of payments upon an account current in the usual course of business, which are followed by new credits for property delivered to the debtor which becomes a part of his estate, for which the creditor is not paid and which equals or exceeds in amount and value the payments, does not constitute a preference, under section 60a, and does not require the creditor to surrender such payments as a condition of the allowance of his claim under section 57g of the bankrupt act of 1898. Kimball v. A. E.

Rosenham Co., 114 Fed. 85; In re Richter's Estate, 20 Fed. Cas. 749, 752 (No. 11,803); In re Dickson, 49 C. C. A. 574, 111 Fed. 726, 728; Peterson v. Nash (C. C. A.) 112 Fed. 311, 314.

In the second place, if the payment of the $220.63 had worked a preference, this creditor would have been entitled to set off against it the amount of the new credit subsequently given, under section 60c of the bankrupt law of 1898. That section reads:

"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."

It is contended that this section authorizes these new credits to be set off only against amounts which might be recovered by the trustee from creditors who have knowingly received preferences in the way described in section 60, subd. "b." The question presented by this contention has been the subject of much debate. All the reasons for and against it have been repeatedly stated by the various courts, and it would be a work of supererogation to repeat or review them here. The arguments in support of the position of counsel for the trustee will be found in Re Christensen (D. C.) 101 Fed. 243; Re Arndt (D. C.) 104 Fed. 234; Re Abraham Steers Lumber Co. (D. C.) 110 Fed. 738, 743. The reasons why, in our opinion, this contention cannot be and ought not to be sustained, have been presented in Peterson v. Nash (C. C. A.) 112 Fed. 311; McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923; Re Dickson, 49 C. C. A. 574, 111 Fed. 726; Re Ryan (D. C.) 105 Fed. 760; Re Seckler (D. C.) 106 Fed. 484; and Re Southern Overalls Mfg. Co. (D. C.) 111 Fed. 518.

Since the decision in Peterson v. Nash, our attention has been called to the following remark contained in the opinion of the supreme court in Pirie v. Trust Co., 182 U. S. 455, 21 Sup. Ct. 906, 45 L. Ed. 1171:

"Nor, again, do we find anything which militates against our conclusion in subdivision '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."

But there are at least two reasons why this remark is neither controlling nor persuasive: In the first place, the question whether or not the set-off provided for by subdivision "c" might be allowed to creditors who had innocently obtained preferences, as well as to those who had done so with intent to evade the provisions of the bankrupt act, was not in issue in that case, and was not decided; and, in the second place, there is nothing in this remark inconsistent with the view that offsets against such preferences may be allowed. It merely states that subdivision "c" is applicable to cases arising under subdivision "b." No one disputes that proposition.

After a careful consideration of the authorities, and the arguments which they so forcibly present upon each side of the question now under consideration, this court, at its last term, arrived at the conclusion that section 60c entitles an innocent creditor who comes within its provisions to set off the amount of his new credits against

the amount he would otherwise be required by section 57g to surrender before proving his claim, and that it is not limited in its application to cases where the trustee may sue to avoid the preferences under section 60b. Peterson v. Nash (C. C. A.) 112 Fed. 311. The circuit courts of appeals of the First and Seventh circuits have arrived at the same conclusion. McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923; In re Dickson, 49 C. C. A. 574, 111 Fed. 726. A thoughtful reconsideration of this question at this term in the light of subsequent decisions, and of the remark of the supreme court to which reference has been made, has served but to confirm us in the righteousness and soundness of that conclusion. The result is that the order below must be reversed, and the case must be remanded to the district court, with directions to allow the claim of the appellant, without the repayment of any of the moneys it has received.

FIRST NAT. BANK OF ROCK SPRINGS, WYO., v. RODER.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,618.

1. MARSHALING ASSETS—JUNIOR INCUMBRANCER—RESORT TO FUND NOT COVERED BY SUPERIOR LIEN.
   One who has a lien upon a single fund or property may compel another, who has a superior lien upon the same fund or property and upon another fund or property, to first resort to the fund or property which is not doubly incumbered for the satisfaction of his claim.
2. SAME—DEMAND BY A JUNIOR INCUMBRANCER.
   A demand or notice by the holder of an inferior lien on one fund or property upon the holder of the superior lien thereon that he preserve and first exhaust his lien upon other funds or property covered thereby, made or given before his lien upon such funds or property is relinquished or lost, is indispensable to the enforcement of the right of the holder of an inferior lien upon property doubly incumbered to compel the holder of the superior lien to preserve or first exhaust that lien upon property covered by it alone.

(Syllabus by the Court.)

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

N. E. Corthell, for appellant.

W. L. Maginnis, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is a bill in equity by a junior mortgagee against the holder of the first mortgage upon personal property for an accounting of the proceeds of the mortgaged property and the application of the surplus after the payment of the debt secured by the first mortgage to the payment of the debt secured by the second mortgage. The result of the final hearing was a finding that on March 13, 1897, the First National Bank of Rock Springs, Wyo., the senior mortgagee, had received $7,227.23 more than an amount sufficient to pay its debt and its necessary expenses, and that

this sum was applicable to the payment of the debt of the junior mortgagee, Mrs. J. W. Roder. A decree followed that the bank should pay this $7,227.23, interest and costs, to Mrs. Roder. From this decree an appeal has been taken to this court, and the errors assigned relate to the allowance and disallowance of various items in the accounting between the appellant and the appellee. The most convenient and expeditious way of presenting our answers to the questions raised and our reasons for them will be to state the rulings challenged, the facts pertinent to them, and our conclusions, seriatim, and that method will accordingly be pursued.

1. It is assigned as error that the court charged the bank with the proceeds of certain wool which it received in the amounts and at the times following, namely, on May 14, 1895, $4,889; on May 2, 1896, $1,555; on June 24, 1896, $3,000; and on November 9, 1896, $1,204.78. The conclusions which have been reached upon other specifications of error render it unnecessary for us to consider any of the items here challenged except the charge of $4,889 made against the bank as of May 14, 1895, and the discussion upon which we are about to enter will be directed to a consideration of the question whether or not the appellant was lawfully chargeable with that item in this accounting. These are the facts which condition the answer to this question: This $4,889 was the proceeds of wool clipped from the sheep hereinafter mentioned in the spring of 1895. The mortgage to the bank, which was made on April 6, 1895, covered 10,750 sheep and the wool growing and to grow thereon, and it secured the payment of a promissory note of even date for $16,728.58, due one year after its date. The mortgage to Mrs. Roder, which secured the payment of a note for $8,300, due on demand, and which was made on April 8, 1895, covered these sheep, and some horses, household furniture, and other personal property of little value, that was not described in the mortgage to the bank, but it did not cover the wool. Mrs. Roder was an aunt of the mortgagor in these mortgages, Edwin S. Murray, and his mother, Mrs. Ellen J. Murray, was her attorney in fact. Mrs. Roder resided in Philadelphia. Mr. Murray and Mrs. Roder's attorney in fact, his mother, lived together at Rock Springs, in the state of Wyoming. The sheep were in the possession of the mortgagor in Sweet Water county and in adjoining counties in the state of Wyoming, where they remained until November, 1895. In the spring of 1895 the wool was clipped from the sheep, and sold, and its proceeds—this $4,889—were sent to the bank, where they were placed to the credit of the account of the mortgagor, Edwin S. Murray, and he drew them out as he pleased, and applied them in part to the payment of his personal expenses and in part to the payment of the expenses of herding and caring for the sheep. In November and December, 1895, Murray shipped 10,500 of the sheep in the name of the bank to the state of Nebraska, where they were left until the spring of 1896, when they were sold, and their proceeds were sent to the bank, which placed them to the credit of the mortgagor, Murray, in his account with it, and permitted him to draw them out as he chose. On March 13, 1897, Murray still had 7,269 sheep. He then owed the bank about $23,000. Thereupon he

agreed to turn these sheep over to the bank for a credit in his account of $2.25 a head, or for a credit in the aggregate of $16,355.25. The bank took them at this price under this agreement, and credited Murray's account accordingly. It sold 6,209 of the sheep for $2 per head, and this was all they were worth. During all this time Murray kept his account with the bank. That account was credited with the proceeds of the wool and with the proceeds of the sheep. Murray drew out the money to his credit in it to pay his personal expenses, to pay interest on the mortgage debt to Mrs. Roder, and to pay the expenses of herding and feeding the sheep. He drew out $6,151.93 that was not applied in any way to the care, maintenance, or sale of the sheep or the wool. During all this time Mrs. Ellen J. Murray, the attorney in fact of Mrs. Roder, lived with her son, the mortgagor, at Rock Springs, in the state of Wyoming, and from time to time, as they were disposed of, she knew that the sheep and the wool were sold, but neither she nor Mrs. Roder ever notified or required the bank to apply to the payment of its mortgage debt the proceeds of the wool to the end that a larger proportion of the value of the sheep might be applied to the payment of her debt; but the bank was aware of the existence of the second mortgage to Mrs. Roder. In this state of the case the court below charged the bank with this $4,889, the proceeds of the 1895 clip of the wool, on the theory that it held its mortgage on the wool in trust for the junior mortgagee of the sheep, and that it was bound in equity to preserve and exhaust its lien on the wool before it could be permitted to have recourse to the sheep, for the reason that it held a lien on both the wool and the sheep, while the junior mortgagee had a lien upon the sheep only. But does not this ruling carry the equitable principle of marshaling assets beyond its just limits? The bank did not derive this $4,889 from the property mortgaged to Mrs. Roder. It did not appropriate it to its own use. It had not taken possession of the sheep or of the wool under its mortgage, or commenced to foreclose it, when the $4,889 was received, and credited to Murray in his account with it. The junior mortgagee had not demanded that the bank should collect its debt by foreclosure or otherwise, or that it should apply this money to its payment. The bank simply permitted the mortgagor to use the proceeds of this wool to pay his personal expenses and the expenses of caring for the sheep. In other words, it simply neglected to enforce its mortgage upon the clip of wool of 1895, and it did nothing more. How does this neglect charge it with liability to Mrs. Roder for this money? The answer of counsel for appellee is that the bank had a lien upon two classes of property (the wool and the sheep), while Mrs. Roder had a lien upon one (the sheep). But does this fact, without more, impose upon the holder of the senior lien the duty to preserve and exhaust the property that is subject to that lien only before it can have recourse to that covered by both liens? Does it make the holder of the senior mortgage the guardian of the holder of the junior mortgage, relieve the latter from all duty and diligence, and impose upon the former the burden of marshaling and realizing upon the securities for the best interests of the latter without any demand or requirement from the latter that

this shall be done? Does the mere taking of an inferior lien upon a part of the property subject to a superior lien relieve the holder of the former from all action and diligence to protect and enforce it, and impose the duty to do so upon the holder of the latter? Let us see. The rule which counsel for appellee invokes is well stated by Mr. Justice Story in section 633 of his work on Equity Jurisprudence in these words:

"If one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund in the first instance for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not trench upon the rights or operate to the prejudice of the party entitled to the double fund."

It will be noticed that under this rule the burden of action and diligence is imposed upon the holder of the second lien, not upon the owner of the first. It gives the former the right in equity to compel the latter to resort first to the fund subject to the single lien. But it does not impose upon him the duty to do so if the former does not exercise this right. Rights in equity do not enforce themselves. Nothing but good faith, conscience, and reasonable diligence can successfully appeal to a court of equity for relief, and, if the holder of an inferior lien upon a doubly incumbered fund intends to insist that the holder of the superior lien shall first resort to the fund subject to that lien alone for its satisfaction, good faith and reasonable diligence require that he shall give notice of his intention, and that he shall point out the course of action which he requires the holder of the first lien to take, before the latter has changed his position and lost his opportunity to pursue it. In McIlvain v. Assurance Co., 93 Pa. 30, Mr. Justice Sterrett well says:

"It is the duty of the latter [holder of a junior incumbrance], if he intends to claim an equity through the prior incumbrance, to give the holder notice, so that he may act with his own understandingly; and, if he fails to do so, the consequences of his neglect must be visited on himself. While the law makes it the duty of every man to so deal with his own as not to injure another unnecessarily, it imposes on the latter a greater obligation to take care of his own property than it does on a stranger to take care of it for him. To hold otherwise would compel the senior incumbrancer to do for the holder of the junior security what in equity and good conscience he ought to do for himself. The doctrine is one of equity jurisprudence, and not of positive law, and hence, to affect the conscience of the former, he should have actual, and not merely constructive, notice of the equity claimed by the latter."

In Ocobock v. Baker, 52 Neb. 447, 452, 72 N. W. 582, 66 Am. St. Rep. 519, a bank had a lien by judgment upon certain real estate, and Ocobock had a lien by mortgage upon a portion of the same real property. The bank released its lien upon some of the property which was not covered by the mortgage of Ocobock, and proceeded to enforce its judgment against the mortgaged property. The supreme court of Nebraska held that, although the bank had notice of the existence of the mortgage of Ocobock, the latter could not charge it with the receipt of the value of the lots released in payment of its judgment, because Ocobock had not demanded of the

bank that it should first exhaust its lien upon the lands that were not covered by its mortgage before it had released them from the judgment. It said:

"But neither constructive notice nor actual notice on the part of the bank of the existence of Ocobock's mortgage was alone sufficient to postpone the bank's judgment lien to his mortgage, because the bank, in possession of such notice or knowledge, released certain lands of Baker's from the lien of its judgment. Ocobock being a subsequent incumbrancer, he was the party that the law required to be vigilant, and the bank was under no obligation to inquire of him as to the amount of his debt, the sufficiency of the security, nor whether he desired it to first exhaust its lien upon lands not covered by its mortgage, or whether he desired it not to release these lands from the lien of its judgment. Ocobock, by his laches, has forfeited the right to have the court apply to his case the doctrine of subrogation."

The rule on which the claim of the appellee is founded here is nothing but a corollary of the equitable principle of subrogation, of the general principle of equity jurisprudence that the holder of an inferior lien may pay off the superior claim and be subrogated to all the rights of its holder. One who has a first lien upon two funds or two pieces of property may collect his debt from one or from both of them. When another procures a second lien upon one of them, the lien of the former is not destroyed or impaired. The primary right of the latter is to redeem the property from the first lien by paying the debt it secures. When he does this be becomes substituted in equity for the holder of the first lien, and acquires the right to enforce that lien against both the funds or properties originally incumbered. In this way the holder of the junior lien may compel the exhaustion of the property covered by the first lien alone to satisfy that claim. Circuity of action is avoided, and the same result is attained, by permitting the holder of the second lien to compel the holder of the first to exhaust the property covered by that lien only, before he has recourse to that which is doubly incumbered. Thus the rule here invoked sprang up as a corollary to this principle of subrogation. But in all these proceedings, in the exercise of the right of redemption, of the right of subrogation, and of the right of compelling the exhaustion of the property covered by the first incumbrance only, the burden of diligence is upon the holder of the second lien, and not upon the owner of the first incumbrance, and he must act, or suffer the loss whch his silence and inaction induce. The holder of the first lien is not required to accept redemption or to permit subrogation until the holder of the inferior lien pays, or tenders payment of, his debt. Nor is he required to preserve and exhaust his lien upon the property or fund which it alone covers until the holder of the second lien demands that he shall do so for his protection. The law provided a sure method by which Mrs. Roder could have availed herself of the lien upon the wool which was held by this bank. She could have paid its debt, and have been subrogated to its rights. It provided another way by which she could have secured the benefit of that lien. She might have demanded of the bank, before it permitted Murray to use the proceeds of this wool, that it should preserve and exhaust its lien upon the wool, and apply all its proceeds to the payment of its claim, before it had recourse

to the sheep to satisfy it. She followed neither course. Her note was due on demand. She could have enforced its collection at any time. The note of the bank was not due until April 6, 1896. The $4,889 was paid to the bank, and placed to the credit of Murray, on May 14, 1895,—more than eight months before its debt was due. The appellee, when she filed her bill in this case on June 3, 1898, prayed for no part of this money, but limited her demand to an accounting for the proceeds of the sheep, which she alleged were seized by the bank in satisfaction of its mortgage in October, 1895. It was not until some time during the preparation for the hearing of this case, years after Murray had spent the money here in question, that the claim to charge this bank with this $4,889 as her trustee was first presented by the appellee. Meanwhile Murray's debt to the bank had never been paid, and, after crediting him with all the proceeds of the wool and the sheep, he remained indebted to it many thousands of dollars. The appellee rested in silence and supine indifference while Murray clipped the wool from the sheep, placed its proceeds in the bank to the credit of his account, which was already overdrawn, and drew it out to pay his personal expenses and the expenses of caring for the sheep upon which she held her mortgage. She now appeals to this court of equity to charge upon this bank a loss which was not willfully sustained or inflicted by it, but which was the direct result of her own silence and negligence. There is no equity in her claim. There was no diligence in its pursuit, and it cannot be sustained. A demand or notice by the holder of an inferior lien on one fund or property upon the holder of the superior lien thereon that he preserve and first exhaust his lien upon other funds or property covered thereby, made or given before his lien upon such funds or property is relinquished or lost, is indispensable to the enforcement of the right of the holder of an inferior lien upon property doubly incumbered to compel the holder of the superior lien to preserve or first exhaust that lien upon property covered by it alone. Taylor's Ex'rs v. Maris, 5 Rawle, 51, 57; McIlvain v. Assurance Co., 93 Pa. 30; Hart v. Anderson, 198 Pa. 558, 561, 562, 48 Atl. 636; Ross v. Duggan, 5 Colo. 85, 102; Clarke v. Bancroft, 13 Iowa, 320, 327; Gilliam v. McCormack, 85 Tenn. 597, 607, 4 S. W. 521.

In reaching this conclusion the familiar rule that where a mortgagee of numerous lots of land, who knows that they have been conveyed by the mortgagor, at various times subsequent to the execution of the mortgage, to different purchasers, releases those still held by the mortgagor or by the last purchasers, he may be charged by the earlier purchasers with the reception in payment of his debt of an amount equal to the value of the lots thus released, has not been overlooked. Patty v. Pease, 8 Paige, 277, 35 Am. Dec. 683; Stuyvesant v. Hall, 2 Barb. Ch. 151; Skeel v. Spraker, 8 Paige, 195; Brown v. Simons, 44 N. H. 475; Lyman v. Lyman, 32 Vt. 79, 76 Am. Dec. 151; Chase v. Woodbury, 6 Cush. 143; Shannon v. Marselis, 1 N. J. Eq. 413. But this rule has no application to cases involving the marshaling of assets to pay liens upon personal property, because the interests of the grantees of the mortgagor of real

estate are fixed, certain, and apparent from the conveyances, while those of the holders of subsequent liens are uncertain, since their debts may have been paid, or they may have elected to rely upon the personal credit of their debtors, or on other security, and to abandon their liens, and because this rule rests upon the principle that lots of land conveyed by a mortgagor subject to the mortgage are primarily liable for the mortgage debt in the inverse order of alienation,—a principle which has no application to funds or personal property incumbered by numerous liens.

This case is governed by the equitable rules and principles to which we have already adverted. The appellee had the right in equity to compel the appellant to preserve its lien upon the wool, and to apply its proceeds to the payment of its claim. But the burden of exercising that right with due diligence, so that no unnecessary loss should be imposed upon the bank, rested upon her. If she desired to exercise it, it was her duty to inform the bank that she intended to do so, and to demand of it that it should preserve and enforce its lien upon the wool before it released it, or permitted its proceeds to pass beyond its control. She took no such action. The $4,889 received by the bank on May 14, 1895,—eight months before its debt was due,—has been dissipated by the mortgagor. He still owes the bank thousands of dollars. To compel it to pay this $4,889 is to impose upon it an absolute loss, which reasonable diligence on the part of the appellee in demanding its application to the payment of the first lien might have prevented. He who seeks equity must do equity. The appellee cannot be permitted to impose this loss upon the bank, which reasonable diligence on her part would have prevented. The $4,889 should not have been charged against the appellant in this accounting.

2. Between May 6, 1895, and August 29, 1895, $1,516.43 was drawn out of the bank by the mortgagor, Murray, and paid to Mrs. Roder in satisfaction of the interest accruing upon her mortgage debt. The referee and the court refused to allow the bank any credit for this amount of money, although they charged it with all the proceeds of the wool and of the sheep which it received and placed to the credit of Murray in the account from which he drew this money. This was error. This was an accounting between the bank and Mrs. Roder for the proceeds of the wool and the sheep. Since the bank was charged with all those proceeds, it was certainly entitled to a credit of all the moneys which it paid to Mrs. Roder out of these proceeds, whether it paid them directly or by the hand of Murray. The bank must be credited with this $1,516.43.

3. It is assigned as error that the bank was charged in this accounting with $2.25 a head, the price which it agreed with Murray to credit him for 6,209 sheep in March, 1897, when it should have been charged with only he amount it realized from them and the amount which they were actually worth, $2 a head. This specification is well founded. This was not an accounting between Murray and the bank, but between Mrs. Roder and the bank. In this accounting the latter was not chargeable with the amounts which it might have agreed to pay for property in the worthless notes or

accounts of Murray, but only with the actual value of the property which it received. As the evidence is conclusive that 6,209 of these sheep were sold by the bank for $2 per head, and that they were not worth more than that amount, the charge against the bank on their account must be reduced by 25 cents per head on 6,209 sheep, or by $1,552.25.

There are many other items in this account which are challenged, but it is unnecessary to consider them, because those already considered so change the account that there is no longer a balance against the bank. The amount of that balance on March 13, 1897, as found by the court, was $7,227.23. The disallowance of the charge of $4,889 against the bank, the reduction of the charge against it for the sheep by $1,552.25, and the credit to it of the interest paid to Mrs. Roder, $1,516.43, make a change in the state of the account in favor of the bank of $7,957.68, so that it is no longer liable to account to or pay to Mrs. Roder anything on account of the wool or the sheep; and the decree below must be reversed, with directions to the circuit court to enter a decree in favor of the bank and against Mrs. Roder for the dismissal of the bill on the merits and the costs, and it is so ordered.

CHOCTAW, O. & G. R. CO. v. HOLLOWAY.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,625.

1. NEGLIGENCE OF MASTER—ORDINARY CARE.
   It is error to instruct a jury that it is the duty of the master to provide reasonably safe appliances, tools, or working places for his servants, or to keep them in a reasonably safe condition of repair. The limit of the duty of the master is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employés with reasonably safe appliances, machinery, tools, and working places, and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair.[1]
2. ERROR—PREJUDICE PRESUMED FROM.
   The legal presumption is that error produces prejudice. It is only when it appears beyond all doubt from the record that the error complained of did not prejudice and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal is applicable.
3. ERROR WITHOUT PREJUDICE.
   Where the court rightly charges the jury, on the conceded facts, that the master was negligent, as a matter of law, an erroneous charge relative to the degree of care required of the master appears beyond all doubt to be error without prejudice, because no question of the negligence of the master was submitted to the jury for their determination.
4. MASTER AND SERVANT—DUTY OF SERVANT—ASSUMPTION OF RISK.
   The servant assumes all the ordinary risks of the employment which are known to him, and which would have been known, by the exercise of ordinary care, to a person of reasonable prudence and diligence in his situation. It is his duty to exercise ordinary care and diligence to observe and become cognizant of obvious defects in the machinery and

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[1] Duty of railroad company to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.

working place; and he is chargeable with a knowledge and assumption of the risk of all such defects which are known to him, or which would have been known by the use of ordinary care to a person of reasonable prudence and diligence in his situation.[2]

5. VERDICT—SUFFICIENCY OF EVIDENCE—INSPECTION.
The court may not reverse a judgment because there was no evidence to support a finding of fact by a jury based upon testimony and an ocular inspection of machinery, a knowledge of the defects of which is in issue, because the evidence derived from the inspection is not, and cannot be, presented to the appellate court for consideration.

6. NEGLIGENCE—CONCURRENCE OF THIRD PARTY NO EXCUSE FOR.
One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent as for one caused entirely by his own negligence.

7. INJURY TO EMPLOYE—NEGLIGENCE—FAILURE TO PROVIDE BRAKES.
The failure to provide an ordinary road engine with brakes, in the absence of evidence excusing it, is, as a matter of law, evidence of the want of reasonable care to provide a reasonably safe locomotive engine to operate upon a railroad.

8. SAME—PROXIMATE CAUSE OF COLLISION—ABSENCE OF BRAKES ON ENGINE MAY BE.
Collisions and accidents may be reasonably anticipated as the natural and probable consequence of the failure to provide brakes to control the movements of road engines.

9. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF KNOWN RISKS.
Contributory negligence regarding, or assumption by a servant of, known risks, will not constitute contributory negligence regarding, or the assumption of, an unknown risk, nor a defense for the master whose negligence produces it. A servant knew and assumed the risks of running an engine backward, tender foremost, in the night, without any light or employé on the forward end of the tender. *Held*, that his contributory negligence and assumption of risks in this regard constituted no defense to his action against the master for negligence in failing to supply the engine with brakes, where he did not know, and a person of reasonable prudence and discretion, exercising ordinary care, would not, in his situation, have known, of the absence of the brakes.

(Syllabus by the Court.)

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

In the early morning of October 30, 1900, while it was yet dark, a road engine of the Choctaw, Oklahoma & Gulf Railroad Company collided with a horse which was caught in a trestle as the engine was backing, tender foremost, from Brinkley to Hulbert, and injured Will Holloway, the defendant in error. There was no light on the forward end of the tender, and no employé there to warn of danger. There was no brake on the engine, although there was a brake upon the tender. Holloway was a fireman working on the engine. He was aware of the darkness of the night, of the absence of a light and of an employé upon the end of the tender, but he insisted that he did not know that there was no brake upon the engine. He sued the company for negligence, in that it failed to supply the engine with a proper brake; alleged that the accident would not have occurred if such a brake had been provided, and that through its absence he was caught between the tender and the engine when the air was applied to the brake upon the tender, and seriously injured. The court instructed the jury that if there was no brake upon the engine, and Holloway did not know, and would not by the exercise of reasonable diligence and prudence have known, that the engine was supplied with a brake, and if the absence of the brake caused the accident, the company was liable, and they might return a verdict

[2]Assumption of risk incident to employment, see note to Railroad Co. v. Henneddey, 38 C. C. A. 314.

against it, but that, if there was a failure of proof of either of these facts, their verdict must be for the defendant. This instruction, and the refusal of the court to instruct the jury to return a verdict for the defendant, are the principal errors assigned by the company, although many others are specified.

E. B. Peirce and C. B. Stuart (J. W. McLoud, on the brief), for plaintiff in error.

J. W. House (M. House, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

Actionable negligence is a breach of duty. Where there is no breach of duty, there is no negligence, and there can be no recovery. It is not the duty of the master to furnish his servants with reasonably safe appliances, machinery, tools, or working places, or to keep them in a reasonably safe condition of repair. His failure to do so is not the breach of any duty, and it furnishes no basis for an action of negligence. The limit of his duty here is to exercise ordinary and reasonable care, having regard to the hazards of the service, to provide his employés with reasonably safe appliances, machinery, tools, and working places, and to exercise ordinary and reasonable care to keep them in a reasonably safe condition of repair. Railway Co. v. Jarvi, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68; Gowen v. Harley, 6 C. C. A. 190, 197, 56 Fed. 973, 980; Railway Co. v. Linney, 7 C. C. A. 656, 660, 59 Fed. 45, 48; Railway Co. v. Needham, 69 Fed. 823, 825, 16 C. C. A. 457, 459; Railroad Co. v. Johnson, 81 Fed. 679, 680, 27 C. C. A. 367, 368; Railroad Co. v. Myers, 11 C. C. A. 439, 63 Fed. 793; Id., 22 C. C. A. 269, 76 Fed. 443. A servant may assume that his master has discharged this duty, unless he knows, or by the exercise of reasonable care he would have known, that the duty had not been discharged, and that there were defects in the machinery and appliances with which, or in the place in which, he undertakes to work. On the other hand, the servant assumes all the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as they would have been known to a person of ordinary prudence and care by the exercise of ordinary diligence. He is not required to search for latent defects or hidden dangers, but it is his duty to exercise reasonable diligence to observe and be cognizant of all obvious defects in the machinery and appliances with which he is working; and he assumes the risks and dangers of all such defects of which he has knowledge, and of which he would have had knowledge by the exercise of ordinary care and diligence. Manufacturing Co. v. Erickson, 55 Fed. 943, 946, 5 C. C. A. 341, 344; Fordyce v. Edwards, 60 Ark. 438, 442, 30 S. W. 758; Anderson v. Railway Co., 39 Minn. 523, 41 N. W. 104; Railroad Co. v. Leverett, 48 Ark. 347, 3 S. W. 50, 3 Am. St. Rep. 230; Wormell v. Railroad Co., 79 Me. 405, 10 Atl. 49, 1 Am. St. Rep. 321; Way v. Railroad Co., 40 Iowa, 341; Batterson v. Railway, 53 Mich. 125, 18 N. W. 584; Illick v. Railway Co., 67 Mich. 632, 35 N. W. 708; Morton v. Railroad Co., 81 Mich. 435, 46 N. W. 111.

The plaintiff in this case alleged that his injury was caused by the

failure of the railroad company to provide the engine upon which he was working as fireman with suitable brakes to arrest its motion when occasion required. The court charged the jury that if there was no brake upon the engine, if the absence of the brake caused the injury, and if the plaintiff was not aware of the fact that the engine was not provided with a brake, and if a person of ordinary prudence, exercising reasonable care, would not, under the circumstances of this case, have been aware of this fact, they might render a verdict against the company. It is contended that this charge was erroneous, (1) because there was no substantial evidence to warrant the finding of the jury that the plaintiff did not know, or by the exercise of ordinary care would not have known, of the absence of the brake; (2) because there was no substantial evidence to warrant their finding that the injury could have been avoided by the presence of the brake upon the engine; and (3) because there was no substantial evidence to warrant the finding that the absence of the brake was the proximate cause of the injury. A careful and painstaking examination of the testimony has satisfied us, however, that this position cannot be sustained. The plaintiff testifies that he was not aware that the engine was not furnished with a brake. Another witness, who was employed about the engine as a brakeman for some time, demonstrates by his testimony that he did not know whether there was a brake on the engine or not; and the jury made an ocular inspection of an engine of the same character as that upon which the accident occurred, for the express purpose of determining this question, and they found this issue in favor of the plaintiff. The knowledge upon this question which an inspection of the engine conveyed to the minds of the jurors is not, and cannot be, presented to this court by the record; and we cannot undertake to say that all reasonable men, with the testimony and the knowledge which this jury lawfully acquired, would necessarily come to a conclusion contrary to that which these jurors have reached. McReynolds v. Railway Co., 14 Am. & Eng. R. R. Cas. 172, 174; Railroad Co. v. Hopkins, 90 Ill. 323.

Upon the question whether or not the engine could have been stopped after knowledge of the presence of the horse in the trestle in time to prevent the accident, the testimony was not so clear that it was the duty of the court to withdraw this issue from the jury. Nor can it be properly said, as a matter of law, that the absence of this brake was not the proximate cause of the injury. It is undoubtedly true that one of the proximate causes of the accident was the negligence of the party who permitted the horse to stray into the trestle. But if the injury would not have been inflicted if there had been a brake upon the engine, it cannot be truthfully said that the absence of this brake was not another of the proximate causes of the damage, inasmuch as the accident would not have happened if the brake had been provided. If it be true, as the jury have found, that no injury would have been inflicted upon the plaintiff if this engine had been provided with a brake, it is no defense for the railroad company that the concurring negligence of the owner of the horse contributed to the infliction of the injury. One is liable for an injury caused by the concurring negligence of himself and a third party to the same extent

as for one caused entirely by his own negligence. It is no defense for a wrongdoer that a third party shared the guilt of the same wrongful act, nor can he escape liability for the damages he has caused on the ground that the wrongful act of a third party contributed to the injury. Railway Co. v. Callaghan, 12 U. S. App. 541, 56 Fed. 988, 6 C. C. A. 205; Railway Co. v. Sutton, 27 U. S. App. 310, 312, 63 Fed. 394, 395, 11 C. C. A. 251–253; Railway Co. v. Chambers, 68 Fed. 148, 153, 15 C. C. A. 327, 332; Railway Co. v. Needham, 69 Fed. 823, 824, 16 C. C. A. 457, 458; Railroad Co. v. Cummings, 106 U. S. 700, 702, 1 Sup. Ct. 493, 27 L. Ed. 266; Harriman v. Railway Co., 45 Ohio St. 11, 32, 12 N. E. 451, 4 Am. St. Rep. 507; Lane v. Atlantic Works, 111 Mass. 136; Griffin v. Railroad Co., 148 Mass. 143, 145, 19 N. E. 166, 1 L. R. A. 698, 12 Am. St. Rep. 526; Cayzer v. Taylor, 10 Gray, 274, 69 Am. Dec. 317; Elmer v. Locke, 135 Mass. 575; Booth v. Railroad Co., 73 N. Y. 38, 29 Am. Rep. 97; Cone v. Railroad Co., 81 N. Y. 206, 37 Am. Rep. 491.

Nor does the absence of brakes from this engine fall without the legal definition of the proximate cause of the injury which the plaintiff suffered. An injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen nor reasonably anticipated as the probable result of such an act cannot be made the basis of an action for damages. The purpose of brakes upon engines and cars is to quickly arrest their speedy motion, and to prevent collisions and accidents. The natural and probable consequences of their absence from machines as powerful and as rapid in their movements as locomotive engines are the collisions and accidents which it is the purpose of their use to avoid. From the failure to provide this engine with proper brakes to arrest its motion, the accident and injury which resulted, or others of like character, might well have been anticipated as probable consequences; and the evidence in the record is ample to sustain the finding of the jury that the injury to the plaintiff was caused by that absence. The very fact that it is the common—the almost universal—practice to provide locomotive engines with brakes for the purpose of controlling their movements, and preventing accidents and collisions, is very persuasive, if not conclusive, evidence that such disasters may be reasonably anticipated as and are the probable consequences of their absence. Railway Co. v. Elliott, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; Railway Co. v. Kellogg, 94 U. S. 469, 475, 24 L. Ed. 256.

It is assigned as error that the court instructed the jury that the failure of the company to provide this engine with brakes was actionable negligence, for which the defendant was liable. But this specification is untenable. Actionable negligence in this case was the failure of the railroad company to exercise reasonable care to provide a reasonably safe engine for operation upon this railroad. The plaintiff testified that he had never worked upon an engine before which was not provided with a brake, although he had been in the employment of railroad companies for some years. The knowledge that it is the usual practice to provide road engines with brakes to control and arrest their motion is so common and general that courts cannot assume to be ignorant of it. Courts take judicial notice of

business customs and practices which form a part of the common knowledge of the people of the country. Brown v. Piper, 91 U. S. 37, 42, 23 L. Ed. 200; 1 Greenl. Ev. 11. There may be, and probably are, circumstances under which the absence of a brake from an operating engine would not constitute a want of reasonable care to provide a reasonably safe locomotive for the purpose to which its use is applied. This might be true of an engine employed in a yard for switching purposes. It might be true under many circumstances which could be shown by evidence. But in the case at bar the defective engine was a road engine, employed in the usual service of moving loaded trains along the railroad. There was no evidence of any circumstances tending to excuse the failure to supply it with the ordinary appliances used to control the movements of such engines. This, then, was the case presented to the court below: Railroad companies ordinarily provide their road engines with brakes. The exercise of ordinary and reasonable care induces carriers to equip their road engines in this way. The purpose of the exercise of this care is to prevent accidents and collisions. Such accidents and collisions are the natural and probable consequences of a failure to exercise this care. The conclusion was inevitable that the failure to provide this road engine with brakes, in the absence of any evidence excusing it, was a failure to exercise ordinary care to provide a reasonably safe engine for operation upon this railroad. And the charge of the court that the defendant was liable for any injury which resulted from the failure to provide the brakes is sustained by the evidence, the law, and the reason of the case.

It is assigned as error that the court refused to instruct the jury that a servant is bound to take reasonable care and make reasonable effort to discover any dangers and defects in the place and machinery in which and with which he is to work; that, the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him; and that if the plaintiff could, by using ordinary care and diligence, have informed himself of the condition of the engine, as to brakes, and if he failed to do so, and an ordinarily prudent man, under like circumstances, would have done so, his failure to take such precautions was negligence, and would bar his recovery in the case. The rules which measured the respective liabilities of the plaintiff and the defendant in this case have been stated at the opening of this opinion. So far as this requested instruction conforms to those rules, it was given in the general charge of the court; and, so far as it does not conform to them, it was erroneous, and should not have been given. The court charged the jury that if the engine was without brakes, and this fact was unknown to the plaintiff, "and could not have been known to him by the exercise of reasonable diligence, under the circumstances of the case as shown by the evidence," the company might be liable; and, when the entire charge is carefully read, nothing inconsistent with this declaration can be found in it. There was no error in the refusal of the court to give the requests under consideration, in view of the general charge, which presented to the jury all the sound propositions of law stated therein.

Another specification of error is that the court refused to instruct the jury that if the plaintiff was guilty of negligence in riding on an engine backing with the tender foremost in the dark, without a light upon the forward end of the tender, he could not recover. But there was no error in this refusal. The plaintiff could not recover for the negligence of the company in running this engine backward in the night without a light upon the forward end of the tender, because the plaintiff was aware of this negligence, and assumed the risk of it. But he did not know that the engine upon which he was riding was not provided with brakes. The exercise of ordinary care by the defendant would have equipped it with these appliances. He had the right to assume that the defendant had exercised this care. He did undoubtedly indulge in that assumption. The jury have found that the absence of the brakes was not an obvious defect,—not a defect which a person of ordinary prudence, exercising reasonable care, would have discovered under the circumstances of this case. As he was ignorant of the absence of the brakes, he did not assume the risk of that absence; and his assumption of the risk of riding upon an engine and tender in the night, with a headlight upon its forward end, was not an assumption of the risk of operating this engine without brakes. His negligence regarding, or his assumption of, the former risks, was neither such contributory negligence regarding, nor such an assumption of, the latter risk, as bars him from a recovery for the negligence of the defendant producing it. A servant may not assume a risk, or be guilty of contributory negligence in exposing himself to a risk, of which he is ignorant, and of which an ordinarily prudent person would not have been aware by the exercise of ordinary care and diligence. Manufacturing Co. v. Erickson, 55 Fed. 943, 948, 949, 5 C. C. A. 341, 346; O'Neill v. Railway Co. (Neb.) 86 N. W. 1098; Railway Co. v. Keegan, 87 Fed. 849, 852, 31 C. C. A. 255, 258.

Counsel for the defendant also complain that, when the jury were sent to inspect the engine, the court instructed them to "go inside, and try to put themselves only in the same place that the fireman would naturally occupy, and then, occupying that place, to determine whether the wheels of the engine on which the brakes would be could be seen from there, without looking for them, while a man was employed for several hours doing work on the engine as a fireman; that is to say, whether he could easily see them by just keeping his eyes open." If this excerpt from the instructions of the court had been all that was said to the jury on this subject, it might have been erroneous. But it was followed with the direction that "a man cannot shut his eyes, and say he don't want to see anything which a reasonable man could not help but see if he kept his eyes open," and that "if the fact that there were not any brake shoes on that engine was obvious to any reasonably prudent man who runs on it as a fireman for several hours, as the evidence shows that this plaintiff did for six hours, from Hulbert to Brinkley, before he went back again before the accident happened, that is perfectly obvious to a man who is fireman and traveling for six hours without hunting for it, then the court will tell you that he had knowledge of, and ought to have known of, it, and he is chargeable with it as if he had known it," and that "if in getting off and on and

working and firing for six hours as any reasonably prudent person would have noticed it, then you are to consider that fact. If, on the other hand, a man could not have noticed it, who was a fireman, by getting on and off, and then attending to his duty and business, as the evidence shows plaintiff is, you may reach another conclusion." Excerpts from a charge cannot be wrested from their connection and relation, and fairly criticised. The entire charge upon a given subject must be taken together, and if, when so read, it conforms to the law, no just objection to it can be urged. When the instruction of the court upon the duty of the jury in inspecting this engine is so read, it will be found to be in accordance with the established rules of law which control this case, and which are stated in the opening of this opinion. There was no error in the instruction of the court upon this subject.

It is assigned as error that the court repeatedly instructed the jury that it was the duty of the company to furnish its servants with reasonably safe machinery and a reasonably safe working place. This instruction was a patent and unquestionable error. It has been so declared by this court repeatedly, from Railway Co. v. Jarvi, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68, decided in 1892, through Gowen v. Harley, 6 C. C. A. 190, 197, 56 Fed. 973, 980, Railway Co. v. Linney, 7 C. C. A. 656, 660, 59 Fed. 45, 48, Railway Co. v. Needham, 69 Fed. 823, 825, 16 C. C. A. 457, 459, to and including Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 Fed. 133, decided in 1902. The limit of the duty of the master to the servant in the matter of place of service, of machinery, and of appliances, is to exercise ordinary care to furnish him with a reasonably safe place and reasonably safe appliances, and to use ordinary care to keep the place and the appliances in a reasonably safe condition. Moreover, the presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable. Association v. Shryock, 20 C. C. A. 3, 11, 73 Fed. 774, 781; Railway Co. v. McClurg, 8 C. C. A. 322, 325, 326, 59 Fed. 860, 863; Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653; Smiths v. Shoemaker, 17 Wall. 630, 639, 21 L. Ed. 717; Moores v. Bank, 104 U. S. 625, 630, 26 L. Ed. 870; Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct. 471, 28 L. Ed. 62; Railroad Co. v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118, 172, 30 L. Ed. 299; Mexia v. Oliver, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602; Railroad Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; Peck v. Heurich, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302. But in the case at bar the record makes it clear beyond all doubt that this error did not prejudice, and could not have prejudiced, the railroad company, because no question concerning its duty or its negligence was left to the jury to consider by the charge of the court. The railroad company conceded that there were no brakes upon the engine. The absence of brakes upon this road engine, in the absence of any evidence excusing it, was conclusive evidence, as a matter of law, of the lack of ordinary care to provide reasonably safe machinery to operate this railroad. The court clearly and pos-

itively instructed the jury to this effect. It instructed them that the railroad company was liable for any injury that was caused by the failure to supply this engine with brakes, unless the plaintiff knew and assumed the risk of their absence. This left the jury nothing to consider relative to the care or the negligence of the company, and limited the issues they were to determine to the questions whether or not the absence of the brakes was the proximate cause of the injury, and whether or not the plaintiff knew, or ought to have known, and hence assumed the risk, of this absence. As there was no question of the care or negligence of the company submitted to the jury, it conclusively appears beyond all doubt that the erroneous charge upon that subject could not have prejudiced the defendant, and error without prejudice is no ground for reversal.

There are other specifications of error which have not been recited in detail. They have all been carefully considered. So far as they present any debatable question, they have been disposed of by the rules and principles to which we have adverted, and the discussion in which we have already indulged. Suffice it to say that a patient and painstaking review of all the evidence, of the charge of the court, and of all the assignments of error, has led us to the conclusion that this case was fairly and impartially tried, and that the rulings and charge of the court were free from prejudicial error. The judgment below must therefore be affirmed, and it is so ordered.

THAYER, Circuit Judge. I concur in the order affirming the judgment below for the reasons stated in the foregoing opinion, but I would not be understood as concurring in the broad statement, which the opinion contains, that a servant "assumes the risks and dangers of all * * * defects [in machinery and appliances] of which he has knowledge, and of which he would have had knowledge by the exercise of ordinary care and diligence." Nor do I think that such a broad statement of the law is necessary to a correct decision of the case. It is well settled that a servant who uses machinery, tools, or appliances known to be defective, but, in pursuance of a promise by the master that they will be repaired, does not assume the risk of injury, but may recover if hurt, excepting where the risk of injury is so imminent that a prudent person would not have used them at all. And I conceive that there may be other exceptions to the rule. Hough v. Railway Co., 100 U. S. 213, 225, 25 L. Ed. 612, and cases cited; Mining Co. v. Fullerton, 16 C. C. A. 545, 549, 69 Fed. 923. See, also, Southern Pac. Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 436, 441.

CALDWELL, Circuit Judge, joins in the views expressed in this concurrence.

SOUTHERN PAC. CO. v. SCHOER.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,566.

1. MASTER AND SERVANT—NEGLIGENCE—STATES MAY REGULATE LIABILITY FOR.
The states have the right to regulate within reasonable limits the relations between employers and employés within their borders, and to fix by legislative enactments the liabilities of the former for the acts and negligence of the latter.

2. NEGLIGENCE OF SUPERIOR SERVANTS—LIABILITY UNDER UTAH STATUTE.
Sections 1342 and 1343 of the Revised Statutes of Utah make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.

3. SAME—ACTS NOT DONE WHILE EXERCISING SUPERINTENDENCE.
Those sections make the master liable for the negligence of superior servants committed in the discharge of their duties as employés, whether the negligence was committed while they were exercising their authority to command or superintend others or not.

4. EVIDENCE—WRITINGS.
A writing which contains competent evidence upon a material issue cannot be lawfully rejected because it also contains evidence which is incompetent and irrelevant.

5. ACT OF GOD EXCUSING PERFORMANCE OF DUTY.
Nothing less than such a fortuitous gathering of circumstances as prevents the performance of a duty, and such as could not have been foreseen by the exercise of reasonable prudence, or overcome by the exercise of reasonable care and diligence, constitutes an act of God which will excuse the discharge of a duty.

(Syllabus by the Court.)

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

Thomas T. Fauntleroy (Cornelius H. Fauntleroy, on the brief), for plaintiff in error.

W. L. Maginnis (A. J. Weber, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Between 1 and 2 o'clock on the dark and foggy morning of December 20, 1899, the second section of a passenger train of the Southern Pacific Company, upon which H. A. Schoer was a fireman, ran into the rear of the first section near the yard limits of the company at Terrace, in the state of Utah, threw this fireman against the boiler of the engine, and fastened him there under a mass of coal which was thrown from the tender by the shock of the collision, until he was so scalded by steam that escaped on account of the breaking of the water gauge that he died. C. Schoer, the administrator of his estate, brought an action against this company for alleged negligence causing his death, and obtained a verdict and judgment which this writ of error has been sued out to review.

The main complaint of the company is that the court below charged the jury that under the statutes of the state of Utah the engineer of the locomotive on which the deceased was a fireman was the representative of the company, and that his negligence, if any, in following the first section of the train too closely, and in running his engine too rapidly as he approached the yard limits at Terrace at the time of the collision, was the negligence of the company. The sections of the statute of Utah which induced this instruction are:

"1342. All persons engaged in the service of any person, firm or corporation, foreign or domestic, doing business in this state, who are intrusted by

such person, firm, or corporation as employer with the authority of superintendence, control, or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice-principals of such employer and are not fellow servants.

"1343. All persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and are working together at the same time and place and to a common purpose, neither of such persons being intrusted by such employer with any superintendence or control over his fellow employees, are fellow servants with each other; provided, that nothing herein contained shall be so construed as to make the employees of such employer fellow servants with other employees engaged in any other department of service of such employer. Employees who do not come within the provisions of this section shall not be considered fellow servants."

Rev. St. Utah, 1898.

It is not denied that the engineer in charge of the engine upon which the deceased was employed at the time of his death was intrusted by the company with authority to superintend and direct him in the performance of his duties, but it is contended that this master was not responsible for his negligence, because the negligence which caused the injury was committed while this engineer was discharging the primary duty of a servant, and was not engaged in performing one of the positive duties of the master, and because this negligence was committed while he was not exercising his authority to superintend the action of the fireman or to direct him in the performance of any of his duties.

The argument in support of the first contention is: Under the general law the master was not liable for the negligence of this engineer, because he was discharging one of the primary duties of the servant, and was not performing one of the positive duties of the master, when he committed the fatal acts of negligence. The purpose and effect of the sections of the statute of Utah which have been cited were not to change or to extend the liabilities of masters for the negligence of their servants, but their sole object and effect were to give an authoritative legislative definition of the terms "vice principal" and "fellow servant," and to leave the liabilities of the masters for the acts of their servants as they were before these sections were enacted. Therefore, since the Southern Pacific Company would not have been liable for the negligence of this engineer under the general law, it is not liable for it under this statute. The truth of the major premise of this syllogism is conceded. In the absence of a statute the liability of a master for the negligence of his servant is a question of general law, upon which the decisions of the state courts are not controlling upon the federal judiciary, and, unless the negligent servant is the general manager or general superintendent of the business of the master, it is not his grade, rank, or authority over other employés, but it is the nature of the duty he is discharging when he is guilty of the negligence, that determines whether he is a vice principal or a fellow servant, and when the master is liable or is exempt from liability for the injury caused by his carelessness. If he is discharging one of the absolute duties of the master, the latter is liable for his acts and for his negligence. But, if he is discharging one of the primary duties of the servants, his

employer is exempt from liability. Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; Railroad Co. v. Conroy, 175 U. S. 323, 327, 20 Sup. Ct. 85, 44 L. Ed. 181; City of Minneapolis v. Lundin, 58 Fed. 525, 527, 7 C. C. A. 344; Coal Co. v. Johnson, 56 Fed. 810, 6 C. C. A. 148. The construction and maintenance of a railroad is the business of the master. Its operation is the business of his servants. The failure to exercise reasonable care in construction and maintenance is the negligence of the master. The failure to exercise such care in the operation of a railroad is the negligence of the servant for which the master is not liable. The alleged negligence of the engineer of the second section of this train in running his engine too close to the preceding section, and too rapidly as he approached the yard limits at Terrace, was negligence in the operation of the railroad, for which the Southern Pacific Company was not liable, in the absence of a statute which changed the rules and principles of the general law. Railroad Co. v. Needham, 63 Fed. 107, 109, 11 C. C. A. 56, 58, 25 L. R. A. 833; Railroad Co. v. Mase's Adm'x, 63 Fed. 114, 115, 11 C. C. A. 63; Brady v. Railway Co. (C. C. A.) 114 Fed. 100. These principles and authorities amply sustain the first proposition of counsel for the plaintiff in error.

But the correctness of the second premise of their syllogism is not so obvious. A vice principal is the representative of the master, for whose acts and negligence the master is responsible. City of Minneapolis v. Lundin, 58 Fed. 525, 527, 7 C. C. A. 344. The rule that the master is liable for the negligence committed by a servant while he is discharging one of the positive duties of the master, and that he is not liable for his negligence when he is performing one of the primary duties of a servant, was not adopted to measure the liability of the master for the acts of a vice principal. It was established to determine who were and who were not vice principals. The master has been invariably held liable by all the courts for the acts and for the negligence of his vice principals. The question upon which they have disagreed—the question which has occasioned debate—has been who were vice principals. Under the general law in the federal courts and in many of the state courts that question has been answered by the rule which has already been stated, based upon the nature of the duty the servant was discharging when the negligence was committed. In this condition of the law and of the decisions the legislature of the state of Utah enacted the statute which has been quoted. It declares that employés who are intrusted by their employers with the authority to superintend other employés of the same master, or with the authority to direct any other employé in the discharge of any of his duties, are vice principals of such employer. This declaration is a plain departure from the general rule of law which we have been considering; an unequivocal declaration that servants who have the authority to direct and superintend other servants are vice principals of their masters, whether they are engaged in discharging the duties of their employers or the duties of their servants. There is no ambiguity in the terms, no uncertainty in the meaning of this statute, and no possible doubt of the purpose of the legislature in enacting it. It is too positive to be dis-

regarded, too plain for construction, and its manifest legal effect cannot be ignored. To sustain the position of counsel for the plaintiff in error that this clear and authoritative declaration of the relation of superior servants to their masters in the state of Utah did not modify or extend the liability of the master beyond that fixed by the general law would be to defeat the manifest object of the legislature in passing this act, and to arbitrarily strike down a law which that body had the undoubted right to enact and to enforce; for the unquestioned rule is that the states have the right to regulate within reasonable limits the relations between employers and employés within their borders, and to fix by legislative enactments the liabilities of the former for the acts and the negligence of the latter. Railroad Co. v. Baugh, 149 U. S. 368, 378, 13 Sup. Ct. 914, 37 L. Ed. 772; Railroad Co. v. Hogan, 63 Fed. 102, 105, 11 C. C. A. 51. Our conclusion is that sections 1342 and 1343 of the Revised Statutes of Utah of 1898 make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence, whether it was committed in the discharge of the positive duties of the master or in the performance of the primary duties of the servants.

Another reason why counsel for the plaintiff in error insist that the Southern Pacific Company is not liable for the negligence of this engineer is that when he committed the acts of negligence charged he was not engaged in exercising his authority to superintend the fireman, or his power to direct the performance of any of his duties. It is earnestly contended that it is only when the superior servant is guilty of negligence while he is actually engaged in exercising his authority of superintendence and control over those subject to his direction that his master is liable for his negligence under the provisions of this statute. In support of this position Shaffers v. Navigation Co., 10 Q. B. Div. 356, 357; Fitzgerald v. Railroad Co., 156 Mass. 293, 31 N. E. 7; Brittain v. Railway Co., 168 Mass. 10, 46 N. E. 111, and Dantzler v. Iron Co., 101 Ala. 309, 14 South. 10, 22 L. R. A. 361, have been cited, and these cases adopt and enforce the rule for which counsel contend. But they enforce it because the limitation which counsel seek to read into the statute of Utah was written into the statutes these decisions were interpreting by the legislative bodies which enacted them. The employers' liability act of 1880 (43 & 44 Vict. c. 42) § 1, subsec. 2, which the opinion in the Shaffers Case was construing, charges the master with liability for injuries caused "by reason of the negligence of a person in the service of the defendants who had superintendence intrusted to him whilst in the exercise of such superintendence." The Alabama and Massachusetts statutes under which the cases from those states arose contain a like limitation. Dantzler v. Iron Co., 101 Ala. 318, 14 South. 10, 22 L. R. A. 361, St. Mass. 1887, c. 270, § 1, subsec. 2. The statute of Utah under which this case arose contains no such limitation, and no indication that the legislature intended to adopt any such restriction. On the other hand, it plainly

declares that all persons intrusted by the master with the authority of superintendence of other persons in his employ are vice principals, and are not fellow servants. This is a declaration that they are vice principals not only when they are engaged in performing acts of superintendence and control, but at all times when the authority of superintendence and control is vested in them, and they are engaged in discharging their duties as servants of their master. This statute is so plain that it cannot be lawfully construed. To write into it the limitation suggested by counsel and found in the laws of England, Alabama, and Massachusetts would be to so amend it as to deprive it of the greater portion of its effect, in violation of its terms, and of the intention of the legislature which its words clearly disclose. It would be judicial legislation, which it is not the province of the courts to enact.

In their brief in reply counsel for the company suggest a third reason why, in their opinion, the Southern Pacific Company was not liable for the negligence of this engineer. It is that this company pleaded in its answer that the night was so dark and foggy that the proximity of the first section of the train could not be discovered by employés on the engine of the second section in time to stop the latter. But, if the night was so dark and foggy that this engineer could not discover the first section in time to stop his engine, reasonable care and prudence on his part demanded that he should either send forward his fireman as he approached the yard limits at Terrace to ascertain its location, or should run his engine so slowly and carefully that he could stop at any moment, and could surely avoid a collision. The complaint of the plaintiff did not estop him from a recovery for the negligence of this engineer which the evidence at the trial established. The result is that there was no error in the charge of the court that the engineer upon the second section of this train was the representative of the company, and that, if his negligence in operating his engine caused the injury, the company was liable to the plaintiff for the damages that resulted. Dryburg v. Milling Co., 18 Utah, 410, 412, 55 Pac. 367; Railway Co. v. Calvert (Tex. Civ. App.) 32 S. W. 246, 247; Railway Co. v. McDonald (Tex. Civ. App.) 31 S. W. 72; Railway Co. v. Wrenn (Tex. Civ. App.) 50 S. W. 210.

It is assigned as error that the train sheet of the railroad company, which disclosed the times when the two sections of the train which collided left the various stations of Toana, Montello, Tacoma, Gartney, and Lucin before they arrived at Terrace, and which also disclosed the time of the collision at Terrace, was admitted in evidence over the objection of counsel for the company. An examination of the record, however, discloses the fact that the only objection to this train sheet was leveled at the entries thereon of the times when the two sections arrived at Terrace. No objection whatever was made to the introduction of the train sheet for the purpose of showing the movements of the sections of the train before they reached Terrace, or to the train sheet as a whole; and the train sheet disclosed the times when the sections left all the stations mentioned above before they arrived at Terrace. It was tacitly conceded that for the purpose of showing everything which appeared upon this sheet except the time of the ar-

rival of these sections at Terrace it was admissible evidence. Conceding, without deciding, that the entries upon the train sheet of the times of the arrival of the two sections at Terrace and of the time of the collision were not competent testimony of those facts, the train sheet was still admissible, and the objection of counsel was properly overruled. If the train sheet contained any evidence competent and material to the issue, it could not be lawfully rejected; and it was tacitly conceded that the entries of the times when the sections of the train left the preceding stations were competent evidence of those facts, for no objection was made to these entries, and no objection was interposed to the train sheet as a whole. Since a portion of the train sheet was competent evidence, the objection to its introduction could not be sustained, and the proper remedy of counsel for the company was to request the court to instruct the jury at the time of its introduction or at the close of the case that it must not be considered as evidence of the time of the collision, or of the times of the arrival of the two sections at Terrace. No such request was made and there was no error in the ruling of the court upon this subject.

The next objection to the trial of this case is that the court refused to instruct the jury that, if the death of the deceased was proximately caused by a sudden and unusual fog, and without fault or negligence of the defendant, their verdict must be for the company. The court clearly and emphatically instructed the jury that there could be no recovery in this case, and that their verdict must be for the defendant, unless they were satisfied by a reasonable preponderance of the evidence that the death of the fireman was caused by its negligence. There was evidence at the trial that the night was dark and foggy, that it was difficult to distinguish objects at any considerable distance, and that the headlight of the second section of the train was not perceived until it was very near to the employés upon the first section. But there was nothing in all this, or in any of the evidence in the case, to warrant an instruction to the jury that they might find that this collision was caused by an act of God; and nothing less than an act of God would relieve the defendant from the duty of exercising reasonable care in the operation of these trains. The foundation of the rule that the act of God excuses the failure to discharge a duty is the maxim, "Lex neminem cogit ad impossibilia." If, by the use of reasonable care, prudence, and diligence under the circumstances of a particular case, it is possible to discharge the duty, then those circumstances do not constitute a valid excuse for a failure to perform it. Nothing less than such a fortuitous gathering of circumstances preventing the performance of a duty as could not have been foreseen or overcome by the exercise of reasonable prudence, care, and diligence constitutes an act of God which will excuse the discharge of the duty. The record discloses no such circumstances. The night was dark and foggy. This condition of the atmosphere imposed upon the operators greater watchfulness and care to prevent collisions and the duty of driving their engines with less speed and more caution. But there was nothing in the foggy air or in the darkness of the night which would have prevented them from safely operating their trains if they had exercised a care, watchfulness, and diligence proportionate

to the situation and the circumstances in which they were placed. In other words, it was not impossible to operate these trains safely by the use of reasonable care; and in this state of the case there was no error in the refusal of the court to submit to the jury the question whether or not the death of the deceased was the act of God. It discharged its full duty when it told the jury that the defendant was not liable for his death unless it appeared by a fair preponderance of the testimony that the defendant was guilty of negligence which caused it.

Another complaint is that the court refused to instruct the jury that, if there was ample time for the flagman to go back and warn the second section of the train after the first section stopped, and no flagman went back a sufficient distance to give that warning, and if the failure or neglect to do so was the proximate cause of the death of the deceased, the verdict of the jury must be for the defendant. But the court instructed the jury in its general charge that there had been some evidence introduced tending to show negligence on the part of the employés of the first section of the train, and that, if there was any such negligence, the defendant was not in any way liable for it, because the employés of that section did not represent the company, but were fellow servants of the deceased. It further instructed them that the risk flowing from the negligence of these servants was a risk assumed by the fireman. This instruction, in view of the evidence in the case, sufficiently presented to the jury the principle of law stated in the request which was refused. That principle was that, if the proximate cause of the death was the negligence of the brakeman on the first section of the train, the plaintiff could not recover. A charge that the defendant was not liable if the proximate cause of the death was the negligence of any of the employés on the first section of the train clearly announced this rule, because the brakeman was one of those employés, and the whole is greater than any of its parts. Where a rule or principle of law is clearly declared by the court in its general charge, it is not error for it to refuse to repeat it in the words of counsel. Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 114 Fed. 133; Telegraph Co. v. Morris, 105 Fed. 49, 53, 44 C. C. A. 350, 353; Trumbull v. Erickson, 97 Fed. 891, 38 C. C. A. 536; Railroad Co. v. Jarvi, 53 Fed. 65, 3 C. C. A. 433.

One of the charges of negligence was the failure to use reasonable care to keep the coal gate of the engine in proper repair, and it is assigned as error that the court admitted the testimony of a witness that this gate was defective and weak 30 days before the accident. The only ground for this specification is that the time named by the witness was too remote from the date of the accident. But it is competent to prove defects in tools and machinery for a reasonable time before the accident which those defects are charged with inducing, and it cannot be said that 30 days is an unreasonable time within which to permit such testimony to range. There is at least a reasonable probability, in the absence of other evidence, that a defect existing 30 days before an accident was not remedied before the casualty occurred. There was no error in the admission of this evidence.

Finally, it is contended that the court erred because it permitted one witness to testify that a rule of the company which required trains to

keep 10 minutes apart did not apply to any train in particular, and permitted another to state that the conductor upon the first section of this train had "full charge of the running of the train over all the employés on the train." The only grounds for these objections are that the rules are the best evidence of their contents, and that the testimony of the witness as to the power of the conductor was a conclusion of law. Conceding that the written rule was the best evidence of its terms, it was competent for the witness to testify whether or not this rule applied to all the trains of the company or only to a portion thereof, and conceding that the statement of the witness who testified to the authority of the conductor was a conclusion of law, the admission of that testimony was not prejudicial, because the legal presumption is, in the absence of evidence, that the conductor has exactly the power which this witness testified was vested in him (Railroad Co. v. Ross, 112 U. S. 377, 390, 5 Sup. Ct. 184, 28 L. Ed. 787; Railroad Co. v. Baugh, 149 U. S. 368, 381, 13 Sup. Ct. 914, 37 L. Ed. 772), and error without prejudice is no ground for reversal.

There was, therefore, no error in these rulings, and the judgment below must be affirmed. It is so ordered.

FITZGERALD v. FIRST NAT. BANK OF RAPID CITY.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,593.

1. CONTRACTS—TERMS HAVE ORDINARY MEANING.
   The legal presumption is that the words used in an agreement have their ordinary and customary meaning.
2. SAME—CONSTRUCTION—FUNDAMENTAL RULE.
   The basic rule for the construction of a contract is to place one's self in the situation of the parties to the agreement when it is made, and then to ascertain and declare the intent with which they used its terms when their minds met.
3. SAME—PRACTICAL INTERPRETATION PERSUASIVE.
   The practical interpretation given to their agreements by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their intent.
4. SAME—CONSTRUCTION.
   Where A. was building a railroad in two ways: (1) By the use of his own employés; and (2) by the use of contractors, who had agreed to construct certain sections for specified prices,—an agreement to furnish beef to the "men working for" him is not an agreement to furnish it to his contractors, but is limited to a contract to furnish it to his employés or servants.
5. STATED ACCOUNT—ESTOPPEL BY.
   One who delivers, or receives and accepts without objection, an account stating the debits and credits between him and the other party to the accounting, is thereby estopped from denying the correctness of the account thus stated, in the absence of fraud, mistake, or undue advantage.

(Syllabus by the Court.)

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

On May 26, 1890, John Fitzgerald & Bro. were engaged in constructing a railroad from Custer City to Deadwood, in South Dakota. They con-

structed a portion of this railroad by means of workmen whom they employed and fed themselves, and other portions by the use of subcontractors, who agreed with them to construct certain portions of the railroad for certain prices. Schleuning & Young were dealers in beef and other meats in Rapid City, S. D. Fitzgerald & Bro. made a written agreement with Schleuning & Young that the latter (called in the contract the "party of the second part") "agrees to furnish beef along the line of the B. & M. Railroad between Custer City and Deadwood, in South Dakota, during the building of said line, to the men working for the said party of the first part, for the sum of 6¾ cts. (six and three-quarters) per lb.; said beef to be of the best quality, and to be furnished whenever desired by the boarding bosses along said line; said party of the second part to be paid on or about the 25th day of the month following that in which the meat is furnished, less eleven per cent. (11%) to be retained by the party of the first part for collection of accounts due to party of the second part for beef furnished in accordance with this contract." Schleuning & Young furnished under this contract meat amounting in value to the sum of $21,622.74, and were paid $21,597.38, leaving a balance of $25.36. A portion of this meat was furnished to men working for Fitzgerald & Bro., and a portion of it to contractors who were fulfilling their agreements with Fitzgerald & Bro. to construct certain portions of the railroad. Monthly statements of the meat so furnished and paid for were rendered to Fitzgerald & Bro. during the progress of the work. This work was commenced in May, 1890, and was completed in December of that year. During this time Chamberlain & Skinner and Wade & Jones were engaged in constructing certain portions of the railroad under contracts with Fitzgerald & Bro., and Schleuning & Young furnished meat of the value of about $4,000 to Chamberlain & Skinner, and meat of the value of about $750 to Wade & Jones. This meat was furnished during all the months between June and December 31, 1890; but no monthly statements of it were presented or delivered to Fitzgerald & Bro. as the work progressed, although such statements were made and presented to Chamberlain & Skinner and Wade & Jones, respectively. Schleuning & Young made independent contracts with Chamberlain & Skinner and Wade & Jones to furnish them meat at a lower price than that specified in the contract with Fitzgerald & Bro. More than three years after the railroad had been completed, and on July 17, 1893, Schleuning & Young made a statement of account against Fitzgerald & Bro., in which they charged them with the meat which they had furnished to Chamberlain & Skinner and Wade & Jones, and assigned the claim based upon this account to the First National Bank of Rapid City, S. D. On September 12, 1893, this bank brought an action against John Fitzgerald and David Fitzgerald, the members of the firm of John Fitzgerald & Bro., to recover the $25.36 conceded to be due upon the account against them, and also to recover the value of the meats furnished by Schleuning & Young to Chamberlain & Skinner and Wade & Jones. The bank alleged, and Fitzgerald & Bro. denied, that the defendants had agreed to purchase and pay for the meats furnished to Chamberlain & Skinner and Wade & Jones, and that they were furnished to them by Schleuning & Young under the contract of May 26, 1890. None of the meat in question was ordered, desired by, or furnished to boarding bosses along the line, for neither Chamberlain & Skinner nor Wade & Jones had boarding bosses on the portions of the railroad which they constructed. At the trial the court instructed the jury (1) that by the agreement of May 26, 1890, Fitzgerald & Bro. agreed to pay Schleuning & Young for all the meat they might sell to subcontractors who under them were constructing portions of the railroad, as well as for the meat which should be furnished when desired by the boarding bosses to the men employed by Fitzgerald & Bro. along the line; (2) that Fitzgerald & Bro. became absolutely liable to Schleuning & Young for all beef furnished subcontractors under that contract, whether the subcontractors ratified and consented to such an agreement and arrangement or not,—and refused to instruct the jury that the meats furnished to Chamberlain & Skinner and Wade & Jones were furnished under contracts with them, and not under the contract between Schleuning & Young and Fitzgerald & Bro. Under these instructions, which are challenged as error, the jury returned a verdict in favor of the bank, and a judgment was rendered against the defendants

for $6,743.07. During the progress of the litigation, John Fitzgerald died, and Mary Fitzgerald, the administratrix of his estate, was substituted for him in the proceedings, and she is now the plaintiff in error in this action.

J. W. Deweese (James Manahan and Frank E. Bishop, on the brief), for plaintiff in error.

Richard A. Jones (H. C. Brome and Arthur H. Burnett, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The question in this case is whether or not Fitzgerald & Bro. were liable to Schleuning & Young for the meats which the latter furnished to the subcontractors, Chamberlain & Skinner and Wade & Jones, between June 1, 1890, and January 1, 1891, under the contract of May 26, 1890. Chamberlain & Skinner and Wade & Jones held independent contracts with Fitzgerald & Bro. whereby they had agreed to build certain sections of the railroad for specified prices. Schleuning & Young made independent contracts with each of these subcontractors to furnish them meat at a rate lower than that made in their contract with Fitzgerald & Bro., of May 26, 1890, to the end that they might get the meat without paying the commission which Schleuning & Young agreed Fitzgerald & Bro. should receive under that contract for collecting their bills. The meat was delivered to these subcontractors during the months of July, August, September, October, November, and December, 1890; and Schleuning & Young sent them monthly statements of the amounts thus delivered, but did not send such statements of this meat to Fitzgerald & Bro., although they sent to the latter monthly statements of all the meat for which Fitzgerald & Bro. have paid, a portion of which was furnished to other subcontractors.

The court instructed the jury that the contract of May 26, 1890, bound Fitzgerald & Bro. to pay for all meat furnished by Schleuning & Young under it to subcontractors, as well as for that furnished by them to the men whom Fitzgerald & Bro. employed to work for them by the day, and that this absolute liability existed, whether the subcontractors consented to this agreement or not. But Fitzgerald & Bro. were engaged in the construction of this railroad in two ways, —by means of men whom they employed, paid wages, and fed through their boarding bosses, and by means of subcontractors, who built certain sections of the road for certain prices, and who hired and fed their own employés. The contract reads that the party of the second part [Schleuning & Young] agrees to furnish beef "to the men working for the said party of the first part [Fitzgerald & Bro.] for the sum of 6¾ cts. (six and three-quarters) per lb.; said beef to be of the best quality, and to be furnished whenever desired by the boarding bosses along said line; said party of the second part to be paid on or about the 25th day of the month following that in which the meat is furnished, less eleven per cent. (11%) to be retained by the party of the first part for collection of ac-

counts due to party of the second part for beef furnished in accordance with this contract." The legal effect of this agreement was that Schleuning & Young undertook to furnish to the men working for Fitzgerald & Bro., at the price named, such quantities of beef as the boarding bosses should desire; and Fitzgerald & Bro., for 11 per cent. of their amounts, agreed to collect and pay the monthly bills for this beef, if these bills were furnished to them before the 25th of the month succeeding their contracting. The question is, what was the meaning of the words "men working for the said party of the first part"? Did they mean the men hired and employed by the party of the first part, or did they mean the subcontractors who had agreed with the party of the first part to build separate sections of the railroad, as well? Now, the primary and natural meaning of the term "men working for the said party of the first part" is the servants of the party of the first part,—those over whom that party has the power of control; the right to direct them when, where, and how to do the work, and for whose acts the party is liable, under the maxim respondeat superior. It may, indeed, be said that all who are engaged in executing contracts for another are in some sense working for him. But after all, this is not the primary meaning of the words. It is in a secondary and subsidiary sense that such men may be described by this term. Contractors for the construction of a railroad, for the erection of a building, or for the manufacture of a machine do not, in the common understanding of either lawyers or laymen, fall within the class of men who are working for the railroad company, or for the promoter of the building or the machine. They form a different and distinct class,—the class of contractors, as distinguished from the class of servants or employés. In the ordinary and customary interpretation of the words "men working for a party," the class they describe is confined to those who are employed, paid, controlled, and directed by that party, and who are in fact his servants and employés.

The legal presumption is that the terms of a contract are used in their ordinary sense, and that they have their usual meaning; and this presumption points to the conclusion that the men working for Fitzgerald & Bro., to whom Schleuning & Young agreed to furnish as much beef as should be desired by their boarding bosses, were the employés and servants of Fitzgerald & Bro. only, and were not the independent contractors with them who had agreed to build certain sections of the railroad for specified prices. Brady v. Railway Co. (C. C. A.) 114 Fed. 100; Corning v. Board, 102 Fed. 57, 60, 42 C. C. A. 154, 157.

The situation and relations of the parties at the time this agreement was made tend strongly to confirm this construction. Fitzgerald & Bro. were building a portion of this railroad with their own employés, whom they were obliged to provide with food in their camps along the line. They accomplished this through boarding bosses, whom they doubtless employed under the contract that they should collect the bills against them for the beef furnished to them, and should retain 11 per cent. of their amount. All this they had the power and the right to do, because they could, and doubtless did,

employ their workmen and boarding bosses under the terms expressed in the contract of May 26, 1890. But they had no control of the hiring or the managing of the boarding bosses and employés of the subcontractors under them, and no right to subject them to these terms. They were employed, controlled, and paid by the independent contractors beneath them. Moreover, these contractors were not bound by these terms. They were not parties to the contract of May 26, 1890. There was no stipulation in that contract, nor in the contracts under which they were constructing their sections of the road, that they would take any beef of Schleuning & Young at the price named in the contract of May 26th, or at all, or that they would allow Fitzgerald & Bro. to collect the bills against them for 11 per cent. of their amounts; and they were under no legal or moral obligation to do so. In this state of the case, it would be unnatural and unreasonable to expect to find in the contract between Fitzgerald & Bro. and Schleuning & Young any agreement that these subcontractors should take, or that Fitzgerald & Bro. should pay for, beef furnished to them by Schleuning & Young; and the agreement will be searched in vain for any such provision. The practical interpretation given to this contract by the parties themselves while they were executing it demonstrates the fact that Schleuning & Young were not bound to furnish, and Fitzgerald & Bro. were not required to collect their bills for beef furnished to subcontractors. And the practical interpretation given to their agreements by the parties to them while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent. Schofield v. Bank, 97 Fed. 282, 38 C. C. A. 179; Publishing Co. v. Swift, 97 Fed. 290, 296, 38 C. C. A. 187, 193; Leavitt v. Investment Co., 54 Fed. 439, 4 C. C. A. 429, 12 U. S. App. 193; Topliff v. Topliff, 122 U. S. 121, 131, 7 Sup. Ct. 1057, 30 L. Ed. 1110; City of Chicago v. Sheldon, 9 Wall. 50, 54, 19 L. Ed. 594.

It will be noticed that in its inception this contract was without consideration, without mutuality, and void, because it specified no amount of beef which Schleuning & Young should furnish, or for which Fitzgerald & Bro. were required to pay. The only measure of the quantity to be found in it is that which should be desired by the boarding bosses along the line. But there was no agreement in it as to what amount these bosses should desire, or that they should desire any. It follows that while the delivery of beef according to the terms of this contract, and the agreement of Fitzgerald & Bro. to pay for the beef thus delivered, constituted sales of the goods thus accepted by Fitzgerald & Bro., yet these deliveries constituted no contract to accept or pay for any beef which Fitzgerald & Bro. refused to accept and pay for under the contract, for the reason that the quantity to be thus accepted and paid for was still undetermined, and there was no valid contract concerning it. Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77; Crane v. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869; Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791.

There is another peculiarity of this agreement which must not be overlooked. It is that Fitzgerald & Bro. were to pay on the 25th

day of the month following that on which the beef was furnished for such quantity of beef as was desired by the boarding bosses, at the price fixed in the contract, less 11 per cent. From the promise to pay monthly, a promise on the part of Schleuning & Young to furnish monthly statements of account, accompanied by the orders of the boarding bosses, is necessarily implied; and this implied stipulation was a material term of the contract, because only by the presentation of such bills and orders could Fitzgerald & Bro. learn the amount to be paid, and collect it out of the sums due to the boarding bosses under the terms of the written contract. So it was only for beef desired by the boarding bosses to feed the men employed by Fitzgerald & Bro., and for which bills were presented to them monthly, that they were required to pay.

Now it is contended that, notwithstanding these provisions of the contract, the parties construed it to bind Fitzgerald & Bro. to pay for the beef furnished to Chamberlain & Skinner and Wade & Jones, because they did pay for beef furnished under this contract to other contractors, namely, to Cable & Chute, Carroll & Donohue, Thomas Mansfield, and Gurley. But the payment for the beef furnished to these four contractors by Schleuning & Young does not tend to establish the conclusion that Fitzgerald & Bro. were bound by the contract to pay for, or that the parties to the contract supposed that they were bound to pay for, the beef furnished to other contractors. The limitations of the agreement—to beef furnished to the employés of Fitzgerald & Bro., to beef desired by the boarding bosses, and to beef for which monthly bills were furnished to Fitzgerald & Bro.—were all for their benefit. They had the right and the power to waive these limitations, either in part or altogether; to agree to pay for beef furnished to certain contractors, or for beef furnished to all the world. If, however, they waived these limitations, and paid 89 per cent. of the bills for beef furnished to Cable & Chute, Carroll & Donohue, Mansfield, and Gurley, that waiver and payment in no way bound them to pay for meats furnished to Chamberlain & Skinner and Wade & Jones, or to any other parties to whom Schleuning & Young might deliver the goods. The truth is that Schleuning & Young had agreed to furnish meat to the employés of Fitzgerald & Bro. at a certain price, and the latter had agreed to collect their bills for 11 per cent. of their amounts. The former were anxious to furnish meat, and the latter were desirous to earn their 11 per cent. The contractors were under no obligation to take meat of Schleuning & Young, nor to permit Fitzgerald & Bro. to collect the bills against them, and retain their 11 per cent., and no contract concerning the beef to be furnished to these contractors had been made. Schleuning & Young persuaded four of the contractors to take meat from them, and to allow Fitzgerald & Bro. to get their 11 per cent. For this meat they sent monthly bills to Fitzgerald & Bro., and the latter collected these bills and deducted their percentage. But all the parties to the contracts and to the transaction understood that the contract of May 26, 1890, neither bound the contractors to take, Schleuning & Young to deliver, nor Fitzgerald & Bro. to pay for, any meat delivered to the contractors That this was the interpretation of the

contract and the understanding of their legal rights by all the parties to the transactions clearly appears from the following facts, which are disclosed by this record: In May, 1890, Schleuning presented to Chamberlain a letter of Mike Corcoran, one of the agents of Fitzgerald & Bro., which stated the price at which Schleuning & Young were to furnish beef under the contract of May 26, 1890, and Chamberlain replied that he could do better. On July 2, 1890, Schleuning & Young made an independent contract with Chamberlain & Skinner to furnish them meat at a price so low that they could get it at the same price as Fitzgerald & Bro. received it, with their commission off. They made a similar independent contract with Wade & Jones. They furnished meat to these contractors from the 1st of July, 1890, to December in that year, inclusive. During all this time they sent to Fitzgerald & Bro. monthly bills of the meat which they furnished to the employés of Fitzgerald & Bro. and to the four other contractors, but they did not include in these accounts any of the beef which they furnished to Chamberlain & Skinner or to Wade & Jones, but they sent monthly bills of this meat to these contractors. The work on the railroad was completed in December, 1890. Between June 1, 1890, and February 1, 1891, Schleuning & Young sent to Fitzgerald & Bro. 12 accounts of beef furnished, but they did not in any one of these accounts charge anything for any of the beef furnished by them to Chamberlain & Skinner or to Wade & Jones. On March 10, 1891, they wrote Fitzgerald & Bro.:

"Will you please remit balance due on your a/c, and don't you think you could be able to secure John Chamberlain and Wade & Jones a/c on a discount? We surely have waited patiently, and you know there is money coming to them from the B. & M. by you. There is a chance for you to make a good discount, as the a/c of them is surely good."

On March 11th they wrote Mr. Cagney, one of the agents of Fitzgerald & Bro.:

"Should you not send us final check, we will draw on you for $5,000, for that is a little less than coming to us, which please honor on presentation."

The amount due them on that day, excluding the Chamberlain & Skinner and Wade & Jones accounts, was $6,084.88. The amount due them, including those accounts, was over $10,800. On March 17, 1891, they wrote:

"In looking over our a/c, found that we forgot to hand in a/c of Wade & Jones, amounting to $802.25. If you can use the same and discount it, all right; otherwise have it returned at once, and by so doing oblige us."

In the last days of March, Fitzgerald & Bro. demanded of Schleuning & Young a final account, and they furnished one, wherein they set forth the debits and credits of the entire account from the beginning of the work to its close. This account contains no charge of any beef furnished to Chamberlain & Skinner, but the last item of the account is a charge for beef furnished Wade & Jones, $802.25. To this account Fitzgerald & Bro. answered:

"The last item of your statement, Wade & Jones, $802.25, cannot be allowed, as you never at any time, nor in any bill, sent an account against these people. Consequently you must not charge us with this item, by including it in your statement at this late date."

On April 4, 1891, Schleuning & Young replied to this letter in these words:

"I expect you are correct in regard to Wade & Jones. I made a draft, and forwarded the same to you; and, as you did not return the same, I expected you would discount 10 %, the same as you would do with other a/cs. If you have a chance to protect me in this a/c, I wish you would do so."

On April 8, 1891, Schleuning & Young wrote to Mr. John Cleary, the bookkeeper of Fitzgerald & Bro.:

"This W. Jones a/c, I know, was not included; but, if you can see a way to help me get it, I will let you an extra fifty dollars to assist me. As I understand, you have not made a settlement with them, and could hold out the same, or can I stop payment in the banks of John Fitzgerald? If so, please be so kind and let me know."

On April 10, 1891, they wrote Fitzgerald & Bro.:

"We also state that we have, as you know, and as we have stated to Mr. Cagney months ago, due us from Skinner & Chamberlain $4,000.00, which we had to furnish at the same price as yourself in a/c that they did not want to take any meat for two months while we were furnishing unless they could get the same for the same as yourself, with commission off; but, if you can handle same, we will turn in a/c's, rather than wait any longer."

The record contains the questionable testimony of Mr. Schleuning to the effect that once or twice he demanded the payment of a part or all of the bills against Chamberlain & Skinner and Wade & Jones from agents of Fitzgerald & Bro., and they agreed to pay them. But he does not claim that he ever presented any claim for these bills in the monthly accounts or in the final account which he rendered, with the exception of the claim in the latter for the bill of Wade & Jones, which his firm immediately conceded, by letter, to be an unfounded demand. There is, indeed, nothing in this record to overcome the conclusive effect of the stated accounts to which reference has been made, and the letters which have been quoted. Schleuning & Young delivered 12 accounts to Fitzgerald & Bro. during the progress of this work, and just subsequent to its completion, none of which contain any claim for beef furnished to Chamberlain & Skinner or Wade & Jones. At the request of Fitzgerald & Bro. they furnished a final account in which they made no claim for the beef furnished Chamberlain & Skinner, but which contained a claim for that furnished to Wade & Jones, which they immediately afterwards, in writing, conceded was improperly charged against the defendants. It is not claimed that Schleuning & Young were induced by fraud, mistake, or by the taking of any undue advantage, to state these accounts; and in the absence of fraud, mistake, or undue advantage, an account stated is conclusive, and estops the party who presents it from assailing its correctness. Porter v. Price, 80 Fed. 655, 657, 26 C. C. A. 70, 72, 49 U. S. App. 295, 300; Atkinson v. Allen, 71 Fed. 58, 60, 17 C. C. A. 570, 572, 36 U. S. App. 255, 260; Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Davenport v. Wheeler, 7 Cow. 231; Wiggins v. Burkham, 10 Wall. 129, 19 L. Ed. 884; Philips v. Belden, 2 Edw. Ch. 1; Langdon v. Roane's Adm'r, 6 Ala. 518, 41 Am. Dec. 60; Oil Co. v. Van Etten, 107 U. S. 325, 1 Sup. Ct. 178, 27 L. Ed. 319; Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811; Manufacturing Co. v. Starks, 4 Mason, 297, Fed. Cas. No. 11,802; 1 Am. & Eng. Enc. Law, 121.

These accounts alone are ample to prove that the parties to the contract of May 26, 1890, did not construe it to bind Schleuning & Young to deliver, or Fitzgerald & Bro. to pay for, meat delivered to Chamberlain & Skinner and Wade & Jones, at the price named therein. This conclusion becomes irresistible when it is considered that Schleuning & Young conceded in their letter that they made independent contracts with Chamberlain & Skinner and Wade & Jones to deliver them meat at a price lower than that named in the contract of May 26, 1890, because the latter were unwilling to pay the commission which that agreement guarantied to Fitzgerald & Bro.

In the construction of a contract, the great desideratum is to ascertain and declare the intent of the parties to it when they made it. The basic rule for its interpretation is to put one's self in the place of the parties when their minds met upon the terms of it, and then, from a consideration of the entire agreement, its purpose, and the circumstances surrounding the parties, to find what they intended to agree to do. In view of the facts that the natural and primary meaning of the term "men working for the said party of the first part" is servants and employés of that party, and not contractors who are not subject to the command or control of the party; that Fitzgerald & Bro. were using their own employés, whom they fed through their own boarding bosses, to construct a part of the railroad, while they had let contracts to independent contractors for the construction of other sections of it; that they had the power to hire the former, subject to the terms of the contract of May 26, 1890, but that they gave the latter such contracts that they were not in any way subject to or bound by those terms; that the legal presumption is that the terms of a contract are used in their ordinary and customary sense, and that the parties to this contract, in the 13 stated accounts which passed between them in the years 1890 and 1891, and in their letters concerning them, both conceded that Schleuning & Young were not bound to furnish, and Fitzgerald & Bro. were not liable to pay for, the meat furnished to the contractors Chamberlain & Skinner and Wade & Jones,—the conclusion is irresistibly forced upon our minds that the only men to whom Schleuning & Young agreed to furnish beef by the contract of May 26, 1890, were the employés or servants of Fitzgerald & Bro., and the only beef for which the latter agreed to pay was the beef furnished to such employés.

The result is that the charge of the court was erroneous in two particulars: First, in that it declared that Fitzgerald & Bro. were liable to pay for beef furnished to their subcontractors; and, second, in that it declared that this liability existed whether the subcontractors consented or assented to the furnishing of beef to them under the terms of the contract of May 26th or not. The judgment below is accordingly reversed, and the case is remanded to the circuit court, with directions to grant a new trial.

THAYER, Circuit Judge (concurring). The sole question of fact which the lower court submitted to the jury for its determination was whether the beef supplied to the two subcontracting firms of Chamberlain & Skinner and Wade & Jones was sold and delivered to the said

firms on their credit, and under the contracts made by those firms with Schleuning & Young on or about July 2, 1890, or whether the meat was delivered to Chamberlain & Skinner and Wade & Jones under the contract which Schleuning & Young had entered into with Fitzgerald & Bro. on or about May 26, 1890, and on the credit of the latter firm. The theory of the lower court appears to have been that as there were two contracts in existence with different parties, under which the meat might have been delivered, that party was liable whom the plaintiffs below trusted and intended or elected to hold when the meat ordered was delivered. The court below instructed the jurors that this issue of fact was the real issue for them to determine, and it was the issue on which the decision of the case hinged, so far as the jury was concerned. In view of the facts alluded to in the main opinion,—that Schleuning & Young, after their contracts with Chamberlain & Skinner and Wade & Jones were entered into, rendered monthly bills for the meat delivered to these subcontractors, to them; that they did not render bills therefor to Fitzgerald & Bro. for such meat from and after July 1, 1890; and that in their correspondence and dealings with Fitzgerald & Bro. they practically admitted on several occasions that the meat delivered to the two subcontracting firms was not chargeable to Fitzgerald & Bro.,—I am of the opinion that it conclusively appears that Schleuning & Young sold and delivered the meat for which they now seek to hold the firm of Fitzgerald & Bro. liable to Chamberlain & Skinner and Wade & Jones, and on the credit of the latter firms, and that the attempt now made to hold Fitzgerald & Bro. was an afterthought. In the face of such evidence as the record contains, showing an evident intent to deal with Chamberlain & Skinner and Wade & Jones, and to extend credit to them for the meat which they ordered, I think the lower court erred in submitting to the jury the question whether the meat was sold on the credit of Fitzgerald & Bro. On this ground, and no other, I concur in the reversal of the judgment of the lower court. I conceive that owing to the uncertainty which attends the construction of the contract between Fitzgerald & Bro. and Schleuning & Young, on which this action is brought, and because of the contemporaneous construction of the contract by the parties themselves, the lower court may have construed that contract correctly as embracing meat which might be ordered by and delivered to all of the subcontractors under Fitzgerald & Bro., who were engaged in building the line of road referred to in the contract,—between Custer City and Deadwood, S. D. I think, however, that as Chamberlain & Skinner and Wade & Jones saw fit to enter into contracts of their own for the supply of meat with Schleuning & Young, and as the latter firm, after making such contracts, rendered all of their bills to Chamberlain & Skinner and Wade & Jones, and did not attempt to charge Fitzgerald & Bro. therefor until long after the meat was supplied, and on one or two occasions admitted that Fitzgerald & Bro. were not liable to pay for such meat, it is now too late to interpose that claim. If the firm of Schleuning & Young was at one time in a situation, as it may have been, to elect whom they would charge, they made such an election long before this suit was brought, and cannot depart therefrom.

LAND TITLE & TRUST CO. v. ASPHALT CO. OF AMERICA.

(Circuit Court, D. New Jersey. April 4, 1902.)

CORPORATIONS—RECEIVERSHIP PROCEEDINGS—INTERVENTION BY STOCK OR BOND HOLDER.

A bond or stock holder in a corporation, though averring that its answer is collusive and void, cannot intervene as a party defendant in receivership proceedings against it, and, while admitting its insolvency and that the appointment of receivers is necessary, question the propriety of the appointment of the particular receivers, having other remedy under the New Jersey corporation act.

Petition of Harry C. Spinks for Intervention as Defendant.

Coult & Howell, for petitioner.
Corbin & Corbin, for opponent.

KIRKPATRICK, District Judge. On the 28th day of December, 1901, the complainant in this case, the Land Title & Trust Company, filed its bill of complaint, setting out the causes for which the defendant, the Asphalt Company of America, should be adjudicated insolvent. A copy of the bill had been previously served upon the defendant company, and on the same day it appeared by its attorney, and filed its answer to said bill, in which it admitted the charges thereof, and joined in the prayer of the complainant for the appointment of receivers to preserve its property and collect and distribute its assets. The court proceeded, in a summary way, in accordance with the provisions of the statute of New Jersey, to adjudicate upon the matters presented, and by its decree declared the said corporation insolvent, and appointed Messrs. Tatnall, Mack, and Shanley receivers for such purpose. In the petition now filed by Harry C. Spinks he asks to intervene as a party defendant, charging that the answer of the defendant is collusive and void, and in order that he may set up matters of defense and methods of collecting the assets of the corporation, which he insists will not be adopted by the present receivers, although, as he claims, for the interest of the shareholders. Mr. Spinks claims this right to intervene because he is the owner of $128,000, par value, of the bonds or certificates of indebtedness of the defendant company, and the owner of $50,000, par value, of the shares of the corporation, upon which he has paid an assessment of 20 per cent., and is liable for an assessment of 80 per cent. By his petition Spinks admits that the decree of insolvency already made was proper and right, because he says that the said defendant corporation is now "temporarily insolvent," and he admits that receivers are necessary to take charge of its property and collect its assets, because he asks that upon the "discharge of the present receivers others may be appointed in their stead." The petitioner cannot be admitted as a defendant to attack or question the propriety of the appointment of the present receivers. It is not necessary that he should be made a party defendant for this purpose. If in the administration of the affairs of the corporation the receivers appointed by the court fail, or for any reason are unable to properly discharge their duties in this respect either in the interest of this petitioner or of any or of all of its creditors and stockholders,

the court will, upon proper representation and proof of that fact, itself see to it that others are appointed in their stead. The proceedings in relation to the administration of the affairs of the company are now in the hands of the court, and beyond the control of any particular set of stockholders, and it is not necessary that intervention should be had by any creditor or bondholder to do the work which the court has appointed its officers to perform. The propriety of such action on the part of a creditor or stockholder was considered in the case of Forbes v. Railroad Co., 2 Woods, 323, Fed. Cas. No. 4,926, where Bradley, J., in delivering the views of the court, said:

"A suggestion in the progress of a suit that an officer of the court [the receiver] is disposed to act fraudulently, or that the court has made an injudicious or erroneous order, will not be a sufficient ground to allow such a party to intervene. Indeed, it is questionable whether in any case where a suit is properly instituted against a corporation a stockholder of that corporation can, even on a suggestion of fraud on the part of its officers, come in by way of intervention as a party to that suit, and seek to defend or control the proceedings. An original bill would rather seem to be a proper mode of proceeding."

If the petitioner in this case should be able to maintain the allegations of fraud set out in his bill, or if he should find that the receivers by their action are negligent or jeopardizing his interests or those of his associates, his remedy as a creditor and stockholder is clearly pointed out in the New Jersey corporation act, as was stated by Judge Green in this circuit in the case of Werner v. Murphy (C. C.) 60 Fed. 769.

The grievances of which the petitioner complains in his petition against the directors and stockholders of the Asphalt Company of America cannot be raised in this suit, the object of which is not to inquire into the reasons for the insolvency of the corporation, but to recognize the fact of insolvency as one accomplished and to be provided against. He cannot be permitted to intervene, therefore, to litigate those questions. The directors and stockholders are not parties to the suit, and would not be bound by any decree made therein, and any personal liability on their part must be enforced in a separate suit. It is also suggested by the answer, and in one of the schedules annexed thereto, that the question of fraud and the liability of the directors and stockholders here raised has already been determined, by a court of competent jurisdiction, adversely to the petitioner. I refer to the case of Spinks v. Paving Co., determined in the court of chancery of New Jersey. The petitioner has failed, by any proof, to sustain any charge of misconduct or fraud on the part of its trustee, who alone, under an agreement to which he is a party, appears to be entitled to bring this suit, and, in the absence thereof, he cannot for that reason be permitted to intervene.

I do not find any analogy between the case at bar and that of the Louisville Trust Co. v. Louisville, N. A. & C. R. Co., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130, upon which the petitioner relies. That case was for the foreclosure of a mortgage, and the court held that the company had conspired with certain creditors to procure foreclosure for the purpose of defeating certain valid claims which existed against it. The court held that these acts were fraudulent, and that,

although the proceedings were regular on their face, the sale must be set aside on that account. In the case at bar no effort is being made to give a preference to one creditor over another, nor to make more or less valuable any particular set of what are known as "gold certificates." But the object avowed in the bill, and in the contemplation of the court and its receivers, its officers, is that all the assets may be collected for and applied to the equal benefit of all. I find nothing in the petition, or in the situation presented therein, which would justify the court in permitting the petitioner to intervene and set up his answer as the answer of the corporation defendant. His interests will, I think, be properly protected, and if a situation should arise by which, in his opinion, they would be jeopardized, he has other remedies pointed out by the statute.

The prayer of the petitioner, for the reasons above stated, is therefore denied.

In re STODDART.

(District Court, D. Washington, N. D. February 17, 1902.)

No. 1,940.

BANKRUPTCY—DISCHARGE—CONCEALMENT OF ASSETS.

The intentional omission by a bankrupt to schedule or bring to the attention of his trustee his interest in real estate of the value of $10,000, which a short time prior to his bankruptcy he conveyed in trust, the income to be paid to another during life, and the property then to be held for his own benefit, constitutes ground for refusing him a discharge, and he is not relieved from the consequences of such concealment by the fact that he was advised by his attorney that his deed devested him of all interest in the property.

In Bankruptcy. On motion of bankrupt to vacate and set aside the findings and conclusions of the referee on his application for discharge.

The following are the referee's findings of fact and conclusions of law:

This matter having been heretofore heard and taken under advisement by the referee upon the objections of W. Rigby, a creditor, to the discharge of said bankrupt, and said referee, being sufficiently advised in the premises, finds facts as follows: That on the 20th day of January, 1900, the said bankrupt made a deed to John T. Harmes, of San Francisco, California, for certain real estate situated in the city of San Francisco, California, described as follows: "Commencing at the point of intersection of the southerly line of Geary street with the easterly line of Gough street; thence easterly along the southerly line of Geary street thirty (30) feet; thence at right angles southerly one hundred and thirty-seven (137) feet and six (6) inches; thence at right angles westerly thirty (30) feet to the easterly line of Gough street; thence at right angles northerly one hundred and thirty-seven (137) feet and six (6) inches to the southerly line of Geary street and point of beginning." That by the terms of said deed the fee-simple title to said property was conveyed to said Harmes upon certain trust conditions, which, in substance, gave to one Emma A. Stoddart the issues and profits of said property during her lifetime, and upon her death the property would be held for the benefit of the grantor in said deed, the said bankrupt, Archibald C. Stoddart. That said property was at the time of the filing of the petition in bankruptcy herein of the value of at least $10,000. That no reference whatever was

made to this property in the petition or schedules filed by said bankrupt, and no mention made thereof by the bankrupt on his examination, until a specific inquiry by the attorney for the trustee showed that he had knowledge in regard to the matter, when, in answer to such question, bankrupt admitted that he knew of this property, but did not proceed voluntarily to fully explain his relations thereto until a certified copy of the deed above referred to was presented to him, which copy was admitted in evidence, and marked "Trustee's Exhibit A." That no satisfactory reason was given at said examination of the bankrupt or upon the hearing of the objections to his discharge for his failure to include this property, or his interest therein, in his schedules, and in view of that fact the referee finds that its omission from such schedules was intentional for the purpose of preventing his interest in said property being reached by his creditors. The referee therefore finds as a fact that specification 1 of the objecting creditor has been proven, and as a conclusion of law from the facts so found the referee finds that the bankrupt is not entitled to his discharge. The referee transmits herewith trustee's Exhibits A and B, offered on the examination of bankrupt, and the objecting creditor's Exhibit 1 and the bankrupt's Exhibit A, put in evidence upon the hearing of the objections, together with the evidence reduced to the form of a deposition of the bankrupt given upon his examination at the first meeting of creditors, for the information of the court.

G. Ward Kemp, for creditor.
Fred H. Peterson, for bankrupt.

HANFORD, District Judge. I consider that the referee has made a correct decision as to the facts and law with respect to the neglect of the bankrupt to return a true schedule of his property, and the effect of that neglect upon his right to a discharge from obligation to his creditors. During the pendency of these proceedings the bankrupt has filed an affidavit in which he claims that the omission was unintentional, being made under advice of counsel to the effect that the conveyance of his San Francisco property which he made to a trustee, completely devested him of all his interest in the property. If he acted upon such advice, it does not free him from the legal consequences of making an untrue representation to the court with respect to his property. To further show his good faith, the bankrupt also deposited in court a quitclaim deed to the property referred to to the trustee for the benefit of his creditors. It will be for the trustee and the creditors to decide whether they will accept this deed. Under the circumstances shown by the evidence, I consider that it will be proper for the trustee to commence legal proceedings in the state of California to have the trust deed set aside, provided the creditors furnish sufficient money to meet expenses of such litigation.

WESTERVELT et al. v. LIBRARY BUREAU.

(Circuit Court, D. Massachusetts. July 10, 1899.)

No. 673.

PATENTS—PRIOR INVENTION—EVIDENCE TO SUSTAIN PLEA.

A plea to a bill for infringement of the Stikeman patent, No. 541,395, for improvements in library shelving, alleging prior invention by another, *held* not supported by the evidence, which was directed entirely to showing prior invention of the bracket described in claim 1, which is but one element of the combination covered by claims 2 and 3.

In Equity. Suit for infringement of letters patent No. 541,395, issued June 18, 1895, to George Stikeman for improvements in library shelving. On plea to bill.

A. A. Connolly, for complainants.

Fish, Richardson & Storrow, Frederick L. Emery, and Nathan Heard, for defendant.

COLT, Circuit Judge. This bill in equity charges infringement of letters patent No. 541,395, issued June 18, 1895, to George Stikeman, for improvements in library shelving. To this bill the defendant filed a plea in bar setting up prior invention in one David E. Hunter. The plea alleges that:

"Prior to the alleged and pretended discovery or invention of said Stikeman, as alleged in said bill of complainant, one David E. Hunter, of Cambridge, Mass., did invent the library shelving, the use whereof by defendant is complained of as an infringement of the patent to said Stikeman, and with reasonable diligence adapted and perfected the same, and made, or caused to be made, before the alleged invention of said Stikeman, a structure embodying his said invention, which was complete and capable of producing the result to be accomplished, and thereupon and thereafter disclosed his said invention to others, and thereafter applied for and obtained letters patent of the United States for his said invention, No. 552,062, dated December 24, 1895, of which patent the defendant is the sole owner by duly-executed instruments of assignment here in court to be produced."

This plea is to the whole bill.

The Stikeman invention is expressed in the three claims of his patent, which are as follows:

"(1) A bracket for library shelves, consisting of a vertical plate having a vertical flange at its rear edge, a horizontal flange on its inner side and below the upper edge of the plate, a threaded nut or lug, and a perforated guiding lug on the inner side of the plate, in combination with a screw passing through the lug and nut and extending to the front edge of the plate, substantially as described.

"(2) In library shelving, the combination of a column composed of a flat plate, and a channel iron mounted on a suitable base, and secured at such distance apart as to leave a space between the flange of the channel iron and the face of the adjacent plate, with a bracket adapted to enter said space, and having a flange adapted to embrace the flange of the channel iron, substantially as described.

"(3) In library shelving, the combination with a suitable base of a flat vertical plate and a channel iron secured to the base, and arranged at such distance apart as to leave a space between the flat plate and the flange of the channel iron for the reception of a bracket, substantially as described."

The patent relates to library shelving. Claim 1 relates to the bracket; claims 2 and 3 relate to the combination of the standard with a suitable base and bracket. The evidence in support of the plea is limited to claim 1. It is directed to showing that Hunter was the prior inventor of the Stikeman bracket, or to the subject-matter of claim 1. It is not contended, and no evidence is introduced to the effect, that Hunter was the prior inventor of the combinations covered by the second and third claims of the patent.

The patent is not for a bracket alone, but for an improvement in library shelving. Such shelving necessarily embraces a standard as well as a bracket. The evidence introduced in support of the plea bears witness to the fact that in library shelving the form and construc-

tion of the standard is very nearly as important as the form and construction of the bracket.

The defendant's evidence falls short of proving the issue raised by the plea. The plea is overruled, with costs to the complainant.

In re HEAD et al.

(District Court, W. D. Arkansas, Texarkana Division. March 26, 1902.)

1. BANKRUPTCY—PARTNERSHIP—DISSOLUTION WHILE INSOLVENT.
The dissolution of a partnership while insolvent, and the division of the firm property between the partners, to be held as their individual property, thus giving individual creditors a preference over firm creditors, who are in justice and equity entitled to priority of payment from such property, is contrary to the whole theory of the bankruptcy law; and where such dissolution is made within four months before the firm is adjudged bankrupt it will be treated as a void transfer, under Bankr. Act 1898, § 67e, and the property in the hands of both partners as firm property, without regard to the actual intention of the partners, who must be held to have intended the necessary and inevitable consequences of their acts.

2. SAME—EXEMPTIONS.
Where, by the laws of the state, a partner cannot claim exemptions from firm property, the members of a bankrupt partnership cannot secure such exemptions by a dissolution of the firm while insolvent, and within four months prior to the bankruptcy.

In Bankruptcy. On review of action of referee disallowing exemptions claimed by bankrupts.

Scott, Lake & Head, for petitioning creditors.
W. H. Arnold, for bankrupts.
Pratt P. Bacon, in pro. per.

ROGERS, District Judge. Clyde Head and Charles P. Smith were merchants at Richmond, Ark., under the firm name and style of Head & Smith. They formed their copartnership and entered into business on the 1st of January, 1901, neither one of the partners having any capital. They purchased the remnants of two small secondhand stocks of goods on credit, and their purchases were subsequently made on credit, and the scope of their business was largely the furnishing of supplies to a large planter near by. They continued in business until the 14th of January, 1902, when they dissolved. Both parties testified that the immediate cause of their dissolution was a notice from said planter that he did not intend to patronize them during the year 1902. The partner Head took for his share 2 horses, 1 buggy, 25 bushels of corn, and some harness; the partner Smith took the merchandise and open accounts, and, indeed, all the other assets of the firm, nominally $4,000, and assumed the debts of the concern, amounting to in the neighborhood of $3,500. Smith testifies that he believed when he took the business that he could carry it on and pay the debts. He at once notified the creditors of the dissolution, and applied for an extension. He failed in that, and on the 7th of February, 1902, creditors filed their petition in bankruptcy against the firm, after both part-

ners had stated in writing that they were insolvent, and expressed a willingness to go into bankruptcy. Head was a single man; Smith married after the partnership was formed, and before it dissolved. No inventory of the stock was taken when the dissolution took place, but they estimated the stock would invoice at between $4,000 and $4,500. After the dissolution Smith bought some goods, sold others, and paid some small firm debts. Smith had no property except the assets of the dissolved firm, and no means of raising money to pay the creditors except by a sale of the goods. Head testifies that after the firm was dissolved he had no further connection with it; that he thought Smith would be able to take charge of the stock, pay the debts, and continue the business; they neither had any idea of going into bankruptcy; they both thought Smith could make sufficient arrangements to get time and convert the goods into cash; that they estimated the goods would invoice $4,250, and liabilities in the neighborhood of $3,600.

On this state of proof the referee found the partnership was insolvent when the dissolution occurred, and in that finding of facts the court concurs. If this transaction is upheld, its inevitable effect is that the mere act of the dissolution of the partnership converts all the partnership assets into individual assets of the respective parties, thereby enabling each partner, not only to claim exemptions out of the partnership assets in violation of the exemption laws of Arkansas as construed by its own courts (Richardson v. Adler, 46 Ark. 43), but also to pay their respective individual creditors out of the partnership assets to the exclusion of the partnership creditors, in plain violation of the express provisions of the bankrupt law (Bankr. Act 1898, § 5). Moreover, its effect is to enable the individual creditors to gain an advantage over the other creditors, which they did not have until the firm was dissolved. It was, in effect, a gift by the insolvent firm to the creditors of the individual members of the firm, and therefore a preference to them over the partnership creditors, who under the bankrupt law and in equity and good conscience were entitled to have the partnership assets appropriated to the payment of the partnership debts, to the exclusion of the individual creditors of the respective partners. Nor will it do to say that the members of this firm acted in good faith in what they did; that they did not intend to hinder, delay, or defraud their creditors. Every man must be held in law to have intended that which was the necessary and inevitable result of his acts, and the dissolution of an insolvent firm, if valid, is, in effect, an appropriation by the firm of the firm assets, which in equity and under the bankrupt law should be appropriated to the payment of the firm creditors to the payment of the debts of the individual members thereof. The firm, and the members thereof, must therefore be held to have intended that very result, and this the bankrupt law forbids.

The injustice of such a transaction, and the inequitable nature thereof, is, in the opinion of the court, in direct conflict with the whole theory of the bankrupt law. I am of the opinion that the dissolution of this firm, it being insolvent, and the withdrawal therefrom of assets by the respective partners, to be held as individual property, was in

violation of section 67e, Bankr. Act 1898, and that the court should set aside the terms of the dissolution, and treat the assets of the firm in the hands of both partners as partnership property, and to do otherwise is to defeat the whole spirit and policy of the bankrupt law. I am not aware that this question has been authoritatively settled by any court of appeals or by the supreme court of the United States, and there appears to be a conflict of authority upon the subject among the district courts. In support of the position assumed by the court may be cited In re Cook, Fed. Cas. No. 3,150; In re Byrne, Fed. Cas. No. 2,270; In re Sauthoff, 21 Fed. Cas. (No. 12,380); Loveland, Bankr. p. 190; Coll. Bankr. (3d Ed.) 70; In re Jones & Cook, 4 Am. Bankr. R. 141, 100 Fed. 781; In re Gillette & Prentice, 5 Am. Bankr. R. 119, 104 Fed. 769. I am aware that all of these cases are not directly in point, but they bear upon the principle involved.

The case of In re Rudnick (C. C.) 102 Fed. 751, is cited as opposing the conclusion reached by the court. The cases are not the same, but, if it may be treated as an authority against the conclusion reached by the court, I am unable to follow it. The action of the referee in disallowing the claim of both bankrupts is affirmed, and an order will be entered accordingly.

The referee will proceed in accordance with this opinion.

WINDMULLER et al. v. STANDARD DISTILLING & DISTRIBUTING CO. et al.

(Circuit Court, D. New Jersey. March 12, 1902.)

1. CORPORATIONS—STATUS OF STOCKHOLDERS—RIGHT TO VOTE.
   Stockholders of a corporation, unlike directors, are not trustees for the other stockholders, but each represents his own interest only in stockholders' meetings, and may vote on any measure, even though he has a personal interest therein separate from, or adverse to, that of other stockholders.

2. SAME.
   A corporation which, as permitted by the laws of the state, owns the common stock of a second corporation, is not deprived of the right to vote such stock in favor of dissolution, because, as a consideration for its stock, it guarantied the payment of dividends on the preferred stock of the second corporation so long as the latter should exist.

3. SAME—DISSOLUTION—POWER OF COURT TO ENJOIN.
   The general corporation act of New Jersey provides that any corporation may be dissolved whenever deemed advisable by the board of directors, provided two-thirds in interest of all the stockholders shall consent thereto at a meeting called for the purpose. *Held*, that a court of equity had no power to review the decision of the board of directors of such a corporation as to the advisability of dissolution or to enjoin such dissolution at the suit of a minority stockholder.

In Equity. On rule to show cause against issuance of injunction.

James E. Howell and Robert H. McCarter, for complainants.

Charles E. Deming, Levi Mayer, and R. V. Lindabury, for defendants.

KIRKPATRICK, District Judge. The complainants are the holders of certain shares of the first and second preferred stock of the Spirits Distributing Company, a corporation organized under the laws of the state of New Jersey, upon which the Standard Distilling & Distributing Company have guarantied a dividend of 6 per cent. upon the first preferred, and 2 per cent. upon the second preferred, stock, during the existence of the said Spirits Distributing Company. It appears from the record that in 1896 the Spirits Distributing Company had an authorized capital of $7,350,000, of which there was outstanding, in the early part of 1899, $1,050,000 of first preferred, 7 per cent. cumulative stock; $1,575,000 of 6 per cent., noncumulative second preferred stock; and $3,675,000 of common stock. Among its sources of revenue was a contract with the American Spirits Manufacturing Company, under the terms of which it received a minimum payment of $100,000 annually, which was to continue for a period of 45 years, unless sooner terminated by a vote of three-fourths of the stock of the said Distributing Company. It also appears that, even with the receipt of the $100,000 provided to be paid by the Spirits Manufacturing Company, the Distributing Company, from the time of its organization until the early part of 1899, had never been in funds with which to pay in full the dividends upon its first preferred stock, nor any part of the dividends upon its second preferred stock. It was proposed, about December, 1898, by one C. H. Eicks, that the stockholders of the Distributing Company should surrender their right to receive 7 per cent. on their first preferred stock and 6 per cent. on their second preferred stock, and that in lieu thereof they should agree to take 6 per cent. on their first preferred and 2 per cent. on their second preferred stock; and, as an inducement for them so to do, he proposed that the said stockholders should surrender to the Standard Distilling & Distributing Company, which had then but recently been organized with a capital of $24,000,000, all of their common stock in the Distributing Company, which constituted a majority of the whole. He also said to them that in consideration thereof the Standard Company would guaranty the said dividends on the first and second preferred stock, as aforesaid, to the said stockholders during the existence of said Distributing Company. In order to carry out this plan, it became necessary that the charter of the Distributing Company should be amended, and the same was accordingly done, with the consent of every one of its stockholders, including these complainants.

The agreement between the stockholders of the Distributing Company and the Standard Company was carried into effect. The old stock of the Distributing Company was surrendered to its officers, and new stock issued to the shareholders, upon which was stamped the guaranty of the Standard Company, and the common stock of the Distributing Company, being a majority of the whole, was transferred to the Standard Company. From January, 1899, to the date of the filing of the bill, the Standard Company has paid to the complainants the dividends upon their stock in the Distributing Company, as provided in the agreement. The Standard Company took charge of the business of the Distributing Company by qualifying and electing as directors a majority of the board. During the time of their control

the business of the company has been successfully prosecuted, and its earnings have so largely increased that during the fiscal year ending June 30, 1901, it showed a profit of upwards of $30,000. No complaint is made in the bill of the manner in which the property has been administered.

In June, 1899, the Distilling Company of America was organized, and it became the owner of $22,742,750, par value, of the $24,000,000, par value, of the stock of the Standard Company, above referred to. It also became the owner, by purchase, of $2,592,650, par value, of the first and second preferred stock of the Spirits Distributing Company; so that at the time of the filing of this bill the stock of the Spirits Distributing Company was held as follows: By the Distilling Company of America, first and second preferred, $2,592,650; by the Standard Company (of which the Distilling Company, as has been said, owned nearly all the stock), $3,675,000 common stock; leaving outstanding stock of all kinds to the amount of $232,350, of which the complainants hold but 1,524 shares, 324 of which is first preferred, and 1,200 second preferred.

At a meeting of the board of directors of the Distributing Company it was resolved that, in the judgment of the directors, it was most advisable and for the benefit of the corporation that it should be dissolved. In accordance with the general corporation act of New Jersey, a meeting of the stockholders was called to vote upon the propriety of adopting such a course. The prayer of the complainants' bill is that the Standard Company may be enjoined from voting upon its $3,675,000, par value, common stock in favor of said proposition, because it has guarantied the dividends on the stock of the Distributing Company as aforesaid, and that the Distilling Company be enjoined from voting upon its $2,592,650, par value, of first and second preferred stock, which it has purchased and owns, because it also owns a majority of the stock of the Standard Company, which is the guarantor thereof. That is to say, however advisable and for the benefit of the corporation it may be that the same should be dissolved, yet it cannot be done because two-thirds of the stockholders whose votes are necessary to accomplish such result are disqualified from voting by reason of their interest in the cancellation of a guaranty which the complainants now conceive to be adverse to their interests. To carry the doctrine to its logical conclusion would be to hold that, if the guarantor's company and those who own a majority of the stock in the guarantor's company should also be the owners of all the stock in the guarantied company except one share, the owner of that one share could prevent the dissolution of the company forever, if its charter were perpetual, or compel its operation at a loss until all its assets were wasted or consumed. Section 51 of the general corporation act of New Jersey provides that any corporation organized under it "may hold the shares of any other corporation of that or any other state," and, while the owner thereof, "may exercise all rights, powers, and privileges of ownership, including the right to vote thereon." In respect to the voting power, the rights of a corporation are identical with the rights of an individual, and only those reasons would operate to prevent a corporation from voting on its

stock which would effect the same object if the stock was held by an individual.

I have not been referred to any authority which holds that one stockholder is in any sense a trustee for other stockholders, or that he is debarred from voting on his stock according to what he may conceive to be his interest, or in a way which may result in a benefit to himself, and which other stockholders may not enjoy. Directors, by whomsoever elected, are the representatives of all the stockholders, and, as such, are charged with the duty of administering the affairs of the company for the equal benefit of their cestuis que trustent. But the doctrine is new that the stockholders are trustees one for another, or that an interest of one stockholder, which in the judgment of another stockholder may seem to be adverse to his own, can operate to prevent him from voting on his own stock as he sees fit.

In the case of Transportation Co. v. Beatty, 12 App. Cas. 589, one of the directors owned a majority of the stock of the corporation, and at a meeting of the shareholders, by reason of his majority, he caused to be passed a resolution ratifying a contract to sell to the company, upon advantageous terms, a vessel belonging to himself. In passing upon the propriety of his right to vote, the court said:

"Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company; and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to or different from the general or particular interests of the company. A shareholder has a perfect right to exercise his voting power in such manner as to secure the election of directors whose views on policy agree with his own, and to support those views at any shareholders' meeting."

The court cannot be called upon to manage the internal affairs of corporations, or to determine whether this or that stockholder is disqualified from voting upon one or another question which may be presented to the stockholders for their consideration by reason of his own interest. If the directors, who are the trustees of all, conspire with a few or some of the stockholders to deprive the others of their property, the court will interfere to see that justice is done. The court will not permit the directors to divert the business of the corporation so that a sale and sacrifice of its assets will become obligatory, and the distribution of the proceeds unequal among its shareholders. This is the doctrine which is at the foundation of the opinion in the case of Farmers' Loan & Trust Co. v. New York & N. R. Co., 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689, and Ervin v. Navigation Co. (C. C.) 27 Fed. 625.

No case has been brought to the attention of the court where any stockholder has been deprived of his right to vote on his stock in such a way as may, in his opinion, best subserve his own interests. He may vote his stock as he pleases for the purpose of his own interest, but he may not sell, or cause to be sold, assets and keep the consideration. Menier v. Telegraph Works, 9 Ch. App. 350. In Gamble v. Water Co. (N. Y.) 25 N. E. 201, a stockholder's right to

vote was questioned because of interest, and the court of appeals, reversing the decision of the lower court, said:

"A shareholder has a legal right, at a meeting of shareholders, to vote upon a measure, even though he has a personal interest therein separate from other shareholders. At such a meeting each shareholder represents himself and his own interests, and he in no sense acts as the representative of others. The law of self-interest has at such time very great and proper sway. There can be little doubt, too, that at such meetings those who do vote on their own stock vote upon it in the light solely of their own interest, or at least in what they conceive to be their own interest."

In the case at bar the court is not in possession of facts which would enable them to determine whether the interests of the corporation, as distinct from the interests of the individual shareholders, require that it should be dissolved. Under the general corporation act of the state of New Jersey, any corporation may be dissolved whenever in the judgment of the board of directors it shall be deemed advisable and most for the benefit of such corporation that it should be dissolved; provided that, at a meeting of the stockholders called for the purpose of passing upon the propriety of such dissolution, two-thirds in interest of all the stockholders shall consent thereto. Laws 1896, c. 185. There is no provision in the law which authorizes the court to review the judgment of the directors as to the advisability of dissolution. And in 4 Thomp. Corp. § 433, it is said:

"It is believed that no case can be found in which a court of equity has granted an injunction at the suit of a minority stockholder against the majority to prevent them from discontinuing the business of the corporation and winding up its affairs."

It is urged in behalf of the complainants that it would be inequitable to allow the Standard Company, after having received a valuable consideration for their guaranty, by their own act to dissolve the corporation, and thereby cancel its said obligation. But it must be remembered that, in the proposition made to the stockholders of the Distributing Company by Mr. Eicks, Mr. Eicks said that, if such stockholders would consent to a reduction of the rate of their dividends, he would procure the Standard Company to guaranty and pay, during the existence of the company, dividends at the rate of 6 per cent. per annum on the first preferred, and 2 per cent. per annum on the second preferred, stock of the Distributing Company. To that proposition the complainants assented, and they did so with the knowledge that at any time, under the laws of the state of New Jersey, two-thirds in interest of the shareholders of the Distributing Company could dissolve the company, and thereby put it out of existence. They are in no position to complain if, in accordance with the terms of the agreement, the Standard Company and the Distilling Company, who are the stockholders of the Distributing Company, propose to put an end to their liability thereunder.

Other reasons are urged in behalf of the defendant company why this injunction should not be granted, but, having come to the conclusion that the Standard Company and the Distilling Company of America are not prohibited from exercising their right to vote at the stockholders' meeting upon the question of dissolution submitted by

the board of directors, it is not necessary to enter into any discussion of them.

For the reasons already stated, therefore, the rule to show cause in this case must be discharged.

UNITED STATES v. FIVE PACKAGES OF TAPESTRY et al.

(District Court, D. Massachusetts. March 20, 1902.)

No. 1,299.

CUSTOMS DUTIES—VIOLATION OF LAWS—FORFEITURE OF GOODS BROUGHT IN PASSENGER'S BAGGAGE.

The provisions of Rev. St. § 3082, apply to dutiable merchandise brought into the United States in the baggage of a passenger, and such goods, when discovered after their entry, are subject to forfeiture thereunder. It seems that section 2802, providing for the assessment of duty on dutiable articles found by the inspector in a passenger's baggage, is limited to articles so found, and has no application where the goods have been successfully passed through the customhouse without discovery.

Proceeding by the United States for Forfeiture of Goods for Nonpayment of Duty.

Henry P. Moulton, U. S. Atty., and William H. Garland, Asst. U. S. Atty.

Elder, Wait & Whitman, for claimant.

LOWELL, District Judge. This is a proceeding, under section 3082 of the Revised Statutes, to forfeit certain goods liable to duty which were contained in the personal baggage of a passenger entering the port of Boston. It has been agreed that, "if the provisions of section 3082 apply to dutiable merchandise brought into the United States in the baggage of a passenger, a decree of forfeiture may be entered in this case." The claimant contends that the matter of passengers' baggage is dealt with in section 2802, and that section 3082 is totally inapplicable thereto. Section 2802 is derived from the Statutes of 1799, c. 22, § 46 (1 Stat. 661, 662). That statute exempted wearing apparel and other personal baggage from duty, provided for the entry thereof, and for the form of oath. It further provided that, in lieu of entry, the collector and naval officer might direct the baggage to be examined, and that, if dutiable articles were discovered in this examination, duty should be assessed upon them. The section then continued substantially in the form of section 2802, providing that, where an entry of the goods was made as theretofore provided, dutiable goods found in passengers' baggage should be forfeited, etc. Section 3082 is derived from St. 1866, c. 201, § 4 (14 Stat. 179). That act is entitled "An act to prevent smuggling and for other purposes." There is nothing in it to show that it does not apply to passengers' baggage. On the contrary, section 3, the section immediately preceding the section here in question, provides that "the secretary of the treasury may, from time to time, prescribe regulations for the search of per-

sons and baggage, and for the employment of female inspectors for the examination and search of persons of their own sex." Section 4 of the act of 1866 and section 3082 have been held to apply to passengers' baggage in several cases. U. S. v. Nine Trunks, Fed. Cas. Nos. 15,885, 15,886; U. S. v. A Lot of Jewelry (D. C.) 59 Fed. 684; U. S. v. Ortega (D. C.) 66 Fed. 713.

The claimant contends that to apply section 3082 to passengers' baggage would submit the passenger to an excessive number of penalties, and that section 2802 deals exhaustively with the matter; but section 2802, in its literal meaning, which meaning is supported by the context, deals only with articles subject to duty which are found by the inspector actually present in the baggage of a passenger. If they are not so found, it would seem that the section does not apply. If this be true, then section 3082 is needed to meet the case of a passenger who has smuggled goods through the customhouse in his personal baggage, and has not been found out until he has taken those goods out of his trunk. Let us suppose, again, the case of jewels smuggled upon the person. Plainly, these cannot be forfeited under section 2802; and so, if smuggling on the person is to be punished, and the jewels are to be forfeited, suit must be brought under section 3082. If this be true, and if the claimant's contention concerning section 2802 be correct, it follows that section 3082 applies to merchandise imported under an invoice, and to goods smuggled on the person, while section 2802 deals with the intermediate case of goods smuggled in passengers' baggage. The argument of the claimant, viz., that a distinction between goods which come with a passenger in his baggage and goods which are imported in the usual course as freight is a reasonable one, loses nearly all its force when we find that goods which are brought on the person must, according to this argument, be classed with goods imported as freight.

For these reasons, I hold that section 3082 applies to passengers' baggage, and that a decree of forfeiture must be entered.

LOWELL MACH. SHOP v. SACO & PETTEE MACH. SHOPS.

SAME v. PETTEE IRON WORKS et al.

(Circuit Court, D. Massachusetts. March 19, 1902.)

Nos. 1,297, 1,298.

PATENTS—INFRINGEMENT—DEVICE FOR GRINDING FLATS OF CARDING ENGINES. The Knowles & Tatham patent, No. 464,029, for a device for grinding the flats used in carding engines, construed, and *held* not infringed by machines made in accordance with the Penney patents, Nos. 544,441 and 620,353.

In Equity. Suits for infringement of letters patent No. 464,029, issued to Knowles & Tatham December 1, 1891, for a device for grinding the flats employed in carding engines. On final hearing.

Wm. A. Macleod, for complainant.

Richardson, Herrick & Neave, for defendants.

BROWN, District Judge. These suits are for infringement of patent No. 464,029, to Knowles & Tatham, dated December 1, 1891. The patent has the misleading title, "Carding Engine," but it is apparent from the specification that its subject-matter is apparatus for grinding the revolving flats of a carding engine, and that it does not relate to the carding operation. The carding engine of the type to which the patent refers consists of a large main cylinder, having wire card clothing thereon. About this cylinder travels an endless chain of flats, which are long strips of metal having wire card clothing, which co-operates with the card clothing upon the cylinder. The wire clothing upon these flats must be adjusted to the cylinder with great accuracy, in order that a very thin and uniform film of cotton fibers, laid substantially parallel, may be formed by the co-operation of the main cylinder and flats. About one-half of the flats are in working position on the cylinder at one time, the other half moving slowly around from engagement with the cylinder until they again come into operation. The wire clothing on each flat requires to be ground from time to time. It was old to do this by bringing the wire clothing of each flat into contact with a grinding roll when the flat is not in position for carding, but is returning to the point where it is again operative for carding. The peculiar shape of the flat gives rise to certain mechanical difficulties in presenting the wire clothing of the flats to the grinding roll. It does not appear, however, that the problem of grinding the flats is connected with, or complicated by, the carding operation, which continues while the flats are being ground. During the carding operation the series of flats in operation is supported at each end upon guide ways called "flexible bends." Each flat is a substantially rigid bar, longer than the main cylinder. The card clothing on each flat is shorter than the length of the flat. Thus at each end of the flat there is a guiding surface, or "shoe," resting upon the flexible bend or support. It is impractical to bring the wire clothing of the flats to the grinding roll by the same means employed to bring it to the cylinder of the carding engine. In its proper working relation, one edge of the flat is nearer to the cylinder than the other edge of the flat. The wire surface is thus slightly tilted or heeled; the edge of the flat nearest the clothing on the main cylinder being called the "heel," and the edge furthest from the cylinder the "toe." The inclination of the flat is small; the "heel," or closest point, being commonly less than .01 of an inch away from the surface of the main cylinder, while the "toe" is slightly more than .03 of an inch. The middle portion of the end of the flats is cut away, so that the bearing of the flat upon the flexible bend is at two points, one under each edge. The tilting of the wire surface of the flat is due to the unequal length of the heel and toe. The flat stands on two legs of unequal length. The heel is higher than the toe by an amount proportionate to the amount that the heel is to stand nearer than the toe to the main cylinder clothing. It will thus be seen that if the flat, in its working position, were brought into contact with a grinder, the grinder would destroy the shape of the wire clothing by grinding off its heel. It is therefore necessary in the grinding operation to employ some device to correct the normal tilt of the

flat, in order that all portions of the surface of the wire may be brought into contact with the grinding roll without destroying the proper angle of the wire. The prior art discloses a number of devices for doing this. One method was to provide each flat with a separate guide surface on the back of the flat. The flat thus is given two separate guide surfaces,—one to support it in its proper angle when at work carding, and another to support it in the grinding operation. A second method is disclosed in the Clegg & Lucas British patent, No. 623, February 19, 1874. Briefly, the method of Clegg & Lucas was to raise the low edge of the flat by a sliding block, which corrected the tilt, and brought the wire surface into correct relation with the grinder. This involved mechanism for inserting and withdrawing the sliding block at the proper time. The British patent to Hetherington, No. 2,642 (1887), provides a movable guide whereby the flat is tilted so as to compensate for the bevel. In a second patent to Hetherington, No. 16,157 (1887), the grinding roll is given a movement with relation to the guide, instead of the guide with relation to the grinding roll. In both the Hetherington British patents the revolving flats are carried past the grinder, having the heel and toe bearings in immediate contact with a guide; and, at the time of grinding, the legs of this flat are at a different level, produced by the action of a movable part. The principal difference between the device of the patent in suit and these machines is in the employment of a stationary guide instead of a moving guide. The combination of a grinding roller, a guide controlling the position of the flat, and means to hold the flat against the guide, was old. The patent, therefore, is not for a machine having a new function, or for a new generic combination, but is for a combination of parts of a specific character, as appears by the claim:

"The hereinbefore described arrangements of apparatus for grinding the flats employed in carding engines in which revolving flats are employed, which arrangements of apparatus consist in fixed parts provided with surfaces, e^2 and e^3, formed parallel with each other, and separated from each other by a difference of level such that a flat held against the surfaces, e^2 and e^3, will have its card-wire surface parallel to said surfaces, e^2 and e^3, and in levers, such as g, by means of which the flats being ground may be successively held against the surfaces, e^2 and e^3, and arranged, employed, and operating in conjunction with the grinding roller, substantially as and for the purposes hereinbefore described."

The patent in suit shows stationary guides, or "fixed parts," of specific construction. The guides are fixed to the carding engine. Each guide has two parallel surfaces, separated by a difference of level. During the grinding operation, the heel bearing travels in a straight line along one surface, and the toe bearing in a straight line along the other. The difference of level of the two surfaces of the guide compensates for the difference in height of the two legs or bearings of the flat, and the wire surface of the flat is thus brought parallel with the surfaces of the guide. At the time of grinding, the two bearings of the flat stand at different levels. There was thus accomplished, by a combination of stationary guides and co-operating levers, what previously had been accomplished by the former machines having movable guides. It does not appear, however, that the device of the

patent in suit is more efficient than the former machines, which are practical and still in extensive use.

The defendants' device is covered by patents to Penney, No. 544,441, August 13, 1895, and No. 620,353, February 28, 1899. The defendants' grinding roll is supported by a "floating cradle," which is movable from one carding engine to another. This cradle has end plates carrying bearings for the grinding roll. To each end plate is secured a plate having its lower edge formed into a concave guide. When the floating cradle is applied to a particular carding engine, it rests upon brackets fixed to the carding engine; and surfaces of the end plates of the cradle slide upon surfaces of the bracket, so that the cradle has an up and down movement. As the flat approaches the grinder, it encounters a fixed abutment on the bracket, which raises it slightly, and the flat then engages with the concave guide on the lower edge of the cradle. The cradle and roll press downward by their own weight upon the flat during the grinding operation. The tilt of the flat is corrected, and the flat ground, by the co-operation of a fixed abutment on the carding engine, a concave guide of irregular curvature attached to the movable cradle, and the weight of the cradle and roll pressing down upon the flat. The advantages of this device are obvious and undisputed. The defendants have dispensed entirely with the levers of Knowles & Tatham, and of prior devices, and also with guides fixed to the carding engines. Thus, if we assume that a factory were fitted with 40 carding engines, Knowles & Tatham would require, for grinding, 80 levers, with studs and weights, and 40 pairs of guiding surfaces, each pair requiring very accurate adjustment. A single movable cradle, provided with bearings for a grinding roll, and with a single pair of guides for the flats, which can be successively applied to a number of different carding engines, is certainly an ingenious invention, which could not have been found in the Knowles & Tatham patent. The defendants' guides are portable guides, and not "fixed parts" attached to the carding engine. They have a fixed relation to the axis of the grinding roll at the time of grinding. But this must be true of all guides, movable and immovable; otherwise they would not be guides. It is also true that the guides have permanently a fixed relation to the axis of the grinding roll. In the Knowles & Tatham device, this is of consequence only at the time of grinding, and is a disadvantage at other times, since it involves useless friction; for the flats are continually pressed against the guides by the levers, not only during the grinding operation, which is infrequent, but during the long intervals when no grinding is being done. This defect may, however, be obviated by additional means—not disclosed by the patent—to hold the levers out of engagement with the flats when no grinding is being done. The defendants' guides are in a fixed and permanent relation to each other, and to the axis of the grinding roll, since they are parts of the movable cradle. The advantage of this is that it permits a single adjustment of two guides to each other and to the bearings of the grinding roll. That they permanently maintain this adjustment, makes them easily removable from the carding engine when not needed, and also ready to be applied to a machine without further adjustment when they are need-

ed. A pair of portable guides is practically a very different thing from the stationary "fixed parts" of Knowles & Tatham.

The complainant's case rests upon the proposition that there is a substantial similarity between the guides of the complainant and the guides of the defendants, and presents an extreme example of an attempt to hold a defendant liable not upon the ground that it infringes the claims allowed by the patent office, but claims constructed by experts. It is a complete answer to the complainant's case that the patentees have not taken out a patent for a guide having a fixed relation to the axis of the grinding roll. The patent is for a combination of three elements. One of these elements (i. e., levers) has no corresponding part in the defendants' device. The function of pressing a flat against a grinding roll was old, and therefore the fact that the defendants' device also performs this function is of no consequence. That it is done by substantially different mechanism from that used by the complainant, and that this new organization of parts gives a new result, and dispenses with a large number of moving parts, is undeniable. That the defendants do not employ the combination described and claimed in the patent in suit is clear. The defendants' expert regards the defendants' grinder as a radically different organism from that of the patent in suit, and as having many and important utilities and advantages not possessed by the Knowles & Tatham construction; and his evidence is much more convincing than that of the complainant's experts. It requires, however, no expert evidence to make it appear that the language of the claim is entirely inapplicable to the defendants' device. The complainant's counsel and experts concede that the defendants' device is not within the "literalism" of the claim; but it is apparent that the language of the claim describes elements—levers, g—which the defendants do not employ at all, and there is nothing whatever in the defendants' device which can be brought within the following language:

"Fixed parts provided with surfaces, e^2 and e^3, formed parallel with each other, and separated from each other by a difference of level such that a flat held against the surfaces, e^2 and e^3, will have its card-wire surface parallel to said surface, e^2 and e^3."

The complainant contends that a pair of portable guides, not fixed to the carding engine, and having irregular, concave surfaces, performs the same functions as the above-described parts of the Knowles & Tatham device. This, of course, would be immaterial if true, for the complainant must stand on its patent, but it is not true. The function of the machine of Knowles & Tatham is to grind flats to a certain definite shape, to wit, a plane surface, with the wires of equal length. This cannot be done upon the defendants' machine. Nor can the complainant's machine produce the curved surface of the defendants' wire clothing. The machines are different in function. It is true that both grind the wire of flats, but the problem was not, broadly, to grind a flat, but to grind it to a predetermined form. The form to be produced determines the shape of the guide which is to produce it.

Invention is said to reside in overcoming the difficulties of using a stationary guide for the production of a predetermined form. The

complainant's experts enumerate these difficulties. A straight guide could not be employed, either horizontal or inclined in either direction, because this would grind one part of the surface, and not the other, and destroy the shape. A line of simple curvature would not answer, not because it would not grind, but because it could not be made to grind to a desirable shape. There is, however, a bare spot in the testimony of the complainant's experts. While it may show the difficulty of grinding a plane surface, and that Knowles & Tatham were the first to solve this difficulty, it does not close up the field of invention. There still remains open to other inventors the problem of grinding an irregular surface by an irregular guide. The contention of the complainant is that when Knowles & Tatham produced a guide whereon one leg of the flat traveled at one height, and the other at another, they closed the field of invention, and that any stationary guiding device whereon the two legs of the flat travel at unequal heights, and which produces any suitable form of wire surfaces, embodies the invention of Knowles & Tatham. It is said that the complainant's guide "is, in effect, two guides,—one for the heel bearing of the flat, and one for the toe bearing thereof. Throughout the entire grinding or trueing operation, the heel and toe bearings of the flat are each on its own guide." But it is surely a straining of language to say that the continuous curved surface of the defendants is two guides, or two independent guiding surfaces.

The brief says, of the Knowles & Tatham guides:

"These two guides are characterized by being at a difference of level, and this is the absolutely essential characteristic of the Knowles & Tatham guide, and necessarily of every equivalent thereof."

It is apparent, from the nature of the problem, and from an examination of the prior structures, that it is the essential characteristic of any guide, whether movable or immovable, that it should tilt the flat, and, as the flats are upon legs of unequal length, that the bearing points of the flats must be at an unequal level during the grinding operation. A very large part of the argument of the complainant and of its experts becomes valueless, from the insistence upon a difference of level of two bearing points of the flat upon a guide as a standard of comparison upon the question of infringement. As the problem is to correct the tilt of the surface to be ground, and as this necessarily involves a change in the position, not only of the wire surface, but of all other portions of the flat, and as flats are commonly constructed with two legs of unequal length, it is a requirement of the problem that the bearing points of the flats should be at a different level at the time of grinding, since this follows necessarily from the requirement that there should be a change of the inclination of the wire surface. It is impossible to tilt the top without tilting the bottom. The problem was how to accomplish the tilt, and it is absurd to make the solution of the problem the final test of infringement. Moreover, it is perfectly apparent that there must be some form of guide which will bring the flat into the appropriate relation to the roll. It is therefore absurd to make the fact that the guide has a proper relation to the grinding roll a test of identity of mechanism. A guide must, of course, establish a relation between the thing guided and the point

to which it is to be guided. All such contentions erroneously imply that Knowles & Tatham were the first to see that there must be a difference in the level of the bearing points of the flat at the time of grinding, or that a guide must guide. The complainant cannot base infringement upon the fact that, at the time of grinding, the guide holds the flat in a proper relation to the grinding roll, or upon the fact that the legs of the flat are at different levels at the time of grinding. The problem was how to shape a stationary guide so that it would accomplish this, and also permit the travel of the flat. Knowles & Tatham provided two straight lines at a difference of level which compensated exactly for the tilt. All parts of the flat advance in a straight line. It is necessary that the flat ends should have a special concavity between heel and toe, so that the shoe can straddle the set-off or inclined surface which separates the two guiding surfaces. If it be said that they were the first to utilize the fact that the flat had two independent bearing points, this involved, also, the use of the concavity between these bearing points. It is this concavity which makes the bearing points independent, and which prevents a change of position from the inclined surface or set-off. The defendants do not require the concavity between the heel and toe in order to tilt their flat, and there is no necessity for any independent legs or bearings, separated by a concavity. If both bearings of the shoe were connected by a plane surface, they would still travel along the guide. The device of the defendants, then, is not dependent upon seeing that the independent legs separated by a concavity could be utilized in tilting the flat. If their device will guide a flat equally well whether it has a single surface, or two independent legs separated by a concavity, then its essential feature is not the use of the independent bearings, nor the provision of a distinct guide for each of the independent bearings. The only remaining "essential resemblance" between the two guides is that each gets the flat into the correct position for grinding.

It is apparent that the case of the complainant is entirely outside the patent, and fails for this reason. But furthermore it appears that the case which has been constructed outside the patent is not a good case. There is no evidence before us, save in their descriptions of the invention, of what was the inventive conception of Knowles & Tatham. It is assumed by the experts that the patentees had a conception corresponding to what they attribute to them. It is by no means to be assumed in any case that the actual inventive conception of a patentee corresponds to the conceptions of an expert skilled in the principles of science. It is the province of scientific experts to detect resemblances and differences where none are apparent to the practical mind. The inventor is not entitled to enlarge his patent by asking the court to assume that he had a conception that embraced all that his experts can conceive. There is no evidence in this case that these inventors made any broader invention than that described by their patent; i. e., a particular device designed to perform a particular function. So far as appears, the Knowles & Tatham patent fully sets forth and covers the actual invention.

The complainant's experts, in my opinion, have failed not only in

getting within the patent, but also in showing that the defendants' guide is the embodiment of any novel idea first embodied in the device of Knowles & Tatham. On the contrary, I think that it appears that Knowles & Tatham left room for an independent solution of the problem of providing a grinding guide which was stationary at the time of grinding. This solution consisted partly in a change of function, to wit, a change of the form to be ground. As the whole problem is to provide a guide that will grind to a proper form, a change of form which involves or permits an important change of mechanism is a substantial change of function. This change of the form to be ground rendered the guide of Knowles & Tatham inapplicable, and called for the construction of a new form of guide, which was not suggested by the Knowles & Tatham patent. It rendered the use of two legs, separated by a concavity, nonessential. As the defendants' device is not dependent upon the conception that two independent legs, separated by a concavity, might be utilized in moving the flat to the required position, the defendants do not infringe the claims of the experts for the complainant.

I agree with defendants' counsel that the patent in suit and defendants' machine are alone necessary to a decision. The defendants' machine is not within the patent, even when construed without regard to the important limitations made by amendments after the rejection of claims. It seems unnecessary, therefore, to consider in detail the important question of anticipation by devices in the general art of guiding bodies of irregular shape to grinders or other shaping tools. In my opinion, the prior art of this case is not properly limited to devices formerly applied to carding engines. The problem was not peculiar to the art of carding, but was simply that of guiding a moving part of irregular shape against a grinding roll. It is impossible to say that the question of invention is to be decided solely upon the particular means of guiding that have been employed heretofore in carding engines. The guiding of parts to a cutting or grinding tool by means of a stationary guide is familiar, and any anticipations of stationary guides found in the general art of guiding an object of irregular shape against a tool would furnish complete instructions to a mechanic whose problem was to change the tilt of the flats of a carding engine. A mechanic who was absolutely ignorant of the carding art would be as well qualified to do this as one who knew it thoroughly. The "particular environment," as it is called, of these moving flats, though referred to in an indefinite way, has not been shown by the expert testimony to have presented any particular problem of difficulty which would not arise were these flats moving around in an endless chain, entirely disconnected from a carding engine. Given a chain of flats, having bearings at each end and moving along a guide; change the tilt of these flats by a stationary guide. That was the entire problem, which was not complicated in any way by the carding operation.

The patent to Holmes, No. 224,187, shows a contrivance closely resembling that of the patent in suit, both as a combination, and in the employment of a guide upon which the article to be shaped bears at two points of a different level. This patent at least throws serious doubt upon the soundness of the complainant's broad interpretation

of the Knowles & Tatham invention. The patent to Susemihl, No. 370,502, also shows a guide of substantially the same form as that of the patent in suit.

If the defendants' device were within the patent in suit, the question of invention would become important. It is unnecessary, however, to decide whether the patent is valid, since the brief of the defendants, in my opinion, presents a clear and conclusive defense of noninfringement.

The bills will be dismissed.

REGINA MUSIC BOX CO. v. F. G. OTTO & SONS et al. (three cases).

(Circuit Court, D. New Jersey. February 18, 1902.)

1. PATENTS—INFRINGEMENT—ACCOUNTING FOR DAMAGES.
Where it appears that, in infringing complainant's patent, defendants acted with full knowledge, and in wanton and willful disregard, of complainant's rights, every question of doubt, on an accounting for damages, should be resolved against the infringer.

2. SAME.
Where, on an accounting for damages for the manufacture and sale by defendants of infringing music boxes, it appeared that the patent was the foundation patent for that class of automatic instruments which it described and claimed; that complainant had a monopoly of their manufacture, and was able to supply those sold by defendants; and that defendants' infringement was wanton and willful,—it will be presumed that but for the infringement all the instruments they sold would have been purchased from complainant, either by defendants or their customers; and this presumption is not overcome by evidence showing that some of them were supplied on orders from customers who dealt exclusively with defendants.

In Equity. Suits for infringement of patents. See 106 Fed. 78. On exceptions by defendants to master's report, stating account for damages.

The following is the report of the master:

The above-entitled causes having been referred to me as master by decretal orders made at a stated term of the United States circuit court for the district of New Jersey, in the Third circuit, on the 29th day of January, 1901, with instructions to ascertain and report to the court an account of the gains, profits and advantages which the said defendants in each of the above-entitled causes have realized through their unlawful infringement of complainant's letters patent Nos. 569,233, 596,393, 621,025, together with the damages which the complainant has sustained thereby, I beg leave to report:

That the respective parties appeared before me by their counsel,—Antonio Knauth, Esq., of counsel for complainant, and Edwin H. Brown, Esq., and Donald Campbell, Esq., of counsel with defendants,—and by stipulation the testimony in the three several accountings was taken simultaneously, said testimony and the exhibits referred to therein being annexed hereto. The complainant duly waived any claim for profits or damages which the defendants may have gained by reason of the infringement in cases Nos. 2 and 3 of the above-entitled causes, and also duly waived the recovery of any profits in case No. 1, and therefore the issue to be passed upon by me, is what damages may have been sustained by the complainant by reason of the infringement by defendants in suit No. 1, F. G.

Otto & Sons and Gustav Otto, of letters patent No. 569,233, the letters patent included therein.

By stipulation the record before the court in each of the causes on which the several decrees were made, was made a part of the record upon this accounting, and from this record and the testimony taken herein, it appears that the defendants, F. G. Otto & Sons, a corporation, and Gustav Otto had full knowledge that the complainant, who is engaged in the manufacture of music boxes, had the sole right to manufacture and sell the interchangeable automatic music boxes covered by said letters patent No. 569,233, and that the infringement of these rights by said defendants was a wanton and willful disregard of the property rights of complainant therein. The defendants, being manufacturers of music boxes, commenced the manufacture of the infringing instrument early in the spring of 1899, and made the first sale thereof on the 21st day of December, 1899, the last sale being on the 9th day of October, 1900. The several actions herein were commenced on the 15th day of January, 1900, and the decrees made the 29th day of January, 1901. In the early part of December, 1900, the defendant Gustav Otto had a conference at Leipsic with Mr. Riessner, the patentee of the foundation patent, No. 569,233, relating to its use by the defendants in the United States, and also had a conversation with a representative of complainant about this time concerning the said letters patent. Moreover it appears that although a voluminous answer was interposed by the defendants herein, that no testimony whatsoever was taken to sustain the same, and no argument was made on the hearing by the defendants. From the circumstances above set forth, there appears to be no doubt but that the infringements herein were made by both defendants with full knowledge of complainant's rights and were a wanton and willful disregard of the same, and in such a case every doubt and difficulty arising on the accounting should be resolved against the infringer. Rubber Co. v. Goodyear, 9 Wall. 803, 19 L. Ed. 566; Creamer v. Bowers (C. C.) 35 Fed. 206, 208; Rose v. Hirsh, 36 C. C. A. 132, 94 Fed. 177, 51 L. R. A. 801.

The product of defendants' infringement of the several letters patent herein was the instrument in evidence known as "Complainant's Exhibit, Defendants' Instrument." This was the first instrument sold by the defendants, and was purchased by Mr. J. C. Breckinridge on the 21st day of December, 1899, from M. J. Paillard & Co., $300 being paid by the purchaser to Paillard & Co. for the same. The instrument was billed by defendants to Paillard & Co. likewise on the 21st day of December, 1899. Defendants manufactured thirty-six instruments similar to the one sold by Paillard & Co., selling thirty-five of the same to various purchasers, the remaining one being sent to Germany, where it now is. This instrument is an automatic interchangeable music box, and is fully described in the record before the court on the hearing in the above-stated causes.

Complainant has offered in evidence a music box manufactured by it and known as the Sublima Corona, and has offered testimony which proves that there is a substantial identity between the Sublima Corona and the defendants' infringing instrument, the testimony showing that the test of the cost of instruments of this nature—that is of automatic interchangeable instruments—depends almost entirely upon the diameter of the tune disk used therein, as the whole mechanism is proportioned in accordance therewith. The diameter of the tune disks in the defendants' instrument is twenty and one-half inches,—of the Sublima Corona twenty and three-fourth inches. Moreover it appeared that the Sublima Corona contained a substantial embodiment of all of the features of the claims of the three letters patent which defendants infringed. The complainant has proved by satisfactory evidence that the cost of the Sublima Corona instrument, including the material, wages paid, the charges for general factory and selling expenses, and an additional fifteen per cent. on the cases alone, was $106.81, and that this cost price was the sole basis for the payment of wages to its employés in the manufacture of the same, and that wages were actually paid in accordance with this scale; and moreover that the selling price of this instrument was based upon the cost so ascertained

by the complainant. The complainant produced two books, made about June, 1899, containing a detailed calculation of the cost of this instrument, showing the cost to be as above stated, and gave competent evidence to sustain the entries made therein. The selling price of this instrument to the trade varied between $173.50 before February 1, 1900, the lowest selling price, and $200 thereafter; but complainant concedes that the latter figure was not always used for sales to the trade after February 1, 1900, and therefore for the purposes of this accounting the lower price of $173.50 must be presumed to have been the usual selling price of such instruments. From this selling price certain discounts were allowed to the trade, six per cent. for cash payment in ten days and an additional five per cent. whenever more than $1,000 was purchased, and I find that in calculating the selling price of said instrument, so far as this case is concerned, that only the five per cent. discount should be allowed. It was complainant's custom to allow other discounts for sales made to customers where an amount was sold larger than is shown by the proofs herein, and these last-mentioned discounts therefore cannot be considered in estimating the net selling price of the complainant's instrument, the Sublima Corona. It further appears from the testimony taken herein that the complainant has the exclusive control of the sale and manufacture of these instruments; that the complainant had manufactured and sold a great many of the same, and had the capacity to manufacture thirty-five other instruments if it had been called upon to do so by the defendants, or the persons to whom these thirty-five instruments were sold by the defendant F. G. Otto & Sons. The testimony of the defendant F. G. Otto, the president of the defendant company, admits specifically that at the time the infringing instruments were sold by the defendant F. G. Otto & Sons, the complainant was the only manufacturer of automatic interchangeable music boxes. Therefore such instruments could only lawfully be purchased from the complainant, which maintained a close monopoly in the manufacture and sale of the same. The introduction of these instruments had displaced to a very great extent the music boxes made prior thereto by complainant, so that two-thirds of the product of complainant's factory is of the automatic interchangeable music box variety. I therefore find that the patent involved in the first suit (No. 1) was a foundation patent for that class of automatic music boxes which it describes and claims; that the machine is claimed by it as an entire organism which it covers by broad and comprehensive claims. It is not a patent for an improvement merely, but a patent for an entirely new class of machines, and it is this patent which gave the whole salable value to the machine. The patents in suits Nos. 2 and 3 are for improvements in such a machine as claimed in the patent in suit No. 1, but did not add anything to the value of the machine which could be assessed in money, and the testimony as to the great commercial value of the invention was confined to the letters patent No. 569,233, the infringement thereof being the cause of action in suit No. 1. McDonald v. Whitney (C. C.) 39 Fed. 466.

The rule of law to be applied to the facts as hereinbefore set forth is settled in Rose v. Hirsh, 36 C. C. A. 132, 94 Fed. 177, 51 L. R. A. 801 (circuit court of appeals, Third circuit). This case follows Creamer v. Bowers (C. C.) 35 Fed. 206, 208; Sargent v. Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67; and the rule is clearly stated in Walk. Pat. (3d Ed.) par. 563.

The substantial identity of complainant's instrument, the Sublima Corona, with the instrument sold by defendants being clearly shown, together with the cost and selling price of complainant's instrument, and also the wanton and willful disregard of complainant's rights by defendants, together with the close monopoly held by complainant in the manufacture of this instrument, and its ability to produce thirty-five additional instruments of the kind known as the Sublima Corona, the only point remaining to be considered is whether defendant would have purchased these instruments from complainant. Many authorities have been cited by defendant upon this point for the purpose of absolving defendant from any liability by reason of the sale to various individuals and corporations of the infrin-

ging instrument. A careful review of these authorities leads to the conclusion that while there are certain general principles of law applicable generally to this subject, yet each case must be decided in view of the peculiar circumstances pertaining thereto; and that there cannot in the nature of things be any one rule of damages which will equally apply to all cases, the mode of ascertaining actual damages depending on the peculiar nature of the monopoly granted (Seymour v. McCormick, 16 How. 489, 14 L. Ed. 1024), keeping in view, when applicable, the principles set forth in Creamer v. Bowers (C. C.) 35 Fed. 206, and followed in Rose v. Hirsh, supra, that in cases of wanton infringement any doubt arising in respect to the sufficiency of the evidence to warrant a finding of the amount of damages, must be resolved against the infringer. See, also, Walk. Pat. (3d Ed.) par. 563.

It appears from defendant's statement of sales that of the thirty-five boxes sold by defendants at least twenty-five were, according to the testimony of defendant, billed to parties who had an agreement with the defendant corporation to deal only with it in the purchase of music boxes, and while this agreement was not proven, or shown to have reference to the interchangeable automatic boxes, yet defendants urge that the fact of its exclusive right to sell music boxes to these parties, clearly shows that said parties would not have purchased the boxes from complainant, and therefore that defendants cannot be held liable for more than nominal damages. This theory rests upon the assumption that the burden is on complainant to prove that the parties to whom the defendant corporation sold the infringing instruments, would have purchased the same from complainant; while the cases cited above are decided on the theory that the defendants would have bought the infringing instruments from the complainant, because complainant had the exclusive right to sell and manufacture the same, actually was doing so, and the defendant had full knowledge of these facts. It is reasonable to assume that when defendant's customers ordered an automatic interchangeable instrument from defendant they supposed defendant would procure the same from complainant, as it will not be presumed that these customers contemplated that the defendant corporation would act unlawfully in supplying its customers with the automatic interchangeable music box desired by them. A court of equity will never presume that a contract relating to the exclusive purchase by its customers from defendant, contemplated the doing of an illegal act by defendant. Such a contract would be unlawful and inequitable. And the same reasoning will also apply to the other customers of the defendant corporation not included in the so-called exclusive agreement, the presumption being that these customers desired the defendant corporation to supply them with an automatic interchangeable music box procured by the defendant corporation from complainant, and which they could lawfully use. There is not sufficient evidence offered by the defendant to rebut this presumption.

Complainant contends that the defendants should be held responsible for the loss by complainant of the tune disks usually sold with the Sublima Corona, either by the complainant or its selling agent, upon the ground that by the sale of each of the thirty-five instruments by defendant corporation, a sale of one set of twelve disks for each instrument by complainant was prevented. It is admitted, however, that the tune disks used in the Sublima Corona instruments could also be used in other instruments made by the complainant. The evidence is not sufficiently clear to hold the defendants responsible for damages sustained by the complainant from the loss of the sale of tune disks.

I further find that if the defendant corporation had purchased thirty-five boxes of the Sublima Corona style from the complainant, the total charge for the same on the basis of $173.50 for each instrument, after deducting the discounts allowed on such a sale, would be $5,768.88. I further find that the total cost of thirty-five Sublima Corona music boxes at $106.81 for each instrument would be $3,738.35. I further find that the difference between the total net selling price and the total cost is $2,030.53.

From the foregoing facts I find as a conclusion of law that the com-

plainant, the Regina Music Box Company, is entitled to recover of the defendant F. G. Otto & Sons and the defendant Gustav Otto the sum of $2,030.53 damages in case No. 1, together with the costs and disbursements on this accounting, and in cases Nos. 2 and 3 only nominal damages against the defendant F. G. Otto & Sons.

Briesen & Knauth (Antonio Knauth, of counsel), for complainant.

Dickerson & Brown (Edwin Brown and Donald Campbell, of counsel), for defendants.

GRAY, Circuit Judge. A careful reading of the master's report in these cases, and consideration of the exceptions thereto by defendants, and the motion of complainant for an increase of the damages awarded, and of the arguments by counsel in support of said exceptions and motion, convinces me that the said report should in all things be confirmed, and that the complainant is entitled to recover of the defendants, F. G. Otto & Sons and Gustav Otto, the sum of $2,030.53, the damages in case No. 1, together with the costs and disbursements of the accounting, and in cases Nos. 2 and 3 nominal damages against the defendant F. G. Otto & Sons.

Let a decree be so drawn.

INTERNATIONAL POSTAL SUPPLY CO. OF NEW YORK v. BRUCE et al.

(Circuit Court, N. D. New York. March 27, 1902.)

PATENTS—INFRINGEMENT BY OFFICERS OF UNITED STATES—JURISDICTION TO GRANT RELIEF.

Complainant's bill alleged infringement of certain patents for improvements in machines designed for use in the post offices of the United States in canceling stamps and postmarking mail matter; that one of the defendants, who was a postmaster, was using in his office two infringing machines under leases from his codefendants; that such leases would expire in the near future, and that defendants were preparing to renew the same. It was also alleged that complainant had tendered to defendant postmaster, for use in his office on the same terms, two machines made under the patent, which had been refused. The bill prayed for the usual relief for infringement, and for an injunction against the renewal by defendants of the lease. The postmaster, who was the only defendant residing within the district, alone appeared, and filed a plea, alleging that he never personally used or caused to be used the alleged infringing machines, but that they were contracted for and placed in his office by the post office department, where they were used by his subordinates by order of such department, solely in the service and for the benefit of the United States; that the rental for such machines was paid by order of the department from government funds; and that he had no control over the leasing of the same, or the renewal of the leases therefor. *Held* that, while the court was of opinion, on principle, that it had jurisdiction, and that complainant was entitled to the remedy invoked, the question of jurisdiction was so far in doubt, in view of the decision of the supreme court in Belknap v. Schild, 16 Sup. Ct. 443, 161 U. S. 10, 40 Fed. 599, that the plea should be sustained.

In Equity. Suit for infringement of patents. On bill of complaint and plea.

The amended bill is in the ordinary form for the infringement of four letters patent for improvements in marking and stamping apparatus designed for use in the post offices of the United States, in canceling stamps and postmarking mail matter. The bill alleges that these post offices afford the sole and only market for the patented machines and that complainant is fully equipped and ready to supply all the machines needed to do the necessary work. The bill alleges further that two of the patents relied on have been sustained by the United States circuit court of appeals of the Second circuit and that as to the other two priority of invention was adjudged in favor of complainant's assignors after interference proceedings in the patent office. The bill alleges that the defendants are maintaining and operating daily, at Syracuse, N. Y., two stamp-canceling machines containing and embodying the improvements and inventions described and claimed in and by said several letters patents; and that the said defendant Dwight H. Bruce, acting as postmaster of the city of Syracuse, N. Y., is using, and permitting to be used, in the post office of said city of Syracuse, in the conduct of the business of said post office, the aforesaid two stamp-canceling and postmarking machines owned and maintained by the defendants Rice and the American Postal Machines Company, and is paying an annual rental of $110 per machine for the use of the aforesaid infringing stamp-canceling and postmarking machines to the defendants Rice and the American Postal Machines Company; that said defendants are acting conjointly and in concert in infringing said letters patents, and although notified of their aforesaid infringement and requested to desist and refrain therefrom they still continue the aforesaid infringement; that complainant has furnished to the defendant Dwight H. Bruce, a stamp-canceling machine made in accordance with the inventions and improvements described and claimed in said several letters patents; and in order that the facilities of the said Syracuse post office might not be impaired complainant has offered to and holds itself in readiness to supply additional stamp-canceling machines to take the place of the aforesaid infringing machines, and to do such other acts as may be necessary in the premises to save the public business of the Syracuse post office from inconvenience and enable the said defendant Dwight H. Bruce to conduct the affairs of the said post office without infringing complainant's patents in the conduct thereof, which said offer the said defendant Dwight H. Bruce has declined. The bill further states as follows: "That the said infringing machines used at the Syracuse post office are leased by the defendants Rice and the American Postal Machines Company, for the term of one year from June 30, 1901, for use in the Syracuse post office by the defendant Bruce as aforesaid, and that the lease or rental of said infringing machines will expire on June 30, 1902, and that the aforesaid defendants are jointly co-operating and making efforts to renew said lease or rental for another year from the 30th of June, 1902, and are endeavoring to and threatening to continue the use of the aforesaid infringing machines after the expiration of the said rental or lease on the 30th of June, 1902." The defendant Bruce, who is the only defendant residing in this district, and who alone appears, files an amended plea alleging "that he has never personally used or caused to be used any stamp-canceling and postmarking machines; that he is the postmaster of the United States post office at Syracuse, N. Y., where certain stamp-canceling and postmarking machines are used by some of his subordinates who are employés of the United States government, such use being entirely in the service and for the benefit of the United States; that such postmarking and stamp-canceling machines as are in use in said Syracuse post office were contracted for by the United States government through the post office department and were placed in the Syracuse post office, and used there, by order of said post office department; that the post office department hired said machines for the term of one year from June 30, 1901, which term is as yet unexpired; and that the rental of these machines is paid by order of said post office department out of funds appropriated for that purpose by the congress of the United States; that the renewal of said lease or rental, or the making of a new lease for another year from the 1st of July, 1902, is a matter which is wholly in the hands of the post office department and over which said defendant Bruce has no control; and de-

fendant avers that the question whether the use of the alleged infringing machines will be continued in the Syracuse post office after the 30th of June, 1902, is one which will be determined by the post office department in Washington." The defendant also contends that if the complainant is entitled to any remedy against him it is not by an action in equity but by a suit at law. The complainant has set the amended plea down for argument.

G. W. Hey, for complainant.
W. K. Richardson and Alex. D. Salinger, for defendant Bruce.

COXE, District Judge. The constitution says:

"The congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Article 1, § 8.

Under the power thus granted the congress has provided that any person who has invented "any new and useful art, machine, manufacture or composition of matter" and who complies with the law in other respects may "obtain a patent therefor."

Section 4884 of the Revised Statutes says:

"Every patent shall contain * * * a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof."

The theory of the plea is that this statute should be interpreted as though it contained a proviso as follows:

"Provided, however, that all officers of the government of the United States and their agents, servants and employés shall, when acting in their official capacity, at all times have the free use of such invention."

Although the defendant does not go so far as to assert that the complainant has no remedy whatever when its patent is used by government officers, this is the practical effect of his contention. If the plea to the jurisdiction be sustained all equitable remedies are denied to the patentee, his right to an injunction is gone and he is relegated to the court of claims to prosecute an inadequate remedy upon a questionable theory before a tribunal having doubtful jurisdiction. Prior to the decision in Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599, in February, 1896, the question presented by the plea, though often mooted, had never been decided adversely to the jurisdiction of the United States courts. The circuit courts had with great unanimity sustained their right to entertain these cases and the supreme court, though expressing doubt upon the subject, in at least two reported cases (James v. Campbell, 104 U. S. 356, 26 L. Ed. 786; Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901), had nevertheless assumed jurisdiction and dismissed the bills upon the merits. Mr. Walker summarizes the law as follows:

"Patent rights are exclusive, not only of citizens and residents of the United States, but also of the government itself, and of its agents. The government has no more right than any private citizen, to make, use, or sell a patented invention, without the license of the patentee. When the government grants letters patent for an invention, it confers upon the patentee an exclusive property therein, which cannot be appropriated or used by the government itself, without just compensation, any more than land which has been patented to a private purchaser can, without compensation, be appropriated or used by the government." Walk. Pat. § 157; 3 Rob. Pat. §

897; James v. Campbell, 104 U. S. 356, 26 L. Ed. 786; U. S. v. Burns, 12 Wall. 246, 20 L. Ed. 388; Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901; Solomons v. U. S., 137 U. S. 348, 11 Sup. Ct. 88, 34 L. Ed. 667; Head v. Porter (C. C.) 48 Fed. 481.

In the latter case Judge Colt, after carefully considering all of the leading authorities, concludes as follows:

"It is at least doubtful whether the present action could be brought in the court of claims. In its present form it is an action in tort, and not upon any contract, express or implied, and, as was said by Mr. Justice Bradley in James v. Campbell, the jurisdiction of that court does not extend to torts. While the supreme court have declined to pass upon the question of jurisdiction in these cases, they have assumed jurisdiction and disposed of each case on its merits; in other words, no case can be found where the court has dismissed the suit for want of jurisdiction, and this would seem to be sufficient ground, in this case, to overrule the plea, and allow the case to be heard upon bill, answer, and proofs. If, however, the principle established in the cases we have reviewed, and the rule laid down by Mr. Justice Miller in Cunningham v. Railroad Co., are sound, it is difficult to see why the court has not jurisdiction in the present case. This is an action of tort for the infringement of a patent, brought against an individual, who is an officer or agent of the United States, and whose defense is that he acted under orders of the government. That this is no defense in actions of this general character has, as we have seen, been repeatedly held by the supreme court and the objections interposed that these suits are substantially against the government, and that, therefore, it is a necessary party to enable the court to grant relief, has been many times urged without avail. The rights secured to a patentee under his grant from the government are a form of property, in the enjoyment of which he is entitled to protection against all trespassers, including the government. To deprive him of the full enjoyment of these rights by using his invention without his consent is to deprive him of his property without just compensation or due process of law, and therefore in conflict with those provisions of the constitution which secure this protection to the citizen. I am of opinion, therefore, that the plea in this case should be overruled."

It is thought that this is a fair exegesis of the law at the time the opinion was filed, in December, 1891. This court is in accord with the views thus expressed.

It has always seemed to the court illogical, to use no harsher term, for the government to give to an inventor an exclusive right to his invention and thereupon proceed to render nugatory its own grant. The grantor of the right should, of all parties, be the last one to invade it. For the government to permit its own agents for its own benefit to violate its own covenant savors of bad faith. To use the language of Mr. Justice Harlan, in the dissenting opinion in Belknap v. Schild, if such evasion be permitted "the government may well be regarded as organized robbery so far as the rights of patentees are concerned." Of what avail is it that the patentee is informed that although his exclusive right can be trampled on with impunity he may yet resort to the court of claims for partial relief and failing there he may apply to congress? The right to use the invention is his and he should not be required to relinquish that right, in invitum, except in cases of public peril or necessity. Not only does good faith require that the government should respect its own patents, but good policy also demands it. To hold otherwise strikes at the foundation upon which our patent laws rest. It discourages that class of inventors who are devoting their energies to the improvements of appliances used in the great de-

partments of the government and upon which the progress and safety of the nation may depend in the future, as it has depended on more than one notable occasion in the past. Is it prudent to expect that the men of genius who have brought our engines of attack and defense to such a high state of perfection on sea and land will continue to work for a government which appropriates at will the fruits of their genius and labor? If the doctrine which forms the basis of this plea be once firmly established a patentee will be practically, though not theoretically, remediless against the encroachments of the officers of the government. What fundamental principle of law requires that the circuit courts should be ousted of a jurisdiction which they have so long maintained? Is it not safe to intrust to the judges of the United States courts the interests of the government, in all confidence that the writ of injunction will not be abused or issued in any case where the public interests are at all involved or are likely to suffer? A patentee has rights which are exclusive of the United States. The United States has no more right than an individual to use, without license, a patented invention. This proposition is no longer open to dispute and yet it is asserted that it is a right without a remedy and must so continue until congress provides a remedy. Conceding that the jurisdiction of the circuit court is not free from doubt should not every effort be made to sustain it until congress provides a tribunal which can grant adequate relief? That the court of claims is not such a tribunal is manifest. In any view its jurisdiction is limited to a recovery upon the theory of an implied contract and even this shred of remedy seems never to have been confirmed by the supreme court. It is true that the court of claims has taken cognizance of several cases which the supreme court has disposed of on the merits. Hubbell v. U. S., 179 U. S. 77, 21 Sup. Ct. 24, 45 L. Ed. 95; Solomons v. U. S., 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed. 667. In only one instance was the jurisdiction under discussion and there it was upheld because the patentee had given his consent to the use of the invention and it was held that the claim was not one for infringement but a claim of compensation for an authorized use. U. S. v. Palmer, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442. Mr. Justice Bradley, speaking for the court, says:

"It is objected that an action cannot be brought in the court of claims on a patent, the circuit court having exclusive jurisdiction of this subject. But whilst that objection may be available as to actions for infringement of a patent, in which its validity may be put in issue, and in which the peculiar defenses authorized by the patent laws in Rev. St. § 4920, may be set up, it is not valid as against actions founded on contracts for the use of patented inventions."

Upon principle and authority, therefore, the court would have little hesitation in overruling the plea were it not for the decision of the supreme court in Belknap and Schild. This decision is relied on by the defendant as a definitive determination of the questions in issue. The patent in that case was granted to Schild for an improvement in caisson gates. The caisson gate alleged to infringe was constructed by the United States and was in its possession and control at the dry dock in the navy yard at Mare Island. This dry dock was

used for naval purposes and the public defense in the building and repairing of ships for the navy of the United States. A plea was interposed alleging these facts and stating further "that the defendants, and each of them, never had anything to do with the construction, use or operation of the gate, or made any claim of right, title, possession, control or use of it other than as officers and agents of the United States, and in obedience to orders of the naval department of the government." The circuit court overruled this plea and the ruling was sustained, the supreme court using the following language:

"The fact so pleaded and suggested could not, consistently with the previous decisions, above cited, prevent the defendants from being held liable to the patentee for their own infringement of the patent. There was no error, therefore, in overruling the plea of the defendants and the suggestion of the attorney general."

As the plea set up the official character of the defendants it is urged that this ruling makes it incumbent upon this court to overrule the plea at bar, but in view of the opinion expressed in the latter part of the decision it is thought that the paragraph above quoted must have reference to some averments of the bill or plea not fully disclosed by the record. The court proceeds to point out that the caisson gate, though made in infringement of the patent, was nevertheless the property of the United States. Both the title and the possession vested in the United States. The opinion says:

"The entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare; and therefore the United States were an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought; and the suit could not be maintained without violating the principles affirmed in the long series of decisions of this court, above cited."

It was also decided that there could be no decree for profits awarded against the defendants and that whatever profits accrued inured to the benefit of the United States.

"The necessary result is," says the opinion, "that even if the validity of the patent and its infringement by the defendants are assumed, the plaintiff, upon this record, is not entitled to an injunction, to profits or to damages."

The points of difference upon the facts between that case and the case in hand are First: The machines at use in the Syracuse post office are not owned by the United States but are leased by the post office department for the term of one year. Second: The complainant is prepared to substitute other machines for the two infringing machines on similar terms so that the substitution can be effected without loss to the government or inconvenience to the public. Third: The quia timet feature of the present bill. Since the decision in Belknap and Schild the supreme court entertained jurisdiction of an equity suit for the infringement of a patent and affirmed a decree of the circuit court of appeals of the Fourth circuit dis-

missing the bill. Dashiell v. Grosvenor, 162 U. S. 425, 16 Sup. Ct. 805, 40 L. Ed. 1025. The action was in the ordinary form for the infringement of a patent for improvements in breach-loading cannon which were being made at the Washington navy yard. The circuit court, after a careful examination of the testimony, upheld the patent and directed an injunction to issue. Grosvenor v. Dashiell (C. C.) 62 Fed. 584. The circuit court of appeals reversed this judgment, holding that the circuit court was without jurisdiction and that the owners of the patent "can recover just compensation for such use and infringement from the government by a suit in the court of claims, or by means of an appropriation for that purpose made by congress, on application made to that body." Although it appeared that the manufacture of the cannon complained of was by the authority and direction of the defendant and under a contract with him by which he was to receive $125 for each cannon, the court of appeals decided that the suit was in substance and effect against the government and could not be maintained. The court also decided that complainant could not succeed for another reason to which it is unnecessary to refer. Dashiell v. Grosvenor, 13 C. C. A. 593, 66 Fed. 334, 27 L. R. A. 67. The supreme court does not discuss either of the propositions upon which the court of appeals bases its judgment, but affirms the decree dismissing the bill upon a ground not alluded to by the court of appeals, namely, that the patent was not infringed. The last sentence of the opinion is as follows:

"This conclusion also renders it unnecessary for us to consider the questions discussed by the court of appeals in its opinion, in respect to one of which see Belknap v. Schild, 161 U. S. 10, 16 Sup. Ct. 443, 40 L. Ed. 599; but for reasons stated, its decree dismissing the bill, is affirmed."

As infringement was specifically found by the circuit court and as this finding was not criticised in the court of appeals it may be argued with some plausibility that the supreme court would not have deemed it necessary to examine and decide the difficult question of infringement if satisfied with the reasoning of the court of appeals upon the jurisdictional question. The Belknap Case had just been decided, the subject was fresh in the minds of the justices, and there is some force in the suggestion that they would not have gone so far afield to find another reason for sustaining the judgment if clearly convinced that the reason assigned by the court of appeals was a valid one. In other words, may it not, perhaps, be inferred that the supreme court intends to confine the ruling in the Belknap Case to situations precisely similar to the one there shown, where the decree reversed contemplated the destruction of property of the government and the serious interference with the work of the navy of the United States? Some additional light is thrown on the discussion by the decision in November, 1898, of the circuit court of appeals of the Sixth circuit in Howell v. Miller, 33 C. C. A. 407, 91 Fed. 129. This was a copyright case, and especial interest attaches to the decision from the fact that the opinion was written by Mr. Justice Harlan who dissented in Belknap v. Schild. After commenting at some length upon the law as there enunciated the learned justice says:

"It thus appears that the supreme court, in Belknap v. Schild, proceeded in its judgment upon the ground that the caisson gate used at the navy yard of the United States under the supervision of the officers of the government, had become its property, and that such use could not be enjoined because an injunction could not operate directly upon the government's use of its own property, when it was not a party to the suit and could not, without its consent be sued. * * * It may be observed that if, before the caisson gate in question had been constructed, the patentee had applied for the relief necessary to prevent such construction, a different case would be presented to the supreme court."

The court has been unable to discover any decision since Howell and Miller which contributes anything of importance to the discussion. The situation is a most perplexing one. What to do!

After the most careful consideration it is thought that the wisest disposition of the controversy is to sustain the plea. The reasons which induce to this conclusion may be briefly stated as follows: First: It cannot be pretended that the question of jurisdiction is so far free from doubt as to warrant the court in granting a preliminary injunction. This being so it is probable that the question raised by the plea can be determined on appeal before the record would be ready for final hearing were the plea overruled. If the decree dismissing the bill be affirmed the parties will be saved the expense and annoyance incident to taking the proofs and printing the testimony. Second: The question is an important one and the controversy regarding it should certainly be set at rest. If it be presented on a bill and plea it must be decided and no better case can be selected in which to raise the naked question of jurisdiction. Should it be finally determined that the circuit courts can no longer entertain cases where government agents, acting under instructions from the executive departments, use devices covered by patents, a strong appeal may be made to congress to grant some adequate relief to this large class of inventors. Third: If the complainant could obtain relief upon the quia timet clauses of the bill the court would be inclined to retain jurisdiction, but as no one appears but the defendant Bruce and he, upon the admitted facts, has nothing whatever to do with the making or renewal of contracts it is not easy to see how an injunction against him will prevent the makers and owners of the machines from entering into renewal agreements with the post office department. The defendant Bruce is not a party to these agreements and has no interest in or control over them. In other words, the parties against whom such an injunction should be aimed are not parties to the action. Fourth: Although the facts differ in the particulars above stated from the facts in the Belknap Case the court cannot resist the conclusion that the attempt to distinguish the two cases is not grounded upon substantial considerations. The court cannot ignore the fact that the supreme court has said that the owner of a patent cannot enjoin officers of the government from using the invention in their official capacity; neither can he recover profits when the only profits shown are made by the United States. The plea states specifically that the defendant is using the invention in his official capacity and that no profits have accrued to him individually. These facts are all admitted. Fifth: This suit is not

the complainant's only remedy; it may yet obtain relief, at least so far as future infringements are concerned, by bringing an action against the other defendants in the proper district. The question of jurisdiction here discussed could not be raised in such an action.

The bill is dismissed.

BOYLE v. BOYLE.

(Circuit Court, E. D. Pennsylvania. March 25, 1902.)

No. 6.

PARTITION—RIGHTS OF PURCHASER AT SALE—RESCISSION FOR DEFECT OF TITLE.

Where real estate was sold in a partition suit between collateral heirs of the last owner, subject to the condition that a deposit should be made by the purchaser, which should be forfeited in case he failed to comply with his bid, the successful bidder cannot refuse to complete the purchase, and recover his deposit, on the ground that the title is unmarketable, because the evidence did not exclude the possibility of the existence of other heirs not before the court, when such evidence had been found sufficient by the master and the court, and was clearly so unless the recollection of the witnesses was at fault, and their testimony was unimpeached.

Partition. On petition for repayment of deposit money by bidder at sale.

Richard C. Dale, for petitioner.
H. W. Scarborough, for defendant.

J. B. McPHERSON, District Judge. As the result of this action of partition between the collateral heirs of the last owner of the real estate, a sale of the property was had, at which the petitioner was the successful bidder for the sum of $4,965. He paid a deposit of $497.50, but afterwards refused to complete the purchase, upon the ground that the title was not marketable. The conditions of the first sale provided that the deposit money should be forfeited if the purchaser failed to comply with his bid. Upon a second sale, only $4,200 could be obtained. The petitioner requested the master to repay him the deposit of $497.50, and upon the master's refusal now applies to the court. The sole ground upon which the petition is put is that the testimony taken by the master in order to ascertain who were the heirs is not sufficiently certain to preclude the possibility of there being other heirs than those who are parties to the action. Assuming that the finding of the master and the decree of the court upon this subject can be re-examined in this manner, I can only say that a consideration of the testimony has failed to convince me that the title can fairly be said to be unmarketable. If the recollection of the witnesses is accurate, all the heirs of the decedent have been accounted for and have been made parties, and nothing whatever is shown to impeach the memory or the good faith of the witnesses that have testified concerning his family connection. It is merely a possibility, with no testimony to support it, upon which the petitioner relies. When it is consid-

ered, also, that the decedent has been dead for nearly 21 years, I think it is highly probable that all persons interested in his estate have presented themselves, or have been brought, before the court.

The petition is refused.

COFFIN et al. v. BOARD OF COM'RS OF KEARNEY COUNTY.

(Circuit Court, D. Kansas, First Division. April 18, 1902.)

No. 7,893.

1. SUBROGATION—HOLDERS OF INVALID BONDS.

Where a county undertakes to fund its outstanding indebtedness into bonds, and on issuing such bonds, payable to bearer, takes up, cancels, and destroys the warrants evidencing such indebtedness, and the bonds are bought in the open market, and are afterwards repudiated by the county, and are held by the court to be void, for want of power at the time in the county to issue them, the purchaser of the bonds for a valuable consideration, on offering to surrender them to the county, is entitled to be subrogated to the rights of the original warrant holders, and to recover from the county the amount of the warrants. Irvine v. Commissioners (C. C.) 75 Fed. 765, followed.

2. STATUTE OF LIMITATIONS—INVALID BONDS—ACTION ON ORIGINAL CONSIDERATION.

The statute of limitations does not begin to run against such suit until denial by the county of its obligation on such bonds; and the action of the county commissioners of such county in adopting a resolution recognizing the obligation of the county on the warrants, and directing the funding of the debt into bonds, is tantamount to a new acknowledgment, and stopped the running of the statute of limitations.

3. ACTION ON COUNTY BONDS—BURDEN OF PROOF.

Where the defendant county undertakes to defeat recovery on such warrants on the ground that they were fraudulently issued or were a nudum pactum, the burden of proof rests upon the county to establish such facts. It is not sufficient to defeat a recovery that the evidence should show, in a general way, that the county commissioners were recklessly extravagant, or that they issued warrants for questionable purposes, or even in greater amounts than were honestly owing by the county; but the proof must go further, and identify the particular warrants in suit with such illegal transactions.

4. SAME—EVIDENCE.

Where the defendant county offers in evidence its county record for the purpose of identifying the warrants in suit, with the numbers entered in such record, and it appears on the face thereof that there have been erasures and substitutions of certain numbers, and additions of other numbers on the outside of the marginal lines of the record, to make out the correspondence of such numbers with those of the warrants in suit, and such tampering with the record is unexplained by the official custodian of such record, and other entries in such record, to eke out the essential identity, are carried forward, out of consecutive order, many hundred pages, to the latter part of the record, not signed by the proper officers of the county as by statute required, such part of the record should be excluded.

5. SAME—COUNTY WARRANTS.

What purports to be a "stub book" of the county, introduced by the defendant for the purpose of identifying by the stubs some of the warrants in suit (such book not being required by the statute to be kept by the county, and it appearing that such book had for a considerable time been in the possession of a person other than the official custodian

of the county records and files, and by him carried about over the country, and not identified by the proper officer of the county as of the records or files of his office), is incompetent evidence on behalf of the county.

6. SAME—DEFENSES.
The defense to such warrants that they had been issued in excess of the statutory limitations of the amount of debts for current expenses of the county for the given year, based upon the assessed valuation of the taxable property of the county, is not maintainable as a complete defense to all the warrants in suit, in the face of the agreed statement of facts that in the county, newly organized, there had been no assessment of the property for purposes of taxation anterior to the issue of the warrants. *Held*, further, that inasmuch as the law contemplates that in the administration of a territory, like a township, preliminary to its organization into a county, special, extraordinary expenses, distinguished from "current expenses" in the conduct of an organized county, are legally permissible, it devolves upon the defendant county to show affirmatively what particular warrant in suit was issued on account of such current expenses, and what particular warrant is in excess of the statutory limitation.

7. EVIDENCE—OFFICIAL CERTIFICATES.
A certificate made by a person designated as an "enumerator" appointed by the governor of the state to report to him the minimum number of inhabitants and the taxable property in the county, for the information of the governor preparatory to the issue of a proclamation by him designating the given territory as an organized county, is inadmissible in evidence to show the assessed valuation of the taxable property of the county in this suit.

8. SAME.
Equally incompetent for such purpose is a compilation of the taxable property of the county found in the published reports of the state auditor; likewise a certificate of the clerk of the county, found in the state auditor's office, giving the valuation of property in the county, claimed to have been furnished when said bonds of the county were presented to the state auditor for registration; there being no statute of the state then in force authorizing such registration or certificate, and no evidence that the original warrant holders or bondholders, or purchasers of the bonds, presented such certificate to the state auditor, or had any knowledge thereof. There can be no presumption that such certificate was presented by either of such persons, in the absence of a statute requiring its presentation.

(Syllabus by the Court.)

In Equity.

Rossington, Smith & Histed and F. P. Lindsay, for complainants.
Milton Brown, for defendant.

PHILIPS, District Judge. It is strenuously urged by defendant's counsel that the complainants are not entitled to the relief sought by their bill, as the doctrine of the right of substitution forbids it. This question was passed upon by Judge Foster, the then presiding judge of this district, on a demurrer interposed by the defendant to the bill of L. M. Irvine, similar to the complainants'. His opinion is reported at page 765, 75 Fed. On coming into this jurisdiction under assignment, it is a part of the unwritten law that I should not overrule that ruling, unless it be so clearly erroneous as to appeal to my sense of judicial duty. It is to be confessed that looking to the broad language of Mr. Justice Miller in Ætna Life Ins. Co. v. Town of Middleport,

124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537, the proposition might be upheld that inasmuch as the purchasers of the bonds bought them on the open market, on speculation, or as an investment, they stand in the relation to the debtor county as mere volunteers, to whom equity does not extend its arm of protection by substituting them to the rights of the original warrant holders. And unless the language of his postulates can be "restrained to the fitness of the matter," it would preclude recovery in this case. The facts of that case can be differentiated from these at bar. The statute under which the appropriation was voted by the town of Middleport to the railroad company provided as the means for its payment a tax on the property of the inhabitants, and not otherwise. No power was given to the municipality to issue bonds therefor. The contract was not an unconditional obligation of the municipality to pay. The railroad company, as the beneficiary of the appropriation, could look alone for payment to taxes to be collected annually from the inhabitants. No other judgment could have gone against the municipality, as such, to enforce this obligation, than of a mandatory character against its governing body to proceed to assess and collect the necessary taxes, sub modo. So when the railroad company took the bonds it paid to the city nothing nor surrendered to it therefor anything of value. Neither was the debt thereby attempted to be extinguished or altered, or the mode of its enforcement in anywise affected. Therefore, even as between the railroad company, to whom the bonds were issued, and the city, no equity was evoked to entitle the railroad company to appeal to a court of equity for relief. Not so in the case at bar. The debt was the direct obligation of the county. The warrants presumptively represented value received and enjoyed directly by the county. The taker of the bonds did surrender something of value to the county,—the warrants, the written evidence of the undertaking of the county. The warrants the county canceled and burned, and undertook thereby to wipe out the written evidence of its original debts. The bonds being void, the warrants, although physically destroyed, remained the obligations of the county; and, on repudiation by the county of the bonds, if then owned by the warrant holders, the latter, beyond question, could have maintained action to recover the amount thereof from the county. By issuing the bonds the county put it in the power of the taker of the bonds to transfer them by delivery, and obtain the amount of his debt against the county. The purchasers of the bonds have no recourse on the person from whom they purchased, as he transferred them simply for what they appeared on their face to be,—commercial paper,—without any guaranty. Otis v. Cullum, 92 U. S. 447, 23 L. Ed. 496. The warrant holders, having realized their money by the sale of the bonds, have no occasion to go on the county for pay of the warrants. Therefore, if the defendant's contention is to prevail, that the complainants are not entitled to be subrogated, the situation presents this anomaly: The county, by the trick or scheme of issuing the bonds, and having the warrants surrendered for cancellation, and then repudiating the bonds, is to be forever discharged from its debts represented by the warrants, aggregating about $35,000 and interest. The complainants, whose money the warrant holders were thus, by the

act of the county, enabled to obtain, have no standing in court to compel the original warrant holders to pursue the county for their use and benefit. So the county is to go free. It is difficult for the human mind to conceive of a situation more rank with injustice; and, if the courts cannot afford relief to these complainants, it must be said that justice no longer, in American jurisprudence, has a "forum of conscience." As said by that other great jurist, Mr. Justice Field, in Marsh v. Fulton Co., 10 Wall. 676–684, 19 L. Ed. 1040:

"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 face of such a contingency as this case presents, the very instinct of justice should compel a chancellor to make a precedent. The motto of the device of the pickax on the dial, "Find a way or make one," should be applied at times by the courts.

The fact that the money paid by the complainants for the bonds to the original bondholders did not pass directly into the treasury of the county cannot avail the defendant as a defense. As said by the court of appeals of this circuit in Geer v. School Dist., 49 C. C. A. 539, 548, 111 Fed. 682–690:

"The case of City of Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238, is authority for his [complainant's] 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 ought the more especially to obtain under circumstances like these at bar, where the bonds were exchanged by the county in an attempted liquidation of its outstanding warrants, which it had authority to issue, and were issued, presumptively, for valid obligations of the county, and, after obtaining them under agreement, canceled and destroyed them.

The Statute of Limitations. It is conceded that under the Kansas statute this cause of action would not be barred until after the lapse of five years. When did the cause of action as to these complainants arise? The contention of the defendant is that the statute began to run the moment the funding bonds were issued. It is then assumed that the bonds were issued August 1, 1888; and as this suit was not instituted until August 14, 1893, the limitation had expired. But the agreed statement is that on August 27, 1888, the board of county commissioners of Kearny county, at a regular meeting of said board, passed the resolution acknowledging the indebtedness on the warrants, and ordering the bonds to be issued in exchange therefor, whereupon the county treasurer should cause the surrender of the evidence of indebtedness to be marked "Paid in full" across the face. The bonds were to be accompanied with a certificate from the county clerk under his seal, "that the indebtedness of Kearny county in registered warrants equal to the sum of such bond or bonds has been surrendered to the board of county commissioners for cancellation, and canceled." Paragraph 2 of the agreed statement of facts recites that "subsequent-

ly, and in pursuance of the order set forth in paragraph No. 1, the chairman of the board of county commissioners and the county clerk executed refunding bonds of said county of Kearny." The bonds necessarily were issued after the date of the funding order. Defendant's counsel has fallen into error respecting the date of the issue, by reason of the recitation that the bonds should be dated back to August 1, 1888, to bear interest therefrom. The taker of the bonds could have had no action growing out of or dependent thereon until after the issue and delivery of the bonds. The correct rule is that until the county repudiated the bonds, by denying liability thereon, the statute of limitations would not begin to run against the bondholder to recover from the county the value of the warrants exchanged therefor, and destroyed by the county. Cowper v. Godmond, 9 Bing. 748; Merrill v. Town of Monticello, 72 Fed. 462–464, 18 C. C. A. 636. As said by the court of appeals in Geer v. School Dist., 49 C. C. A. 549, 111 Fed. 691:

"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 the plaintiff in error had a lawful right to institute suit to recover upon the implied obligation at any time within six years [which was the limitation under the Colorado statute] after the district repudiated the express obligation. As the agreed statement recites that the suit was brought on the bonds July 5, 1890, when payment was resisted, in the absence of any evidence showing an earlier denial by the county of liability the presumption must obtain that the answer to that suit marks the initial period for the running of the statute of limitations. Furthermore, by resolution of the board of county commissioners of August 27, 1888, they acknowledged the existence of the debt,—that they owed the sum of the warrants,—and proceeded to discharge the warrants by thereafter issuing said bonds. Under statutes of limitation in no material respect different from that of Kansas (Gen. St. Kan. 1897, p. 90, § 18), it has been held (and such is the trend of the adjudications) that it is sufficient if the party acknowledge that he owed the debt, to stop the running of the statute of limitations, even though unaccompanied by any promise to pay. Chidsey v. Powell, 91 Mo. 622, 4 S. W. 446, 60 Am. Rep. 267; Elder v. Dyer, 26 Kan. 604, 40 Am. Rep. 320; Rolfe v. Pilloud (Neb.) 19 N. W. 615, 970; Sluby v. Champlin, 4 Johns. 462; Patterson v. Choate, 7 Wend. 441; Whitney v. Reese, 11 Minn. 138 (Gil. 87); Palmer v. Gillespie, 95 Pa. 340, 40 Am. Rep. 657; De Forest v. Hunt, 8 Conn. 180. So, in this view of the law, this acknowledgment of the debt having been made by the defendant on the 27th day of August, 1888, and the suit having been instituted on August 14, 1893, the period of limitation had not run."

At the hearing of this case, at the conclusion of the oral argument then presented by counsel it was suggested by the court to defendant's counsel that: Conceding there was some irregularity and fraud in the issue of the warrants in question, the practical and essential question is, has the defendant traced such fraud or want of consideration into any of the warrants involved in this suit? and

suggested to counsel for defendant that he present, in some tangible, intelligible form, a statement pointing out this required identity. This he has attempted to do in subsequent briefs. But I confess my inability to find the satisfactory proofs, outside of the mere assertions and cunning arrangement of figures by counsel. It stands alike to authority and to a sense of justice that, before the defendant can avoid a single warrant sued on, the burden rests upon it to show, by intelligible and honest testimony, that the particular warrant is vitiated by fraud in its issue, or that it is a nudum pactum. Board of Com'rs of Lake Co. v. Keene Five Cents Sav. Bank, 108 Fed. 505, 47 C. C. A. 464.

The defendant has sought to identify some of these warrants, and the purposes for which they were issued, by offering in evidence certain pages of the commissioners' journal, No. 1, of Kearny county. To the admission of this journal for such proof, complainants' counsel objected, for the reason, inter alia, that the material pages of this record bear upon their face unmistakable evidence of having been tampered with. It must be admitted that it is quite apparent on the face of this record that there have been material erasures and substitutions of figures denoting the number of the warrants, evidently made since the original record was made up. It is also apparent (particularly so on pages 53 and 58 of this journal, which purports to contain a list of the county warrants ordered destroyed and refunded into bonds) that not only have the numbers of the original writing thereon been changed, but that after the entries were made there have been added two columns of figures on the left-hand margin, and one column of figures on the right-hand margin, outside of the lines which separate the margins from the usual place for making record entries. Superadded to this is the fact that this enumeration of numbers of warrants was wholly insufficient to indicate either their amounts, or names of the payees, or the purposes for which they were entered; and after their entry, and apparently in fresher ink, occur the words, written in, "See commissioners' journal, page 605, for full description." Why, if this entry was ordered made at the time of the purported transaction, it was not made in consecutive order on the record, but had to be carried over 547 pages to the back of the book, is not explained. And even then all the entries necessary to make out the numbers of the warrants canceled and destroyed were not entered on page 605, but a part of them were entered on page 604, bearing unmistakable evidence of not having been entered at the time; and these later pages are not signed, as required by the statute, by the officers of the court, or officially attested. No sufficient evidence is offered by the defendant in explanation of the evident tampering with this record.

Aside from this criticism, there is nothing in this record proper to identify any warrant in question with any fraud in its issue, or to show what the original consideration therefor was. Encountering this obstacle in the defense, recourse was sought by defendant to the testimony of one Waterman, and a certain stub book presented by him, known as "Exhibit Y," purporting to have contained

scrip or warrants issued by Kearny township; the stubs in some instances indicating to whom issued. No chancellor, who distrusts a self-seeking hypocrite, can place any reliance upon the uncorroborated word of this witness. From statements made by defendant's counsel in open court, it appears that this man, in other litigation between this county and other creditors, involving questions as to the issue of county warrants and county indebtedness, gave his deposition or depositions, not making the developments he undertakes to disclose in this case in respect to said stub book and other matters. And counsel assigned as a reason for asking for a delay to take further depositions that this witness had of late, at a religious revival, experienced a change of heart. But when on the hearing of this case it was developed that this witness had entered into a solemn compact, of record, with the defendant county, to assist it in getting up evidence in this case, in consideration of $600 to him since paid, the conclusion is enforced that his confession is merely a needful exhibition of that unselfishness "which is but a lively sense of favors yet to come." It is by this witness that the defendant must rely for the identification of this stub book as of the files of Kearny township. The objection by complainants' counsel to the admissibility of this book in evidence is well taken. In the first place, there was no statute of the state requiring such a book to be kept by the township or county officials; second, no officer of the township or of the county who would have been the official custodian of this book has sufficiently identified it as of the records or files of the township or county; and, third, it appears from Waterman's testimony that, for a long period of time after this book is claimed to have been used by the officers of Kearny township, it was in his private possession, carried about by him outside of the state, and at other places in the state, hundreds of miles away from Kearny county. From every consideration of sound policy, such a book cannot be introduced by the county as evidence in its behalf. Board of Com'rs of Lake Co. v. Keene Five Cents Sav. Bank, supra; State v. Cook, 30 Kan. 82, 1 Pac. 32; State v. Nye, 32 Kan. 201, 4 Pac. 134; Phelps v. Hunt, 43 Conn. 194; White v. Fitler, 2 Pa. Law J. 302; Hardin v. Blackshear, 60 Tex. 132; Alexander v. Campbell, 74 Mo. 142; Roberts v. Wilson, 1 Utah, 292; Noble v. Douglass, 56 Kan. 92–95, 42 Pac. 328. The defendant cannot eke out the omissions, imperfections, and want of identity between the numbers of the warrants and the parties to whom issued, not shown by the stub book, by the testimony of Waterman in pais. If the book, indeed, be a record or file of the county proper, it must speak for itself. This rule is inflexible when such evidence is produced for the purpose of carrying home notice as to the character and consideration of warrants of a county to the payee or the purchaser. Rollins v. Board, 90 Fed. 575, 33 C. C. A. 181. Sending Waterman and his "stub book" out of court, as in law and good conscience ought to be done, the defense should go with them.

The remaining defense worthy of consideration is that the warrants sued on were an overissue, beyond the debt-making power

of the county, and are therefore invalid. The statute relied upon is section 1853, Gen. St. Kan. 1901, in force at the period in question:

"The board of county commissioners of any county shall not levy upon the taxable property of such county a tax for current expenses of said county of any one year in excess of the following amounts: Upon a valuation of five million dollars and under, one per cent.; over five millions and under six millions, eight and one-half mills; over six millions and under seven millions, seven and one-half mills; over seven millions and under eight millions, six and one-half mills; over eight millions and under nine millions, five and three-fourths mills; over nine millions, one-half of one per cent.; provided, that the electors of the county, by a direct vote, may order an increase in such levies."

The succeeding section (1854) limits the power of issuing warrants within the prescribed limit of section 1853.

It hardly admits of debate that the evidence of the assessed valuation of the property of the county contemplated by this statute is that made by the proper county officers, made and extended upon the tax books of the county for the purpose of collecting taxes. No taker or purchaser of the issued obligations of a county, acknowledging an indebtedness, has ever been held, to my knowledge, to the duty of looking further than the record books of the county containing the assessment and tax levy. Aside from this, however, by paragraph No. 12 of the defendant's answer herein it is expressly admitted:

"That said warrants referred to in complainants' bill, if issued at all, were made and issued against the county fund of said county, and as a charge against the county fund, before there had been any assessment of taxable property of said county for the purpose of taxation, and before there had been any levy of taxes for county purposes in said county."

No matter what other allegations the answer may contain respecting the present assessments on the valuation of the county property, the foregoing admission of the answer should preclude all attempts made by the defendant to show aliunde that there had been such an assessment and valuation on the property of the county prior to the issue of these warrants. "A party should be bound by the allegations of his pleadings, deliberately made, and cannot be allowed to obtain benefits from contradictory and inconsistent allegations therein, even if made in separate counts." Losch v. Pickett, 36 Kan. 216, 12 Pac. 822. This rule is aptly stated in Savings & Trust Co. v. Bear Valley Irr. Co. (C. C.) 112 Fed. 694–704: "A party is not permitted to assume inconsistent positions in the same litigation." It should also be a sufficient answer to the attempts, by extraneous matters, to show what the assessed valuation of the taxable property of the county was, to say that all of these should be supplemented by evidence showing that either all of the warrants, or some of the particular warrants in suit, were issued "for current expenses of said county of any one year" in excess of the statutory limitation. As warrants issued by the county for special and extraordinary expenses of the municipality (especially those incident to the administration of the affairs of a new township and the organization of a new county) are not within the inhibited limitation of the statute (Lake Co. v. Rollins, 130 U. S. 662, 9 Sup. Ct. 651, 32 L. Ed. 1060; Childs v. City of Anacortes (Wash.)

32 Pac. 217; State v. Cornwell, 18 S. E. 184, 40 S. C. 26; Germania Sav. Bank v. Town of Darlington, 27 S. E. 846, 50 S. C. 337; State v. Common Council of City of Tomahawk, 71 N. W. 86, 96 Wis. 73), it devolved upon the defendant to show not only that the particular warrants in suit were issued for current expenses of the county, but also that at the time of their issue the statutory limit had been passed. This the evidence fails to sufficiently point out and fix with any degree of certainty. The state of the proof in this case defies any mental effort, pursuing permissible legal lines, to ascertain this required quantity.

The astute and industrious counsel for defendant has sought in many ways to supply this needed and indispensable proof. His first effort was to introduce in evidence the contents of a report made by one Prouty, as the enumerator designated by the governor of the state under the state statute (Sess. Laws 1887, c. 128), made for the purpose of enabling the governor of the state, preliminary to issuing the proclamation declaring the new county organized, to determine whether the county contained the minimum population and taxable property. Neither the original nor a certified copy of this report was offered in evidence, but the defendant's counsel claimed that it was in his possession, and had been lost. Waiving, however, any question about this proof, how can it be judicially maintained that such certificate by such enumerator, made for a limited and single purpose, can be used by the county, in a suit against it by a third party, to show what the assessed valuation of the property of the county was? At common law it would be the merest hearsay evidence, and as there is no statute of the state making such report evidence for any purpose, except for the information of the governor before issuing his proclamation declaring the county organized, this paper is clearly inadmissible.

The next evidence, and of like character, offered by the defendant, is a certified copy made by the auditor of state of what purports to be a certificate filed in his office by the county clerk of Kearney county in November, 1888, to secure the registration of the bonds. It is conceded that at the time of making this certificate to the state auditor there was no statute of the state requiring the registration of bonds issued by counties, and consequently no statute authorizing or requiring such certificate by the clerk. And consequently it could not be evidence of notice of its contents to the holders of county warrants. The contention, however, of counsel, is that, inasmuch as the holder of the bonds presented such certificate to the auditor, he is bound by its recitals. In the first place, there is no evidence before this court that such certificate was presented to the auditor by the then holder of the bonds; and, in addition to this, the proof fails to connect the complainants with said certificate. If, as counsel contends, such certificate was presented to the auditor by the then holder of the bonds, they were presumably in the hands of the party who exchanged the warrants therefor; and, as the alleged object of the registration of the bonds was to qualify them for circulation upon the markets as commercial paper, not only would the further presumption arise that they had passed out of the hands "of the holder" onto the market, but this presumption ripens into an admitted and indisputable fact by the

agreed statement of facts filed herein by the parties. By the fourth paragraph of this agreed statement it is stipulated:

"That the complainant, subsequent to the issuance and delivery of the bonds described in paragraph No. 2, to wit, on January 10, 1889, bought the same upon the market, in good faith, paying par therefor, without notice of any irregularities or defect, or claim of illegality, save and except such as might be imparted from the face of the bonds themselves, and the public records and laws of Kansas; and complainant has continued to be, and is now, the owner and holder of said bonds."

The clear import of this statement is that the complainants bought the bonds after they had gone through the office of the auditor, as they would not go "upon the market" until after the holder of them had thus, according to his notion, qualified them for the public market. This is confirmed by the express stipulation that the complainants took the bonds without notice of any irregularities or defect or claim of illegality, "save and except such as might be imparted from the face of the bonds and the public records and laws of Kansas." As there was no law of Kansas authorizing or requiring such registration or such certificate, the contents of such paper is but hearsay, inadmissible against a third party in a suit against the county. Authorities supra. It was an unauthorized, superserviceable preparation of the clerk, and as such it is in no sense such a record of the county as a taker or purchaser of its obligations should take notice of. There is no evidence in this case that said certificate was presented to the auditor by any warrant holder. And even if this certificate were competent evidence, it would leave the defendant's cause precisely where all of its other evidence stops,—short of pointing out which warrant is bad by reason of being an overissue. Counsel for defendant contents himself with the bald statement that "it is easily ascertainable that there was an overissue of warrants, and it is easily computable as to the amount thereof." Yet notwithstanding he has been industriously engaged for the past year in this task, he finds it easier to leave the court to work it out, or guess at it, than furnish the demonstration.

In its last extremity the defendant has offered in evidence, on page 350 of a bound book labeled on the back, "Sixth Biennial Report, Auditor State, 1888, Kansas," which purports to give the valuation of properties returned by the county clerks, and the total valuation of the property fixed by the state board, and the per centum to be collected. And in the same connection he offered by his testimony to show what was a copy of a certain certificate found in the printed record of another case (Speer v. Board, 32 C. C. A. 101, 88 Fed. 749), from which it appears that the valuation of the railroad property had not been changed by the board of equalization, but remained as originally assessed by the state board of railroad assessors. So that this evidence, even if competent, would not show what was the assessed valuation of the railroad property admitted to then be in the county, and would therefore leave the court to presume something which the evidence does not show. I undertake to say that no well-considered adjudication can be found holding that in determining the question of whether or not there was an overvaluation of property for assessment purposes,

when the county issued certain evidences of indebtedness, such proof could be made by recourse to the state auditor's report, made up by him from sources and papers themselves not in evidence. It is not such a record as the law contemplates that the taker of the county's obligations should examine before taking or purchasing its warrants.

Other defenses interposed by the defendant in this case are precluded by the rulings of the court of appeals in the case of Speer v. Board, supra, and therefore need not be reviewed.

While the court, from all the facts and circumstances connected with the history of Kearny township, cannot escape the conviction that there was in the administration of its affairs by the township officers wanton extravagance, fraud, and peculation, and while the court would cheerfully see the county relieved of the great burden of debts placed upon it by improvident, if not dishonest, officials, it cannot do so against established rules of evidence and of law. There are facts and circumstances presented by the evidence on behalf of the defendant, for instance, which point pretty directly to fraud on the part of the township board, and their aiders and abettors, in employing a large number of men to work upon the construction of a public road through the township, with the ulterior purpose of colonizing such employés in the township to vote at an election for the location of a county seat for the new county. But as the evidence shows such employés did much and valuable work in the construction of this road, which the statute of the state authorized the township board, in its discretion, to have done, even if the evidence in this case showed that the sum of the warrants issued for such services was excessive, and that some of the warrants could on such account be defeated for want of consideration, or because of fraud in their issue, the defendant's evidence again falls short of identifying any particular warrant in controversy with such fraud or overissue. The same may be said respecting the large amount of fees for attorneys' services for which warrants were issued. While the defendant's testimony raises a reasonable doubt as to the value of such services being equal to the amount of compensation allowed by the governing board, I am unable, from the evidence presented, to identify such warrant or warrants with those in suit; and, if I could, it would be mere guesswork for this court, on the evidence before it, to undertake to determine what amount of such warrant was honest, and how much was dishonest, or reasonable or unreasonable. The board had authority to employ counsel, which it did; and, as such counsel unquestionably rendered some professional service, the presumption obtains that every warrant issued therefor was not voidable for total failure of consideration.

Decree will go for the complainants.

FIRST NAT. BANK OF SEATTLE v. CITY TRUST, SAFE DEPOSIT & SURETY CO. OF PHILADELPHIA et al.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1902.)

No. 719.

1. PRINCIPAL AND SURETY—RIGHTS OF SURETY—SUBROGATION.
A surety on the bond of a contractor with a city for public work, who assumes and completes the work after its abandonment by his principal, is subrogated, so far as necessary to protect him from loss, to all rights which the city might have enforced against the contractor if it had declared the contract forfeited, and completed the work itself.

2. SAME—COMPLETION OF CONTRACT BY SURETY—EFFECT OF ASSIGNMENT OF PROCEEDS BY PRINCIPAL.
The bond of a contractor with a city for paving was conditioned for the completion of the contract and the payment of all claims against the contractor for labor and materials. The contract provided for monthly payments of 70 per cent. of the estimates as the work progressed, and the retention by the city of 30 per cent. until after completion of the contract, to secure the payment of laborers and material men. The contractor abandoned the work, having earned about $3,900, which was unpaid, and leaving outstanding claims for labor and material amounting to $3,100. The city called upon the surety, which assumed and completed the contract, paying all claims against the contractor for labor and materials. Prior to the abandonment of the work, the contractor had borrowed money from a bank, and assigned to it all sums to become due from the city during certain months, and the bank had notified the city of the assignment. *Held*, that the surety was subrogated, to the extent necessary to protect it from loss, to all the rights which the city might have asserted against the fund in its hands, and that such rights were not limited to the 30 per cent. reserved under the contract, but extended to the entire fund, which the city might, notwithstanding the assignment, have declared forfeited, and applied in reduction of its damages, if it had been compelled to complete the work, which it must have done but for the action of the surety; that the surety's right was superior in law and equity to that of the bank under its assignment, by which it took no greater rights than those of the contractor, as against either the city or surety.

McKenna, Circuit Justice, dissenting.

Appeal from and in Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

The appeal in this case is taken from an order dismissing the bill of intervention of the appellant, the First National Bank of Seattle, in a suit begun by the City Trust, Safe Deposit & Surety Company of Philadelphia against Frank H. Paul, as comptroller of the city of Seattle, to compel the issuance of city warrants to the complainant in the bill for work done upon a contract for a city improvement, which contract had been made between McCauley & Delaney, contractors, and the city of Seattle, and which, upon the abandonment thereof by said contractors, had been completed by the complainant, who was their surety. The intervener denied the right of the surety company to the warrants, and asserted its own right thereto upon the ground that the contractors had, in consideration of moneys to be advanced by the intervener, assigned to it certain moneys to be earned by them under said contract. The facts of the case, as alleged in the two bills, are these: On or about August 2, 1900, McCauley & Delaney entered into a paving contract with the city of Seattle. They applied to the First National Bank of Seattle for a loan of money to enable them to carry out their contract, and accompanied their application with a promise to provide a reliable surety company bond to the city, and to assign to the bank all moneys.

bonds, and warrants that should become due from the city under the contract for the months of August, September, October, and November, 1900. Upon those conditions the bank promised to loan and advance the necessary money. The contract for the street improvement provided that on or before the 20th day of each month bonds or warrants should be issued for 70 per cent. of the contract price of the estimated amount of the work returned by the city engineer as having been performed during the preceding month. The remaining 30 per cent. was to be retained to secure the payment of laborers and material men until 30 days after the completion of the work. The City Trust, Safe Deposit & Surety Company of Philadelphia became the surety on the bond which was entered into with the city for its own use and for the use of all persons who should perform work or labor in the execution of the contract. On August 2, 1900, the contractors, in writing, assigned to the bank the proceeds of the contract for the months of August, September, October, and November. The consideration of the assignment was the sum of $2,000, then advanced, and other moneys thereafter to be advanced, including the money to be paid to procure a surety company's bond. The bank subsequently, as the work progressed, advanced $5,000, making a total of $7,000, which was intended to be secured by the assignment, no part of which has been repaid. The bank, upon obtaining the assignment, served upon the comptroller, and caused to be filed in his office, a written notice that it held the assignment, and that it would present an order for the warrants to be issued in payment of the amount so assigned and so to become due. The notice was written on an official blank furnished by the comptroller for the use of banks and others who advanced money under like circumstances. The city engineer subsequently estimated that the work done on the contract for the months mentioned in the assignment amounted to $12,619.14. But in the meantime, early in October, the contractors discontinued the work, and shortly thereafter the city called upon the surety company to complete the same, to which it assented. Before it assumed the contract of its principals, it had notice of the assignment to the bank. At the time when the contractors abandonded their contract there had been earned thereunder $3,924.31, as shown by the estimates made by the city engineer. The surety company completed the contract, and paid the expenses thereof, and all the unpaid bills incurred by the original contractors. The bank, in its bill of intervention, alleged that when the contractors abandoned the contract there was due to certain laborers and material men sums of money, the amount of which was unknown to the bank, but which sums would have been liens upon no more than 30 per cent. of said sum of $3,924.31 so earned by the contractors according to the terms of the contract. To the bill of intervention the trust company and the comptroller of the city of Seattle each demurred for want of equity. The demurrers were sustained, and the bill of intervention was dismissed.

Walker & Munn, for appellant.
John P. Hartman, for City Trust, Safe Deposit & Surety Co.
W. E. Humphrey and Edward Von Tobel, for appellee.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

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

The appellant earnestly contends that its bill of intervention presents ground for equitable relief at least as to $2,747, or 70 per cent. of $3,924.31, the amount which the city admitted to have been the value of the work done by the contractors at the time when they abandoned their contract; and it insists that the sum of $2,747 is beyond any doubt payable to it under its assignment; that that sum was earned by the contractors by work done in a public improve-

ment which was accepted by the city, and for which the city stood ready to pay, notwithstanding that claims and liens for work done and material furnished in said improvement to the amount of $3,168.38 were outstanding and unpaid; that the city never declared a forfeiture of the contract, and that in fact the contract never was forfeited, but that the surety company had simply undertaken and completed the work, which it was bound to do under its bond; that the appellant's equities are prior to those of the surety company and to those of the unpaid claimants and lienholders, for the reason that the arrangement to obtain money from the bank was entered into by the contractors before they had obtained the bond from the surety company, and that when the surety company took up the contract it did so with knowledge of the assignment to the bank, and subject thereto.

The doctrine announced in Prairie State Nat. Bank v. U. S., 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, must control the decision of these questions. The controversy in that case was between a bank which had advanced money to Sundberg & Co., the contractors who had undertaken to erect a custom house for the United States, and Hitchcock, the surety on the contractors' bond, and it concerned the 10 per cent. of the contract price, which, by the terms of the contract, had been reserved by the government from the current payments until after the completion of the contract. The bank based its claim to the fund upon advances which it had made to the contractors in consideration of a power of attorney from the latter authorizing it to receive from the United States the final payment. Some three months after the execution of this power of attorney, the contractors defaulted, and Hitchcock, the surety, thereupon completed the contract, and disbursed therein about $15,000 in excess of the current payments from the government. The bank asserted an equitable lien upon the deferred payment, which it claimed was prior and paramount to the lien of the surety, since the claim of the latter arose only at the date when he undertook the completion of the contract. The court held, however, that the claim and equity of the surety arose when he entered into the contract of suretyship, and that his right to the reserve fund was prior and paramount to that of the bank, and said that the stipulation in the building contract for the retention until the completion of the work of a certain portion of the consideration "is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created." The court further said:

"If the United States had been compelled to complete the work, its right to forfeit the 10 per cent. and apply the accumulation in reduction of the damage sustained remained. The right of Hitchcock to subrogation, therefore, would clearly entitle him when, as surety, he fulfilled the obligation of Sundberg & Co., to the government to be substituted to the rights which the United States might have asserted against the fund."

In so ruling, the controlling consideration was, not that the deferred payment had been, by the words of the contract, reserved, but that the money in controversy was still in the hands of the gov-

ernment, subject to its power to apply the same upon the unfinished contract if it had undertaken the completion thereof.

Applying these principles to the present case, it is clear that the lien of the surety company upon all funds now retained in the possession of the city, and applicable upon the contract, had its inception at the time when it entered into the contract of suretyship, and that subsequent to that date the contractors, McCauley & Delaney, had no power to create a lien upon the payments to be made by the city, and make it paramount to the lien of the surety. That the right of the bank in this instance is subsequent to the surety's lien is not to be questioned. The arrangement which is said to have been made between the bank and the contractors just prior to the execution of the bond cannot affect the rights of the surety. That arrangement, so far as the pleadings inform us, was not in the form of a binding agreement, and was not obligatory upon either party thereto; and, if it were, it could not take precedence of the lien of the surety by virtue of the bond which it entered into simultaneously with the execution of the contract, unless it was known and assented to by the surety. There is no intimation that the surety assented to or had notice of such an agreement. One who becomes a surety for the principal upon such a contract as is disclosed in this case may not be deprived of his lien by the secret contract or agreement into which his principal may have entered. By abandoning the contract the contractors lost the right to compel the city to pay them any sum whatever on account of the work which they had done. Their assignee, the bank, stood in no better position than they. The city undoubtedly had the right to declare the contract and all unpaid sums which it had promised to pay thereunder forfeited. That it had this right is not disputed, but it is said that the city has not exercised it, and that, therefore, the right cannot avail the surety. But the true inquiry is, not what has the city done, but what had it the right to do? It had the right, if it had itself assumed the completion of the abandoned work, to retain for its own protection not only the stipulated 30 per cent., but all sums then due or earned under the contract, and no assignment by the contractors could defeat that right. Among the obligations of the contractors was included the duty to pay all claims for work, labor, and material. The surety, by the terms of its bond, had guarantied that the contractors would pay "all just claims for work, labor, or material furnished in the execution of the contract." The surety's obligation to pay liens and claims outstanding when the contract was abandoned was not limited in extent to the reserved 30 per cent. of the money then earned by the contractors, but it included the full sum of the unpaid claims, amounting to $3,161.38. In the Prairie State Nat. Bank Case the court expressly declared that the right of Hitchcock, the surety, was not limited to the 10 per cent. reserved, but that it was a right to "resort to the securities and remedies which the creditor, the United States, was capable of asserting against the debtor, Sundberg & Co." So, in the case before the court, when the surety assumed the burden of the contract, it stood in the position of the city, so far as the unpaid stipulated sums under the contract were concerned, and it

acquired the city's right so far as it might be necessary to resort to the same to reimburse it for all its outlay in completing the work. We think the right of the surety company went that far, and no farther; and if it appeared upon its own bill herein, or in that of the intervener that the money of the latter so advanced to the contractors under its agreement went into the improvement, so that the surety company acquired the benefit thereof, and availed itself of the same, and thereby acquired, on the completion of the contract, a profit,—or, in other words, if the moneys which are now retained by the city, if paid to the surety company would more than repay it the total amount of its expense incurred in completing the contract,—equity would require that the excess be paid to the bank, rather than to the surety. The right of subrogation has its origin not in contract, but in equity, and it goes no farther than the strict demands of equity and justice demand. The equitable lien of the surety company extends only so far as may be necessary for its reimbursement. The remainder of the fund, if any there were, would belong to the bank by virtue of its assignment. In 24 Am. & Eng. Enc. Law, p. 191, of the nature of the right of subrogation, it is said: "Being a creature of equity, it will not be enforced where it will work injustice to the rights of those having equal equities;" and on page 192 it is said that subrogation will not be permitted "in favor of one who will thereby be permitted to derive an advantage therefrom, or to establish his claim through his own wrong or negligence, or inequitable or illegal taking." It appears from the bill of the surety company that the amount of the unpaid labor and the unpaid liens for material which had been incurred by the contractors at the time when they abandoned the contract was $3,161.38. The difference between that unpaid sum and $3,924.31, the amount which the city admitted to be the value of the improvement which had been made at the time of the abandonment of the contract, is $762.93, which latter sum represents the amount of the money advanced so by the bank which actually went into the improvement over and above the unpaid expense thereof at the time of the abandonment of the contract; but there is no averment and no facts are pleaded in either bill from which it may be deduced that the deferred payments on the contracts will be more than sufficient to make the surety company whole, and repay all its outlay in completing the total work. We find no equity, therefore, in the intervener's bill.

Counsel for the appellant cite and rely upon the decision of the supreme court of the state of Washington in Dowling v. City of Seattle, 22 Wash. 592, 61 Pac. 709,—a decision which it may be conceded announces a doctrine directly at variance with that of Prairie State Nat. Bank v. U. S. In the Dowling Case it was held that orders drawn by a contractor on sums to become due on a contract with the city carried an equitable assignment of the fund, and, being valid when made, they were not rendered invalid by the default of the contractor, or by the assumption of the contract by the surety. The argument of the court was that, inasmuch as the city asserted no claim of right in the fund, there existed no right to which the

surety could be subrogated; and that, as the contractor could not justly claim that his own assignments were invalid, neither could his bondsmen, who had assumed the performance of the contract, so claim. The decision in that case does not involve, and neither does the present case, so far as the foregoing discussion goes, involve, any question of the construction of a provision of the charter of the city of Seattle, or of the constitution or the statutory law of Washington. That decision, therefore, does not become a precedent which we are bound to follow. We find no error in the decision of the circuit court sustaining the demurrers and dismissing the bill of intervention.

The decree will be affirmed.

McKENNA, Circuit Justice (dissenting). I am unable to concur in the conclusion of the court. I think the bill of intervention states a cause of action for at least $2,747. There was due the contractors, McCauley & Delaney, when they abandoned their contract, the sum of $3,924.31. Thirty per cent. of that sum the city had a right to retain, and to that 30 per cent. only—to the rights of the city in that 30 per cent.—was the surety company subrogated. Seventy per cent. of the sum was a vested substantive right of the contractors, and passed by their assignment to the bank. This view is sustained, in my opinion, not opposed, by the case of Prairie State Nat. Bank v. U. S., 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412. In that case, as in this, the controversy was between assignees of a contractor and a surety on the bond of such contractor, and the surety prevailed. But the assignment in that case was void because given in violation of section 3477 of the Revised Statutes of the United States. In the case at bar the assignment was and is valid. In that case, therefore, the rights of the parties were held to be equitable only, and that of the surety was held to be the superior. What was the equity of the surety? A right to the 10 per cent. in subrogation to the rights of the United States in that percentage. In the case at bar the surety company is not only subrogated to the right of the city to the 30 per cent. which the city had a right to reserve, but to the 70 per cent. of the sums due which the city had no right to reserve, and which could be and was legally assigned.

The demurrer to the bill of complaint should have been overruled.

THE SEA KING.

THE BUFFALO.

(Circuit Court of Appeals, Second Circuit. February 7, 1902.)

No. 98.

COLLISION—STEAMSHIP AND BARGE IN TOW—FAULT OF TUG.

The tug Sea King was coming up the lower New York Bay, having two barges in tow tandem, in all about 1,200 feet long, when the second barge came in collision with the steamship Buffalo, outward bound, and was sunk. The collision occurred from 250 to 300 feet to the westward of the center of the channel. After signals for passing port and port were exchanged between the Buffalo and the Sea King, the latter ported her helm two points, and continued on such course until she had passed, and then at once resumed her former course. *Held*, that the Sea King was in fault for failing to take proper measures to counteract the effect of the flood tide, which drifted her and her tow into the westward side of the channel, contrary to rule 25, and also in resuming her course before her tow had passed the Buffalo. *Held*, also, under the evidence, that neither the barge nor the Buffalo was in fault; that, while the latter was aware that the tow was drifting nearer her course, after the tug ported both she and the first tow drew away and passed at a safe distance, and had she continued on such course, as the Buffalo had reason to expect, the second tow would also have been drawn out of danger, and that after the danger became apparent she made all proper efforts to avoid collision.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Suit for collision.

The following is the opinion of the district court, by BROWN, District Judge:

At about 5:30 p. m. of October 1, 1898, as the three-masted coal barge Samuel E. Spring was going up the Lower Bay in tow of the tug Sea King, with the tide about two hours' flood, she came in collision below the Narrows with the steamship Buffalo outward bound, some 100 or 200 yards above black buoy No. 9, and was sunk in three or four minutes afterwards. The above libel was filed to recover for the loss of the barge and her cargo.

The Spring was the hindmost of two similar barges each about 135 feet long, forming a tandem tow in all about 1,200 feet long. Each barge was on a hawser, which at the Scotland lightship had been shortened to about 70 fathoms. The tug and tow came up through the Swash Channel, rounded within 50 or 100 feet of the bell buoy, as their witnesses say, at the exit of that channel, and took a course, according to her master, of N. x E. ½ E., going through the water at the rate of about 4 to 5 knots. When about one-quarter of a mile above the bell buoy, with the tow directly astern, a signal of one whistle was exchanged between the Sea King and the Buffalo, which was seen coming down about three-fourths of a mile or a mile distant, and a very little on the tug's port hand at the rate of about nine knots. Soon after, according to the Sea King's testimony, her wheel was gradually ported until at the time the Buffalo was abreast of her, her heading was N. E. ½ N., and the Buffalo passed her at the distance of 200 or 300 feet. The first barge, the Carleton, passed the Buffalo only a little nearer; but the Buffalo's stem struck the port quarter of the second barge abreast of the mizzen rigging at an angle of about two or three points, breaking in that part of her side and causing her, as above stated, to sink almost immediately. Each side contends that the vessels would have cleared except for a sheer which each insists was given by the other at about the time when the Buffalo was

abreast of the Carleton. The witnesses for the tug testify that the Buffalo at that time gave a rank sheer to the eastward; and several witnesses from the Buffalo say that the Spring, by a hard a-port wheel, swung her stern across the Buffalo's stem.

The greatest draft of the tug and tow was 19½ feet. They had sufficient water in any part of the buoyed channel, which was there about 2,000 feet wide. The Buffalo was an iron steamer 400 feet long, and drew 27.1 feet. She came down the usual course of deep draft vessels, in the westerly half of the buoyed channel, a little to the east of the line of the Chapel Hill range prolonged, which is much to the west of mid channel. When she signaled the Sea King, she was overtaking and a little lapping the stern of the still larger steamer Pretoria, drawing 31½ feet and about 200 feet to the westward of her and going through the water at the rate of about eight knots on a parallel course with the Buffalo. The latter, previously going about nine knots at half speed, after signaling, slowed, but still gained on the Pretoria until her bows came abreast of the Pretoria's bridge. She stopped her engines before coming abreast of the Sea King, and when abreast of the first barge reversed, but too late to avoid the Spring.

As respects the sheer described to each vessel, I am quite satisfied that no such sheer was the proper cause of the collision on either side. There is not the least probability that any sheer to the eastward was made by the Buffalo. It is testified to by the three witnesses on the Sea King alone, who were not in a position for most correct observation on this point; no such sheer was seen by the two witnesses on the Spring, who were in the best position to see it, if made; nor by the pilot of the Pretoria, who was nearest to her at the time; it is denied by all of the Buffalo's officers; there was no possible motive for such a sheer; and as the Buffalo was reversing at that time and was a right-handed propeller, any change of her heading must have been to the westward rather than to the eastward.

As respects the sheer of the Spring's stern to the westward, her two witnesses admit that her helm was put hard a-port at about the time the Buffalo was abreast of the Carleton, the barge ahead; but this would not have been material had not the barge and the steamer already come into very dangerous proximity. The tug and the Carleton were headed at that time at least two points off to the eastward of the channel course and were therefore pulling the Spring off in that direction, though that effort was soon relaxed, as hereafter explained. The port wheel in directing the stern of the Spring more to port would doubtless tend to throw her stern towards the Buffalo, while her bow would run to starboard; but the Spring's witnesses say that this set of the stern to port would be offset by the forward motion in turning off two points to the eastward; no other experts testify directly to the contrary; and although I have not sufficient data for making any exact theoretical computation not knowing the rate of rotation of a loaded barge in tow on a hawser under a port wheel, such analogies as I know forbid the conclusion that there would result any material net westward swing of the stern from a port wheel under such circumstances as here exist. The tow's heading two points to the eastward would itself and independently of any port helm carry her stern more than fifty feet to the eastward with every advance of a length; and this rate would be increased after the heading of the stem was brought more to the eastward by the port helm. This rate of drawing off is greater, I think, than any probable swing towards the Buffalo; so that although I cannot find positively on this point, I think the port wheel by the barge was probably a proper maneuver, in no way contributing to the collision.

All the witnesses, moreover, agree that the Carleton was from 150 to 200 feet distant when she passed abreast of the Buffalo, and no swing to that extent could possibly have been caused by a port wheel in advancing only about 100 yards. I have no doubt, therefore, that at least the Carleton's hawser, like the Carleton herself, was tailing two or three points towards the westward of the Buffalo's heading, as, indeed, most of the witnesses testify; so that, whether the Spring had already swung in line or not, the Buffalo's heading, when abreast of the Carleton, was very nearly directly upon the Spring. This is the positive testimony of the Spring's two wit-

nesses, and is the reason they give for their hard a-port wheel. This testimony is further confirmed by one or two passages in the testimony of McDonald, the Buffalo's pilot.

"Q. When you gave the order to stop and hard a-port where was the barge Spring? A. She was about ahead of me then.

"Q. What do you mean by ahead of you? A. I could see both sides of the Spring, her stern on one side and her bows on the other; that is, just overlapping.

"Q. Was the Spring ahead of your course? A. Yes; her bow was."

Other passages in this witness' testimony are inconsistent with this situation; and there are so many inconsistencies in his testimony that I cannot rely much upon it.

The master of the Buffalo says that the Spring, before her "sheer," was heading about on a parallel line with the Buffalo's heading; but he does not say how much, if any, to the eastward of his course the Spring was at that time. The Buffalo's witnesses in general say that the Spring, prior to her sheer, had not ported to go off to the eastward, as the tug and Carleton had done. The pilot says:

"Q. Did they keep going to port? A. They kept going to port; that is, the first barge and the towboat; not the second one.

"Q. The second one did not go? A. No, he did not go to port."

Upon this testimony of the master and pilot of the Buffalo, the situation would be such that while the Spring was heading more nearly up the channel course than the Carleton and tug were heading, her hawser would be leading about 2—3 points to the eastward of the Buffalo's course to the stern of the Carleton. This lead of the hawser would necessarily result from the Carleton's previous turn eastward, following the tug; and if the Carleton was but 170 feet distant from the Buffalo when abreast of her, the Spring's stem, 70 fathoms behind the Carleton, would be directly ahead of the Buffalo and her stern overlapping, as the pilot states. The Buffalo was heading, however, like the Pretoria (S. x W.) at one-quarter of a point to the eastward of the exact range course, which, according to the chart is S. x W. ¼ W. Her heading may have been in fact a little more than one-quarter of a point to the eastward as immediately after collision it was noticed to be S. ¾ W., i. e., half a point more to the southward, notwithstanding her prior reversing and westward sheer. Some easterly heading from the exact range course was necessary, in order to counteract the westerly set of the tide. This easterly heading, whatever it was, would increase the angle of the crossing courses, and the consequent rate of approach of the barge and steamer, even if the situation were that contended for by the steamer, as above stated; although, as I have said, the opposing witnesses testify that the Spring was tailing directly astern of the Carleton and the tug at the time when she ported.

The situation, on either contention, therefore, was in my opinion such as needs no sheer by either vessel to account for the collision. There was a westward set of the tide, which, not being sufficiently counteracted by the Sea King, had gradually set the tug and tow to the westward from the time they left the Swash Channel, two-thirds of a mile below, until the Spring had sagged over to the line of the Buffalo's course (the latter being necessarily headed a little to the eastward), and the Buffalo did not fully stop before the Sea King had pulled the barge away.

1. The Sea King is in my judgment primarily to blame for this result; because she did not keep her tow in the easterly half of the channel, as required by rule 25. The place of collision in the channel is indeed controverted; but the weight of evidence on that point seems to me clearly against the Sea King. The place of the wreck was exactly marked by triangulation, under the direction of the lighthouse board, as having Norton's Point light bearing N. E. ¾ N.; the Elm Tree beacon, N. W. ¼ N.; and Old Orchard Shoal light W. x S. ¾ S. These bearings were sworn to by Capt. Matthews, who took them. I have carefully compared them with the chart and find that they show the wreck to have been very nearly as marked on the Buffalo's Exhibit A, viz., about 400 feet east of the line connecting black buoy No. 9 with the bell buoy next above, on the west bank. The government chart with a star

added upon it, marking the place of the wreck, is not verified by any witness; and as there are no other data for placing the star than the triangulation above stated, the star can only be regarded as designed to conform to that. On trial, however, I find that the two northerly bearings from the star are erroneous by from one-eighth to three-sixteenths of a point, making the star too much to the eastward by about 400 feet. The libelant's witness Beebe, moreover, places the wreck only 150 feet easterly from the line of the Chapel Hill range course; whereas the star is from 500 to 600 feet easterly of it. That range course prolonged runs about 350 feet east of the black buoys on the westerly side of the channel; so that Beebe's location of the wreck agrees very nearly with the results of the triangulation, making it only 400 to 500 feet easterly from the line of the black buoys on the westerly side of the channel. In that position vessels of 29 feet draft could go west of it in the flood tide, as Beebe states.

The collision itself must have been but very little to the eastward of the wreck. The witnesses who speak of it say the Spring sank very near the place of collision, and within three or four minutes afterwards. It was directly astern of the Buffalo, as she drew to the southward. The Spring at collision was heading nearly N. E. and was going about 4 or 5 knots. Her stern was doubtless turned somewhat to the southward by the collision; but she could not at first have got headed much to the westward, inasmuch as she passed for 400 feet along the easterly side of the Buffalo, which must have been fully stopped before the Spring reached her stern; and when sunk the wreck headed only 1½ points west of north. An allowance of a change of 200 feet to the westward between the place of collision and the place of the wreck, would be considerably more than anything in the testimony would warrant; so that I cannot place the collision over 700 feet at most (agreeing with Wall's estimate) from the line of the black buoys on the westerly side of the channel. The whole width of the 24 feet channel from the westerly to the easterly line is about 2,000 feet. The Spring was, therefore, at least 250 or 300 feet to the westward of the extreme limit of her rightful water under rule 25.

There were no circumstances to excuse the Sea King from keeping the tow on the right-hand side of mid channel. The greatest draft of the tug and tow was 19½ feet. They had about 1,000 feet in width in the easterly half of the buoyed channel way of 24 feet depth, and a considerable additional space of available water to the eastward of over 19 feet. There were no other vessels in the way. The only explanation that can be surmised of the Sea King's course is, as above observed, that sufficient account was not taken of the westward set of the tide, proper observation employed, nor timely means to avert, the westward drift. Her witnesses say that they rounded the red bell buoy at the upper end of the Swash Channel within 50 or 100 feet of it; and if so, their westward drift was all the more noticeable in getting 1,000 feet to the westward and beyond mid channel in going about two-thirds of a mile beyond that buoy. The course which the master says he took on rounding the buoy was N. x E. ½ E. This was but a quarter of a point east of the direct course up the channel. That was perhaps enough for a tow or vessel going 8 or 10 knots through the water, but not enough for one going but 4 to 5 knots.

The master says that on signaling, he ported two points; but the wheelsman on cross-examination says that porting was not commenced until the Buffalo was within one-fourth of a mile, and was so gradually done that the tug was not headed two points to the eastward until the Buffalo was abreast of the tug; and that after she had passed the tug, he hauled again to his former course, though the master, who at that time was aft, denies this. However it occurred, this sagging to the westward was the fault of the Sea King, as she had ample means to prevent it.

2. At the porting of the Spring the Buffalo was no doubt moving at the rate of 3 or 4 knots; both were within 200 or 300 feet of the point of collision, which must have occurred within one-half minute after. The Buffalo appeared to be heading straight for the Spring. The situation had become critical; and if porting was an error, which I doubt for the reasons above stated, it was not a legal fault. The blame is in bringing about that situa-

tion. Nor do I see how porting earlier, which must have caused similar changes of position in the Spring, whatever these changes were, could have made any material difference to the Buffalo. I hold the Spring, therefore, not to blame.

3. The chief embarrassment in the case I find, as usual, as respects the alleged fault of the other vessel. All agree that fault in vessel A. does not justify vessel B. though she has the right of way, in running into A. when B. might avoid her by reasonable prudence and skill. The difficulty is in the application of this principle. Here the Buffalo was in her proper part of the channel. She had the right of way there, and she had the right to expect that the Sea King would keep her tow in her own half of the water. The Spring was in effect negligently allowed to drift under the Buffalo's bows, while the Buffalo did not in fact stop, as she might doubtless have done, in time to avoid the Spring, which had sagged in her way. It is a question of the Buffalo's notice of danger; and of what she had a reasonable right to expect that the Sea King could and would do to keep the Spring away. If there was no reasonable ground of apprehension, or if she had the right to expect that the Sea King would draw the tow away, up to the time when collision could no longer be avoided by the Buffalo, then she is not to blame. The Mary Powell, 34 C. C. A. 421, 92 Fed. 408.

There is no doubt that the Buffalo had notice of whatever danger there was, up to the time she came abreast of the tug. The tow had been plainly sagging to the westward. Instead of keeping its distance and gradually broadening off as it approached, the tow, as the Buffalo's pilot says, "kept all the time closing in on us, until the Spring was about ahead." The Buffalo had added to the danger by running up partly abreast of the Pretoria, so that she could not turn to the right or left except for a few feet. The Buffalo had, however, previously slowed for one or two minutes, turned towards the Pretoria as near as was safe, and then stopped her engines, so that the Pretoria was slowly drawing past her. The Sea King, a tug of ample power, was seen to be turning more to the eastward, and would naturally soon pull the Spring out of the way. In that situation it was the Buffalo's duty to give the Sea King reasonable time to do so by reversing as soon as it was apparently necessary. Contrary to my first impressions, I must find upon the evidence that the Buffalo did so.

All agree that the tug and first barge passed the Buffalo at a reasonable and safe distance, estimated variously at from 200 to 400 feet, giving rise to no apprehension whatever. All also agree that the distance of the first barge on passing was about the same as that of the tug, or only a little nearer. From the latter fact, which is nowhere disputed, it necessarily follows, that while the Buffalo was moving from abreast of the tug to abreast of the first barge, the latter was pulled over to the eastward nearly as much as her previous tailing to the westward; and as the Buffalo was moving forwards, this could only have been done through a more easterly sheer of the tug about that time, which agrees with the wheelsman's testimony; so that the line of the whole tug and tow was probably somewhat convex on the side of the Buffalo. The evidence on this point is not as explicit or consistent as could have been desired.

But if the tug in the interval between her and the first barge almost wholly overcame that barge's westerly tailing towards the Buffalo by her hauling to the eastward, so that the first barge was 150 or 200 feet distant on passing, the Buffalo had a right to expect that the same easterly pull would be continued by the tug, and that the Spring, which was astern of the Carleton by a similar interval, would pass at nearly the same distance as the Carleton. The time available for hauling the Spring off to the eastward was greater, since the Buffalo's forward motion, with her engines stopped, was constantly diminishing; and this additional time was in fact considerably further increased by the Buffalo's reversal when abreast of the Carleton, in consequence, it is said, of seeing the Spring port her wheel. Why the Spring was not hauled away as the Carleton had been, is explained by the wheelsman of the tug, who testifies that while the master was aft he starboarded and resumed the former course of N. x E. ½ E. after passing the Buffalo and before collision, without the master's knowledge.

"Q. How long did you carry the wheel aport, until you came back to the old course? A. Till she [the Buffalo] had just passed us. Her stern was abreast of us, thereabouts; then we starboarded, and put her on her course again * * * her old course, N. x E. ½ E. * * * The captain was aft then. He did not tell me. I knew enough for that myself. We were just about on that course at the time the collision occurred * * * steadied before collision."

Thus the tug's pull to the eastward was prematurely stopped, and the Spring's stern, which was "overlapping" to the starboard side of the Buffalo when 500 feet away, was not hauled clear, as it doubtless would have been had the tug's course two points to the eastward been continued as it ought to have been. The Buffalo could not have foreseen or anticipated this last false maneuver of the tug, and the Buffalo in no way induced this false maneuver. But for that, the Buffalo's measures would have been sufficient to avoid the Spring, and the whole blame must, therefore, rest upon the Sea King.

Decree accordingly.

Le Roy S. Gove, for the Sea King.
James E. Carpenter, for libelant.
Harrington Putnam, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Affirmed, with interest and costs, on opinion of court below.

GREAT NORTHERN RY. CO. v. BRUYERE.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)
No. 1,587.

1. RAILROADS—REMOVAL OF TRESPASSERS—PERSONAL INJURIES.
Plaintiff boarded a caboose on defendant's freight train to make inquiries from the conductor concerning his wife, having expected her on that train, and while he was still in the caboose, and waiting for the conductor, the train started. When the conductor came, he demanded that plaintiff pay his fare or get off, but refused to stop the train. Plaintiff stepped out onto the platform, and the conductor locked the door, leaving him outside, and he was thrown from the train by the sudden lurching of the caboose, after having attempted to re-enter. *Held* wrongful conduct on the part of the conductor, for which the company was liable if it was the proximate cause of the injury.

2. SAME—PROXIMATE CAUSE OF INJURY—QUESTION FOR JURY.
The question whether the wrongful conduct of the conductor was the proximate cause of the injury was for the jury.

Sanborn, Circuit Judge, dissenting.

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

W. E. Dodge (C. Wellington and C. J. Murphy, on the brief), for plaintiff in error.

James H. Bosard (R. H. Bosard, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a suit for personal injuries brought by Richard N. Bruyere, the defendant in error and the plaintiff below, against the Great Northern Railway Company, the plaintiff in error. The plaintiff below gave evidence tending to show the following facts, which, in view of the verdict below, must be regarded by this court as having been established to the satisfaction of the jury: That he resided about six miles from Larimore in North Dakota; that on the evening of August 8, 1898, he went to the station of the defendant company, in Larimore, with a view of meeting his wife, who had been at Grand Forks, and was expecting to return on defendant's freight train No. 15; that before that train arrived he heard that it had been taken possession of by a crowd of rioters, whom he termed "hoboes," at an intermediate station; that when the train arrived at Larimore he was on the platform of the station, expecting his wife, and that considerable excitement ensued, upon the arrival of the train, which attended the arrest of the rioters; that his wife did not get off the train, and, as he did not see the conductor, he went to the rear end of the train and boarded the caboose, with a view of interviewing the conductor and obtaining information concerning his wife; that, as the conductor was not in the caboose, he supposed that he was out making his report to the superintendent, and would return shortly, and that he accordingly remained in the caboose awaiting his return, and that while he was waiting the train started unexpectedly.

The plaintiff below further testified that when the train started he supposed it would stop very shortly at the coal shed to coal up, and that in the meantime he could see the conductor and inquire about his wife; that when the train reached the coal shed, which was not far from the station, it was going faster, and did not stop, and that the conductor came in about that time; that he explained to him why he was on the train, told him that he expected his wife was coming on that train, and that he was looking after her, and that he also inquired of the conductor if she had started from Grand Forks on the train; that the conductor told him that no lady had started on the train with him that night from Grand Forks, and then told the plaintiff that he must get off of the train; that at that time the train was going pretty fast, and that he told the conductor it was going too fast to get off with safety; that the conductor then said he must pay his fare; that he told the conductor there was no place he wanted to go to, and that he asked him to slack up; that the conductor replied that he would not do so, and told him he must get off; that he, the plaintiff, thereupon stepped outside of the door, to the rear platform, whereupon the conductor followed him and immediately closed the door and fastened it; that he first went to the left-hand side of the train and looked along the side thereof and could see the train bending as though going round a curve; that he then went back to the door and tried it and shook it, but that it was fastened, so that he could not get in; that he thereupon went to the right-hand side of the platform, and was going to sit down there, when the caboose lurched and threw him to the ground, injuring him seriously, where he lay unconscious until

near daylight, when he was revived by a shower and managed to get to a house which was about half a mile distant from the track. The plaintiff testified further, and in substance, on his cross-examination, that when the train started unexpectedly he intended to get off at the coal shed, where he supposed that the train would stop; that he didn't want to go anywhere as a passenger, his purpose being simply to see the conductor and obtain information about his wife; that the coal sheds were about half a mile from the station, and that when the train reached that point it was going pretty fast; that he wanted to get off there; that when the conductor demanded his fare he refused to pay it, telling him he didn't want to go anywhere; that he, in fact, wanted the conductor to stop the train; that when he went out on the platform he went there "to show the conductor that the train was going too fast for any man to get off safely"; and that the conductor followed him to the door, and, immediately after he had passed through it onto the platform, closed it and fastened it.

The trial court instructed the jury, in substance, that the plaintiff below was wrongfully upon the train, even though he boarded it for the purpose above stated; that he had no right to ride upon the train for the purpose of meeting the conductor and making inquiries about his wife; that he had no right to insist that the train should be stopped, after it had started, to let him off; and that it was his duty to have paid his fare when it was demanded and to have ridden until the train reached a regular station where he could get off. No exception could well be taken to this part of the charge by the defendant company, and none was taken. But the court proceeded to say:

"The plaintiff being wrongfully upon the train, the conductor had a perfect right, under the law, to remove him from the train, but in the exercise of that right he was charged with the duty not to unnecessarily expose the plaintiff to danger. The fact that the plaintiff was wrongfully upon the train would give the conductor no right either to injure him or expose him to danger. He, therefore, had no right to insist upon the plaintiff's leaving the train while it was in motion. His duty was either to stop the train and put the plaintiff off, if he decided that the plaintiff must leave the train, or to carry the plaintiff to the nearest station. This brings us to the issue of fact in the case upon which there is a conflict of evidence. Plaintiff says, in substance, that the conductor ordered him to leave the train, and that he stepped to the door for the purpose of pointing out that the train was going so fast that he could not leave it, and that the conductor shut the door, and locked it, thus fastening him out upon the platform. If you believe that is a true statement of the occurrence, the conduct of the conductor was wrongful, and if that wrongful conduct was the proximate cause of the plaintiff's injuries he is entitled to recover, unless he himself was guilty of contributory negligence, which I will presently explain to you more fully. Shutting the plaintiff out on the platform, if you find that he was shut out upon the platform, would be the proximate cause of plaintiff's injuries, if those injuries were the natural and probable result of that act, and such as a reasonable and prudent man would have foreseen as likely to result therefrom."

It is urged that error inheres in this portion of the charge, and the exception thereto raises the only question to be determined, namely, whether the act of the conductor in locking the door and compelling the plaintiff to ride on the platform, instead of on the inside of the

caboose, was a wrongful act, for which the defendant company can be held liable, assuming, as the lower court held, that the plaintiff was wrongfully on the train, and not entitled to the rights of a passenger.

In view of all the circumstances of the case, we entertain no doubt that the question last stated should be answered in the affirmative. It was obviously more dangerous to ride on the platform, where one standing or sitting was liable to be thrown off by the lurching of the car, than to ride on the inside. We may well take judicial notice of the fact that the platform of a car is not as safe a place to ride as the inside, because it is a common practice of railroad companies to place notices on the doors of their cars warning people not to ride on the platform because of the enhanced danger. Nor do we find any evidence in this record which furnishes a reasonable excuse for the conduct of the conductor in locking the plaintiff out on the platform and compelling him to ride there and incur the unnecessary risk of being thrown off. He had boarded the train for a laudable purpose, and it had started unexpectedly, and had not stopped at the coal sheds, where he supposed it would stop, according to the usual custom. Moreover, the car, on the inside, does not seem to have been overcrowded, and the plaintiff was making no unseemly noise or disturbance to annoy other passengers in the caboose, if there were any. The fact, therefore, that he refused to pay his fare, did not warrant the conductor in locking him out on the platform, when the train was going at such speed that the plaintiff did not dare to jump off. The conductor's action in that matter must be pronounced wrongful and wanton, in that, without any sufficient cause or excuse, he willfully exposed the plaintiff to unnecessary danger.

The charge of the lower court is further criticised because it permitted the jury to determine, as a question of fact, whether the wrongful act of the conductor in locking the plaintiff out on the platform was the proximate cause of the injury, but in view of the plaintiff's own testimony, showing his attempt to get on the inside of the car after the locking of the door, and how he happened to be thrown off by the lurching of the car, we do not well see how the lower court could have acted differently. The question of proximate cause is usually one for the jury, as it certainly was in this case. Railway Co. v. Yeargin, 48 C. C. A. 497, 109 Fed. 436, 439; Railway Co. v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256.

The question whether the plaintiff, after he was locked out on the platform, conducted himself as a prudent man should have done in his situation, or contributed to his own hurt by a want of ordinary care, was also submitted to the jury under proper instructions, and was decided adversely to the defendant company.

We find no error in the record, and the judgment below is accordingly affirmed.

SANBORN, Circuit Judge. I dissent in this case, because, in my opinion, the closing and locking of the door of a moving car against a trespasser upon the platform is not, as a matter of law, conclusive

evidence of a willful or reckless intent to injure him, and this was the legal effect of the charge of the court below. It charged the jury that the act of the conductor in closing and fastening the door was a wrongful act, and that if this act was the proximate cause of the injury the company was liable for it. This charge took from the jury the question whether or not this act evidenced a willful or reckless intent to injure the plaintiff, and prevented their consideration of this question. The plaintiff was a trespasser upon the train. The only duty of the company or of the conductor of the train to him was to abstain from wanton or reckless injury to him. Purple v. Railroad Co. (C. C. A.) 114 Fed. 123; Condran v. Railroad Co., 67 Fed. 522, 523, 14 C. C. A. 506, 508; McVeety v. Railway Co., 45 Minn. 269, 47 N. W. 809, 11 L. R. A. 174, 22 Am. St. Rep. 728; Way v. Railroad Co., 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431. In Trumbull v. Erickson, 97 Fed. 891, 893, 38 C. C. A. 536, 538, this court held that it was not, as a matter of law, conclusive evidence of even ordinary negligence for a passenger to ride upon the platform of a moving car when he could have occupied standing room within the car. If it is not conclusive evidence of ordinary negligence for one to ride upon the platform of a moving car, it cannot be conclusive evidence of a willful or reckless intent to injure a tramp or a trespasser to close the doors of the car against him when he is riding upon its platform. It may be that such an act under some circumstances would be evidence from which a jury might infer a malicious or reckless intent to injure, but I cannot persuade myself that it is conclusive evidence of such an intent, because it does not seem to me doubtful that all reasonable men would not agree that such an act indicates any willful or reckless intent on the part of the conductor who closes the door to injure the trespasser, and this is the test by which the question should be answered. Speer v. Board, 88 Fed. 749, 754, 32 C. C. A. 101, 107; Railroad Co. v. Jarvi, 53 Fed. 65, 70, 3 C. C. A. 433, 438. For this reason I think the judgment below should be reversed, and a new trial should be granted.

MEXICAN CENT. RY. CO., Limited, v. SPRAGUE.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1902.)

No. 1,072.

MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT—LAWS OF MEXICO.

The common-law doctrine as to the nonliability of employers to an employé for the negligence of a fellow servant is not in force in the republic of Mexico; and under the laws of that country a railroad company is liable for all faults or accidents which may occur through the negligence, imprudence, or want of capacity of its employés, whether the person injured be an employé or a stranger.

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

T. A. Falvey and Waters Davis, for plaintiff in error.
Millard Patterson and C. N. Buckler, for defendant in error.
Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The defendant in error, W. B. Sprague, plaintiff below, brought suit against the Mexican Central Railway Company, Limited, to recover damages for personal injuries sustained by him September 20, 1899, at or near Cardenas, republic of Mexico, while engaged in his duties as engineer and road master of the railway company, in riding on one of said company's cars which was wrecked. This case grew out of the same accident which resulted in the injury of E. S. Conway, who had a suit here on writ of error at the last term of this court. Railway Co. v. Conway, 48 C. C. A. 147, 108 Fed. 932. The issues in this case, however, are different from those in the Conway Case. In both cases the ground of recovery is upon two allegations of negligence, namely: First, the negligence of P. T. Lavelle, the engineer in charge of the engine, in running his engine recklessly; and, second, negligence in having a defective triple valve on the caboose on which plaintiff and Conway were riding. In the Conway Case it was contended that the company was negligent in retaining Lavelle in its service, he being incompetent on account of drunkenness, which incompetency was brought to the notice of defendant railway company through Lavelle's general reputation. In the present case, however, it is not contended that Lavelle was incompetent, or that the defendant had any notice of his incompetency, but it is insisted that he was negligent upon this particular occasion. In the Conway Case defendant failed to present any proof as to the condition of the triple valve on the caboose, and Conway's statement that it was out of order was not in said former case controverted. On the other hand, Conway's statement was strenuously denied in the present case, and defendant produced proof to show that the triple valve was in good condition. The proof in the present case establishes the negligence of Lavelle in the operation of his engine, but may be said to leave in doubt the question of the condition of the triple valve, upon which question the testimony was conflicting. The court upon this statement of the evidence, nevertheless, charged the jury to find a verdict for the plaintiff. In view of the conflicting evidence as to whether or not the triple valve was really defective, the action of the court in instructing to find for plaintiff is erroneous, unless defendant is liable in this suit for the negligence on the part of Lavelle.

The plaintiff, an engineer and road master of the railway company, was at the time of his injury, and while riding on the train of which Lavelle was the engineer, a fellow servant with Lavelle (see Railroad Co. v. Stuber, 48 C. C. A. 149, 108 Fed. 934; Railroad Co. v. Smith, 14 C. C. A. 509, 67 Fed. 524, 31 L. R. A. 321; Tomlinson v. Railroad Co., 38 C. C. A. 148, 97 Fed. 252); and thus the question before us, shortly stated, is whether the court below erred in holding that, under the pleadings and proof in this case and the legal presumptions applying in such cases, the common-law doctrine denying the

liability of employers to an employé for the negligence of a fellow servant is not in force in the republic of Mexico.

The plaintiff pleaded and proved the following laws from the Codes of the republic of Mexico:

"Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: The payment of all the damages caused to the injured party, to his family or to a third person, existing and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause, as a proximate and inevitable consequence."

"Art. 326. No person can be charged with civil liability upon an act or omission contrary to a penal law, unless it be proven that the party sought to be charged usurped the property of another; that without right he caused, by himself, or by means of another, damages or injuries to the plaintiff; or that, the party sought to be charged being able to avoid the damages, they were caused by a person under his authority.

"Art. 327. Whenever any of the conditions of the preceding articles are established, the defendant shall be civilly liable without regard to whether he be absolved or condemned to criminal liability."

"Art. 330. In order that masters may be held civilly liable through their clerks and servants, according to the provisions of articles 326 and 327, it is an indispensable condition that the act or omission of the clerks or servants causing the liability shall occur in the service for which they were employed.

"Art. 331. Under the condition of the preceding article, those liable are * * * railroad companies."

Transitory Law, Penal Code:

"Art. 26. Until it is determined in the new code of procedure what judges shall have jurisdiction and the mode of proceeding, in suits to enforce civil liability, the following rules shall be observed: * * * (5) Actions to enforce the civil liability may be brought before a court of civil jurisdiction, whether or not the criminal proceeding has been commenced; but while the latter is pending, the proceeding in the former shall be stayed."

"Art. 184. Companies [railway] are liable for all faults or accidents which may occur through tardiness, negligence, imprudence or want of capacity of their employés."

The following is from the statement of Lic. Andres Horcasitas, one of the judges of the supreme court of the republic of Mexico, which was introduced in evidence without objection:

"In answer to the question as to whether or not under the laws of Mexico, where two men are employed by the same employer or by the same railroad, and are engaged in the same common service, and through the negligence or carelessness of one of the men so employed the other receives an injury without any fault upon his part, the courts of the republic of Mexico hold the master or railroad company liable for such injury, I will state that, although it would not be easy to designate any sentence in which such a case has been decided, I certainly can assert that, according to the articles of the Penal Code before mentioned, the liability of the railroad company for compensation for loss and damage caused by the negligence of its employés is clearly shown, whether the injured party is a stranger to the company or whether he bears the character of an employé of the same company; as a philosophical study of the law will at once show that the liability of the company cannot be altered by the character of the injured party, unless in the case where he himself is the person to be held liable. In my opinion, there can be no doubt that articles 326, 327, 330, and 331, and others of the

same character, in the Penal Code of the Federal District, establish the liability of the railroad companies for the personal injuries that are caused through the negligence of one of their employés, and suffered by another employé of the same company, and that the same rules are laid down in the penal legislatures of the States of the Federation, which, as already, have almost all adopted the same penal code, while those which have enacted different penal laws did not make any provision on this point different to those of the Federal District."

Under our construction of these articles in the codes of Mexico, in connection with the evidence of Judge Horcasitas, the common-law doctrine as to the nonliability of employers to an employé for the negligence of a fellow servant does not exist in Mexico, but, on the contrary, railway companies in the republic of Mexico are liable for all faults or accidents growing out of the negligence, imprudence, or want of capacity of their employés, and the employé of a railroad corporation does not assume as one of the risks of his employment the negligence of his co-employé to the exclusion of the employer's liability.

This construction of the laws of Mexico proved in this case is supported by the fact that in the republic of Mexico the common law never did prevail, but the prevailing system was that of the civil law, under which, as we understand, the fellow-servant doctrine as known in the common law never was recognized. This construction is also supported by the following: Railroad Co. v. McDuffey, 25 C. C. A. 247, 79 Fed. 934; Railway Co. v. Robinson, 14 Can. Sup. Ct. 105; Barksdale v. City of Laurens (S. C.) 36 S. E. 661; Pol. Torts, 85.

Entertaining these views, we find no error in the record of this case warranting a reversal of the same, and the judgment of the circuit court is therefore affirmed.

CITY OF ELIZABETH v. FITZGERALD.

(Circuit Court of Appeals, Third Circuit. February 26, 1902.)

No. 25.

1. TRIAL—SPECIAL SUBMISSIONS TO JURY—POWER OF COURT.
   A circuit court has power in a proper case to make a special submission of questions of fact to the jury as a preliminary to the general submission of the case or the direction of a verdict.
2. SAME—QUESTION FOR JURY.
   The questions whether a contractor with a city had performed the work in substantial compliance with the contract, and whether the refusal of the city's officers to certify that it had been so done, and to approve the same, was unreasonable, are questions of fact, and, where material, and the evidence is conflicting, are proper questions for submission to a jury.
3. CONTRACTS—RIGHT OF RECOVERY—SUBSTANTIAL PERFORMANCE.
   A substantial performance of a contract is sufficient to entitle the party so performing to recover thereon.
4. SAME—ARBITRARY OR UNREASONABLE REFUSAL TO APPROVE WORK.
   A provision of a contract to perform work for a city requiring the contractor to obtain the certificate of the city engineer that the work

has been done in accordance with the contract, and the approval of such work by certain boards or committees before he is entitled to payment therefor, does not deprive him of the right to recover for the work, where it has been done in substantial conformity to the contract, because the city's officers arbitrarily or unreasonably refuse the certificate and approval called for.[1]

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

James C. Connolly, for plaintiff in error.

Henry B. Twombly, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

DALLAS, Circuit Judge. Michael Fitzgerald, the defendant in error, brought an action against the city of Elizabeth, the plaintiff in error, to recover for work done by him under a contract for paving one of the streets of that city. It was defended upon the ground that the work had not been done in accordance with the contract, nor certified, approved and accepted in conformity with its terms; and upon its appearing that a portion of it did not literally and exactly conform to the specifications, and that the certificates, approval and acceptance referred to had in fact been withheld, the court was asked to direct a verdict for the defendant. Instead of doing this, the learned judge submitted to the jury the following questions:

"First. Did the plaintiff do the work of paving South Park street substantially according to his contract and specifications? Second. (a) The city surveyor having refused to certify that the work had been done in accordance with the contract and specifications, was that certificate unreasonably refused? (b) The committee on streets and parks, as well as the street commissioner and the inspector, having severally refused to approve and accept the plaintiff's work, was that approval unreasonably refused?"

Each of these questions was affirmatively answered, and thereupon the jury was instructed to render a general verdict for the plaintiff in such sum as, upon the evidence, might appear to be due to him; and this it accordingly did. This mode of procedure, though exceptional, was by no means unprecedented, and it was, we think, properly resorted to in this instance. By the answers of the jury to the specific interrogatories propounded, the questions of fact which the court deemed material were distinctly resolved; and by the "general verdict" the damages to which (if to any sum) the plaintiff was entitled were duly assessed. We are therefore to decide: (1) Whether the questions submitted were, if material, properly for determination by the jury; and, if they were, then (2) whether a substantial performance of the contract on the plaintiff's part was sufficient to support his right of action thereon; and (3) whether, if it was, an unreasonable refusal to certify, approve and accept his work precluded him from recovery.

1. The first of these points presents no difficulty. Whether the plaintiff's work had been done substantially according to the contract,

[1] See Contracts, vol. 11, Cent. Dig. §§ 1308 [i, ll, n, vvv, w], 1310; 1897 Dig. § 113 [j]; 1898 Dig. § 126 [d]; 1899B Dig. § 159 [d]; 1900A Dig. § 150 [b]; 1901A Dig. § 111 [e].

and whether the refusals of the city's officers to certify that it had been so done, and to approve and accept it, were unreasonable, were questions of fact; and, as the evidence respecting them was conflicting, the court was unquestionably right in referring them (their relevancy being assumed) to the jury for determination. The extent to which the work done was not in exact conformity with the specifications was itself a subject of controversy. It was not conclusively shown, on the one hand, that the variances were so trivial as to warrant a binding ruling that they were unsubstantial, or, on the other hand, that they were so obviously important as to require the court to charge that they must be regarded as substantial. Therefore the question of substantial performance, if legally pertinent, was necessarily for the jury; and that the reasonableness of the refusals to certify and approve, if at all open to inquiry, was for decision by it, and not by the court, is, upon familiar principles, indubitable.

2. The jury having found that the plaintiff did his work substantially according to the contract, a sufficient compliance therewith on his part was competently ascertained. "The rule is that a substantial performance must be established to entitle the party claiming the benefit to recover, but this does not mean a literal compliance as to all details." Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486, 56 N. E. 995; McCartan v. Inhabitants of Trenton, 57 N. J. Eq. 571, 41 Atl. 830. "Whether * * * alleged defects are substantial or unimportant is a question of fact for the jury. Substantial performance of the entire contract is sufficient, and the jury may properly so find." Pitcairn v. Philip Hiss Co., 113 Fed. 493.

3. The second question propounded to the jury correctly assumed that the contract provided for certification of the work by the city surveyor, and for its approval and acceptance by the committee on streets and parks as well as by the street commissioner and the inspector, and also that such certification, approval and acceptance had been severally refused; so that the only question submitted was, were they unreasonably refused? We have already said that this question, if legally pertinent, was properly referred to the jury, and we now add that, in our opinion, it was a material and important question in the cause. As was said by the learned trial judge, the plaintiff could not, by unreasonable refusals to certify and approve his work, "be deprived of the fruits of his labor." The jury was not left without guidance as to what would constitute an unreasonable refusal. Upon that subject the court said to them:

"Some courts have gone so far as to say that, where a man had substantially, in good faith, complied with the contract, and a certificate was distinctly refused him, without any reason given, or without any reason existing, then that would be unreasonable, and the certificate could be dispensed with. But what have we here? Do you consider that these men are acting whimsically; that they are not acting with good judgment; and, because they honestly believe, and have reason to believe, that this work has not been done according to the contract and specification, that it is not a good job? They tell you what they have seen there, and what defects there are in it; and certainly, if what they say is true, they are far from acting unreasonably in the matter. And as a part of what you can judge as to whether they are acting unreasonably is their very appearance here,

and the way in which they gave their testimony, and all that has occurred about these meetings, with the parties to it, and what has passed back and forth between them."

Hence it must be understood that, by answering the second question affirmatively, the jury found that the officers of the city, in refusing the certification and approval in question, had acted, not upon honest belief that the work had not been done according to the contract, but whimsically, and without cause; and surely such conduct may, without exaggeration, be characterized as unreasonable. Had, then, the defendant's officers the right to arbitrarily refuse the certificates and approval called for by the contract? Both in reason and upon authority it is clear that they had not. "When the consideration furnished is of such a nature that its value will be lost to the plaintiff, either wholly or in great part, unless paid for, a just hesitation must be felt, and clear language required, before deciding that payment is left to the will, or even to the idiosyncrasies, of the interested party. In doubtful cases courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant." Hawkins v. Graham, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; Welch v. Woodworking Co., 61 N. J. Law, 57, 38 Atl. 824; Elevator Co. v. Clark, 26 C. C. A. 100, 80 Fed. 705; Mitchell v. Dougherty, 33 C. C. A. 205, 90 Fed. 639.

All of the 12 specifications, except the eleventh, have been covered by what has been said, and that one is without merit. The only specific objection which was made upon the trial to the admission of the certificates, which it is now contended should have been excluded, was that they were "objected to until the execution of the same has been proven." Thereupon the required proof was made, and then followed a general objection, the ground of which was not stated, but which, from the argument in this court, appears to be that there was not "proper proof of their having been executed or properly filed." As we have said, the proof of execution demanded by the objection as first made was in fact supplied, and we would not be disposed to hold that the court erred in failing to observe, without having its attention directed to the matter, that they had not been shown to have been also "properly filed," even if there had been no evidence that they had been. But inspection of the record has satisfied us that the proof of filing, as well as of the execution of the papers, was amply sufficient to warrant their reception in evidence; and therefore, apart from the consideration just suggested, the eleventh specification of error cannot be sustained.

The judgment of the circuit court is affirmed.

In re CELESTINE.

(District Court, D. Washington, N. D. March 25, 1902.)

1. FEDERAL COURTS—JURISDICTION—SUITS BY INDIANS.
The circuit and district courts of the United States have no jurisdiction except such as congress has given them by law, and there is no law conferring jurisdiction upon either of a suit merely because an Indian, who is a ward of the government, is a party, or his personal rights are involved.

2. SAME—AUTHORITY OF INDIAN AGENT TO SUE.
There is no statute authorizing an Indian agent to sue for the benefit or protection of the Indians under his charge, so as to bring such a suit within the provision of Rev. St. § 563, which gives the district court jurisdiction "of all suits at common law brought by the United States, or by any officer thereof authorized by law to sue." On the contrary, it is the right and duty of the government itself to maintain such suits as are necessary to protect the rights of tribal Indians.

3. HABEAS CORPUS—PARTIES—SUBSTITUTION OF UNITED STATES AS PETITIONER.
A district court will not make an order permitting the United States to be substituted as petitioner for a writ of habeas corpus in a proceeding of which, as instituted, the court is without jurisdiction, at least unless such anomalous action is shown to be necessary to prevent a failure of justice.

4. INDIANS—STATUS OF ALLOTTEE OF LANDS IN SEVERALTY.
An Indian born within the United States, to whom an allotment of land in severalty has been made pursuant to law, becomes, under Act Feb. 8, 1887 (1 Supp. Rev. St. [2d Ed.] p. 536), a citizen of the United States, with all the rights, privileges, and immunities of such, among which is the right to sue in any proper forum, federal or state, and thereafter the government is relieved from the duty of representing him in suits involving his personal or domestic rights.

Application by Josie Celestine for a writ of habeas corpus. On return challenging the jurisdiction of the court.

E. E. Cushman, Asst. U. S. Atty., for petitioners.
Richard Osborne, for respondents.

HANFORD, District Judge. Upon the petition of Mrs. Josie Celestine, an Indian woman residing on the Tulalip Indian reservation, and Dr. Buchanan, United States Indian agent in charge of said reservation, this court granted a writ of habeas corpus against George Sidwall and his wife, who are Indians residing near Seattle, and not upon an Indian reservation, for the purpose of inquiring into the cause of the alleged detention of Annie George, an infant child of the petitioner, Mrs. Josie Celestine. The object of the proceeding is to restore to Mrs. Celestine the custody and control of her child. By their return to the writ, the respondents admit the parentage of the child, admit that she has been in their care since the death of her father, and admit that they have refused to give up the child to her mother; but they urge that they have become attached to the child, and that they are willing and anxious to keep and provide for her as their own child, which they are able to do. They also deny the jurisdiction of the court to interfere in the matter.

The question of jurisdiction is serious, and must be decided before the court can give consideration to the merits of the controversy.

The case was instituted and has been conducted by the United States district attorney upon the theory that the Indians are wards of the national government, that congress has plenary power to make laws for their protection and affecting their rights, that the executive department of the government exercises authority over the Indians, and that the federal courts should hear their complaints and adjudicate questions affecting their rights. This theory has a plausible sound, but it is erroneous in assuming that the courts may exercise jurisdiction in cases properly cognizable therein on that ground alone. Congress has power to define the jurisdiction of the courts inferior to the supreme court, and from the beginning the rule has been steadily adhered to that these courts have no jurisdiction except that which congress has conferred by law. Authority is given by law to this court to issue writs of habeas corpus, but this authority can only be exercised in cases of which the court has jurisdiction. In re Burrus, 136 U. S. 586, 10 Sup. Ct. 850, 34 L. Ed. 1500. The right to invoke the jurisdiction of the federal courts has not been given to the Indians, nor is jurisdiction given to the courts to adjudicate questions with respect to the domestic relations of the Indians or other people. The general jurisdiction of the district court is conferred and defined by the acts of congress now included in section 563, Rev. St., and in the enumeration of the powers therein conferred the nearest approach to this case is in the fourth subdivision, by which jurisdiction is given "of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue."

Therefore our inquiry is narrowed down to the question whether an Indian agent of the United States is authorized by law to sue for the benefit or protection of Indians, and my attention has not been directed to any statute giving to such officer any such authority. On the contrary, it has been decided in several cases that it is the right and duty of the government itself to maintain such suits as may be necessary for the protection of the rights of the Indians. 16 Am. & Eng. Enc. Law (2d Ed.) 226; U. S. v. Boyd (C. C.) 68 Fed. 577; U. S. v. Flournoy Live Stock Co. (C. C.) 69 Fed. 886; Id., 71 Fed. 576; U. S. v. Winans (C. C.) 73 Fed. 72. The reasons above given lead me to the conclusion that whilst the government may, in performance of the paternal functions which it has assumed with respect to Indians who are neither aliens nor citizens, maintain suits and actions in any form when necessary for their protection, Indian agents cannot of their own volition assume like authority. They must show authority conferred by law, or else this court cannot take jurisdiction. Congress can confer the necessary authority upon those officers, but it has not done so, and therefore this court does not have jurisdiction of this case.

The district attorney, in behalf of the United States, has asked for leave to intervene and carry the case through as if the government had appeared as a party of record at the commencement of the case, but it would be an irregular proceeding for a new party to intervene in a case of which the court has no jurisdiction. I believe that there is no precedent for a proceeding so extraordinary as this would become if the national government should now appear in the role of a petitioner for a writ of habeas corpus. I am not prepared to say that the gov-

ernment cannot do such a thing if it should be necessary in any case in order to prevent a failure of justice, but it is not necessary in this instance. I say that it is not necessary, because the evidence shows that the mother of this child is now married to an Indian to whom an allotment of land has been made pursuant to a law of the United States, and, being a Tulalip Indian, I have a right to infer that he was born within the United States. Such an Indian is a citizen of the United States, and entitled to all the rights, privileges, and immunities of other citizens, including the right to sue in the proper forum. Congress has relieved the government of responsibility in such cases as this by conferring the rights of citizenship upon Indians to whom allotments of land have been made. 1 Supp. Rev. St. (2d Ed.) p. 536; U. S. v. Kopp (D. C.) 110 Fed. 160. Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the supreme court, in an opinion written by Mr. Justice Bradley, has said:

"When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected." Civil Rights Cases, 109 U. S. 25, 3 Sup. Ct. 31, 27 L. Ed. 844.

In view of their status as citizens, I consider that the mother and stepfather of this child should be permitted to seek an adjudication of their controversy with respect to her in the state court which has jurisdiction of such causes.

A judgment of dismissal for want of jurisdiction will be entered.

MARTIN v. BERWIND-WHITE COAL MIN. CO.

(Circuit Court, D. Pennsylvania. March 21, 1902.)

DAMAGES—BREACH OF CONTRACT—STIPULATED DAMAGES IN COAL LEASE.

A coal lease provided that the lessee should mine not less than a stated number of tons per year during the term, and should pay royalty on such number of tons, whether mined or not. *Held*, that such provision was one for liquidated damages in case of nonperformance by the lessee in whole or in part, and not for a penalty, and that, where he abandoned the lease before the end of the term without good cause, he was liable for damages in the sum so stipulated, without regard to the value to the lessor of the coal remaining in place.

At Law. Trial to the court.

R. M. Schick and Austin O. Furst, for plaintiff.

David L. Krebs, for defendant.

J. B. McPHERSON, District Judge. By agreement of the parties, this suit was tried before the court without a jury, and it now becomes my duty to state the conclusions of fact to which I have

been brought by a consideration of the evidence. The action is brought to recover damages for the breach of a mining contract, by which the plaintiff leased to the defendant a seam of coal under a tract of land in the county of Cambria, state of Pennsylvania, with the right to mine, transport, and sell, and the defendant agreed to mine and ship not less than 75,000 tons annually after the first year, and to pay a royalty of 10 cents for each ton of this quantity, whether mined or not, and for each ton mined and shipped in excess of such quantity. The contract was to run for 10 years from January 5, 1891, and this period had expired when the suit was begun. The defendant began to mine the coal, but in a few months reached a part of the seam in which the coal was so inferior in quality as to be unmarketable. The opening was driven into this material for some distance, and the defendant then ceased to mine. Thereupon the plaintiff, with the defendant's consent, drove the mine still further, in order to determine whether the trouble was merely local, and, after some months of work, passed through this inferior section of the seam, and came to marketable coal. Nevertheless the defendant refused to go on with the operation, and did nothing more during the term of the lease. The plaintiff's claim is for the sum of $7,500 a year, being the royalty of 10 cents upon the minimum quantity that the defendant had agreed to take out during the last nine years of the lease.

Two defenses are set up, each raising a question of fact. The first is that the seam contained nothing that could be properly called coal,—nothing but an unmerchantable compound of slate, sulphur, clay, and coal,—and therefore that the consideration for the lease had wholly failed. To this the plaintiff replied, that, while it is true that unmerchantable coal rendered the seam valueless for a short distance, he had opened the mine beyond that section, and had come upon good coal, fit for the market, which the defendant nevertheless refused to take out. The second defense is that possession of the leased premises was surrendered by the defendant and accepted by the plaintiff, and that the contract was thus brought to an end. The plaintiff declared this defense to be unfounded, and both parties have offered evidence in support of their respective contentions. I have examined with care the evidence concerning both defenses, and am clearly of opinion that the weight of the evidence is with the plaintiff upon both. I shall not discuss the testimony, nor find the facts specially, believing such a course to be unnecessary, but I shall confine myself to the general finding that upon the whole case the plaintiff is entitled to a verdict.

The remaining question is, what is the measure of damages? Upon this point I regard the following clauses in the lease as controlling:

"And the said lessee covenants and agrees to mine and ship from the premises aforesaid not less than 75,000 gross tons of coal per year (after the first year of this lease), and to pay royalty on 75,000 gross tons per year, whether mined or not, and as much more as is practicable, unless prevented by strikes, riots, or any other unforeseen calamity, or by fire or water, or by troubles or faults in the coal seams. And the said lessee agrees to pay to the said lessor a royalty of ten cents per gross ton on all said coal

mined and shipped. Settlements to be made for said royalty on or before the 20th day of each and every month during the continuance of this lease for each and every ton of coal, of 2,240 lbs., mined and taken away from the said premises during the preceding month.

"And it is further understood and agreed between the parties hereto that all royalties which may be paid upon any coal not mined or taken away from said premises during any current year shall be credited upon any coal mined and taken away in excess of the minimum herein provided for in any future or past years."

The defendant contends that the sum thus provided for is not liquidated damages, but a mere penalty, and that, if the plaintiff is entitled to recover at all, he must make an allowance for the present value of the coal that is still in place, and therefore remains at the plaintiff's command. If this position is sound, it follows that, as the royalty now paid in that region is as large as the royalty reserved by the lease, the defendant's breach of contract has entailed a very limited liability. The case of Lyon v. Miller, 24 Pa. 392, is cited in support of this contention. The facts there, however, were very different from the facts now before the court. No minimum quantity was provided for, but the lessee simply undertook to mine coal from the lessor's land, and to pay a certain sum for every bushel mined during the year. Upon the breach of that contract it was held (and, no doubt, properly held) that, in computing the amount of damage that the lessor had suffered, the value of the coal still in his land must be taken into account, and that the measure of damage was the difference between the stipulated rate of compensation and the value of the coal in the mine. This case is referred to with approval in a dictum of Judge Thayer, of the common pleas of Philadelphia county, who tried the comparatively recent case of Kille v. Iron Works, 141 Pa. 451, 21 Atl. 666; but it is distinctly stated by the learned trial judge that the contract then before him contained "no language which by any ingenuity can be tortured into an agreement for liquidated damages." In the case now being considered, however, the parties have stipulated upon the minimum sum to be paid each year for the right to mine; and this sum is, in my opinion, so clearly and distinctly liquidated damages, and not a penalty, that I shall not take time to discuss it. It is, I think, an annual rent, distinctly agreed upon, and must be paid, if, as I have found, the coal is merchantable, although no coal is actually mined. I am unable to distinguish the case from Powell v. Burroughs, 54 Pa. 329, in which the supreme court of Pennsylvania, while considering a similar agreement, used the following language:

"The tenth and eleventh assignments may be considered together. The one is an amplification of the other, or, rather, the latter is an explanation of the former, and is 'that, if the jury believe that the coal in the mine was worth a greater rent at the termination of the defendant's lease than the defendant stipulated to pay, then there can be no recovery beyond nominal damages.'

"Had this instruction been granted, it would have directly sustained the defendant's tenth plea. We are therefore to determine whether it was error to refuse it or not.

"It can hardly be said that this plea was a ground of defense at law for a breach of the covenants sued on. It does not aver performance in any

shape, nor does it show that it was contrary to law that it should be performed. If it be a plea at all, it is an equitable plea or defense. It says to the plaintiff: 'True it is, I entered into the covenants for the breach of which I am sued, and did commit the breaches charged, but it was better for you that I did. You now get more for your coal than I agreed to give you. You are therefore entitled to nominal damages only.' Such equity, it is apparent, rests not on any merit in the party claiming it, but arises exclusively in his bad faith in not regarding his covenants. There is no such principle in equity as this. If sanctioned, it would be a panacea to heal every broken covenant where performance was stipulated for. The defendant had three alternatives, either of two of which would have relieved him from all damages, namely, the performance of his covenants as they were written, or showing that they were dispensed with by some inability to perform provided against in the lease; the third, to terminate the lease at the end of any year, on giving the notice required, and this would have released him from liability for any breach but for the past year. He chose to do neither, and now claims to show that he has done better for the plaintiffs by keeping their coal in place for a higher price. This policy, if taken in time and extended, might have covered the entire coal region, and but a single mine might have been worked. Competition thus set at defiance would undoubtedly be profitable to such a lessee, if, when called on to answer in damages to other lessors for broken covenants, he might successfully defend himself by showing that there were parties who had given or were willing to give higher prices for the unmined coal than he had contracted to give. If he could do this, he might be fairly entitled to stand acquitted of damages, and to have the credit of a discovery.

"The defendant covenanted to take out of the Burroughs mine, leased in 1862, without any reference to any other mine or lease, so many tons per year, while the term lasted, and, on failure to take them out, to pay for the stipulated number taken or not taken. The number of tons to be taken or paid for was the moving consideration for the lease, and must be so regarded. It was therefore a clear case of stipulated damages in case of nonperformance, or nonperformance pro tanto. The parties fixed it as the true measure of damages in case of failure, 'without reference to the extent of the injury that might ensue by nonperformance,' and, so far as the covenant is concerned, are bound by it. The uncertainty as to the extent of the injury which may ensue is a criterion by which to determine whether it is a case of liquidated damages or a penalty. Chit. Cont. 763, 766."

See, also, Coal Co. v. Schultz, 71 Pa. 180.

The statute of limitations was not set up as a partial defense, and I express no opinion, therefore, concerning its applicability: Heath v. Page, 48 Pa. 130; Peck v. Whitaker, 103 Pa. 297. It follows that the plaintiff is entitled to recover the annual sum of $7,500 for each of the last nine years of the lease, with interest from the end of the respective years to December 11, 1901, the day when the trial was concluded,—a total of $87,525,—less a credit of $938.66 which the plaintiff concedes to be due from him to the defendant.

I therefore find in favor of the plaintiff for the sum of $86,586.34.

CHICAGO UNION TRACTION CO. v. STATE BOARD OF EQUALIZATION et al. CHICAGO CONSOL. TRACTION CO. v. SAME.

(Circuit Court, S. D. Illinois. April 4, 1902.)

SOUTH CHICAGO CITY RY. CO. v. BAIRD, et al., County Collectors. CHICAGO EDISON CO. v. RAYMOND et al., County Collectors. CHICAGO CITY RY. CO. v. SAME. PEOPLE'S GAS LIGHT & COKE CO. v. SAME. CHICAGO TEL. CO. v. SAME.

(Circuit Court, N. D. Illinois, N. D. April 4, 1902.)

1. TAXATION—ASSESSMENT—CORPORATIONS—VALUATION OF CAPITAL STOCK—METHOD OF ASCERTAINMENT.

The value of the capital stock of a corporation and its franchise for the purpose of taxation is determined by ascertaining the true net earnings, which is the gross earnings reduced by the annual expenditures, increased debts, and the current depreciation in its tangible property, and by capitalizing such net earnings at the ratio of 6 per cent., and equalized to the assessment of the other property of the state.

2. SAME—STATE BOARD OF EQUALIZATION—ASSESSMENT OF CAPITAL STOCK—EQUALIZATION.

Const. Ill. art. 9, § 1, which provides that the value of the taxable property shall be ascertained by persons elected or appointed as directed by law, and which confers upon the general assembly the power to tax corporations owning or using franchises, with the limitation that the tax shall be uniform as to the class on which it operates; and Hurd's Rev. St. 1899, c. 120, §§ 3, 4, which require that real property shall be valued at its fair cash value, and that personalty, except as otherwise provided, shall be valued at its fair cash value, and which direct that the state board of equalization shall determine the fair cash value of the capital stock of corporations,—establish uniformity in taxation, and make the state board of equalization the original body to assess corporate capital stock, as well as the body which must equalize the assessment of all property, including such capital stock.

3. SAME—REASSESSMENT FOR 1900—RESULT OF FICTITIOUS JUDGMENT—WRONG METHOD—RIGHTS OF PARTIES ASSESSED.

The Illinois state board of equalization, pursuant to the mandate of the state courts, reassessed the capital stock of certain corporations and their franchises for the year 1900. Such reassessments were from 30 to 47 per cent. higher than the assessments for 1901. The board endeavored to approximate the aggregate indebtedness of the corporations and their capital stock as measured by the stock market quotations for April 1, 1900. The reassessments, if made upon the basis of a capitalization of the net earnings by 6 per cent., would approximate the assessments for the year 1901. *Held*, that the reassessments did not express the result of the board's independent quasi judicial judgment, but were in fact fictitious, involving mistake, fraud, or coercion, threatening to deprive the corporations of their property without due process of law and of the equal protection of the law, entitling such corporations to equitable relief.

4. SAME—EQUITABLE RELIEF—INJUNCTION.

Equity will enjoin the collection of the taxes levied on such assessments, for the constitutional guaranties that one shall not be deprived of his property without due process of law, and shall be entitled to the equal protection of the laws, does not merely authorize a suit for the recovery of the payment of the illegal taxes.

5. SAME—CONDITION OF GRANTING INJUNCTION—PAYMENT OF TAXES LEVIED ON A PROPER ASSESSMENT.

Since the issuance of an injunction is a matter of discretion and right, the court will require that the corporations shall pay the taxes for the year 1900 on the basis of their net earnings capitalized at a ratio of 6

per cent. and equalized by the reduction of 30 per cent., and then divided by 5, as a condition precedent for the granting of the injunction restraining the collection of the taxes levied on the state board's reassessments for the year 1900.

John S. Miller, J. P. Wilson, E. R. Bliss, Holt, Wheeler & Sidley, Sears, Meagher & Whitney, W. W. Gurley, Henry Crawford, and W. R. Crawford, for complainants.

Frank L. Shepard, Edwin W. Sims, and Wm. F. Struckman, for defendant S. B. Raymond, county collector, etc.

H. J. Hamlin, Atty. Gen., and E. S. Smith, Asst. Atty. Gen., for defendant state board of equalization.

Charles M. Walker, Corp. Counsel, and Henry Scholfield, Asst. Corp. Counsel, for defendant city of Chicago.

Before GROSSCUP, Circuit Judge, and HUMPHREY, District Judge.

GROSSCUP, Circuit Judge. The complainants are utility corporations organized under the laws of Illinois, and operating in Cook county, Illinois. The defendants are the County Treasurer of Cook county, the local Town Collectors, and, in the first two cases, the State Board of Equalization. There exists in none of the cases, therefore, the diversity of citizenship that confers jurisdiction on the Federal court.

The substance of the bill in each case is as follows:

That at the annual meeting of the State Board of Equalization for 1900, the capital stock of the complainant corporations, including their franchises, was assessed according to law; that on the basis of such assessments the taxes for the year 1900 were paid; that, subsequently, upon the relation of certain citizens of Illinois, mandamus proceedings were instituted in the Circuit Court for Sangamon County against the State Board of Equalization, charging that the board had, in respect of these assessments, illegally neglected and refused to discharge its duty, in that such assessments fell far below the real value of capital stock of the complainant companies; that on or about the first day of May, 1901, final judgment was rendered in said cause, directing a writ of mandamus to issue against the members of the State Board, requiring it to convene forthwith to reassess such capital stock, including the franchises, at their fair cash value, as of the first of April, 1900, "arriving at such valuation from the best information obtainable, taking into consideration, among other things, the market value of the shares of stock of each corporation and the total amount of its indebtedness, except for current expenses." Upon appeal to the Supreme Court of Illinois this decree was affirmed. 61 N. E. 339. But in neither the Circuit Court nor the Supreme Court were the complainant corporations parties to the suit.

In pursuance of this mandate, the State Board of Equalization for the year 1901, successor in office to the board of 1900, but largely changed in individual membership, at its regular meeting for the year 1901 purported to re-assess the capital stock, including franchises, of the complainant corporations; and it is to restrain the

collection of additional taxes on the basis of these re-assessments that these suits are brought.

In substance, it is averred that such re-assessments, if enforced, would deprive the complainant corporations of their property without due process of law, and deny to the complainant corporations the equal protection of the laws. Upon these provisions of the Constitution of the United States the jurisdiction of the Federal courts is predicated—the contention being that the cases arise, within the meaning of the Judiciary Act, under the Constitution and laws of the United States.

Upon a previous motion, in the traction company cases pending in the Southern District (112 Fed. 607), we held that stock market quotations, though significant indicia of the value of capital stock, are not the absolute, ultimate measure of such value; that the real purpose of the Illinois statute is to reach capital stock subject to taxation, in accordance, not with the stock market quotation upon segregated shares of stock upon a single day in the year, but according to its stable value as an entirety; that such was the real purpose and judgment of the Supreme Court of the State in the mandamus case; whence, it followed, that the said board, itself an independent tribunal, was not shorn by the decision of the State Court of its right and duty, upon its own judgment, to ascertain the real value of the property to be assessed.

The fundamental question of fact involved in the present hearing in each of these cases is this: Did the State Board of Equalization, without fraud or mistake, and free from coercion, exercise its judgment in the making of the re-assessments complained of? In solving this question we have looked into, not only the re-assessments complained of, but also the assessments for the year 1901. A comparison between these records of the State Board is significant. In the case of the Chicago Union Traction Company, the assessment for the year 1901—capital stock and tangible property aggregated—falls from a little over fourteen millions of dollars (the re-assessment for 1900) to about eight millions, two hundred and fifty thousand dollars—a loss of about forty per cent.

In the case of the Chicago Consolidated Traction Company, the depreciation is from a little over three millions, seven hundred and fifty thousand dollars to about two millions of dollars, or about forty-seven per cent.

In the case of the People's Gas Company, the depreciation is from over twelve millions and a half to about eight millions and a half, or about thirty-two per cent.

In the case of the Chicago City Railway, the depreciation is from a little over six millions to a little over four millions and a quarter, or about thirty per cent.

In the case of the Chicago Telephone Company, the depreciation is from a little less than two millions, six hundred thousand dollars to a little over one million, seven hundred thousand dollars, or about thirty-four and one-half per cent.

In the case of the Chicago Edison Company, the depreciation is from a little over two millions, four hundred thousand dollars, to a

little over one million, three hundred thousand dollars, or about forty-six per cent.

In the case of the South Chicago City Railway, the depreciation is from nearly five hundred seventy thousand dollars to a little less than three hundred thousand dollars, or about forty-seven per cent.

These assessments, so widely divergent, were upon the same properties, by the same board, entered almost on the same day. The dates as of which they spoke were, it is true, a year apart; the one being of the first of April, 1900, the other of the first of April, 1901. But the tide of stock quotations, and the tide of current values, were higher on the latter day than the former. If, between these two assessments, a considerable disparity should exist, the increase ought to be found in the assessment for 1901, and not in that for 1900.

We can comprehend a possible state of facts showing that neither of these assessments embodied the real judgment of the State Board. We can comprehend, also, a state of facts showing that either one or the other may have embodied the board's real judgment. But both can not be vindicated. In the very nature of things, one or the other has been made up under some species of fraud, mistake or coercion; and a few pregnant circumstances convince us that whatever may be said of the assessment for 1901, the re-assessment for 1900 can not be accepted as the independent judgment of the State Board.

One of these is this: The re-assessment of each of the complainant corporations for 1900 is a close approximation to the aggregate of its indebtedness and its stock value, as measured by the stock market quotations for April 1, 1900. The board seems to have adopted as its own standard in the making of these re-assessments the stock exchange record of that one day of the three hundred and sixty-five, and to have restricted its function to the mere arithmetic of adding up the figures of that day's record. In so doing the board followed, possibly, the interpretation put upon the mandate by the State circuit judge; or, the board may, in the exercise of its own judgment, have so interpreted the mandate; or, it may have felt that, under all the circumstances, an assessment according to that standard was the safer course for the members personally. But, on either supposition, the significance of the fact is not lessened. It goes far toward convincing us that the objective of the board was not the real value of the properties as entireties, but simply what the stock market for one day indicated the value to have been.

What was the real value, in fact, of the property re-assessed? A determination, approximately, of this fact will aid materially in determining whether the board, in the adoption of the standard referred to, exercised its real judgment as an independent tribunal in search of the value of the stock as an entirety. To arrive at such value we have looked into the earnings of the several complainants for the year 1900. The disclosures are made from the books of the company kept for the information of the stockholders. They seem to have been kept with no reference, prospectively, to tax valuations. In the absence of better data, we feel justified in accepting them for the purposes of this motion—subject, of course, to any inquiry that may

affect their accuracy. Except in the case of the Union Traction Company, it is not shown whether the net earnings thus reported have made allowance for current depreciation in the tangible property. In the case of the Union Traction Company, by our direction, an annual reduction, equal to six per cent of the current value of cars, tracks and machinery has been allowed. This is not, in our judgment, an excessive allowance. Railway companies make such reduction each year on the book value of their cars; and it is the rate for depreciation adopted by the Tax Commissions of some of the States.

Nor do the net earnings reported take into account the increase of tax for the year 1900, occasioned by the re-assessments as they may be finally modified. It is only fair that the earnings should be reduced by such increase—itself an omitted fixed expenditure—before they are used as the basis for capitalization.

Several other elements in a fair calculation, based on net earnings, have raised questions to which we have given careful consideration. The first of these is upon what rate of the true net earnings the aggregate value of the property should be capitalized. We have fixed the rate at six per cent. That is the rate adopted in states where assessments are made upon the basis of net earnings. It is less than the rate that some advanced advocates of municipal ownership are willing to guarantee to investors in securities of this character. The rate adopted, is, we think, justified by the considerations that usually attend the real investors' purchase of stock. Commonly, net earnings are applicable, first, to preferred securities, such as bonds or preferred stock. We may assume that the preferred half of a capitalization that earns as an entirety, six per cent may be considered worth par upon the basis of five per cent. But when it comes to second half, involving as it does, much more the uncertainties of the future, the security will not commonly be regarded as good at par upon the basis of even six per cent, unless there is a margin of earnings over and above the dividends paid; for no investor feels secure of a dividend at six per cent next year, simply because the company has earned it this. It is probably fair to say that net earnings, accruing through several years, at the rate of five per cent upon the preferred half of the securities, and of seven per cent upon the remaining half, would make both securities worth their par value; and this would be equivalent to six per cent upon the whole.

Another element entering into the calculation is this: Should the capitalization, thus arrived at, be equalized to the assessment of the other property of the State? The record convinces us that the assessment of other property throughout the State, including railroad, for the year 1900, as finally equalized by the State Board of Equalization, did not exceed seventy per cent of the cash value; and that such standard was not adopted by the State Board unintentionally or through inadvertence, but deliberately, as a means of arriving at an equalization of taxable values generally throughout the State. May the board now, or the court in review of the board, upon these re-assessments disregard this standard? We think not, and to that question have given careful inquiry.

The Illinois law, constitutional and statutory, upon the subject is substantially the following:

"The general assembly shall provide such revenues as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct and not otherwise; but the general assembly shall have power to tax * * * insurance, telegraph and express interests or business, venders of patents and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." Const. 1870, art. 9, § 1.

"Real property shall be valued as follows: First, each tract or lot of real property shall be valued at its fair cash value estimated at the price it would bring at a fair voluntary sale." Hurd's Rev. St. 1899, c. 120, § 4.

"Personal property shall be valued as follows: First, all personal property, except as herein otherwise directed, shall be valued at its fair cash value. * * * Fourth, the capital stock of all companies or associations now or hereafter created under the laws of this State, except those required to be assessed by the local assessors and hereinafter provided, shall be so valued by the State Board of Equalization as to ascertain and determine respectively the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association," arriving at such valuation from the best information obtainable, taking into consideration, among other things, the market value of their shares of stock and the total amount of their indebtedness. Hurd's Rev. St. 1899, c. 120, § 3; State v. State Board of Equalization (Ill.) 61 N. E. 339.

These provisions, read together, disclose plainly enough the policy of the State respecting the listing of property for taxation. The General Assembly is given power, it is true, to set, as a class apart, persons or corporations owning or using franchises and privileges, and, so doing, to tax them either upon a valuation, or at a ratio, different from the other classes of property of the State. But until the legislative will is thus exercised all the property of the State is to bear uniformly the burdens of taxation. Uniformity is the dominating mandate of the Constitution. It is the prime maxim in almost every system of taxation, where justice and fair play are sought. It will not be interpreted out of the State's policy unless a clear legislative intention to that end is evinced.

Has the General Assembly in any of the acts referred to evinced an intention to depart from this general mandate of the Constitution and this general maxim of taxation generally? In this connection, two features of the revenue law are pointed out to us. It is said that by section three, above quoted, the capital stock of persons and corporations, such as complainants, are to be so valued by the State Board as to ascertain their fair "cash value;" also that the provisions relating to the listing of railroad rolling stock, tracks, etc., in the several taxing districts show that railroads, at least, are to be regarded as a class apart. But neither of these features of the revenue law prove the point claimed. The second relates plainly, not to standards of valuation, or to uniformity or want of uniformity therein, but to the distribution among the districts of the fruits of taxation by whatever standard laid. The first—the cash value clause—is equally inconclusive when a comprehensive view of the entire taxing machinery of the State is taken.

That machinery begins with the listing of the property subject to taxation. This ordinarily is done by the local assessors, and extends to all classes of real property, moneys, credits, stocks and personal property generally. It is the first step towards ascertaining each citizen's rightful proportion of contribution due to the State under the constitutional provision already quoted.

But this assessment is made by different men in different districts. They may entertain divergent conceptions respecting the value of the same kinds of property; they may be unfairly prejudiced against individual tax-payers and unfairly inclined to favor others. To counteract the unequal conditions thus made possible, County Boards, or Boards of Review, have been created. It is the function of these boards to examine the assessments as of individuals, with a view to the correction of errors and inequalities, and to examine them as a whole with a view to determine their relative equality as between the different primary taxing districts. This is the first process of equalization, and its prime purpose is to insure uniformity as between people of the same general taxing district.

But these local reviewing boards may themselves have divergent views respecting the values of the same kind of property, and thus, unless there be a central Board of Equalization, there might creep in, as between the different general taxing districts of the State, inequalities in taxation. Hence, a final reviewing board—the State Board of Equalization. It is elected, one member from each congressional district, and its general function is to bring the assessments of the several districts to the same relative standard, so that no district of the State may be compelled to pay a disproportionate part of the State's taxes. It has no power to pass over the heads of the local equalizing boards to reach or change individual assessments. Its sole function is to bring about, as nearly as possible, a common level in the valuations throughout the State. Here, again, the prime purpose of the provision is uniformity.

Now, when the General Assembly came to laying a tax upon the capital stock of franchise corporations, there arose the necessity of lodging the power of initial assessments somewhere in the States' machinery. The assessment initially of the tangible property of these franchise corporations was left with the local assessors. But in the assessment of the capital stock, as an entirety, a difficulty appeared not present in the assessment of local properties. The franchise corporations, in great part, are the railways of the State. They cross her entire area—north and south, east and west—running in and out of taxing districts. The capital stock of each, as distinguished from its tangible property, is in its nature an entirety, and its valuation for taxing purposes could not, therefore, in the very nature of things, be cut up into taxing districts. For the assessment of the capital stock of such corporations the initial assessor must necessarily be one whose jurisdiction comprehends the entire line within the State.

But though the section in question made the State Board, in this class of properties, the initial assessor, and charged it with assessing such capital stock at its fair cash value, nothing, either in terms or by inference, is, by the section, taken from the board's general func-

tion and duty as an equalizer. There is in the section no evidence that the general assembly intended to deprive the board of this duty of equalization respecting capital stock. The employment of the words "cash value" is not in point; for cash value is made the primary basis of the valuation of other properties—properties finally equalized below such value—as well. Plainly, the one thought in the mind of the general assembly in enacting section three was, in addition to laying such tax, to find a place where the power of initial assessment could be lodged so as to be effectively used; not intending thereby to throw out of adjustment the equalizing functions of the taxing machinery. In our opinion, uniformity is still the statutory policy of the State in the levying of taxes, with respect of franchise corporations, as well as of other properties. Accordingly, it was imperative, that before the re-assessments for 1900 were entered there should have been such deductions as would have equalized the valuation adopted with the valuations placed upon the other properties of the State. This can not be questioned, on any view, to the extent that such deduction was necessary to equalize the assessment of the complainant corporations with the assessments of railroad corporations for the same year.

Now, if we take the net earnings for 1900 (and this year does not appear to have been an exceptional one) as the basis of valuation, capitalize them at the ratio named—six per cent—equalize this with the other property of the State by deducting thirty per cent, and then divide by five, according to the law in force, adding thereto the tangible property, we will arrive approximately at the real figures at which the re-assessments, including tangible property, should have been entered. Allowance, however, in these net earnings must be first made for the payment of the increased taxes, for, to that extent, the net earnings reported do not disclose a fixed expenditure of the company for that year. The result in round figures can be stated as follows:

The re-assessment for the Chicago Union Traction Company should have been about seven millions seven hundred and sixty-three thousand dollars, or about six millions two hundred and fifty thousand dollars less than the re-assessment complained of, and within four and one-half per cent of the assessment of 1901.

That of the Chicago Consolidated Traction Company should have been about six hundred and twenty-one thousand dollars, or about three millions two hundred thousand dollars less than the re-assessment complained of.

That of the People's Gas Company should have been about eight millions five hundred and one thousand dollars, or about four millions one hundred and thirty thousand dollars less than the re-assessment complained of, and within two per cent of the assessment for 1901.

That of the Chicago City Railway Company should have been about four millions and fifteen thousand dollars, or about two millions one hundred and eight thousand dollars less than the re-assessment complained of, and within five per cent of the assessment for 1901.

That of the Chicago Telephone Company should have been about one million eight hundred and fifty thousand dollars, or about seven hundred and fifty thousand dollars less than the re-assessment complained of, and within seven per cent of the assessment for 1901.

That of the Chicago Edison Company should have been not to exceed one million eight hundred thousand dollars, or more than six hundred thousand dollars less than the re-assessment complained of.

The South Chicago City Railway Company shows no net earnings; indeed, it seems to have been operated at a loss. There is no basis, therefore, upon which to assess the capital stock over and above tangible property.

Now, what do these comparisons show. The disparity between the re-assessments complained of and the figures at which they should have been entered, upon the basis of net earnings, runs from thirty to forty-seven per cent. In cases where the disparity is about thirty per cent we might entertain the explanation that the board felt itself under no obligation to equalize the re-assessments with the property of the other State, hence the disparity. But, considered in connection with the other facts disclosed, the explanation is untenable. It does not explain the action of the board in cases where the disparity runs as high as forty-seven per cent; and it is contradicted by the view of the board, entertained three weeks later, in the assessment for the year 1901 when equalization was allowed. A significant circumstance, too, tending to show what was the real judgment of the board as between the re-assessments complained of and the assessments for 1901, is the fact that except in the case of the Edison Company the assessments for 1901 run only from two to seven per cent apart from our calculation of assessments based upon earning power.

The sum of it all is, that by whatsoever causes brought about, the re-assessments complained of did not, in our opinion, express the real judgment of the State Board as an independent tribunal, and were, therefore, in effect, fictitious judgments, for the impeachment of which, somewhere, the law holds out opportunity to the parties injured. Is the remedy prayed for in the bills within the complainants' legal opportunities?

Taxes are enforced contributions, levied by the State upon the property of individuals, by virtue of its sovereignty, for the support of government, and for the public needs. The money thus taken, until taken, is, as much as real estate or chattels, property within the meaning of the Constitution of the United States; and the taking of such money is a taking of property, as much so, for instance, as the taking of private land for some public work authorized by some law of the State or of Congress.

Due process of law, as applied to the cases under consideration, is the authorized procedure whereby the property of the individual can be taken by the State; it includes the initial authority to levy taxes; the purpose to which money thus raised is to be devoted; and the instrumentalities that distribute the burden upon the citizens. Ours is a government of laws, and not of individual officers, or of boards, or of men.

Any substantial departure, therefore, in the collection of taxes, from the law, either as to the authority for a tax, or its purpose, or the provisions for the just distribution of its burdens, is a departure from due process of law; and the enforced collection of taxes, in the laying and distributing of which there is a substantial departure from law, is the depriving of a citizen of his property without due process of law.

A substantial step in the taxing process as fixed by the law of Illinois; a step essential to the equal distribution of the burdens of taxation; is the decision and judgment of the State Board of Equalization. The Board's place in the taxing system is that of a quasi judicial body. Its judgment affects, as keenly as that of any court, the property interests collectively, of the several districts of the State, and, directly and individually, of the persons and corporations owning franchises. No court can by its judgment grasp more completely what would otherwise remain the property of the individual. In no other tribunal can there be found apter illustration of the power of the State to compel the individual to deliver up his property under the stress of law. It needs no argument to show that power, such as this, is only exercised rightly when exercised judicially.

The prime quality of every judgment, without which it is no judgment, is, that it is the final thought of the judge on the subject submitted, unaffected by extrinsic influences. This implies freedom of mind—not merely theoretically, but practically—the freedom of a mind that does not fear, that has no wish of its own, that sees nothing not seen through the lenses of the law. Judgments honestly made up in such an atmosphere, though subject to review for error, are due process of law; judgments affected by fraud or fear, however, solemnly entered, are as nothing, when weighed by the constitutional guaranties thrown around liberty and property.

The sum of all this, as applied to the cases under consideration, is that the reassessments complained of do not embody the real judgment of the board, in either the assessment or the equalization of the capital stock of complainants for the year 1900; and that in the absence of such real judgment, the threatened collection of taxes on the basis of the fictitious entry, would be to deprive complainants of their property without due process of law.

We have no doubt that complainants may intrench themselves against this invasion by the writ of injunction. One of the primary grounds of equity jurisdiction is to reach cases involving mistake, fraud or coercion, and the relief necessary to their correction. The cases under consideration come clearly within this jurisdiction. It is incomprehensible that the complainants may not avert this threatened invasion of their rights—that they must first yield and then turn prosecutors in a court of law to recover their loss. The fundamental guarantees of the Constitution must not be thus emasculated.

But injunctions issue as a matter of discretion and conscience, not of right. The court may always attach equitable conditions, and the cases under consideration present to our minds a situation where conditions should be required.

We are not unmindful of the fact that the original assessments for 1900 were much less than any fair administration of the law would have made them; and that complainants can not justly escape responsibility for this evasion of their just share of the burdens of taxation. Nor may we shut our eyes to a fact known to all others, that the school funds of the county—the first and most needful outlay for our rising citizenship—are running low, partly in consequence of the taxes withheld. Before the injunction issues, therefore, we shall require the payment to the proper officers by the complainants of their taxes for the year 1900, according to the following rule:

The basis shall be the true net earnings of the several complainants for the year covering April 1, 1900, proper allowance being made for depreciation and replacement, but not for extensions; and reduced further by the amount of additional taxes that the enforcement of this rule produces. Upon this basis the value of complainants' capital stock, including franchises and tangible property, shall be capitalized on a ratio of six per cent; this equalized by reduction of thirty per cent; and then divided by five. The sums thus produced will be regarded as the true re-assessments for the year 1900. Upon this the tax will be extended at the true rate for 1900, exclusive of interest and penalties, not to exceed eight and thirty-seven hundredths per cent from which will be subtracted the taxes already paid, and the balance will be the sum required. We allow no penalties, for the reason that the re-assessments complained of are void, and complainants could not reasonably pay until a proper basis was fixed, either by the board or the courts.

When the cases come to final decree, we will require, before entering such decree, the payment by complainants of the costs of the suit.

The cases in the Southern District will be referred to Walter W. Allen, and those in the Northern District to Henry W. Bishop, masters, to make the calculations indicated, with power to employ such experts or actuaries as they may deem needful.

HALE v. COFFIN.

(Circuit Court, D. Maine. March 5, 1902.)

No. 524.

1. CORPORATIONS—STATUTORY LIABILITY OF STOCKHOLDERS—RIGHT OF ACTION TO ENFORCE UNDER LAWS OF MINNESOTA.

Under the statutes of Minnesota relating to creditors' suits for enforcing the liability of stockholders, which provide that when there is found to remain corporate property the court shall appoint one or more receivers, but that otherwise it may proceed without a receiver, the right to proceed against stockholders is vested in the creditors, and not in any officer to be appointed by the court; and the appointment of a receiver in such a suit, after all the property of the corporation has been administered in a previous suit, confers upon such receiver no legal right of action in his own name against a stockholder in a state where the common-law rule prevails which requires the plaintiff to have the title. But under the decision of the circuit court of appeals for the First circuit in Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747, that such a receiver is vested with sufficient

title to maintain an action at law in Massachusetts, a circuit court in such circuit is not justified in dismissing a suit in equity brought by him, on the ground alone of his incapacity to sue.

2. WILLS—LIABILITY OF LEGATEE FOR DEBTS OF TESTATOR—ENFORCEMENT.
Assets distributed to legatees may, under special circumstances, remain impressed with a trust in favor of unpaid creditors of the estate, and may be subjected to administration by a suit in equity.

3. JURISDICTION OF FEDERAL COURTS—SUIT TO CHARGE LEGATEE.
Where the administration of an estate has been completed by the probate court of a state, and the property has been distributed, and has passed out of its control and beyond its jurisdiction, a federal court has jurisdiction of a proceeding in equity to subject such property in the hands of a distributee to a debt of the decedent.

4. LIMITATION—SUIT IN EQUITY.
Where such a suit in equity is based on a legal demand, the court is bound by the statute of limitations which would govern a special statutory action at law thereon.

5. CORPORATIONS—NATURE OF STOCKHOLDER'S LIABILITY.
A proceeding to enforce the statutory liability of a stockholder, whether at law or in equity, is based on a common-law, and not an equitable, right.[1]

6. LIMITATION—ACTION TO CHARGE LEGATEE—MAINE STATUTE.
Rev. St. Me. c. 87, provides that, where a right of action on a demand against a decedent does not accrue within the period limited by statute for bringing suits against the executor or administrator, the claimant may file his demand in the probate office, in which case, unless a bond is given, sufficient assets to meet the claim shall be retained, but, if the claim is not so filed, "the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due." *Held*, that such provision gives no new right, but merely a specific remedy for the enforcement of a right existing independently of statute, and therefore the limitation of one year is not merely a condition inhering in the special remedy, but declares the policy of the state, and is applicable to all analogous proceedings, whether brought in a state or a federal court.

7. SAME—CONSTRUCTION OF STATUTE—"HEIRS AND DEVISEES."
The provision of Rev. St. Me. c. 87, § 16, giving a remedy against the "heirs and devisees" of a decedent on a demand against the estate accruing after the time limited for bringing an action against the executor or administrator, is not restricted in its application to those who are technically "heirs and devisees," but such words must be construed, in view of the context, and the law of the state making the personal estate primarily liable for debts in case of intestacy, and equally chargeable in case of testacy, to include next of kin or legatees.

8. SAME—SHOWING TO AVOID BAR.
A decree was entered by a court of Minnesota laying an assessment upon the stockholders of an insolvent corporation. A stockholder domiciled in Maine had previously died, and, at the time of the entry of such decree, her estate had been closed. Nearly three years after such decree the receiver brought a suit in equity in the circuit court for the district of Maine to charge a legatee of such stockholder for such assessment. *Held*, that under the statutes of Maine the right of action accrued at once on the making of the assessment, and was barred in one year thereafter. *Held*, also, that the suit, being based on a legal demand, was governed by such limitation, although in equity and in a federal court, in the absence of a sufficient showing in excuse to remove the bar; and that allegations that complainant was a resident of Minnesota, and

[1] Stockholder's liability to creditors of corporation, see note to Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 23 C. C. A. 315, and Scott v. Latimer, 33 C. C. A. 23.

had no knowledge of the death of the stockholder, were not sufficient, without specific facts showing diligence on the part of complainant.

In Equity. Suit to subject assets of the estate of a deceased stockholder of an insolvent Minnesota corporation, in the hands of a legatee, to an assessment made against such stockholder under the statute of Minnesota.

M. H. Boutelle and Eben Winthrop Freeman, for complainant.
Locke & Locke, for respondent.

PUTNAM, Circuit Judge. This is one of the group of cases growing out of the same receivership, and having its origin in the same circumstances as those shown in Hale v. Hardon (C. C.) 89 Fed. 283; Id., 37 C. C. A. 240, 95 Fed. 747; and in Hale v. Tyler (C. C.) 104 Fed. 757. The present case, however, is in equity, in order to reach the assets of the estate of a deceased stockholder which have been distributed to one of the legatees. Hale v. Hardon was at law, in the district of Massachusetts, and, of course, so far as parties were concerned, governed by sections 721 and 914 of the Revised Statutes. Therefore the result of that case can be accepted as in all respects authoritative within the district of Massachusetts only. The case at bar arose in the district of Maine, and therefore, for at least some purposes, may be governed by the peculiar laws of that state. Although in equity, it is based, as we will see, on a common-law right.

The complainant sues, in his capacity as so-called receiver,—constituted as such by one of the courts of the state of Minnesota,—on a certain proceeding brought by a judgment creditor of the Northwestern Guaranty Loan Company, a corporation organized under the laws of Minnesota, in behalf of himself and other creditors, solely for the purpose of enforcing against the stockholders thereof a peculiar liability imposed by the constitution of that state. The corporation became insolvent, and, in a proceeding in one of the courts of Minnesota prior to that in which the present complainant was appointed receiver, all its assets were sequestered and administered for the benefit of its creditors, so that in the proceeding in which the complainant was appointed receiver there were no remaining assets to be administered. The statutes of Minnesota provide that when, in a suit for enforcing the liability of a stockholder, there is found to remain corporate property, the court shall appoint one or more receivers, but that, if it appears that the corporation has no property, the court may proceed without appointing any receiver.

Therefore, under the constitution and laws of Minnesota, so far at least as this case is concerned, the mere right to proceed against stockholders originates and vests in the creditors, and not in any officer or other person appointed or to be appointed, or authorized or to be authorized by force of any statute or by any executive or judicial proceeding. Consequently no right of action against any stockholder of the corporation in question ever arose or vested in the complainant; and he has no title by virtue of any assignment,

sequestration, executive or judicial action, or in any other way, and he is in fact only a master in chancery, appointed by the court to assist it in effectuating its decrees. Under these circumstances, if this were a suit at common law, brought within the district of Maine, where the rule has always prevailed, by virtue of which no action can be brought except by some party having a title, no suit could be maintained by the complainant in his own name, although, under the statutes of this state, if he were an assignee, an action might lie, and although, also, according to the rules of the common law, an action would lie in his name if the right of proceeding against the stockholders originated in him, instead of in the creditors. Moreover, although the right of action arose in another state, the courts in Maine would be compelled to enforce them, not on the ground of comity, which word can be properly used and applied by courts of common law only in its conventional and limited sense (Dicey, Confl. Laws, 14, 15), but because the constitution of the United States requires it (Stewart v. Railroad Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619). So if, on any account, a failure of remedy is at any time threatened, it is for the courts to await the action of the legislature. That the remedy involves a matter of absolute law, not reached by any international rules, is illustrated by following to its conclusion Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184. That suit was brought by an assignee in a jurisdiction where an assignee may bring any action in his own name, but as soon as the same assignee attempted to proceed in a jurisdiction where the common law prevailed the supreme court refused him relief. Glenn v. Marbury, 145 U. S. 499, 508, 12 Sup. Ct. 914, 36 L. Ed. 790.

Childs v. Cleaves, 95 Me. 498, 50 Atl. 714, is understood to assert in this district a different rule with reference to parties plaintiff; but, if so, it would be so clearly contrary to the law of Maine as it has existed from the origin of the state, adduced from the common law of England through the common law of Massachusetts, that it could not receive the assent of this court, and could not bind it. If it were of the character claimed for it in this particular, we would be obliged to stand to the uniformity of the law, regarding Childs v. Cleaves as concerning some oversight which the court at some future time would remedy. That such is the rule which governs us, even with reference to the construction of statutes, was made especially clear by Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359. But Childs v. Cleaves does not necessarily go to the extent claimed for it. It is apparent that the court proceeded with reference to a receiver who was supposed to be of a different class from the one at bar. It is to be borne in mind that, while we take judicial notice of the statutes of Minnesota, they are made known to the courts of Maine only as pleaded or proven. Childs v. Cleaves went to the court in bench on a demurrer, and in what way the court was advised or ascertained with regard to the laws of Minnesota, and how fully it was advised, the case does not clearly show.

The judicial proceedings in Minnesota resulting in Childs v. Cleaves were of an apparently different character from those out of which grew the case at bar. With reference to the latter, the assets of the corporation had been sequestered and administered in a prior proceeding in Minnesota, and the present suit arose out of a subsequent proceeding, in which no remedy was sought except the enforcement of the stockholders' liability. It appears, however, from the opinion in Childs v. Cleaves, at page 502, 95 Me., and page 714, 50 Atl., that the receiver, who was the then plaintiff, was appointed in the same case in which the assets of the corporation were administered. In that proceeding, as there were assets, the statute required the appointment of a receiver, as we have already shown. The statutory provision applicable thereto was peremptory: "and shall appoint one or more receivers." Childs v. Cleaves, 95 Me. 505, 50 Atl. 715. It is stated at page 502, 95 Me., and page 714, 50 Atl., that the administration of the estate by the receiver first appointed was completed in July, 1897, but that meanwhile, and pending that administration, an order was issued by the court in the same case, on the intervention of creditors, for the enforcement of the stockholders' liability, and that thereupon, in the same month of July, a decree was entered against the stockholders in favor of the interveners, and Childs was appointed receiver for enforcing against stockholders the judgment rendered for the net balance of indebtedness. Whether he was appointed such by virtue of the powers vesting on the ordinary rules of equity, or as the successor of the receiver expressly required by statute, is not clear.

In any event, the court appears to have assumed that the right to sue stockholders originated, or at least vested, in Childs, as receiver, and not in the creditors. Indeed, this follows, apparently, from the reliance it placed on Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337,—a case of very narrow application. It involved the rights of the superintendent of insurance for Missouri, who was as said at page 225, 103 U. S., 26 L. Ed. 337, "the statutory successor of the corporation for the purpose of winding up its affairs." The opinion was careful to observe that his authority did not come from the decree of the court, but from the statute, and it added, "He was in fact the corporation itself, for all the purposes of winding up its affairs." Indeed, so far as the law is concerned, he stood the same as a corporation created by the legislature, as the successor of one or more old corporations, receiving the assets and charged with the liabilities, as in the case of Maine Cent. R. Co. v. Maine, 96 U. S. 499, 24 L. Ed. 836. Under such circumstances, no foreign tribunal has ever questioned the proper joinder of the new corporation as a party, either plaintiff or defendant, with reference to the transactions of its statutory predecessor. Thus the reliance placed on Relfe v. Rundle in Childs v. Cleaves leads to the belief that the court did not intend to subvert the common law with reference to parties and rights as always known in Maine, and that therefore that decision has no necessary application to the case at bar.

Childs v. Cleaves emphasizes, at pages 508 and 509, 95 Me., and page 717, 50 Atl., Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506,

44 L. Ed. 619, and Whitman v. Bank, 176 U. S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587; but those cases touch no question involved here, as there was nothing in them regarding parties or title. They only went to the effect that, where a right of this general nature is given by the statutes of one state, it is effective in another state, not as a matter of comity, but of absolute, constitutional obligation. Indeed, the expressions of the court in Childs v. Cleaves, at page 512, 95 Me., and page 718, 50 Atl., and elsewhere, apparently show quite clearly that it regarded the then plaintiff as fully within the distinction made by us in Avery v. Trust Co. (C. C.) 72 Fed. 700, applied by Judge Coxe in Howarth v. Ellwanger (C. C.) 86 Fed. 54. On the whole, we are led to the conclusion that Childs v. Cleaves, as the court understood it, lies outside of a case where no title originated, or at least vested by statutory succession, in the nominal plaintiff.

Therefore, as this bill is not founded on a merely equitable right, but was filed to enforce one arising at common law, and therefore concerns only the remedy, we would be compelled to give force to these views, and dismiss the suit, if the subject-matter out of which it arose had had its origin within this district. The fact is, however, that the cause of action arose in another state; and it was, of course, necessary to the conclusions of the circuit court of appeals in Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747, by which we are bound, that under the laws of that state there was something which vested in the plaintiff as receiver, sufficient to enable him to become an actor in a suit at common law in the district of Massachusetts. While this would not meet the conditions in Maine in the event this were a common-law action, it is sufficient to control us in a proceeding in equity, although pending in this district, inasmuch as in equity we have no concern with the local practice as to parties. Therefore, it having been determined by the circuit court of appeals that the laws of Minnesota give the complainant something which is sufficient to make him an actor in a judicial tribunal, and as the rules of equity as administered in the federal courts are broad enough to protect a proceeding in the name of such a complainant, we cannot dismiss this bill on the mere question of parties, and we are compelled to look at the facts of the case.

It has been stated in regard to this receiver that the decree establishing the amount of the corporation's deficiency, and adjudicating that it was necessary to assess the stockholders the entire par of their stock to make good such deficiency, and appointing the complainant a receiver to enforce the same, was entered in February, 1897. This was erroneous, because the proceeding of that date was merely a finding of facts, and a statement of conclusions of law, with an entry of an order for judgment. The judgment itself bears date of November 3, 1897.

It is necessary to assume, and we understand, that the result reached by the circuit court of appeals in Hale v. Hardon accepted this judgment as conclusive on all stockholders, domestic and foreign, so far as the amount assessed is concerned, so that the relations of the parties to this bill date from the day of the judgment; that is, November 3, 1897. This cannot, for present purposes, be questioned, because oth-

erwise, in view of the fact that the corporation never was dissolved, and is not made a party (Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577), the absence of any qualification by the supreme court would compel a dismissal. Consequently the well-known rule applies that the right of proceeding against the respondent accrued on November 3, 1897, and that all computations under any statute of limitations or otherwise must be made from that date. McDonald v. Thompson, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. ——.

The stockholder out of whose holdings this bill arose was the owner of 22 shares of the stock of the corporation in question, of the par of $2,200. She deceased on March 14, 1895, at Portland, in the county of Cumberland and state of Maine, where she was resident at that time, leaving a will which was duly probated in that county. Hon. Joseph A. Locke duly qualified as executor thereof on April 16, 1895, and promptly gave proper notice of his appointment. He finally settled the estate in August, 1897, and was discharged as executor before the present bill was filed. At the time of the filing of the bill no legal representative of the estate existed, and there were no assets aside from those in the hands of the legatees.

It is not necessary to detail the laws of Maine with reference to the period of limitation for proceedings against the estates of deceased persons, or the steps necessary to be taken within that period by those holding claims which have not matured, in order that rights may be preserved against the executor or administrator. It is plain that in this case no rights continue against any official representative of the estate, and that none were preserved; this coming, presumably, from the fact that there was no person in existence until the judgment in Minnesota of November 3, 1897, which was after the estate was closed and the executor discharged, who would take any proceedings in that direction. Consequently there is no remedy at law against the estate in the local tribunals, and therefore there can be none in the federal courts,—a proposition which it is not necessary to elaborate. Morgan v. Hamlet, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043. This does not, however, bar a remedy in equity according to the fundamental principles applicable to chancery courts.

The estate was distributed to two legatees,—the respondent, who received $4,174.90, and Thomas Fairbrother, a resident of Vermont, and therefore not made a party. The distribution was made in July, 1897. The amount received by Fairbrother is not disclosed. Whether the inability to make Fairbrother a party would affect the jurisdiction, or whether the entire claim of the complainant could be liquidated from the amount received by the respondent, or only proportionately, we will not have occasion to consider.

This bill was not filed until June 27, 1900, which was about two years and ten months after the distribution to the legatees. It alleges that at the time of the decease of Mary A. Ripley, and ever since, the complainant was a nonresident of Maine, and had neither knowledge nor notice of her death, or of the pendency of administrative proceedings until after their close, nor until shortly before this suit was commenced. No demand was made on the respondent for payment within one year after the complainant was appointed receiver; that is to say,

within one year after November 3, 1897, when the claim in suit ripened, as we have seen. In pursuance of these allegations, it is agreed that the general solicitor of the complainant, which solicitor resided in Minnesota, on July 12, 1899, first sent to a solicitor within this state, whom the complainant had already employed, the claim now in suit, with other claims against other stockholders, in a letter which was received by the Maine solicitor on July 15th; that on July 22d the Maine solicitor wrote the general solicitor, informing him of the death of Mary A. Ripley, and that her estate had been settled; and that this was the "first information, knowledge, or notice" which the complainant or his general solicitor received of either of these facts. How long the solicitor in Maine had been employed does not appear, nor the extent and nature of his employment, nor in what part of the state he resided.

Under these circumstances, there can be no question that, aside from whatever provisions exist in the statutes of Maine, and aside from the questions of jurisdiction and apportionment to which we have referred, the complainant had a remedy in equity in this court against legatees when his bill was filed. This is such a well-settled principle that it needs no citation of authorities to support it. It is, however, put in a very positive manner in Borer v. Chapman, 119 U. S. 587, 599, 600, 603, 7 Sup. Ct. 342, 30 L. Ed. 532, where even assets distributed to legatees under an ancillary executorship are declared to be impressed ordinarily with a trust in behalf of creditors, even within the country of domicile, under circumstances where a creditor has had no method or opportunity of pursuing his claim through the ordinary channels. Mr. Justice Nelson, in Williams v. Gibbes, 17 How. 239, 254, 15 L. Ed. 135, pointed out that this was inherent in the broad rule applicable to every case where there is a common fund, in the distribution of which several parties are interested.

Neither is there any difficulty, so far as the present bill is concerned, arising from the fact that the administration of the estate was through the probate courts of Maine. It can hardly be said that it is not within the power of congress to devolve on the federal courts some jurisdiction even with reference to the probate of wills, because it would not now be maintained that any expression in section 2 of article 3 of the constitution, defining the judicial power of the United States, is to be construed in that narrow way. Ellis v. Davis, 109 U. S. 485, 497, 3 Sup. Ct. 327, 27 L. Ed. 1006; La Abra Silver Min. Co. v. U. S., 175 U. S. 423, 455, 20 Sup. Ct. 168, 44 L. Ed. 223; King v. Asylum, 12 C. C. A. 145, 64 Fed. 331, 335, et seq. Nevertheless, either because the matter of probate of wills belongs to the administrative side of the jurisdiction of special tribunals akin to the doctrine of parens patriæ (Fontain v. Ravenel, 17 How. 369, 384, 15 L. Ed. 80; King v. Asylum, 12 C. C. A. 145, 64 Fed. 331, 349), or because congress has not seen fit to confer on the circuit courts any powers in reference thereto, it has been held, ever since the case of Kosciusko's will, that the circuit court has no jurisdiction to grant or refuse probates. It has been also held, ever since Tarver v. Tarver, 9 Pet. 174, 9 L. Ed. 91, that the circuit courts

have ordinarily no power to declare probate proceedings void. This has not been based on any rule peculiar to the federal courts, but on the general proposition that courts of equity, whether in England or in this country, have ordinarily no jurisdiction of that character. In re Broderick's Will, 21 Wall. 503, 22 L. Ed. 599. Consequently there are some exceptions to the rule. In re Broderick's Will, 21 Wall. 517, 22 L. Ed. 599 et seq.; Ellis v. Davis, 109 U. S. 485, 496, 503, 3 Sup. Ct. 327, 27 L. Ed. 1006.

It is also well settled that the circuit court cannot interfere with the ordinary course of the administration of an estate of a deceased person, over which administration the local courts have already assumed jurisdiction. This might be put on the ground that the machinery for exercising a jurisdiction of that character has never been given any of the federal courts; but it is usually rested on the general rule which bars those courts from interfering with the res of which the state courts have taken control, and vice versa, within Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, and Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, and other well-known cases of that character. Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. It is also clear that, wherever the probate court has done any act in the ordinary course of the administration of an estate, or with reference to any matter within its jurisdiction, the federal courts are barred on the usual rule of res adjudicata. Simmons v. Saul, 138 U. S. 439, 458, 11 Sup. Ct. 369, 34 L. Ed. 1054; Sherman v. Association (decided by the circuit court of appeals for this circuit January 24, 1902) 113 Fed. 609. Where, however, the administration has been completed, so far as any particular branch of it is concerned, and the property has passed out of the control of the probate court, and beyond its jurisdiction, the federal courts are free to avail themselves of all the ordinary proceedings in law and in equity with reference thereto, as was fully demonstrated in the case which we have just cited (Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532). There it was said (at page 601, 119 U. S., and page 349, 7 Sup. Ct., 30 L. Ed. 532) that the powers which this court is asked to exercise in the case at bar are "a part of the ancient and original jurisdiction of the courts of equity," which is vested "by the constitution of the United States, and the laws of congress in pursuance thereof, in the federal courts," and which is "independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States." The rule is stated broadly in Byers v. McAuley, 149 U. S. 608, 620, 13 Sup. Ct. 906, 37 L. Ed. 867. Therefore there is no difficulty in taking jurisdiction of the case at bar, unless on account of some peculiarity which we have yet to consider.

The complainant has a serious difficulty to meet in the defense of limitation. We have already said that the basis of this bill is not an equitable right, but merely the seeking of a remedy in equity to enforce a right at common law. In construing rule 90 of rules of practice in equity, the supreme court has referred us to the prac-

tice as it existed in England when that rule was adopted. Thomson v. Wooster, 114 U. S. 104, 112, note, 5 Sup. Ct. 788, 29 L. Ed. 105. Volume 2 of the edition of Daniell's Chancery Practice there referred to was published in 1840. Its notes were written by the author, and are therefore of the same force as the text. There it is said that courts of equity have held themselves bound by the statute of limitations of James I. in respect of all legal titles and demands. This rule is expressly so restated in Metropolitan Nat. Bank v. St. Louis Dispatch Co., 149 U. S. 436, 448, 13 Sup. Ct. 944, 37 L. Ed. 799, as follows: "Courts of equity, in cases of concurrent jurisdiction, consider themselves bound by the statutes of limitation which govern actions at law." This is restated as late as Willard v. Wood, 164 U. S. 502, 520, 17 Sup. Ct. 176, 41 L. Ed. 531, and Baker v. Cummings, 169 U. S. 189, 206, 18 Sup. Ct. 367, 42 L. Ed. 711.

At the time the judgment of November 3, 1897, was entered, the complainant had a perfect remedy under chapter 87 of the Revised Statutes of Maine (section 16). A previous section provides that, when an action on a covenant or contract does not accrue within the period limited by statute for bringing suits against the executor or administrator, the claimant may file his demand in the probate office, and thus, unless a bond is given, secure the retention of a part of the estate to meet his claim when it comes due, with some other incidental provisions to which we need not refer. Section 16 reads as follows:

"When such claim has not been filed in the probate office within said two years, the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due, and not against the executor or administrator."

The liability in this case is contractual, as has been stated by the supreme court several times, but the right of action did not accrue till the period provided by statute for suing the executor had expired. Therefore the subject-matter of this proceeding falls within all branches of the provisions of the Maine statute referred to. Under the circumstances, there was plainly, for the full period of a year after the judgment of November 3, 1897, a complete statutory remedy, and also, as we have shown, a concurrent remedy in equity in this court. Borer v. Chapman, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532, is directly to the point that the statute cited could not contravene the broader right of the creditor to proceed in equity in the federal courts.

It may be observed that proceedings under this legislation, which originated in provincial times, have in Maine always been by common-law actions; yet the frame of the statute is broad enough to permit a remedy in equity where circumstances require it. Therefore the statute may well be held to insure relief in equity or at law, as the case may be, but, whether under one procedure or the other, always subject to the limitation of one year. The federal courts certainly can afford the common-law relief under the statute, as well as the equitable relief originally vesting in them. In any view, we thus have concurrent remedies, both based on contract, arising from the acquirement by the

testatrix of her shares of stock, and from the ripening by the entry of the judgment of November 3, 1897, into a complete statutory and contractual obligation, ordinarily enforceable in the common-law courts, and always so when, as in the case at bar, it extends to the full par value of the shares. Kennedy v. Gibson, 8 Wall. 498, 505, 19 L. Ed. 476, and subsequent decisions to the same effect.

The general rule that under such circumstances chancery is bound by the statutes of limitations was precisely determined in McDonald v. Thompson, 184 U. S. 71, 22 Sup. Ct. 297, 46 L. Ed. ——, already referred to. That was a suit in equity brought by the receiver of an insolvent national bank to enforce the double liability of a stockholder therein. So far as the liability is concerned, it is precisely the same as that at bar; arising under the application of exactly the same principles of law. The court laid aside the question whether the complainant should not have sued at law, and, assuming that he rightly proceeded in equity, held him absolutely bound by the statute of limitations of the state forming the district where the suit was brought, applicable to common-law proceedings with reference to actions on contracts and statutory liabilities. The court, as we have said, applied the rule that the cause of action accrued when the assessment was made,—in this case, November 3, 1897,—and added that at that time the statute of limitations began to run. The court assumed unhesitatingly that although the proceeding was in equity, inasmuch as it was based on a common-law right, the statute of limitations was to be implicitly obeyed. The whole reasoning of the court assumed this to be an undoubted proposition, so that the discussion in the opinion related only to the question which particular provision of the statute reached the case. Therefore, as we have said, the circumstances make McDonald v. Thompson conclusive on the case at bar, so far as the general propositions as to the effect of statutes of limitations are concerned.

In reply, the complainant urges his nonresidence and the lack of notice which we have stated; but, as against statutes of limitations, mere nonresidence, unless "beyond the seas," or out of the United States, is ordinarily disregarded. Undoubtedly equity sometimes excuses the bar of statutes of limitations when the law would not, although, with reference to the administration of estates, such an excuse was refused, even in equity, in Morgan v. Hamlet, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043, already cited. However this may be, no case is shown us where such an excuse arises from mere nonresidence, though accompanied with lack of knowledge, with reference to a fact so easily ascertained as the decease of one whose will is publicly exposed in a probate court. For a complainant to avail himself of this rule of equity, he must set out all the facts, so that the court may clearly see that he has exercised due diligence. Hardt v. Heidweyer, 152 U. S. 547, 558, 559, 14 Sup. Ct. 671, 38 L. Ed. 548. Among other things, in the present case, the complainant should have negatived any presumption arising from the fact that he had under employment, though for a time not stated, a local solicitor, and have shown that he made prompt inquiries, and that by some strange coincidences he failed to learn of the death of the shareholder. The pre-

sumption that if he had made early inquiries he would have learned the facts in season to have proceeded against legatees within the year provided by statute is so strong as to require clear proof to overcome it. Indeed, we are bound by the practical rule applicable hereto laid down in Re Broderick's Will, 21 Wall. 503, 519, 22 L. Ed. 599, already referred to. There it was claimed that the bar of the statute with reference to the alleged forgery of the will in question was met because the complainant resided in a secluded part of the United States, and was ignorant, not only of the fraud, but even of Broderick's death. Although that was a case of fraud, as to which courts are most liberal with reference to allowing exceptions to any bar arising from the lapse of time, yet the excuse offered was not accepted. The opinion rendered in behalf of the court says that the delay was due only to ignorance of Broderick's death, and of the open and public facts of the case, and that the plea is that the complainants "lived in a remote and secluded region, far from means of information." It adds:

"Parties cannot thus, by their seclusion from the means of information, claim an exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with a knowledge of their status and conditions, and of the vicissitudes to which they are subject."

The court then adds that this is the foundation of all judicial proceedings in rem; but this was not particularly applicable to that case, as distinguished from the case at bar, and it could not limit the principles involved in the citations which we have made from the opinion, nor can it be accepted as intended to do so. As we have already said, independently of the case of In re Broderick's Will, and on the general principles which we have stated, everywhere applicable to questions of limitations and laches, the mere nonresidence in Minnesota, under the circumstances of this case, does not establish an exception to the general rule.

The complainant also says that the Maine statute which we have cited affords no sufficient analogy with reference to the matter of limitations, because it is restricted to remedies against "heirs and devisees," and that therefore its remedy is not concurrent with that based on the broad rules of equity. It is to be regretted that as this proposition involves the construction of a statute which has existed, in one form and another, for over a century, and has passed through several phases, it is merely insisted on in such manner that we must notice it, without our being afforded the aid of the history of the legislation, or of the decisions of the courts in Massachusetts and Maine in reference thereto. Originally the Massachusetts statute used, instead of the words "heirs and devisees," the words "those who inherit the estate of such person, or devisees thereof." It came into Maine in that form. Laws Me. 1821, c. 52, § 28. As there found, the context shows that it was not intended to be limited to those who, in a technical sense, are "heirs and devisees," because the proviso which forms a part of the same section concerns legacies and bequests. The form of expression found in the act of 1821 continued through the Revised Statutes of 1840, and the present condensed form of expression, "heirs

or devisees," first occurs in the Revised Statutes of 1871. The provisions of the statute covering this topic were codified anew in 1872. Chapter 85. This statute needs no particular observation. In Massachusetts the legislation has been amended so as to expressly include legatees and next of kin.

The construction which the complainant puts on this provision of law would result in throwing its entire burden on those who take the real estate, either by will or inheritance, leaving those who take personalty, whether by will or on distribution, exempt. At the common law, by virtue of which realty bore no burden of debts unless expressly charged, this conclusion would be absurd. It is none the less so under the systems so long established in Maine and Massachusetts, by virtue of which, with reference to intestate estates, liabilities are charged on the personal property before the realty can be reached, and where, even in case of testacy, the entire estate, both realty and personalty, if all covered by specific gifts, contributes proportionately. It is not to be forgotten that the popular confusion between "devisees" and "legatees" has crept into the law books, and that many authorities have recognized the fact that they are sometimes used in legal instruments interchangeably. Stroud, Jud. Dict., and Bouv. Law Dict., "Devise." Even in Baker v. Bean, 74 Me. 17, 20, the court, in discussing the liability under this very statute, uses the phrase "bequeathing his property" to the person who was claimed to be liable, although the word "bequeath" is as remote from the word "devisee" as is the word "legatee."

But the construction of the precise section of chapter 87 of the Revised Statutes of Maine under consideration is easily determined by the context. Sections 14 and 15, to which we have already referred, provide that, if the demand is seasonably filed in the probate office, sufficient assets must be retained by the executor or administrator to meet it, unless a bond is given to pay whatever may be found due. Section 15 provides that, "when a bond is given, assets shall not be reserved, but the estate is liable in the hands of the heirs or devisees, or those claiming under them, and an action may be brought on such bond." Then follows section 16. There can be no question that all these sections go pari passu, and are to be construed on parallel lines. It is clearly the intention that the "assets" in the hands of the executor or administrator shall always remain liable, wherever they may be found. Primarily these "assets" are personal property, although under certain proceedings, the personal property being exhausted, the real estate may, by leave of the probate court, be converted into "assets" for the payment of debts. It is unreasonable to ask the courts to hold that what is primarily liable in the hands of the executor or administrator for debts is, by a continuous line of statutory provisions, all relating to the same topic, and intended to work out the same subject-matter, absolutely relieved when it comes into the hands of the next of kin or legatees. It is impossible, on any just rule of construction, to give effect to this proposition of the complainant, and he does not support it by the citation of any judicial authority indicating that we should. Our own search has also disclosed none.

As we wish to dispose of the entire topic on broad principles, and by a thorough application of them, we call attention to one fact in this connection which has not been brought before the court by the complainant. Although, under the rule of Borer v. Chapman, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532, which we have already explained, assets coming into this jurisdiction from an ancillary administration can be reached through the equity side of the circuit court, yet, under the decisions in Massachusetts, they apparently cannot be reached by virtue of the class of statutes which we have been discussing; and there is no reason to doubt that the Maine courts would implicity follow the decisions of its sister state, where this legislation had its origin. This is a more serious proposition with reference to the complainant's claim that the remedies are not parallel, and therefore not concurrent, than that on which he rested, and which we have discussed; but the whole topic will be disposed of when we come to state the law of Maine with reference to the question of public policy underlying the statutory limitation.

The complainant makes a further answer to the claim that he is barred by the one-year limitation to which we have referred by the proposition that this does not come from any general statute declaring a general policy, but is simply one of the conditions inherent in the special remedy given by the Maine legislation, and not inherent in the remedy in equity which this court can offer. The decisions cited by the complainant do not assist us on this proposition. They involve the question which was under consideration by the circuit court of appeals for the First circuit in Railroad v. Hurd, 47 C. C. A. 615, 108 Fed. 116, where not a new remedy was given, but a new right. This class of cases is illustrated by The Harrisburg, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 358, cited by the complainant. It is more specifically illustrated by Theroux v. Railroad Co., 12 C. C. A. 52, 64 Fed. 84, 85, also cited by the complainant, and Railroad v. Hurd, to which we have referred. These cases lay down the rule that where a right is thus originated by a statute the period of limitation imposed as a condition in the statute follows the right wherever it is enforced, either in any domestic or foreign tribunal. It is well known that such is not the law where the limitation relates only to the remedy. With reference to the present claim against a legatee there was undoubtedly a right in equity which both the federal courts and those of Maine would recognize anterior to, and independent of, any legislation. The statute cited merely gives a specific remedy. As, therefore, it affords only a new remedy, and not a new right, it is not cognizable in foreign courts, and much less so the conditions which it contains. Therefore it falls within the principles of the ordinary statutes of limitations, and we are compelled to look deeper into the matter.

In doing this we are met by Hall v. Bumstead, 20 Pick. 2, 8, showing that the limitations in this class of statutes are based so deeply on grounds of public policy that even the disabilities which are allowed as exceptions in the ordinary statutes of limitations are

not allowed here. In Fowler v. True, 76 Me. 43, 46, we are told, by citation from Massachusetts decisions, that by the policy of the laws of Maine "the remedy of a creditor upon the heirs or devisees of a deceased person is extremely limited," and that "every demand which can be made and enforced against the estate of a deceased person is to be pursued against the administrator, where it can be done." It adds:

"This object is one of great importance, by securing as far as practicable an early and final settlement of estates, so that the residuum may be distributed among those entitled, free from incumbrances and charges which would lead to protracted litigation."

It is a well-known fact that the policy of the legislation of Maine and of Massachusetts is, as thus stated, to transfer the succession as soon as it can reasonably be ascertained to whom it shall come, under such circumstances that the recipient shall not be harassed in reference thereto, nor build on it hopes which may long afterwards prove to have been without foundation. The law in this respect in Massachusetts, and successively in Maine, has been very scrupulous. The limitation contained in the extract which we have made from the Revised Statutes of Maine was not merely an arbitrary condition imposed in granting a new statute right, but it was undoubtedly framed in pursuance of a general purpose, which should not be disregarded, either by the courts of that state, or by federal tribunals enforcing the law within the territorial limits of her jurisdiction. If a rule was in fact given in Chewett v. Moran (C. C.) 17 Fed. 820, as broadly as the complainant maintains, it was negatived by the supreme court, two years afterwards, in Morgan v. Hamlet, 113 U. S. 449, 5 Sup. Ct. 583, 28 L. Ed. 1043. Indeed, the carrying of Morgan v. Hamlet to its legitimate conclusion would seem to be decisive of the pending case in favor of the respondent, in any view of it. That the federal courts, even when proceeding in equity, will insist with rigor on a reasonable compliance with local policy as to the administration and distribution of estates, and will decline to interfere by giving relief beyond the statutory limitations, except under very special circumstances, is strictly insisted on in Board of Public Works v. Columbia College, 17 Wall. 521, 530, 21 L. Ed. 687.

We are therefore compelled to hold that the claim is barred, by analogy, by the one-year limitation contained in Rev. St. Me. c. 87, § 16.

Let there be a decree dismissing the bill, with costs for the respondent.

UNITED STATES v. BUTLER.

(Circuit Court, D. Maine. March 26, 1902.)

No. 115.

1. UNITED STATES—LIABILITY OF OFFICER FOR FUNDS STOLEN—INTEREST.
The rule applied that in an action by the United States against a disbursing officer to recover public funds which were abstracted from defendant's possession without his knowledge, and from which he received no benefit, where no demand is proved, interest is not recoverable prior to the date of the writ.

2. SAME—BURDEN OF PROOF.
Where the accounts of a disbursing officer of the army, which were duly audited and allowed, were restated by the treasury department nearly 10 years later, and a claim made against the officer for a sum shown to be due from him by the restatement, the burden rests upon the United States to falsify the accounts previously allowed by clear and satisfactory proof.

3. SAME—ACTION AGAINST DISBURSING OFFICER—SUFFICIENCY OF PROOF.
Defendant was acting paymaster in the army at the Rock Island arsenal. The pay rolls were made up by a clerk appointed by the commanding officer, and, after being approved by such officer, were delivered to defendant for payment. His accounts for disbursements on account of such payments were allowed by the department, but it was subsequently discovered that the clerk, in making up the pay-rolls, had entered after the names of certain workmen, as due them for wages, larger sums than were actually due, and by some means had secured for himself the excess payments. After such discovery, and the trial and conviction of the clerk, defendant's accounts were, after 10 years' delay, restated, and suit was brought against him to recover the amount of the alleged shortage thereby shown. He was ignorant of the frauds, and received no benefit from the same. The evidence did not show with any certainty whether the clerk abstracted the money from the pay envelopes before it had been disbursed by defendant, or secured it after its disbursement in accordance with the pay rolls as approved, through collusion with the workmen or otherwise. *Held*, that the case was insufficient to charge defendant with liability.

At Law. Action to charge defendant with liability as a disbursing officer of the army.

Isaac W. Dyer, U. S. Atty.
Richard Webb, for defendant.

PUTNAM, Circuit Judge. In this case the writ bears date March 6, 1899, and the declaration contains two counts,—the first one for $524.40, money had and received to the plaintiffs' use; and the second one for interest on the same.

Inasmuch as the suit is to recover public funds, which it is claimed were abstracted from the possession of the defendant as a disbursing officer without his knowledge, and while he was innocent in reference thereto, and, as the defendant had no use thereof, and no demand is proven, the interest charged in the declaration cannot be recovered. This has been so held, not only in behalf of sureties, but in the opinion of Mr. Justice Miller in U. S. v. Denvir, 106 U. S. 538, 1 Sup. Ct. 481, 27 L. Ed. 264, it was stated to apply in behalf of the officer himself. Moreover, while ordinarily laches does not apply as against the United

States, it does apply against them so far as interest is concerned. U. S. v. Sanborn, 135 U. S. 271, 281, 10 Sup. Ct. 812, 34 L. Ed. 112. There is enough in this case on either rule thus stated by the supreme court to bar the United States from recovering any interest accruing prior to the date of the writ.

The defendant, from some period in 1883 to some period in 1886, was a commissioned officer of the United States in the ordnance corps, and during a portion or the whole of that period he was acting paymaster, as provided in section 1161 of the Revised Statutes. The transactions involved ended in 1886, and at some time previous to November 25, 1889, the defendant's accounts as such paymaster were duly allowed. This so stood until they were restated by the accounting officers of the treasury under date of November 22, 1898. As originally allowed, they showed nothing due from him on account of the present claim, but, as restated, they show the amount covered in the first count of the declaration.

This restatement is found at length in the record. It refers to certain items of disbursement, which it states had been allowed in prior settlements, and which it states had been charged back to the defendant in a settlement No. 8,942, of November 25, 1889. That settlement we do not find in the record. Therefore we are compelled to reject it from our consideration, and the dates stand as follows: The defendant's accounts were settled and allowed by the proper accounting officers of the treasury some time prior to November 25, 1889, and on November 22, 1898, they were restated, and a balance declared, corresponding to the amount demanded in the first count of the declaration.

That under section 886 of the Revised Statutes a disbursing officer's accounts may, under some circumstances, and with reference to certain matters, be restated by the treasury, and that, when so restated, they may be used to make a prima facie case against him, cannot be questioned, in view of Soule v. U. S., 100 U. S. 8, 11, 25 L. Ed. 536, and Moses v. U. S., 166 U. S. 571, 594, 599, 17 Sup. Ct. 682, 41 L. Ed. 1119. In the present case the restatement apparently arises largely, if not entirely, out of alleged forgeries and alterations in the defendant's vouchers, by which the person who is charged with making the forgeries and alterations was enabled to cover up thefts of the public moneys in the hands of the defendant. Whether, in view of U. S. v. Jones, 8 Pet. 375, 8 L. Ed. 979, and Bruce v. U. S., 17 How. 437, 15 L. Ed. 129, such alleged forgeries and alterations are so far within the cognizance of the officers of the treasury that a restatement of an account growing out of the same is effective, or whether the accounts were restated and certified in accordance with the statutes and the regulations of the treasury, and how far such restatements are affected by the act of July 31, 1894 (28 Stat. 162, 168), we are not called on to consider, because we are not called on to give statutory effect to the restatement found in the record. The United States rest their case on the claim that the defendant did not conform to the army rules and regulations, and especially to those concerning the ordnance corps, by virtue of which neglect he hazarded the public moneys in question; and also on their offer to show by primary proofs that the sums dis-

allowed by the treasury were part of the moneys which came into the hands of the defendant, and were never disbursed at all.

As to the first proposition of the United States, the rules and regulations referred to are, in some respects, too obscure to justify us in holding the defendant responsible for public funds by reason of not complying with them. The various steps necessary to show that the loss of the public moneys arose through their violation do not all clearly appear. What is more important, these rules and regulations for the most part, if not entirely, concern the personal conduct of the officer, so that the violation of them subjects him to proceedings before a military tribunal, and not to a liability to be charged in damages by a civil tribunal; and, on the whole, there is not enough here, in connection with whatever else appears in the case, to change the burden which rests on the United States, which we will explain.

The defendant's accounts having been allowed, they stand like an account stated, and the burden is on the United States to show them erroneous. This burden, under the circumstances of the long delay, before, so far as the record shows, the claim was made on the defendant, necessarily, to such an extent, obscures the facts, and adds to the difficulty which the defendant would have in ascertaining and proving them, that this burden is thereby very much increased. The hardship growing out of reopening the accounts of a disbursing officer of the army of the United States, where the facts are so complicated and doubtful as it will appear they are at bar, is especially great in view of the fact that military orders issued at comparatively short intervals take such officers from point to point, and often long distances, and thus leave them where it is impracticable for them to investigate, or direct an investigation of, matters which can be supported or overthrown only by proofs derived from the immediate locality of the transactions involved. Therefore, under the peculiar circumstances of this case, we do not hesitate to say that the burden rests on the United States to falsify the accounts of the defendant, which they once allowed, by clear and satisfactory proofs. In view of this, what is the record which we have before us?

It consists largely of an agreed statement, which is substantially as follows: The defendant was on duty at the Rock Island arsenal, where the commanding officer hired the workmen, and, among the rest, the clerk, one Mr. Warren, who is charged with the theft or fraud out of which the present claim arises. This clerk made up the pay rolls, which were submitted to the commanding officer for his approval, and which, after being certified by him as correct, were delivered to the defendant with a written order for their payment. While, on the one hand, there can be no question that the defendant falls within the great class of United States disbursing officers who are chargeable with public funds received by them, except as against the acts of God or of the public enemy, or that, also, he did receive the sums covering the amount now demanded of him, yet, on the other hand, it cannot be questioned that, under the law and the regulations, it was his duty to pay, and he was justified in paying, and entitled to be allowed the amounts required in paying, the rolls thus certified to him, even if they had been fraudulently drawn up, or altered or

falsified in any manner before they received the approval of the commanding officer. The agreed case then proceeds as follows:

"It subsequently appeared that the said Richard O. Warren, whose duty it had been to make up these pay rolls as aforesaid, had, from time to time, entered after the names of certain workmen, as due them for wages, larger sums than were actually due, and then, by further acts of dishonesty, the said Warren had arranged to secure for himself the excess payments. By means of these frauds, extending over a long period of time, there was improperly paid out upon these pay rolls the sum of $524.40. Upon said frauds being discovered, said Warren was indicted, tried, convicted, and punished therefor. The said defendant was at all times and in all things ignorant of said frauds, and innocent of any intention or desire to defraud the government or any of its employés, and from said frauds he derived no benefit, directly or indirectly, pecuniary or otherwise."

It was also agreed that the United States might, as a part of their case, introduce, and it did introduce, the reports of certain officers of the ordnance corps, who made certain investigations with reference to the matters in question; that those officers, if present, would testify as stated in those reports; and that, also, the United States might introduce the treasury transcript to which we have referred. These reports were made in 1888, but whether before or after the defendant's accounts were settled as stated the record does not show. The difficulty with them is that they do not contain matters within the personal knowledge of either of the officers who made the reports, which would aid the court, if proven by their testimony in open court. Among other things, so far as they are specific even in matters of information, they mainly relate to the transactions of an officer of the ordnance corps who had been acting as paymaster either before or after the defendant so acted. No better exposition of the lack of any practical use as evidence, under the fundamental rules of law, to which the court can put these reports, or any part of them, can be given than is shown by the following extract from one of them:

"The whole system of stating the accounts of the employés at this arsenal for the period included in our investigation was so generally irregular as to place us frequently in doubt as to whether or not any particular irregularity covered a fraud. The absence of the responsible officer, or of any one who had a knowledge of the circumstances and facts at the time, rendered the uncertainty greater, and the task more difficult. Mr. Warren's opportunities and methods were such that it was possible for him to so alter the accounts that at this late period detection in every instance would be impossible, and therefore it is not claimed that the foregoing statement covers all the irregularities through which fraud was committed; neither is it claimed that each of the irregularities noted covers a fraud. They are irregularities for which no explanation was given or could be found, and most of them certainly cover frauds."

It appears, from a statement made by the defendant and put into the case, that he was accustomed to make up envelopes containing the several amounts to be paid to the several persons whose names appeared on the pay rolls certified to him, and that these envelopes, or a portion of them, were deposited at times in a safe in the office of the commanding officer of the arsenal, to which safe Clerk Warren had access. He also states that the United States claim that the wrongs were accomplished through thefts made by Clerk Warren by abstracting from these envelopes certain amounts corresponding in

the whole to the sum now demanded, so that those amounts never came to the hands of the persons named on the pay rolls; and that he covered up these thefts by falsifications of the rolls after they had been certified by the commanding officer. Of course, if the United States clearly proved such to be the fact, the defendant would stand liable for the amounts so abstracted, because, as maintained by the second proposition of the United States, it would then be the fact that he never disbursed them. If, on the other hand, the moneys were taken from the envelopes after they had been disbursed by the defendant, either by fraudulent arrangements between Clerk Warren and the workmen whose names were on the pay rolls, or in any other manner; or if the actual payments corresponded to the pay rolls as certified by the commanding officer, and the pay rolls were afterwards falsified; or if, in any way, the defendant paid into the hands of the workmen the amounts called for by the pay rolls as they stood when certified by the commanding officer,—he would stand relieved. As we have said, it rests on the United States, under the circumstances, to show clearly and satisfactorily how the wrongs occurred. So far from doing this, the record shows only that the officers who were especially sent to investigate the alleged wrongs were unable to discover the methods in which they were effected, the conclusion being, as stated in the report which we have cited, that, for at least a portion of the irregularities, if not for all of them, "no explanation was given or could be found." The United States gave no clear explanation then and give us none now; and therefore, for the reasons we have stated, their case fails.

The court finds in favor of the defendant, without costs.

EDGAR v. CITY OF PITTSBURG.

(Circuit Court, W. D. Pennsylvania. March 13, 1902.)

MUNICIPAL CORPORATIONS—POWER TO CONTRACT FOR PUBLIC IMPROVEMENTS—LIMITATION BY PENNSYLVANIA STATUTE.

Act Pa. March 7, 1901, for the government of cities of the second class, with the supplemental act of June 20, 1901, which together constitute the governing law of cities of such class, vests the power to make contracts in the councils, providing that "no contract shall be let until councils shall have passed an ordinance providing for the letting of the same by the city recorder and head of the proper department." The power of councils with respect to contracts, however, is limited by other provisions, among which is one that "every contract for public improvements shall be based upon estimate of the whole cost, furnished by the proper officer through the department having charge of the improvement and no bid in excess of such estimate shall be accepted." *Held*, that the obtaining of such estimate by councils covering the whole cost of a proposed public improvement was a condition precedent to the exercise of the power to contract for such improvement, or any part of it, the clear purpose of the act being that the entire probable cost of an improvement should be taken into consideration and deliberated upon before any contract with reference thereto should be made; and that a city had no power to contract for the construction of a part of a filtration plant, in

connection with the extension and improvement of water supply and distribution, where no estimate had been obtained from the proper department of the cost of the improvement when completed, including such accessories and additions to the existing system as the use of such filtration plant proper would render necessary.

In Equity. On final hearing on bill, answer, and replication.

Geo. W. Guthrie and W. B. Rodgers, for complainant.
Clarence Burleigh and Thos. D. Carnahan, for defendant.

BUFFINGTON, District Judge. This is a bill in equity filed by one Edgar, a citizen of Ohio and a property owner in Pittsburg, against said city, to enjoin the letting of a contract for the construction of a portion of a city water filtration plant. The case involves no question as to the wisdom of the city constructing a filtration plant as a whole, nor is issue raised as to the contract price of this particular part thereof, or to the qualification of the proposed bidder. The underlying question is one of law, namely, whether the statutory provisions prerequisite to the city contracting for a public improvement have been complied with. The statute under which the city acts in this regard was but lately passed; and, as new laws suggest new questions, different views exist as to its proper construction. It is to the interest of the contracting parties and a protection to the city's executive officers that the status of the proposed contract should be judicially passed upon before liabilities are incurred thereunder. It is fortunate, moreover, that the case is undisputed as to facts, raises no partisan question, and involves nothing but the purely legal question of such construction. It will be conceded by all that the power of the city of Pittsburg to make a contract—such as here in question—rests upon the act of March 7, 1901, entitled "An act for the government of cities of the second class," and the supplement thereto, approved June 20, 1901. To ascertain the true construction of a law, regard must be had to the object and purpose of its enactment, and, in considering questions of municipal contracting power, the fundamental truth borne in mind that the real principal in a municipal contract is not the city, but the people of the city. As it would be impracticable for them to assemble, deliberate, and contract for municipal work themselves, they cause a corporation—a municipal corporation—to be constituted, in order that their municipal affairs may be transacted through the medium of corporate agency. That such corporate creature is a mere means, and not an end, is shown by the fact that in state and national affairs the state and nation, which are the people, contract without such agency. There is no such corporation as the United States or the commonwealth of Pennsylvania. It will, therefore, be seen that a city, legally and politically considered, is but a corporate agency, created to conveniently transact the municipal affairs of the people who compose it. It therefore follows that, just as in the case of other corporations, the power and authority of the municipal corporation to contract depends on the statutory, charter, or common-law powers thereto enabling it. In transacting municipal affairs, the city necessarily acts by agents, who, with reference to contracts made by the

city, perform legislative or executive duties. As a contract, when made, is an agreement to do a particular thing, the law ascribes to a contracting party knowledge of the subject-matter thereof, deliberation as to the wisdom of making it, and assent to being legally bound by it, and on such basis enforces it. Knowledge, deliberation, and assumption are all implied from the fact that it is an agreement to do a particular thing. It is evident, therefore, that the agent exercising the contracting power of a municipality acts in a legislative capacity. After such legislative agent causes the city to contract, the duty of the executive agent to fulfill such contract attaches. Now, in the delegation of powers to officers of cities of the second class, the act in question vests legislative power in and restricts it to councils, and such power must be exercised by ordinance or resolution. Article 14 provides:

"The legislative power shall be vested in two bodies to be designated as the select and common council. Every legislative act of the councils shall be by resolution or ordinance and every ordinance or resolution, except as hereinafter provided, shall, before it takes effect, be presented, duly engrossed and certified, to the city recorder for his approval. The city recorder shall sign the said resolution or ordinance, if he approves it, or return the same to the branch of council wherein such resolution or ordinance originated within ten days; or at the next meeting of councils after ten days have expired, if he do not approve it, with the reasons therefor; and if, thereupon, each branch of councils pass the same, within five days of such veto, by a vote of three-fifths of all the members elected to each branch, it shall become effective as though the city recorder had signed the same. It shall equally become effective if he should neglect to return the same within such ten days."

Councils, then, being vested with final municipal legislative power (for they can enact over the recorder's veto), it follows they have a right to call on the executive officers of the city to render such aid as shall enable them to properly perform their legislative duties; for the grant of a power carries with it the power to exercise rights necessary to its execution. Such power of councils to call for the aid of executive officers is not dependent on implication. Article 2 provides:

"Each department shall furnish to the * * * councils or either branch of the councils such information as * * * they may at any time demand in relation to its affairs."

Now, while the act makes the recorder and the head of the proper department the signatory officers in behalf of the city to all its contracts, and prohibits the councils from executing the same, stating, "No contracts shall be entered into or executed directly by the councils or any committee thereof," yet the fact remains that councils are expressly vested with the sole power to authorize the letting of a contract, the act providing: "No contract shall be let until councils shall have passed an ordinance providing for the letting of the same by the city recorder and head of the proper department." In view of these provisions, it is clear that the exercise of the contracting power of the city is vested solely in city councils. But the power thus vested is not unlimited. It is coupled with conditions, both as to the scope of the contract and the mode of exercising it within such scope. In

the case of public improvements,—and such description would include an extensive filtration system,—the act provides:

"Every contract for public improvements shall be based upon estimate of the whole cost, furnished by the proper officer through the department having charge of the improvement, and no bid in excess of such estimate shall be accepted. Every such contract shall contain a clause that it is subject to the provisions of this act, and the liability of the city thereon shall be limited to the amount which shall have been or may be, from time to time, appropriated for the same."

As councils are the sole agents to authorize a contract, and as their power to contract for a public improvement is limited to the estimate furnished, it is clear that they are the bodies to which the departmental officer is to furnish the estimate. And as the contract authorized by councils "shall be based upon estimate of the whole cost furnished by the proper officer through the department having charge of the improvement," it is equally clear that, in the absence of such basis for contracting, an attempted contract has no foundation. It must be presumed that the legislature intended a preliminary estimate of cost should be considered by councils before they contracted for a work large enough to be deemed a public improvement. Such course is only to apply to municipal transactions the practice of common business forethought,—a practice so ancient as to have long since been confidently appealed to in the inquiry:

"For which of you, intending to build a tower, sitteth not down first, and counteth the cost, whether he have sufficient to finish it?"

An estimate, then, being the basis on which the contract rests, it would seem that the estimated cost, not of a part, but of the whole proposed improvement, should be submitted to councils. Such, indeed, it appears to us, is the provision of the statute. The estimate is to be made by the department having charge of "the improvement," and "the improvement" is certainly the whole improvement,—is the sum of all the parts necessary to its use as an improvement; less is not "the improvement"; there is to be an estimate of the "whole cost," and the clause has for its subject-matter contracts for "public improvements." Such construction is in accord with the general purpose of the act to vest the exercise of municipal contracting power for public improvements solely in councils. An estimate in accord with this construction enables councils to intelligently pass upon and commit the city to the improvement as a whole, and to outline a systematic and continuous policy in making it. By making such estimate the executive officer places on record the basis of cost on which the councils are induced to contract,—a safeguarding provision which must lead to deliberate and well-considered action on his part; and, councils being restricted in the extent of their contracts to the basis estimate, assume the responsibility of undertaking the improvement on such basis of cost. Under any other construction a department could furnish an estimate of the cost of a part only of some public improvement, and councils, by the adoption of such part, useless in itself without other additions, would place the city in the alternative of spending large sums to make the work undertaken of

any practical use or lose the isolated part unwisely begun. In the absence of express language necessitating such view, we cannot accede to a construction that would sanction a procedure so unbusinesslike and fraught with the possibility of ill-considered expenditure. Indeed it is evident that section 15 was designed as a safeguard against such dangers by subjecting a proposed improvement, in the light of its probable cost, to the light of publicity and the test of general civic opinion. Section 4 provides, "All sessions of council * * * shall be public," and "no ordinance * * * shall be passed finally on the day of its introduction,"—measures which provide time for public opinion to influence councilmanic action. An estimate of the whole cost made to council thus causes the people to face the city's undertaking a public improvement in its entirety. It will then be for the people, who, as we have seen, are the principals in the contract, to determine, through the councils, whether the city shall embark in the undertaking and shall contract. The facts in this case show that the contract in question was not authorized in accordance with the construction here given the act. On December 13, 1901, an ordinance, which is the sole basis of such contract, was enacted, as follows:

"An ordinance—providing for the letting of a contract or contracts for the work necessary to be done for the purpose of the extension and improvement of water supply and distribution, and including the filtration of such water supply.

"Section 1. Be it ordained and enacted by the city of Pittsburg, in select and common councils assembled, and it is hereby ordained and enacted by the authority of the same. That the city recorder and the director of the department of public works shall be and are hereby authorized and directed to let a contract or contracts for the work necessary to be done for the purpose of the extension and improvement of water supply and distribution, and including the filtration of such water supply, for a sum not to exceed one million five hundred thousand dollars ($1,500,000.00) or so much thereof as may be necessary to construct so much of the filtration plant for the city of Pittsburg as is shown upon the drawings and description in the specifications as and to be known as contract No. 1 to the lowest responsible bidder or bidders, and enter into a contract or contracts with the successful bidder or bidders for the performance of the work, in accordance with an act of assembly entitled, 'An act for the government of cities of the second class,' approved the 7th day of March A. D. 1901, and the different supplements and amendments thereto, and the ordinances of councils in such cases made and provided.

"Sec. 2. That any ordinance or part of ordinance, conflicting with the provisions of this ordinance, be and the same is hereby repealed, so far as the same affects this ordinance."

It is contended that the report of the filtration commission constituted such an estimate as the act required. In 1896 that commission was created to examine and report on the subject of a water supply for Pittsburg. The commission called to its aid competent experts, examined plants here and abroad, and subsequently made an exhaustive report to councils, recommending the construction of a filtration plant, the adoption of a meter system therewith, and gave estimates of cost. The report evidences a systematic and intelligent consideration of the subject and its conclusions and recommendation deserve high regard. But we cannot overlook the fact that this

report, in existence when the act was passed, is not made by such act the basis upon which the city may contract, and, highly as we personally regard it, we cannot judicially adjudge it an "estimate of the whole cost, furnished by the proper officer through the department having charge of the improvement." Other than this report it is not proved that any estimate of the cost of the whole of the proposed improvement was furnished councils by the department director, or was any estimate made by him of the part of the improvement included in the present contract and submitted to councils. It is true the engineers furnished to the director estimates of the parts of the work embraced in this contract, but they were furnished after the ordinance was passed. It will be noted that the present contract provides for the construction of sedimentation basin, filters, force main, and conduits, or the filtration plant proper. The intake pumping machinery to carry the water to such plant and the tunnel to carry the filtered product under the river to the Brilliant pumping station have not been estimated to councils, and, of course, no estimate of their cost has been considered by councils and made the basis of future contracting for their construction. So, also, no estimate has been made to councils of the land upon which the plant will be located. These elements are, singly and collectively, absolutely necessary to the use of the filtration section, and they, as well as the land, must, under any view, be deemed parts of the filtration plant, and, as such, regarded as proper subjects of estimate and consideration at the same time. But, apart from these elements, which are physically connected with and a part of the filtration plant, the necessity for an estimate of the cost of the filtration improvement or system as a whole, and the adoption of the estimate of the whole as the subject of and basis for future contracts, is strikingly illustrated by the facts disclosed in the report of the filtration commission in reference to an accompanying meter system. Such meter system, though not physically connected with the filtration plant, is by such report deemed a necessary and indispensable factor to the practical use of a filtration plant. That such is the case is shown by the report. To illustrate: It is therein shown that in 1883 the quantity of city water used averaged 157 gallons daily per person. This amount, certainly ample in quantity, has steadily increased, owing to uncontrolled waste, until in 1897 it reached 233 gallons daily per person. If the past is an index of the future, it is evident that this waste will continue to increase in quantity; and the water wasted will be more costly to the city, because it will be a waste of filtered instead of unfiltered water, as at present. In view of this the commission say, and their words should command grave consideration:

"Should the present unrestricted use of water be allowed to continue, a filter plant as proposed will have been outgrown almost before it is completed, and additions will require to follow each other on a scale, and with the frequency, which can hardly be estimated."

If this reasoning be correct, and no one who has made a study of public water supply can question the general principle here stated, the construction of a filtration plant on the scale proposed in the

present contract must be followed by others, unless the meter system is employed. When, then, the city contracts for a filtration plant, it faces the alternative of adding additional filter plants hereafter or of restricting consumption by a meter system. The present contract provides for a filtration system, but by the action of the councils there is nothing to show, either in plan or estimate, which course is to be followed,—whether these filtration plants are the forerunners of others, or whether the meter system shall be adopted. The statement of these facts, based wholly on the report of the commission, is a demonstration of the correctness of the construction we place upon the act; namely, that the estimate on which any part of a proposed public improvement is based should be an estimate of cost, based on the whole improvement. In the absence of such estimate as a foundation for the present contract, no one can say whether the city, in contracting for the filtration plant provided in Contract No. 1, is beginning a public improvement consisting of this filtration plant alone, with a meter system that will render it ample for the city's needs, or whether this filtration plant, without a meter system, is to be outgrown before it is completed, and is, therefore, but the first of a series. We deem it proper to say we understand from the statements made at the hearing that the intention is to supplement the filtration plant with the meter system, which the report of the commission shows can be gradually added, and with the result of lowering present water rates, and not to embark the city in the construction of a series of such filtration plants without the meter system. If such be the case there should be no uncertainty as to the scope of the improvement the city is undertaking, and there will be none if its contracts are based "upon estimate of the whole cost, furnished by the proper officers through the department having charge of the improvement." That these provisions are obligatory, basic to the city's contractive power, and mandatory, we have no hesitation in holding; and this view finds support in Hepburn v. City of Philadelphia, 149 Pa. 340, 24 Atl. 279; Malone v. Same, 147 Pa. 420, 23 Atl. 628; City of Pittsburg v. Walter, 69 Pa. 365, and Reading City v. O'Reilly, 169 Pa. 369, 32 Atl. 420. If the improvement is such that the statutory estimate of the whole cost can be made, the legislature has said it must be made, and it alone shall be the basis of contract. If the improvement is such that no estimate can be made, then the legislature has not given the city the power to contract. As the contract before us was not based on the statutory estimate, the legal question involved must be decided against the city. Let a decree be prepared enjoining the letting of the contract.

THE JAMESTOWN.

THE NORFOLK.

(District Court, E. D. Virginia. February 18, 1902.)

1. COLLISION—STEAMSHIP AND TUG WITH TOW—PRESUMPTION OF FAULT.
   A tug with a vessel in tow occupies the position of an encumbered vessel, and it is the duty of a steamship approaching it, unencumbered, to keep out of the way. Its action, under any circumstances, should be on the safe side, taking no chance of collision which can be avoided, and it will be presumed to have been in fault for a collision unless fault of the tug or tow is shown.
2. SAME—DUTY OF TUG WITH TOW—NAVIGATING CHANNEL.
   While a tug with a tow has the right of way over an unencumbered vessel, it has no right to unduly or unnecessarily obstruct the pathway of other vessels, and in navigating a channel known to be constantly used by other vessels it is its duty to take all proper and reasonable measures to have its tow under control, and to lessen the danger of collisions.
3. SAME—EVIDENCE CONSIDERED.
   A large steel barge, laden with freight cars, while passing up the Elizabeth river to Norfolk at about 5 in the evening, in tow of an ocean tug, came into collision with the steamship Jamestown, which was passing down. The barge was on a hawser of 70 to 100 fathoms, the tide was flood, and a gale from the northwest made it difficult to control the tow, so that the two vessels occupied the greater part of the channel. This fact was known, or should have been, to the Jamestown, which saw the tug and tow when 2½ mile away, but kept its speed of 14 or 15 miles an hour until opposite the tug, when its effort to avoid collision by stopping and reversing came too late. *Held*, that both the steamship and the tug and tow were in fault, the former for approaching at too high a speed and failing to stop before there was danger of collision, and the latter because it was negligence, under the circumstances, to enter the channel, at a time of day when outgoing steamers were known to be coming down, without shortening the hawser, or taking other measures to bring the barge under closer control, she having been to the east of the center of the channel at the time of collision.

In Admiralty. Libel and cross libel for collision.

Thomas H. Willcox and Whitehurst & Hughes, for the barge.
Frank D. Sturgiss and Hughes & Little, for the Jamestown.

WADDILL, District Judge. This is the case of a libel and cross libel arising out of a collision between the Old Dominion Steamship Company's ship the Jamestown and Barge No. 5 of the New York, Philadelphia & Norfolk Railroad Company, on the evening of February 8, 1899, in the Elizabeth river, between Boush's Bluff and Sewell's Point, the barge, in tow of the tug Norfolk, coming up the river, on her way from Cape Charles to Port Norfolk, and the steamer going down, on her way from Norfolk to Newport News. The tide at the time was flood, with a heavy northwesterly gale prevailing.

The charges of fault alleged against the Jamestown are: (1) That she was proceeding at too rapid a rate of speed; (2) that she did not have a proper lookout; (3) that she changed her course from the eastern side of the channel; and (4) that she did not stop and reverse in time.

The charges against the tug and tow are: (1) That they were wrongly navigating on the east side of the channel; (2) that they did not obey the law, and go to the right; and, (3) as one reason for their omission to obey the law, that the barge could not be properly handled, because of the undue length of the hawser by which she was being towed.

The evidence, as viewed by the court in this case, establishes quite clearly two facts, one of which is most earnestly contested by the libelant, and the other by the respondent, viz.: First, that the tug and tow, at the time of the collision, as they had been for some time prior thereto, were occupying practically the whole channel, and certainly that the stern of the barge was considerably east of the midway of the channel; and, second, that this position of the tug and tow ought to have been seen and was observed by the navigators of the Jamestown a sufficient length of time ahead to have avoided the collision by the exercise of proper care on their part.

It is necessary to ascertain the liability of the parties, respectively, in the collision with these two facts established. The tug with the tow occupied the position of an encumbered vessel, and the Jamestown was free, and, under the circumstances, should have been navigated with caution; and, unless it appears that the encumbered vessel was at fault, it will be presumed that the collision was the result of the Jamestown's negligence. An unencumbered vessel approaching a tug with tow should keep out of the way. The Mayumba (D. C.) 21 Fed. 476; The B. B. Saunders (C. C.) 25 Fed. 727; The Lucy, 20 C. C. A. 660, 74 Fed. 572; Spencer, Mar. Coll., 264, 275, 276.

In The Syracuse, 9 Wall. 672, 675, 19 L. Ed. 783, 784, Mr. Justice Swayne, speaking for the supreme court, said:

"A tug with a vessel in tow is in a very different position from one unencumbered. She is not mistress of her motions. She cannot advance, retreat, or turn either way at discretion. She is bound to consult their safety as well as her own. She must see that what clears her of danger does not put them in peril. For many purposes it may be regarded as a part of herself. They have the benefit of her traction, and she the burden of their inertia."

The tug Norfolk was a large ocean-going tug, and had in tow a steel barge of large dimensions, loaded with 28 freight cars, with a hawser variously estimated from 70 to 100 fathoms in length, and was at the time of collision ascending the Elizabeth river, with a flood tide, and a strong northwesterly wind prevailing, which tended to make the barge trail across the channel, and made the control of the tow a matter of more or less difficulty. The steamship, under these circumstances, was descending the river, with wind and tide against it, which enabled it more easily to control its movements. The Galatea, 92 U. S. 439, 23 L. Ed. 727; The Henry Clay (D. C.) 72 Fed. 1021.

While the libelant insists that the tug and tow were to the westward side of mid-channel, and that the tug was well to the westward side at the time Sewell's Point was passed, a distance of some mile and three quarters below the scene of collision, which was agreed to be about 3,600 feet below, or north, of Boush's Bluff, still the evidence

does not sustain, in my judgment, this contention of the libelant, certainly as to the position of the tug and tow when the collision occurred, though the tug may have been in the position claimed for it at the time it passed Sewell's Point. The navigators of the steamship admit having observed the tug and tow after passing Lambert's Point, and from thence for a distance of some 2½ miles, and that they slowed down while making the turn at the piers at Lambert's Point, and thence straightened out on the course down to Boush's Bluff lightship, there made a close haul to the eastward, and proceeded, according to their testimony, down the eastern side of the channel of the Elizabeth river, under one bell, until within a short distance of the scene of the collision, when the steamer, under her port helm, applied for the purpose of passing to the eastward of the barge, "smelt bottom," and took a sudden sheer, coming into collision with the barge, and that the steamer at that time stopped and reversed, and did all in its power to avert the disaster. The libelant's contention, on the other hand, is that the Jamestown ran at a high rate of speed, from 14 to 15 miles an hour, from Craney Island down until when, abreast of the tug, it slackened its speed, and attempted to stop and reverse, but too late to avoid the collision. The evidence tends strongly to support the position taken by the tug and tow as to the speed of the steamer, when it attempted to stop and reverse, and at least establishes the fact of the steamer's failure to take the proper precautions to avoid collision with the tug and tow, then virtually across its pathway. Indeed, it seems quite evident that, until practically in collision, the steamer proceeded upon the theory that it could pass clear of the barge with safety.

There was nothing in the existing conditions to prevent the steamship's keeping out of the way of the tug and tow; and having seen the same the distance it admits it was observed, at that hour of the evening, about dark, knowing that the tow was moving with the wind and tide, it should have exercised a greater degree of care and caution than it did in approaching the tow. Any error should have been on the safe side. It was not enough to have so acted or changed its course as possibly, or even probably, to have avoided a collision. No such chances need or should have been taken. The Wilkesbarre (D. C.) 50 Fed. 582; The Chatham, 3 C. C. A. 161, 52 Fed. 396, 399; The Owego (D. C.) 71 Fed. 537; Mars. Mar. Coll. 377.

Coming to the faults alleged against the tug and tow, while it seems quite evident that the Jamestown should have exercised a greater degree of care to avert the collision than it did, it cannot be said that the tow was free from fault, and that its neglect did not, in part, bring about the collision. For a distance of some two miles during the hour of the evening that steamers leave Norfolk on their outward trips practically the entire channel was taken up by this tug and tow, and, while other steamers passed it further down the channel with safety, one barely escaped having the same misfortune overtake it that befell the Jamestown. The condition of the wind and tide was well known to those in charge of the tug and tow, and there was no difficulty in so managing the same as to prevent the obstruction of the entire fair-

way to others entitled to the like right. The tug was admitted to be sufficiently powerful to have carried two barges like the one in tow; and if the hawser as used, whether 70 or 100 fathoms, was too long to keep the barge, under the then existing conditions of the weather, under proper management and control, it could easily have been shortened, and should have been. While it is true that the tug and tow occupied the position of an encumbered vessel, and to that extent had the right of way, still corresponding obligations rested upon it, not unduly and unnecessarily to obstruct the pathway of commerce, as it did on this occasion, and particularly in this narrow, busy, and much frequented channel. The Mary McWilliams (D. C.) 47 Fed. 333; The Plover (D. C.) 100 Fed. 883.

Counsel for libelant has made reference to the case of The Westhall, recently decided by this court, and unreported, as sustaining the contention made in behalf of the tug and tow on this occasion. A careful examination of that decision will fail to show anything inconsistent with the views herein expressed. In that case the tug, with several barges in tow, on passing down the eastern side of the channel of the Elizabeth river, crossed to the western side, with a view of proceeding to an anchorage ground, and in so doing the steamship, in broad daylight, passing up the western side of the channel, came into collision with the rear barge in tow, the tug and other barges having passed out of the channel. No excuse could properly have been made for this conduct on the part of the steamer, as the position of the tug and tow was obvious, and only one barge was in the track of the steamer, with ample room for it to have passed clear on the other side and avoided the collision.

It follows from what has been said that both the steamship and tug and tow were at fault in the collision, and as a result the damage caused thereby should be divided, and a decree may be accordingly so entered.

In re R. T. ERVIN & CO.

(District Court, E. D. Pennsylvania. March 12, 1902.)

No. 809.

BANKRUPTCY—PROVABLE DEBTS.

The fact that a corporation entered into an ultra vires contract, by which it became a de facto partner in an existing firm, does not affect its rights as a creditor of such firm upon a debt previously contracted; and where, through a mutual mistake, the indebtedness was overlooked, and remained unpaid until the firm became bankrupt, the corporation may prove the same in bankruptcy upon an equality with the claims of other creditors.

In Bankruptcy. On certificate of referee and exceptions to referee's decision allowing claim of Ervin, Page & Co., Incorporated.

Following is the report of the referee, Edward F. Hoffman:

The referee certifies to the court the following question as to the allowance of a claim of Ervin, Page & Co., in the amount of $2,000, which claim, it is

alleged by the claimant, is not covered by the decision of the referee confirmed by the district court and circuit court, disallowing a claim in excess of $17,000 filed by this claimant.

The facts are, briefly, as follows:

Prior to January 1, 1900, Benjamin S. Fagan and Russel T. Ervin, under the firm name of Barnes & Co., were engaged, in the city of Philadelphia, in the business of keeping a restaurant and selling teas and coffees. Ervin, Page & Co., Incorporated, a corporation organized under charter in the state of New Jersey, were engaged in the city of Philadelphia in the business of importing teas and coffees. In 1899 this corporation made sales of teas and coffees to Barnes & Co. in the amount of $2,000, which amount ($2,000) is the subject of this claim.

On December 15, 1899, subsequent to the sales mentioned, the corporation of Ervin, Page & Co. entered into a written agreement of partnership with Benjamin S. Fagan and Russel T. Ervin, hitherto trading as Barnes & Co., by the terms of which agreement the firm name of the partnership was changed to that of Russel T. Ervin & Co., and the partnership was to commence January 1, 1900. By this agreement the corporation agreed to contribute $15,000 to the enlargement of the business of the new firm of Russel T. Ervin & Co., as reorganized under said agreement, and provided for a partnership participation in the profits and management of the business by the corporate partner.

At the time that this new partnership was entered into it was supposed by the parties thereto that there was no indebtedness then existing from the firm of Barnes & Co. to Ervin, Page & Co.; but it subsequently developed, and is an admitted fact, that through a mistake in bookkeeping the before-mentioned debt of $2,000 was, on January 1, 1900, due by Barnes & Co. to Ervin, Page & Co., but this fact was not discovered until the latter part of October or early part of November, 1900, when the books of the corporation were examined by an expert accountant.

The original claim filed presented two items,—$10,773.33 "for cash loaned," describing the claim as "balance of cash loaned after deducting the amount of $15,000 invested at the risk of the business," and an item of $7,565.78 for "merchandise sold and delivered." It appears of this amount $2,000 was for sales made by Ervin, Page & Co. to Barnes & Co.

In passing upon this claim the referee found that as to money contributed by virtue of a partnership agreement the claimant could not recover, as it has sought to obtain the benefits of a partner, and could not defend on the ground of "ultra vires" to the detriment of creditors after the contract had been executed.

As to the sale of goods made prior to the partnership agreement, the referee found as follows:

"As to a portion of the claim, the amount of indebtedness contracted before the execution of the agreement, if it can be shown that there was no arrangement by which this debt was merged into the indebtedness created under the agreement, a proof of claim for that amount should be admitted. The claim as presented is disallowed, with leave to the claimant to offer proof of claim of money due prior to the agreement and not arising from any transaction connected with said agreement."

The claimant now makes demand for $2,000, admitted to be due by R. T. Ervin & Co., successors to Barnes & Co., if the said debt of $2,000 is not to be considered as a contribution under the partnership agreement, and therefore controlled by the decision of this court confirmed by the circuit court of appeals.

It is claimed by the trustee that the corporation, having allowed this money to remain uncollected, must be considered to have done so for the purpose of adding that much to its cash contribution under the partnership agreement, and that it therefore forms part of the fund covered by said agreement, and as to which the corporation are not protected by the doctrine of ultra vires.

The referee's understanding of the opinions of the district court and circuit court of appeals is that the reasoning of these opinions only applies to the

moneys contributed after the date of the partnership agreement. To hold otherwise would submit the corporation to the full liabilities of partnership.

The stockholders of the corporation are fairly chargeable with the consequences of the illegal acts of the directors, but should not suffer loss of a legal debt because of subsequent misconduct. The doctrine of ultra vires is of comparatively modern origin, and its purpose is to protect stockholders from entering into business relations foreign to the purposes of the corporate grant. The public is also to be protected, but the loss of the right to recover affords sufficient protection. If directors of corporations could involve the stockholders in full partnership liabilities, the consequences would be most unjust and disastrous.

The illegal conduct of the directors of the corporation in this case did not begin until after the so-called articles of partnership had been entered into. The directors have a right to enforce contracts entered into before that date.

Amounts involved do not affect legal principles, but may serve to illustrate results. Suppose that the figures in the case in hand were reversed, and that $17,000 was due from the bankrupt's estate for sales legally made prior to the partnership agreement, and that only $2,000 had been contributed under the partnership agreement, it would seem to be an extreme view to hold, for instance, that $2,000, contributed after the partnership agreement had been entered into, controlled all debts previously contracted. It would be, in effect, holding that after the mere execution of a partnership agreement by a corporation, though the agreement be ultra vires, no claim could be made by the corporation for sales previously made. It cannot be disputed that the partnership agreement was an ultra vires act. The stockholders, on discovering that the corporation organized for the sales of teas and coffees had entered into an agreement for the conduct of restaurants, could have enjoined further proceedings and obtained relief from the courts against their directors. Therefore it would appear clear that if the bankrupts, in the proper course of business, were indebted to Ervin, Page & Co., Incorporated, the right to recover this indebtedness should not be lost to the stockholders of the corporation, because articles of partnership, not within the limit of the corporate powers, had been entered into.

The agreement between Ervin, Page & Co. and R. T. Ervin & Co. does not mention prior indebtedness. It stipulates that the $15,000 mentioned therein was contributed for the enlargement of Ervin, Page & Co.'s business on lines therein stated, the opening of new restaurants, and under joint management. All moneys embarked by Ervin, Page & Co. in this new enterprise, whether in the form of sales on credit, cash contributed, and loans made, cannot be recovered by the corporation claimant, because it is, on the ground of estoppel, estopped from making the defense of ultra vires to the illegal transactions of its directors resulting in detriment to other creditors. Sales made previous to the agreement, and not in contemplation of it, cannot be affected by it, unless the agreement be construed to involve the parties thereto in the full liabilities of partnership. All the cases cited are of contracts entered into in pursuance of agreements ultra vires in character, where the corporate creditor seeks to recover the debt arising under the agreement, and escape liability on the ground of ultra vires.

In Bank v. Gray, 14 Barb. 471, the claim is on notes given in pursuance of an ultra vires partnership agreement. Indebtedness in Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co., 83 Pa. 160, and Wright v. Pipe Line Co., 101 Pa. 204, 47 Am. Rep. 701, arises from ultra vires contracts sought to be avoided. The claim for $2,000 in the case in hand does not arise under the agreement. If the trustee in bankruptcy can enforce this agreement against the corporation as to this indebtedness arising on book accounts two years prior to the agreement, then this agreement must be construed to establish not a quasi partnership, but an "actual partnership." To decide this would abolish the doctrine of ultra vires.

The creditor is estopped from making the defense of ultra vires to transactions arising under the partnership agreement.

The trustee cannot enforce the partnership agreement as to transactions not entered into in pursuance of it.

In passing upon the claim first filed, the circuit court says, opinion by Dallas, J.:

"The trustee in bankruptcy did not seek to enforce an ultra vires contract, nor to compel the performance of any of its provisions. He simply insisted that a status which had been created by what had actually occurred should not, at the instance of a party to its creation, and to the prejudice of innocent third parties, be utterly ignored."

This dictum appears to be in accord with the views expressed by the referee. For the reasons stated, the claim in the amount of $2,000 is allowed.

Reath & Reath and Albert B. Weimer, for trustee.
N. Dubois Miller, for claimants Ervin, Page & Co.

J. B. McPHERSON, District Judge. I think the referee was right in allowing this claim. The argument of the exceptant is based upon the proposition that the money in dispute was "left in the business" of the bankrupt by the claimant,—carelessly, it may be, and not by design, but left there at all events,—thus swelling the apparent assets of the enterprise. From this proposition the conclusion is said to follow that the claim of the corporation partner must be postponed to the claims of the general creditors. This conclusion, in my opinion, is not sound, and finds no support in Wallerstein v. Ervin (C. C. A.) 112 Fed. 124. Indeed, the sum now in dispute was expressly declared by the court of appeals to be outside the scope of that decision; and I am in a position to say with confidence that the district court, in deciding the case below (109 Fed. 135), gave the matter no consideration. The facts necessary now to be taken into account are these: When the illegal partnership was formed between Barnes & Co. and Ervin, Page & Co., Incorporated, under the firm name of R. T. Ervin & Co., Barnes & Co. owed the claimant Ervin, Page & Co., Incorporated, a valid debt of $2,000, but by some mistake this debt was overlooked, and it was not provided for by the settlement that preceded the formation of the partnership. The oversight did not obliterate the debt, however, nor did the formation of the partnership transform the debt automatically into a virtual advance toward the partnership business. It is true that, if the debt had been known and had been paid, the partnership would have been $2,000 poorer, and it may be conceded that its apparent assets and its credit were therefore larger by that sum; but this was an inevitable incident of an innocent mistake. The corporation was decided to be a de facto partner, and its claim upon advances to the partnership was postponed to the claims of general creditors; but its disability as a partner does not prevent it from prosecuting a valid claim against the other partner, contracted before the illegal partnership was formed, and never intentionally used for the benefit of the partnership business. The claim does not grow out of the partnership relation, but out of an independent and antecedent transaction.

The allowance of the claim is approved.

In re MAYS.

(District Court, S. D. West Virginia. April 21, 1902.)

1. BANKRUPTCY—GENERAL ASSIGNMENT—ALLOWANCE TO ASSIGNEE.
An assignee under a general assignment for the benefit of creditors, where the assignor is adjudged bankrupt within four months after the assignment, is not entitled to any allowance for his services in the care and preservation of the property, since the assignment, being an act in violation of the bankruptcy law, to which he was a party, he becomes merely the agent of the bankrupt.

2. SAME.
Such assignee is entitled to an allowance from the estate for the actual and necessary expenses incurred in preserving the property while in his possession, since such expenses would have been provable debts of the estate had they been incurred as such by the bankrupt.

(Syllabus by the Court.)

In Bankruptcy. On application of Jean F. Smith, assignee of the bankrupt under the state insolvency laws, for allowance for compensation, attorney's fees, and expenses.

John T. Graham, for assignee.

KELLER, District Judge. On January 1, 1902, J. W. Mays and S. B. Mays, his wife, made a voluntary assignment of their property in the state to Jean F. Smith, Esq., for the benefit of their creditors. The assignee qualified as such in the state court, took possession of the property thus assigned, protected the same by insurance against loss by fire, and took personal charge of the same. Within a few days after the making of this assignment an involuntary petition in bankruptcy was filed against J. W. Mays by certain of his creditors, and T. A. Null was, by order of this court, appointed special receiver to take charge of the property and effects of said bankrupt; and on January 10, 1902, said Smith, assignee, delivered the property and effects of said Mays and wife into the hands of said special receiver. The said S. B. Mays, wife of J. W. Mays, also filed a voluntary petition in bankruptcy. The case was referred to R. M. Baker, one of the referees in bankruptcy of this court, and a trustee was duly appointed by the creditors of the bankrupts. In the course of the proceedings the assignee named in the voluntary deed of assignment filed a claim for $100 for his services, $50 as a fee to his attorney, and $12 for various expenses paid by him in connection with the assignment; making in all $162. The allowance of the claim for services and attorney fees was resisted by the creditors, and the referee held that "he cannot allow the said assignee or his attorney anything for services rendered under and by virtue of said deed of assignment, as such claims are not provable debts of the bankrupt, not having been incurred by him, but by the assignee himself in an attempt to prevent the administration of the estate in the bankruptcy courts, such assignment being an act of bankruptcy in itself, and in contravention of the policy of the bankrupt law, which is to draw to the bankruptcy courts the administration of the estates of all insol-

vents; but that said Smith, assignee, is entitled to an allowance from the estate for the actual and necessary expenses incurred in the administration and preservation thereof, which, from the proof of claim filed by said Smith, is $12; and this amount is allowed, it appearing that he had actually expended that amount in good faith prior to the institution of the bankruptcy proceedings." The assignee, claiming to be aggrieved by the action of the referee in refusing to allow the claim as filed by him, prays that the order of the said referee be set aside, and the proceedings, so far as they relate to his claim, be reviewed; and the referee thereupon certified the question to the court as follows:

"Whether an assignee for the benefit of the creditors, under an assignment made under the state laws, prior to the filing of an involuntary petition against the bankrupt, is entitled to compensation, as such assignee, for his services rendered prior to the adjudication and prior to the appointment of a trustee in the bankruptcy proceedings?"

In the case of West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, it was held by the supreme court of the United States, in construing the present bankruptcy act, that:

"A deed of general assignment for the benefit of creditors constitutes in itself an act of bankruptcy, which per se authorizes an adjudication of involuntary bankruptcy under section 3 of the act of congress of 1898, entirely irrespective of actual insolvency."

In the case of Stearns v. Flick (D. C.) 103 Fed. 919, it was held by Judge Thompson that:

"A claim by an assignee under the state insolvency laws for his compensation and expenditures in administering the estate prior to the filing of a petition in bankruptcy against the assignor was not a provable debt of the bankrupt, not having been incurred by him, but by the assignee himself in an attempt to prevent the administration of the estate in the bankruptcy courts; and that it was immaterial that he acted in good faith, and in conformity to the insolvency laws of the state."

In a case decided by Judge Purnell (In re Tatum [D. C.] 112 Fed. 50) a precisely similar question to the one here presented arose, and the judge there held that:

"A trustee under a general assignment for the benefit of creditors, where the assignor is adjudged bankrupt within four months after the assignment, is entitled to an allowance from the estate for the actual and necessary expenses incurred in preserving the property while in his possession, but not to any allowance for his services, since the assignment was an act in violation of the bankruptcy law, to which he was a party."

In that case the court said:

"Taking the inventory and preserving the estate being for the benefit of creditors, equity, which governs, when not otherwise provided, in the administration of bankruptcy estates, would justify and require that a trustee or assignee under a general assignment should be allowed actual expenses incurred. This he should itemize, and, if required, verify under oath, producing proper vouchers for money expended or expenses incurred. Such assignee is the agent for the bankrupt, and the estate may be taken from him by a summary proceeding in the bankruptcy court. Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814. The assignment being an act of bankruptcy (West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098), and a fraud on the bankruptcy act, as contemplated therein, the as-

signee is a party to the wrongful act. An allowance for services rendered in furtherance of such wrongful act would be a violation of the spirit, if not the letter, of the bankruptcy law. The assignment is void, and acts done in pursuance thereof confer no rights when the proceedings in bankruptcy are instituted within four months of the date of such assignment. An assignee or trustee under such assignment is a party to the wrongful act, and cannot be allowed for services rendered in this behalf, out of the estate, in the court of bankruptcy. Such assignments are contemplated and allowed under the state law (Laws N. C. 1893, c. 433), but are acts of bankruptcy under the act of congress."

This case appears to me to be absolutely similar to the one certified to me for opinion, and to correctly propound the law. So far as the courts of bankruptcy are concerned, the assignee of a debtor under a general deed of assignment must be considered as the agent of the bankrupt, and entitled, therefore, to no more compensation out of the estate of the bankrupt in the administration thereof in the bankruptcy court than the bankrupt would be entitled to had he performed these services himself. So far as actual and necessary expenses incident to the care and preservation of the property are concerned, I regard these as provable debts of the estate, because, had they been incurred by the bankrupt as debts, they would have been so provable by the creditors. They are not preferred claims. Stearns v. Flick (D. C.) 103 Fed. 919.

For the foregoing reasons the order of the referee made on the 12th day of April, 1902, upon the hearing of the petition of Jean F. Smith, assignee, is approved in full.

CORBITT v. FARMERS' BANK OF DELAWARE et al.

(Circuit Court, E. D. Virginia. March 19, 1902.)

1. REMOVAL OF CAUSES—PROCEEDINGS AFTER REMOVAL.
   The removal of a cause from a state to a federal court does not admit that it was rightfully pending in the state court, nor deprive the defendant of the right to move for the abatement of an attachment by which that court acquired jurisdiction.
2. ATTACHMENT—PROPERTY SUBJECT TO ATTACHMENT—MONEY IN REGISTRY OF ANOTHER COURT.
   Moneys paid into a federal court pending litigation in regard thereto, and placed in its registry, remain in its custody until paid out, pursuant to law, by its order, and are not subject to attachment by any other court; the jurisdiction of the court over such funds is not extinguished by the entry of a final decree or order for their disbursement, but continues until such decree or order has been executed.

In Equity. On motion to abate attachment.

McLemore & Corbitt, for complainant.
Heath & Heath, for defendants.

WADDILL, District Judge. By decree entered in the United States district court for the Eastern district of Virginia, on the 23d day of December, 1901, in the matter of the West Norfolk Lumber Company, in bankruptcy, a check was directed to be drawn in favor

of the defendant the Farmers' Bank of Delaware, or Heath & Heath, its counsel, on the funds to the credit of the court, in its registry in the City National Bank of Norfolk, Va., for the sum of $12,316.49. On the 27th of December a check pursuant to such order was duly issued and delivered to the defendant bank's counsel. On the 26th of December this suit was instituted in the court of law and chancery of the city of Norfolk, by the trustee of the bankrupt company, asserting certain preferences claimed to have been made to the defendant bank within four months of the bankruptcy, in which suit an attachment was sued out, and on the morning of the 27th served upon the president of the City National Bank of Norfolk, and Heath & Heath, attorneys, before the payment of the check was demanded of the bank. By proper proceedings in the state court the cause was regularly removed to this court, and is pending therein, and is now before the court upon a motion to abate the attachment, sued out and executed, as aforesaid, upon the officers of the registry of the court and the attorneys of the defendant company.

The removal of the cause from the state court to this court does not disentitle the defendant bank to move to abate the attachment sued out, nor does it admit that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; and in this court the defendant can avail itself of any and every defense, duly and seasonably reserved and pleaded, to this action, in the same manner as if the suit had been originally commenced therein. Goldey v. Morning News, 156 U. S. 523, 525, 15 Sup. Ct. 559, 39 L. Ed. 517; Railway Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431.

The question presented by the motion to abate the attachment in this cause is whether moneys paid into court pending litigation in regard thereto, and placed by order of the court in its registry or some other designated depository, pursuant to law, are the subject of attachment emanating from another court. This question is one of importance, as it not only affects the orderly administration of justice in the several courts, but goes further, and tends, as in this case, to thwart and annul the carrying out of the court's judgment, in a case fully litigated, with the parties in interest all before it. Money paid into the registry of the court, pursuant to law, can only be withdrawn therefrom, by the very terms of the act of congress providing for the deposit, "by the order of the judge, or the judges of said court, respectively, to be signed by such judge, or judges, and to be entered and certified of record by the clerk." When a court causes funds to be so placed in its registry, they are to the credit of the court itself, there placed and held, to the end that its decrees and orders in respect thereto may be obeyed and carried out in accordance with its judgment rendered; and no court, other than one having a supervisory power over the acts of such court, can by any act of its own, or any decree, order, or process emanating from it, except with its leave, assert any claim to, or secure any right in or lien upon, such funds, so long as the same remain under its control. To entertain a contrary doctrine to this would not only work untold mischief and delay in legal proceed-

ings, but would result in innumerable conflicts between the courts themselves; and the consequence would be that funds once paid into court, with a view of having the rights of parties litigant thereto adjusted and determined, instead of being disposed of by the termination of the particular controversy, would be involved in an endless chain of litigation. This subject has been before the courts, state and federal, too frequently to now admit of serious cavil or doubt. Wallace v. McConnell, 13 Pet. 136, 150, 151, 10 L. Ed. 95; The Lottawana, 20 Wall. 201, 22 L. Ed. 259; Jones v. Bank, 22 C. C. A. 483, 76 Fed. 683, 686, 687, 35 L. R. A. 698; In re Forsyth (D. C.) 78 Fed. 296, 302–304; In re Cunningham, Fed. Cas. No. 3,478; Tuck v. Manning, 150 Mass. 211, 22 N. E. 1001, 5 L. R. A. 666; Curtis v. Ford, 78 Tex. 262, 14 S. W. 614, 10 L. R. A. 529; Holker v. Hennessey, 143 Mo. 80, 44 S. W. 794, 65 Am. St. Rep. 642; Allen v. Gerard, 21 R. I. 467, 44 Atl. 592, 49 L. R. A. 351, 79 Am. St. Rep. 816.

The position taken by counsel for complainant, that the court, having entered its final order in respect to the money in question, had exhausted its jurisdiction over the same, and that such funds then remain subject to seizure by attachment or other legal process, as any other property belonging to the defendant bank, is equally fallacious. A conclusion in favor of parties litigant to any controversy would be barren of good, if the court rendering the decision was powerless to cause its decrees and orders to be put into operation and duly executed; and such a result, as to moneys in the court's own registry, would, indeed, leave it in a helpless and pitiable plight.

In Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, Chief Justice Marshall said:

"The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied. Many questions arise on the process, subsequent to the judgment, in which jurisdiction is to be exercised."

In Osborn v. U. S., 91 U. S. 474, 479, 23 L. Ed. 390, Mr. Justice Field, speaking for the supreme court, said:

"The power of the court over moneys belonging to its registry continues until they are distributed pursuant to final decrees in the cases in which the moneys are paid. If from any cause they are previously withdrawn from the registry without authority of law, the court can, by summary proceedings, compel their restitution."

Reference has been made by complainant's counsel to the cases of Gumbel v. Pitkin, 124 U. S. 131, 154, 8 Sup. Ct. 379, 31 L. Ed. 374; Earle v. Conway, 178 U. S. 456, 20 Sup. Ct. 918, 44 L. Ed. 1149; Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855. Upon a careful examination of these cases, nothing will be found inconsistent with the views herein expressed; and the several state court authorities cited holding a contrary doctrine, notably Weaver v. Davis, 47 Ill. 235, and Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331, are not in accord with the preponderance of authorities, state and national.

It follows from what has been said that the attachment should be abated, and a decree may be accordingly so entered.

SWIFT & CO. v. GROFF et al.

(Circuit Court, D. Minnesota, Third Division. February 12, 1902.)

UNFAIR COMPETITION—USE OF TRADE-NAMES—"SWIFT."

The word "Swift," adopted and long used by Swift & Co., meat packers, etc., as a name for the various products of the company, has become known to the public as denoting the origin of such products; and the company is entitled to an injunction, on the ground of unfair competition, to restrain a manufacturer of like products from designating them by such name, where there is no apparent reason or appropriateness in such use, but it appears, rather, to have been adopted for the purpose of deceiving purchasers.[1]

In Equity. Suit to restrain unfair competition in trade. On motion for preliminary injunction.

Bond, Adams, Pickard & Jackson, for complainant.
John W. Willis and John E. Stryker, for defendants.

LOCHREN, District Judge (orally). The law recognizes that where a manufacturer has acquired popularity for his manufactured articles by reason of their excellence and satisfaction to purchasers, and has adopted a name by which they are designated, so as to refer to the origin of the articles of the manufacturer, he has such property in the name so adopted that no other person will be allowed to pirate it and use it for his advantage, and to the detriment of the person originally using the name to designate his own manufacture. This is so for the reason, first, that it is an injury to the person who has got a good name for his articles to deprive him of that advantage by deceiving persons who desire to buy articles of him, thus causing to him the loss of the sale of the articles; and also because it is a fraud upon the purchaser, who is prevented in that way from purchasing the articles he may desire to purchase. Now it is true, as stated by counsel, that nobody can adopt as a trade-mark or acquire a monopoly of a family name, so as to prevent another person to whom that name appertains from using it as his own name and marking his goods with it, if he does so in a way which is not calculated to represent them as the goods of another. But there may be some restriction on the use of one's own name, and he cannot use it in connection with other words in such a way that it will be likely to mislead intending purchasers, and cause them to purchase goods of his manufacture, mistakingly, as the goods for another person of the same name, who has an established reputation for his goods, and whose goods are desired by the purchaser. In this case it appears that the complainants adopted the name "Swift" for their various products, and that was the name of the person who originated the Swift Company, and properly used his own name to designate the various marketable products that were produced in the business of the company,—meats, mainly, but also such other articles as came

[1] Unfair competition, see notes to Scheuer v. Muller, 20 C. C. A. 165, and Lare v. Harper, 30 C. C. A. 376.

from the stock yard and slaughtering business as well. Among other things, they have used it for articles which they call "stock food" and "poultry food." They have never manufactured nor placed their trade-mark on the other articles which are stated here to have been manufactured by the defendants. Why the defendants adopted that name, or used the name "Swift" in their business, does not very satisfactorily appear. It appears that none of them were of that name. It is said that they used the name with reference to the rapidity or quickness with which the articles would operate; and while there might be some propriety or aptness with reference to some of these articles, such as lice killer and vermifuge or worm exterminator, it is difficult to see the aptness of applying it to lemon extract or lemon juice, or to the different kinds of food. It does not occur to me that there is any particular aptness in applying it to such articles. Its use in connection with the name adopted as the name of the company cannot have that particular idea connected with it; and it would seem that its use with reference to the articles would be to refer to their origin, or the place where they were manufactured, or to the persons who manufactured them. As far as defendant company is concerned, it does not seem to matter whether it was the name "Swift" or "Swift's," that was used. "Swift Packing Company" or "Swift's Union Stock Company" would not be particularly different from "Swift's Packing Company" or "Swift Union Stock Company." It would be still generally understood, I think, as taken from a proper name. And my impression is that, in the general apprehension, it would be so regarded in respect to these articles. "Swift" is not a very apt adjective to apply to any of them. The word goes further than "quick" or "rapid." It gives the idea of continuance of a very rapid motion. I am not impressed with the good faith of the use of that name in this case, and I am rather inclined to the impression that the name was used with the idea of taking advantage of the fact that the complainant company was a well-known company and largely engaged in business, and therefore it was an improper appropriation of the name of that concern. But I think there can be no complaint made where the name is used to designate goods that are not manufactured, or analogous to goods which are manufactured, by the complainant. The complainant does not make any lemon juice, or several of the other articles that are mentioned in the bill, and the complainant is not defrauded by the use of that name by the defendant, or by the sale of any such articles; and, as to the making of such articles, the public has no reason to expect that any articles that they buy of such kinds are the manufacture of the complainant.

I think that, as far as the stock food and poultry food are concerned, the writ of injunction should issue, and that as to the others it should not issue. An order may be drawn accordingly.

In re TAYLOR.

(District Court, D. Colorado. August 1, 1901.)

1. BANKRUPTS—CONCEALED ASSETS—IMPRISONMENT.
A bankrupt cannot be imprisoned indefinitely on the ground that he has concealed assets, especially when it is not known certainly that he has the assets which he is called on to surrender, and where he has been kept in jail for something over a month he ought not to be confined longer.

2. SAME—EXEMPTIONS.
A bankrupt who has made way with the greater part of his assets, and gotten them out of the jurisdiction, cannot ask to have an exemption set apart to him out of what is in the court's possession.

In Bankruptcy. On exceptions to rulings of referee.

John T. Bottom and Frank E. Carstarphen, for bankrupt.
Bicksler, McLean & Bennett, for creditors.

HALLETT, District Judge (orally). There is no doubt whatever that this man is a swindler, and a very bold and unscrupulous one. It has been apparent at all times that he either gave the money which he drew from the bank to the woman he calls his wife or kept it himself. The story that he put it in a cupboard under a stairway is incredible. That he drew the money from the bank and put it in such a place as that is too absurd for belief. If his wife was a concubine, and not his wife, she has probably made off with it, and is indifferent to his fate. In that view, he cannot return the money. Upon the hypothesis that he has possibly concealed the money, or at least $1,700 of the amount, and knew where he could get it, we have kept him in jail for something over a month. In a proceeding of this kind the court is not authorized to imprison a bankrupt indefinitely, especially when it is not certainly known that he has the money which he is called upon to surrender; and upon the ground that the bankrupt has been kept a sufficient time, probably, to induce him to surrender the money if he has it, I suppose he must now be discharged. In making such an order I would not have it understood that I am at all convinced that he has not this money in some place of concealment. He is a man of low order,—so low that it is most extraordinary that merchants should have given him credit. I do not think the merchants are entitled to very much sympathy in a case of this kind,—to pick up an adventurer of this sort and sell him goods. They ought to expect to be swindled. We will discharge the bankrupt from imprisonment upon the ground that it seems to be useless to keep him longer imprisoned in order to recover this money.

As to the exception to the report of the referee in disallowing the exemption, that will be overruled. It would be most extraordinary if a man of this kind, after making away with a great part of his stock, and getting it out of the jurisdiction, could come into court and ask that he have an exemption from the remainder of the stock. The statute of exemptions is made for honest debtors, and not for men like this one. The ruling of the referee in that respect is sustained.

KELLER et al. v. PIESEN et al.

(Circuit Court, S. D. New York. February 20, 1902.)

PATENTS—INFRINGEMENT—CABINET AND CUTTER'S SIZE TICKET.

The Keller patent, No. 403,939, for a combination of garment cutter's size tickets, with a cabinet for holding the same, *held* valid and infringed.

In Equity. Suit for infringement of letters patent No. 403,939, for a combined cabinet and cutter's size ticket, issued to John Keller May 28, 1889. On final hearing.

Walter D. Edmonds, for plaintiffs.
Eugene Cohn, for defendants.

WHEELER, District Judge. This patent, No. 403,939, dated May 28, 1889, and granted to John Keller, is for a combination of garment cutter's size tickets in rolls, with a cabinet for holding them in tiers, to be drawn out through apertures as the sizes are wanted for use. The specification is meager, but it seems to describe the parts sufficiently to be understood by those skilled in that art, which is all that is required. The description does not mention a back to the cabinet, and the perspective of the drawing is such that it does not show any, but one would be implied in the former and suggested by the latter. The evidence was admissible to make this plain, and properly shows how the cabinet, which is the principal part, would be understood to be used. Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177. The specific infringement complained of is a box holding the rolls of tickets to be drawn out through a long aperture extending in front of all the rolls. This variation seems to be immaterial. The rolls and box were furnished to an agent of the plaintiffs by one of the defendants at their place of business, who testifies that the agent requested the arrangement of the partitions for holding the rolls in the box and the aperture. This is denied by the agent, and the circumstances, together with the letter of the defendants to a customer as to furnishing cabinets, show that as to this the agent is most probably right.

Decree for plaintiff.

COLER v. ALLEN et al.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1902.)

No. 713.

1. APPEAL—PARTIES.

On an appeal to the circuit court of appeals, citation need be served only on those parties whose interests are affected by the decree or order appealed from.

2. CORPORATIONS—VALIDITY OF MORTGAGE—EFFECT OF INSOLVENCY.

A corporation, so long as it is a going concern and engaged in the active prosecution of its business, may lawfully execute a mortgage on its property, if done in good faith, to secure an extension of a prior indebtedness and further advances to be used in its business, although it is at the time financially embarrassed, or even insolvent; and there is nothing in the law of Washington, as established by the decisions of its supreme court, which renders such a mortgage invalid as against other creditors.

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

The appellant, F. W. Coler, appeals from a decree of the circuit court dismissing his bill of intervention after the court had sustained a demurrer thereto and he had refused to further plead. The appellant was a judgment creditor of the Pacific Northwest Packing Company, a corporation, and by his bill of intervention he sought to annul and set aside a mortgage which had been executed by the corporation to Henry F. Allen, and which was in the progress of foreclosure at the suit of said Allen. The mortgage had been executed on May 11, 1900, to secure the sum of $25,734 and advances to be made by the mortgagee not to exceed $10,000. In the bill brought to foreclose the mortgage it was alleged that after the execution of the mortgage, and in the months of May and June, 1900, the mortgagee had made advances under said agreement to said corporation in excess of said sum of $10,000. The complainant in the foreclosure sought to enforce his mortgage lien to the full amount of the said sum so owing on May 11, 1900, and the subsequent advances. From the pleadings it appears that the mortgagor was engaged in the business of catching and canning salmon, and was possessed of various kinds of property, which it used in connection with its business. All of its property was included in the mortgage to Allen, and in its answer to the bill of complaint in the foreclosure suit it alleged that its indebtedness to the complainant therein arose out of an arrangement which he had with the complainant by virtue of which the latter was to advance and did advance divers sums of money from time to time to the corporation, and was to receive, and did receive, in return the total output of the corporation's cannery for his reimbursement. In the foreclosure suit a receiver was appointed, and all the mortgaged property passed into his possession. The appellant in his bill of intervention alleged that by reason of the receivership all the property of his judgment debtor had been placed beyond the reach of execution, and he prayed the court to set aside the mortgage, and permit him to share equally with the mortgagee in the assets of the corporation. He further alleged in his bill that he had "no knowledge or information concerning the averments" of the mortgagee's bill relating to the consideration of the mortgage or the advances made or to be made thereunder, and he made denial of the legal conclusion that the mortgage was valid. This matter so set forth in the intervener's bill was clearly insufficient to impeach the mortgage or to raise an issue as to any of the facts pleaded in the mortgagee's bill. The appellant impliedly admits that such is the case, for he rests his cause upon the appeal solely upon the ground that he has shown that he is entitled to equitable relief upon his allegation that the corporation was insolvent at all times in the month of May, 1900, and at the time of the giving of the mortgage to the complainant Allen, and that its liabilities

grossly exceeded its assets, and "that at the time of giving the mortgage the defendant the Pacific Northwest Packing Company had reached a point where its debts were greater than its property, where it could not pay in the ordinary course, where its business was no longer profitable, and when it ought to be wound up and its assets distributed." The allegations of fact in this charge against the validity of the mortgage are that the corporation was insolvent; that it had reached a point where it could not pay in the ordinary course, and where its business was no longer profitable. The remainder of the allegation states the remedy which the pleader averred was appropriate to its condition.

Bausman & Kelleher, for appellant.

Harold Preston, E. M. Carr, and L. C. Gilman, for appellees.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

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

A motion is made to dismiss the appeal, on the ground that neither the corporation which executed the mortgage, nor its predecessor in interest, nor Austin Claiborne, W. M. Williams, or W. A. Keene, who were parties to the foreclosure suit by reason of having been made trustees of certain of the mortgaged property, were served with the citation on the appeal. In the suit of foreclosure the appellant was permitted by the court to intervene. To his bill of intervention but one of the parties to the suit appeared. Allen, the complainant in the suit, filed a demurrer. The order which was appealed from was that the complaint in intervention be dismissed, and "that the complainant be not required to further answer the said complaint." This order affected none of the parties to the suit except Allen, and afforded none of them the right to appeal or to be heard in the appellate court. The appellees rely upon the case of Davis v. Trust Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563, in which it was said "that all the parties to the record who appear to have an interest in the order or ruling challenged must be given an opportunity to be heard." But in what way are any of the other parties to the record interested in the order which is appealed from? The insolvent mortgagor can have no interest in the determination of the legal question which is presented upon this appeal, and certainly none of the other parties to the suit are in any way affected thereby. It is sufficient if the case is so presented on the appeal "that the appellate tribunal shall not be required to decide a second or third time the same question on the same record." Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953.

Does the bill of intervention present a state of facts such as to entitle the intervener to equitable relief? The courts of the United States in dealing with the question of the right of an insolvent corporation to prefer a creditor have in all cases, except where the matter is the subject of statutory regulation, held that the corporation had the same right and authority to make such preference that an individual would have. In Fogg v. Blair, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. Ed. 721, referring to the doctrine that the assets of an insolvent corporation are a trust fund for its creditors, Mr. Justice Field said:

"That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to bona fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, the court said:

"A party may deal with a corporation in respect to its property in the same manner as with an individual owner, and with no greater danger of being held to have received into his possession property burdened with a trust or lien."

See, also, Sanford Fork & Tool Co. v. Howe, Brown & Co., 157 U. S. 312, 15 Sup. Ct. 621, 39 L. Ed. 713.

But it is said that a different rule has been established in the state of Washington by the decisions of the supreme court of that state in Thompson v. Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25, Conover v. Hull, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810, and Biddle Purchasing Co. v. Port Townsend Steel Wire & Nail Co., 16 Wash. 681, 48 Pac. 407. In the first of these cases a mortgage to secure demand notes was given on all the property and assets of a corporation. No time for payment was mentioned in the mortgage, but it was stipulated that until default the mortgagor should remain in possession. The debt which the mortgage was given to secure had long been overdue. For many months the corporation had been embarrassed, and could pay nothing on its debts, but was merely using up its property, and its business was practically closed, of all of which facts the court found that the mortgagee was informed. The court remarked of this mortgage that "it was designed to act as a shield between the corporation and its other creditors * * *"; and that "no device can receive the countenance of the court which provides for an indefinite continuance of its corporate life under the protection of a mortgage against the protest of those who are entitled to share in its property." In Conover v. Hull the court denied the right of the corporation to prefer an antecedent debt upon the ground that the corporation was not only insolvent, but that there was collusion between its officers and the preferred creditor, all of which was known to the latter. In Biddle Purchasing Co. v. Port Townsend Steel Wire & Nail Co. the insolvent corporation simultaneously executed several mortgages to creditors to secure prior indebtedness. The corporation was seriously embarrassed, and at the date of giving the mortgage and for some time prior thereto had been unable to operate its works and plant, and they were idle, and "for a long time prior thereto" it had been insolvent. Its purpose in giving the mortgage was to prefer the secured creditors and to hinder and delay the others. Under these circumstances, the court applied the doctrine of the trust fund and set aside the preference. In the case before the court the facts differ widely from the facts in the cases so cited. It must be borne in mind that this is not the ordinary case of an insolvent corporation selecting one creditor to whom it owed an antecedent debt and securing the same to the exclusion of others. The mortgage in the case at bar

was taken not only to secure a prior indebtedness, but a large proportion of the amount secured was a new consideration, money to be advanced for the use of the corporation in its business to the amount of $10,000. The corporation had not to any extent closed its business, nor is it alleged that it was embarrassed further than that it was insolvent. Its business was not brought to a close until several months later. Even if the decisions of the supreme court of the state of Washington are held to sanction the general doctrine that an insolvent corporation cannot prefer one of its creditors, the doctrine has not been held applicable to a mortgage given in whole or in part for a valuable consideration moving at the time of its execution. The mortgagee in this instance, according to the pleadings, furnished the corporation funds for its use in the course of its business. His mortgage was taken for money already advanced and for money thereafter to be advanced. It is not alleged that he had any knowledge of the insolvency of the corporation or that the officers of the latter intended to give him a preference or to hinder or delay other creditors. The corporation was a going concern. At the time of giving the mortgage and receiving the advances it was apparently preparing for the annual run of salmon which might be expected to furnish it the means of discharging or reducing its liabilities. The supreme court of Washington, in adopting the doctrine of the decisions above noted, was guided largely by the case of Rouse v. Bank, 46 Ohio St. 493, 22 N. E. 293, 5 L. R. A. 378, 15 Am. St. Rep. 644. But the supreme court of Ohio in a later case (Damarin v. Iron Co., 47 Ohio St. 581, 26 N. E. 37) held that a mortgage executed by a corporation to secure a preexisting debt is not necessarily invalid for the reason that the company was known to be insolvent, where the company was at the time in the possession of its property and in the active prosecution of its business, and intended to continue therein unless prevented by other creditors, and the object of the mortgage was not to prefer the creditor, but to obtain an extension of credit. Said the court:

"The right of a company, though embarrassed, to continue its business and retrieve its fortunes, if possible, must be conceded to it as well as to natural persons, and this right necessarily carries with it the power to obtain an extension of credit by giving a mortgage upon its property to such of its creditors as are unwilling to give further time unless so secured. When this power is fairly and honestly exercised, with no purpose at the time of immediately abandoning business or making an assignment, the validity of a security so obtained cannot be questioned."

We think, in view of all the facts set forth in the bill of intervention and the law applicable thereto, that the appellant has shown no ground sufficient to justify a decree setting aside the mortgage.

The decree of the circuit court is affirmed.

FOSTER v. PORTLAND GOLD MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,634.

1. NEGLIGENCE—DANGEROUS CONDITION OF PRIVATE PROPERTY— IMPLIED INVITATION TO VISIT—CARE REQUIRED.
   A mining corporation which erects dwelling houses on a tract of land owned by it, and operated for mining purposes, extends an implied invitation to the public to treat the tract as a residence tract, and to enter and depart therefrom for all proper purposes incident to its use as such, and must therefore exercise reasonable care to have the premises in safe condition; and where it omits to open streets or highways, but requires persons desiring to visit the residences to cross the tract "at any point most convenient," and leaves unguarded a deep and abandoned shaft alongside one of the paths leading thereto, into which a person returning from one of the residences falls and is injured, it is guilty of negligence; the injured party not being, in such case, a mere trespasser or licensee.

2. SAME—PLEADING.
   The complaint in an action for such injuries need not aver that plaintiff went onto the premises for a lawful purpose.

3. SAME.
   The complaint need not aver, in terms, that defendant invited plaintiff onto the premises, but is sufficient if it avers the facts disclosing the invitation.

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

Robert Graham, L. G. Campbell, and D. V. Burns, for plaintiff in error.

H. N. Hawkins (A. T. Gunnell, T. M. Patterson, and E. F. Richardson, on the brief), for defendant in error.

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

ADAMS, District Judge. The plaintiff below, who is plaintiff in error here, filed her complaint against the defendant corporation, alleging, in substance, that it was engaged in mining operations upon a large tract of land owned by it, adjoining the city of Victor, in the state of Colorado; that it had "erected, caused or permitted to be erected," upon this tract, "a large number of dwelling houses, which it permitted to be used and occupied by divers persons and families as residences"; that it opened or constructed no streets or highways for the use of the residents or persons desiring to visit the houses; that the tract was unfenced and open to the public; that defendant required persons visiting the houses to cross the tract at any point most convenient; that there was a path leading across to the residences; that close to this path was a deep, abandoned shaft, which defendant had previously dug, and which was on April 22, 1900, owned and controlled by defendant; that the shaft was then unfenced and uncovered, but, by reason of a deep snow which had recently

fallen upon two pieces of timber lying across the mouth of the shaft, the same was practically concealed, so that it could not be seen by plaintiff or other persons passing near it; that defendant "carelessly, negligently, willfully, and unlawfully" allowed this shaft to be and remain unfenced and uncovered; that on the evening of April 22, 1900, the plaintiff "went to one of the houses on defendant's said unfenced lands, and, in returning therefrom across said lands, she, without any fault or negligence (or conduct) on her part, fell into said abandoned, unfenced, and uncovered shaft, and was suddenly precipitated a distance of 29½ feet" into the shaft, whereby she sustained a severe injury. To this complaint the defendant demurred, alleging as ground therefor that the same did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the trial court, and, plaintiff declining to plead further, final judgment was entered in favor of the defendant.

The plaintiff brings the case here by writ of error, and assigns that the trial court erred in sustaining the demurrer to the complaint. Such being the facts, the only question presented for our consideration is whether the complaint states a cause of action.

The defendant contends that the allegations of the complaint make plaintiff a trespasser or bare licensee upon defendant's land, and that, such being the fact, the defendant owed her no duty, either of care or diligence, and therefore incurred no legal liability for failure to discharge any duty. It may be conceded that if plaintiff, a person of mature years and judgment, entered upon defendant's land without any right to do so, she was a trespasser, and, as such, could not have called into activity any obligation on the part of the owner to protect her against the perils incident to the place. So, too, if she were a bare licensee or volunteer (that is to say, if she went upon defendant's land by its mere sufferance or toleration, without its invitation or inducement, but solely for her own convenience or pleasure), she would be held to accept and enjoy the license, subject to all its concomitant risks and perils. Sweeny v. Railroad Co., 10 Allen, 368, 87 Am. Dec. 644; Reardon v. Thompson, 149 Mass. 267, 21 N. E. 369; Redigan v. Railroad Co., 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; Benson v. Traction Co., 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436.

Defendant's counsel, in order to maintain their proposition, that plaintiff was a mere trespasser or licensee, were called upon to meet the proposition advanced by plaintiff's counsel, that the case made by the complaint shows an implied invitation held out by defendant to any person to enter upon its lands for any purpose incident to the uses to which the defendant put the same. If there was such an invitation, plaintiff's acceptance thereof subjected the defendant to certain duties and obligations towards her, totally different from those towards a trespasser or mere licensee. The rule seems to be well settled that "when one expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger; and, to that end, he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

Cooley, Torts, p. 605; Carleton v. Franconia Steel Co., 99 Mass. 216; Sweeny v. Railroad Co., supra; Bennett v. Railroad Co., 102 U. S. 577, 26 L. Ed. 235.

The chief question for our consideration, therefore, is whether the complaint in this case discloses an invitation, within the meaning of the rule just stated, to the public to enter upon defendant's land for any purpose. In answering this question, we are disposed to adopt the test suggested by defendant's counsel, namely, that an invitation may be inferred where a common interest or mutual advantage prompts it. What, now, is the situation disclosed by the complaint? The defendant, for reasons satisfactory to itself, is maintaining upon its premises a large number of dwelling houses, and is using them, or permitting them to be used, as residences by divers persons and families. Whether defendant leases the houses to the residents for rent reserved, or whether it permits them to occupy the houses as incidental to its mining operations, does not distinctly appear; but it does appear that defendant, for some consideration deemed satisfactory to itself, is maintaining a settlement upon its premises, devoting its land to the uses of families for residence purposes. By so doing, defendant necessarily subjects the land to uses incident to family life, and among these, manifestly, is the right to entrance and exit, not only for the particular family occupying a given house, but for all others who in the usual and ordinary course of things have occasion to visit the occupier, either for pleasure or business. By maintaining this residence district, the defendant, in our opinion, must be held to have extended an invitation to the public to treat it as such, and to enter upon and depart from the district for any and all proper purposes incident to the use to which it was put. The interest and advantage of the owner, as well as its tenants and the public, obviously are subserved by such free access and egress. Without it, the residences would be unoccupied and profitless, and the entire purpose of their construction or maintenance thwarted. Plaintiff avers in her complaint that defendant never opened or constructed any streets or highways for the use of the public, but required persons desiring to visit any of the residences to approach the same across the tract of land at any point most convenient, and further alleges that the defendant "carelessly, negligently, willfully, and unlawfully" left a deep shaft, which it had previously dug near to one of the paths leading to and from the residences, to remain unguarded and unprotected, into which the plaintiff, "without any fault or negligence on her part," fell as she was returning from one of the residences to which she had been. We are of opinion that these averments, taken in connection with the invitation necessarily implied from defendant's maintaining the settlement, already pointed out, disclose a duty or obligation violated by defendant.

Defendant's counsel argues that plaintiff might have been upon defendant's premises for an unlawful purpose,—as, for instance, to commit a crime,—and that the complaint is defective in that such unlawful purpose is not negatived. We think the presumption should be indulged that plaintiff went upon the premises pursuant to the invitation held out, for a lawful and proper purpose, and that, if the

hypothesis suggested by counsel is correct, it may and should properly be urged as a defense.

The complaint, in our opinion, states facts which, if proved, would, with their reasonable and fair inferences, entitle plaintiff to recover, and this is the best test of the sufficiency of a complaint in a given case. It is true, as argued by counsel, that the complaint fails to aver in terms that the defendant invited the plaintiff upon the premises in question, but we think that such omission is not fatal to the complaint. In Mine & Smelter Supply Co. v. Parke & Lacy Co., 47 C. C. A. 34, 107 Fed. 881, this court, having occasion to consider the sufficiency of complaints under the Code of Colorado, remarked as follows: "When from the facts stated the law implies a promise to pay, the promise the law implies from the facts stated need not be alleged." We think it is likewise true that, when facts are alleged disclosing an invitation to the public to visit the defendant's premises, it is not fatal to the complaint, if the plaintiff fails to state the legal conclusion flowing from such facts.

For the reasons stated, we are of opinion that the complaint stated a cause of action at common law, and that the trial court erred in sustaining the demurrer.

We do not deem it necessary to now pass upon the proposition argued at length, that the complaint stated a cause of action under the statute of Colorado. A determination of this question involves a consideration of the constitutionality of an act of the legislature, which may never become important, and we therefore refrain from entering upon it.

The judgment must be reversed, and the cause is remanded to the trial court for a new trial.

EVANS v. BLAIR.

(Circuit Court of Appeals, First Circuit. March 4, 1902.)

No. 420.

1. SHIPPING—CONSTRUCTION OF BILL OF LADING—RIGHT TO DISCHARGE IN TURN.
A bill of lading, besides the general provision fixing the lay days for discharging, contained a clause providing that the vessel should have precedence in discharging over all vessels arriving or giving notice after her arrival, and should be compensated in demurrage for any violation of such provision. *Held*, that the provision for demurrage for a delay caused by a failure to discharge the vessel in her turn controlled the provision fixing the time allowed for lay days.

2. SAME—PRIVILEGE OF DESIGNATING DOCK.
There being no provision in the bill of lading on the subject, the consignee had, under the custom of most or all of the Atlantic ports, and in view of the particular kind of cargo, the privilege of determining at which of its docks the vessel should discharge, and her right to her turn was limited to such dock. This privilege, however, was not absolute; and whether the assigning her to a particular dock, where she was delayed awaiting her turn, while other vessels arriving after her were discharging at the consignee's other docks, rendered the consignee liable to demurrage, depended on whether such assignment was just and reasonable, and based on some reasonable necessity.

8. SAME—PRECEDENCE IN DISCHARGING.
Under a provision of a bill of lading for a cargo consigned to a railroad company, giving the vessel the right to be discharged in her turn, the fact that such cargo is owned by the company, while that of another vessel arriving later is merely consigned to its care, to be shipped over its road, does not entitle the company to give the latter preference in discharging.

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

David W. Snow (Symonds, Snow, Cook & Hutchinson, on the brief), for appellant.

Benjamin Thompson, for appellee.

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

PUTNAM, Circuit Judge. This appeal arises out of a libel for demurrage, filed by the owners of the schooner Augustus Hunt against a cargo of Cumberland coal, shipped from Philadelphia to Portland, Me., and claimed by Mr. Evans in behalf of the Maine Central Railroad Company, its owner, and the real party in interest. The decree of the district court was in favor of the vessel, and Mr. Evans appealed.

The bill of lading provided that the vessel should have a lien on the cargo for demurrage. The case turns on the application of the following provision contained in it:

"Said vessel shall have precedence in discharging over all vessels arriving or giving notice after her arrival, and for any violation of this provision she shall be compensated in demurrage as if, while delayed by such violation, her discharge had proceeded at the rate of three hundred tons per day."

The bill of lading also provided lay days, to be computed at the rate of one day for every one hundred and fifty tons of coal. The vessel was discharged within the lay days computed at that rate, but, of course, this provision was qualified, and in part overruled, by the stipulation giving her precedence. The vessel claims that the Lewis H. Goward and the John Twohey, which arrived and reported after her, were given before her berths at which she might and should have been discharged.

The three vessels were laden with bituminous coal, but from different mines, and therefore, perhaps, of different qualities and intended for different uses. The Lewis H. Goward was laden with George's Creek Big Vein Cumberland coal, as appears by her bill of lading. This coal did not belong to the Maine Central Railroad Company, and therefore it was consigned to it, to be unladen by it, and transshipped over its rails to its owners. The John Twohey was laden with New River steam coal, also shown by her bill of lading, and which the evidence proves was intended for the passenger locomotives of the Maine Central Railroad Company. The Augustus Hunt was laden with Davis bituminous coal, as also shown by her bill of lading.

The Maine Central Railroad Company controlled three wharves at which coal was discharged,—one its principal place of discharge,

at which about 90 per cent. of its coal was received, being the same at which the Augustus Hunt was unladen; and two others, which are described as "above the bridges," and one of which was used for discharging the Lewis H. Goward, and the other, the upper one, the John Twohey. Under these circumstances, the defenses set up in the answer were that the Augustus Hunt "had on board Davis bituminous coal, intended for the use of the railroad of said Maine Central Railroad Company, and that said Maine Central Railroad Company was then, and had been for a long time, in the habit of discharging coal of this description, intended for the use as aforesaid, upon its pile upon said lower wharf, and nowhere else, and that it had no facilities at any other wharf for discharging schooners loaded with coal as aforesaid; that, according to the terms of the bill of lading under which said cargo was brought, it was optional with said Maine Central Railroad Company to discharge said schooner at said lower wharf or at its wharf above the bridges; that exercising such option, and without delay, said Maine Central Railroad Company ordered said schooner to said lower wharf, and there discharged her;" that "the cargo upon said schooner John Twohey consisted of a different kind of coal from that on the schooner Augustus Hunt, and was not intended to be placed upon the pile at said lower wharf, or for use upon the railroad of said Maine Central Railroad Company in the same manner as the coal upon said schooner Augustus Hunt; and that the discharge of said schooner John Twohey did not in any way interfere with or delay the discharge of said schooner Augustus Hunt."

There is a further defense in connection with the Lewis H. Goward, to which we will refer in its proper connection.

The bill of lading in issue hardly sustains the allegation of the answer that, according to its "terms," it was optional with the consignee to discharge at its lower wharf or at a wharf above the bridges. It is true that, in accordance with the custom at most Atlantic ports, if not at all of them, and also in accordance with the necessities of the case (Davis v. Wallace, 3 Cliff. 123, 130, Fed. Cas. No. 3,657), the Maine Central Railroad Company had, in a general way, the privilege of determining at which of its wharves it should discharge the Augustus Hunt; but in view of the provision in the bill of lading securing to this vessel her turn, and, indeed, without it, it cannot properly be said that this option was an absolute and arbitrary one.

Both parties have cited judicial decisions supposed to elucidate the case; but an examination of them results in giving us no assistance, unless it be found in Stephens v. Macleod, 19 Sess. Cas. (4th Series) 38. Charter parties and bills of lading which provided for loading or discharging an entire cargo at ports where there were several berths for loading or discharging, and which have been under discussion in the English courts, contained the expression, "at any safe berth as ordered," or its equivalent. Murphy v. Coffin, 12 Q. B. Div. 87; Copper Co. v. Morel [1891] 2 Q. B. 647. The result of this class of cases, after some fluctuation, has been to leave the consignee a somewhat unlimited power in the matter of select-

ing the berth, regardless of its crowded state, provided, only, it is a safe one. This, however, comes from the fact that the charter party, or bill of lading, contained express language favorable to the consignee, and from the application of the well-known rule that where, in maritime contracts, parties have seen fit to choose fixed forms of expression, the great variety of contingencies incidental to maritime transactions disenable the courts from establishing any safe theory by which the letter can be modified to meet any supposed intent. In the case at bar, however, there is no such express phraseology, and we are left to work out the construction of the bill of lading as though it provided in effect, in general terms, for a specified number of lay days which the consignee could not exceed, but with also an obligation to give the vessel its turn, even though thereby she is the sooner discharged. Practically, therefore, this case comes down to the mere question whether or not the vessel was given her turn, subject to whatever customs or necessities existed at the port of discharge which might be fairly within the contemplation of both parties.

As we have already said, the custom at most Atlantic ports, including, undoubtedly, the port of Portland, gave the Maine Central Railroad Company, in a general way, the privilege of determining at which of its wharves it should discharge the Augustus Hunt, leaving the vessel to be satisfied if she received her turn at that wharf, provided the lay days expressly limited in the bill of lading were not exceeded. As we have already said, this privilege which the Maine Central Railroad Company had of selecting the berth at which the vessel should be discharged did not come from any express stipulation, as in the English cases to which we have referred, but from the general rules which necessarily govern the relations of the parties. When the law itself attaches to a contract conditions beyond those expressed by the parties, and attaches them because some conditions beyond those expressed are essential to practically work out what the parties have undertaken to accomplish, the conditions thus attached will be just and reasonable. This is a universal rule, applicable alike to contracts at the common law and to those relating to maritime affairs.

Therefore, in the present case, as the entire cargo belonged to the Maine Central Railroad Company, and was deliverable to it, and as the bill of lading failed to point out the specific wharf or berth at which it was to be discharged, the consignee had a privilege of selecting the place of discharge, and the vessel's right to precedence, or, what is the same thing, her turn, was subject thereto. Nevertheless, as we have already said, this did not give the Maine Central Railroad Company an arbitrary right, but only one which was just and reasonable. As well said by Lord Esher, the master of the rolls, in Carlton S. S. Co. v. Castle Mail Packets Co. [1897] 2 Q. B. 485, 490, although in a different connection, this "is a power given to the charterers for business reasons."

While the three vessels named in this case were each laden with bituminous coal, yet bituminous coal is of great varieties, and has so many different uses that the mere fact that they were all so

laden does not of itself fix their right to a turn at a particular wharf other than if one was laden with coal, the second with flour, and the third with sugar. The limitations of the rule applicable to this case are very well shadowed out, on the one hand, in Stephens v. Macleod, already referred to, which is well summed up in Carv. Carr. by Sea (3d Ed.) 708, 709, and by the observations of Chief Justice Jervis in Leidemann v. Schultz, found in the work entitled, with a certain degree of liberality, Abbott's Merchant Ships and Seamen (14th Ed.) 411. In Stephens v. Macleod, the Cassia, which was the vessel in question, having arrived at the port of Portugalete, and being thus outside of the words "as ordered," was entitled to be berthed in turn. There being several wharves for loading iron ore, which was to be her cargo, and the case showing no particular reason to the contrary, she was held to have been entitled to be berthed at the first wharf which was open for her. On the other hand, in the case in which Chief Justice Jervis made the remark referred to, it appeared that the delay arose from the vessel being directed, at Newcastle, to load coke at a particular spout. It was contended for her owner that she could have been loaded earlier at another spout. To this Chief Justice Jervis answered: "Yes; but with different coke and at a higher price. If the captain may choose at what spout he will load, he may next choose what articles he will load with." So far as we can discover, there are no authorities of weight inconsistent with these expressions on the one hand and on the other. They practically illustrate the remark of Lord Esher, that the power given charterers to select a berth is for business reasons. They, therefore, further illustrate that, where several vessels are to load or discharge cargoes of the same generic class, they are apparently entitled, in their turn, to the first berths available, but that it may be shown that the particular circumstances are such as reasonably justify the consignee in directing otherwise.

The result of all this is to sustain, as a mere matter of law, the defense set up in the answer, aside from its reference to the "terms" of the bill of lading of which we have spoken. Coming back to the pith of the answer, that, while the Augustus Hunt was laden with bituminous coal, yet it was of that character which could properly be discharged only at the wharf where the consignee's business was ordinarily transacted, and that the cargo per the John Twohey was of a different class of coal, which could not be availed of at the berth to which the Augustus Hunt was ordered: This is explained by some evidence tending to show that the cargo per the Twohey was exclusively for the use of passenger locomotives, and was discharged at the berth at which that class of coal, and only that class, was discharged, while the cargo of the Hunt was essentially of a different class, not used on passenger locomotives, but for general purposes, and therefore properly discharged at the wharf where the Maine Central Railroad Company discharged all its coal, aside, only, from a small percentage of an exceptional character. It would not be reasonable to so far limit the option which the consignee had with reference to the berth to which the Augustus Hunt was to be ordered as to compel a reversal of its order of business, regard-

less of the precise character of the cargo with which the vessel was laden. Therefore, the answer, in view of these suggestions, shadows out what would have been a proper and reasonable justification for all refusals to order the Augustus Hunt to the berth at which the John Twohey was discharged; but, in the view of the learned district judge, the proofs fail to come up to its allegations. He observed that there is nothing to indicate that it was impracticable to give the Hunt one of the vacant berths without so much delay, and "that the evidence does not show that there was anything in the character of her cargo which made it impracticable to put it upon those berths which were vacant." A careful examination of the record leaves us strongly of the opinion that, if we should announce a different result from that reached by the learned district judge, we could not satisfy ourselves that we were probably any more in the right than he. Only one witness was called for the claimant. At some points in his testimony he stated impressions that the cargo of the John Twohey was for passenger locomotives, and was discharged at the wharf where such coal, and only that class of coal, was discharged, while the cargo of the Augustus Hunt was of the character which we have stated. On the other hand, he also stated as follows:

"Q. What kind of coal did the Twohey have on board? A. New River coal. Q. For what was that coal intended? A. That went over to Thompson's Point. The passenger locomotives' coal is put over there. Q. That is a different purpose than what the cargo of the Augustus Hunt was intended for? A. No; practically the same purpose. It was for locomotive use; all of it. Q. It was your custom to keep separate the different kinds of coal? A. To a certain extent."

Again he said, replying to a question referring to the cargo of the Augustus Hunt:

"Q. Was any of it put into the same pile with the Twohey's coal? A. I cannot say; I do not recollect the whole distribution. There might possibly have been a few cars put in there."

Again he testified:

"Q. When you are rushed with vessels,—that is, when you have a large number,—you then discharge at both of those wharves without any regard to the class of coal? A. We do at times; yes, sir."

"Q. In discharging vessels with soft coal, do you never put different kinds of coal upon the same wharf,—the same pile? A. Yes, sir; I presume it is done at times. Q. You do sometimes? A. Yes, sir. Q. What I want to know is, if you sometimes mingle in piles, or in trains of cars, coal of different character, as, in this case, the Davis coal and Cumberland coal? A. Different kinds of coal go into piles; I don't know just how many different kinds. Q. If they were all steam coal, they would go in? A. Naturally. Some coal is better than others, and some, of course, is different from others, and used for different purposes."

Referring to the use of the lower wharf, he also testified:

"Q. Was that use influenced at all by its convenience and accessibility? A. That was why it was done,—on account of convenience. Q. And not on account of the character of the coal? A. Well, there is more or less difference in coal, as I said before, and it is kept separate to a certain extent. The passenger coal we send over to Thompson's Point. Q. Is the passenger coal of an entirely different character from either of these? A. I am not well enough acquainted with coal to tell."

Without commenting in detail on this evidence, it is entirely plain that it is not of a character which enables the court to determine that the burden of disclosing a reasonable business necessity for delaying the Augustus Hunt, which the answer properly assumes, has been sustained.

This leaves the matter of the Lewis H. Goward, which the answer puts in a somewhat different position. As to her, it says "that said schooner L. H. Goward was not consigned to these claimants or either of them; that she had on board George's Creek Big Vein Cumberland coal, intended for the Phillips & Rangeley Lakes Railroad Company and the Bates Manufacturing Company, and not intended for these claimants or either of them; and that said schooner Augustus Hunt was not delayed in any way by the discharge of said schooner L. H. Goward, as aforesaid." The answer is technically correct in alleging that this coal was not consigned to the Maine Central Railroad Company, as it was consigned only to its care, but it was to be discharged by it and shipped over its rails. The district court was entirely right in holding that the mere fact of the ultimate consignment of the cargo would not justify giving her a preference over the Augustus Hunt. By the bills of lading, all the vessels were to be discharged by the Maine Central Railroad Company, and the Hunt was therefore entitled to her turn accordingly, regardless of the ownership of the cargoes.

Some things in the proofs are explanatory of the precise defense intended. The Lewis H. Goward was discharged neither at the wharf at which the bulk of the business of the Maine Central Railroad Company was done, nor at the wharf at Thompson's Point, but at one intervening between them. If the case showed that this wharf was adapted only for coal intended for transshipment by rail to customers of the Maine Central Railroad Company away from the seaboard, and that there were no facilities at that berth for handling cargoes intended for use at Portland, further supplemented by evidence that the cargo of the Augustus Hunt was not intended for transshipment by rail, this, in accordance with the principles we have already stated, would have given the consignee a reasonable ground for sending the Lewis H. Goward there, and not the Augustus Hunt. Here, again, the proofs halt. The claimant's witness testified as follows:

"Q. Coal consigned to you by bill of lading for somebody else you deal with as you do your own coal, so far as discharging is concerned? A. Yes, sir; so far as discharging is concerned, after we get orders from the shippers where they wish it sent."

He also testified:

"Q. As I understand, so far as the wharves are concerned, or so far as the facilities were concerned, and the manner of discharging, it was purely optional with you whether those vessels should be discharged at one berth or the other; and when I say 'those vessels' I mean all three of the vessels,—the Hunt, the Twohey, and the Goward. A. No, sir; not always. Q. I say, so far as those vessels were concerned, in that particular case and time? A. Yes, sir; it was."

"Q. You had the right to assign berths? A. Yes, sir. Q. There was nothing in the condition of the berths which prevented you from assigning where you pleased? A. Not that I am aware of."

Then comes what we have already said as to the practice of discharging vessels at all the wharves, without regard to the classes of coal, when rushed with cargoes.

He also testified:

"Q. Where was the coal from the Augustus Hunt which was put onto cars carried? A. I think a portion of it went to Vanceboro. Q. Was any of it put into the same pile with the Twohey's coal? A. I cannot say. I do not recollect the whole distribution. There might possibly have been a few cars put in there."

This shows that coal from the Augustus Hunt was discharged upon cars, as was that from the Lewis H. Goward. How much was so discharged, whether a small or a large part, or the whole, is not made to appear; but this evidence certainly leaves a strong impression that not only a part of it was in fact discharged upon cars, but that the whole of it might have been, as was the cargo of the Goward. Here, again, as with reference to the precedence given to the Twohey, while there are, perhaps, expressions enough in the proofs, if they stood alone, to maintain such a distinction between the different classes of coal, constituting the cargoes of the three vessels, as would have justified discrimination in selecting the places of discharge, yet the whole leaves the case in a state of equilibrium, and fails to maintain, by a preponderance thereof, the defense set up in the answer.

The decree of the district court is affirmed, with interest, and the costs of appeal are awarded to the appellee.

DENNEE et al. v. CROMER.

(Circuit Court of Appeals, Eighth Circuit. March 10, 1902.)

No. 1,604.

APPEALS FROM MAYORS.

Under Act Cong. June 28, 1898 (30 Stat. 499, c. 517, § 14), adopting and putting in force in the Indian Territory Mansf. Dig. Ark. c. 29, for the organization and government of cities and towns, and giving to mayors the same jurisdiction as United States commissioners have in such territory, which, under Act Cong. May 2, 1890 (26 Stat. 98, c. 182, § 39), is that of a justice of the peace under Mansf. Dig. Ark. c. 91, and declaring that for purpose of this section all laws of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory, appeals lie from the mayor in said Territory; Mansf. Dig. Ark. c. 29, § 797, providing appeals may be taken from a mayor as from a justice of the peace.

In Error to the United States Court of Appeals in the Indian Territory.

This action was brought by M. G. Cromer, the defendant in error, against Stewart Dennee and John S. Hammer, the plaintiffs in error, before the mayor of Ardmore, in the Indian Territory, on a promissory note for $150. In that court the plaintiff recovered judgment for the amount of the note and interest, from which judgment the defendants appealed to the United States court for the Southern district of the Indian Territory, at Ardmore, where the like judgment was rendered, from which an appeal was taken by the defendants to the United States court of appeals for the Indian Territory, which court affirmed the judgment of the lower court, and thereupon the defendants sued out this writ of error. In the United States court the de-

fendants filed what in the pleading itself is called a "demurrer to the proceedings" and in the record a "demurrer in the nature of a plea to the jurisdiction." The principal ground of this demurrer, and the only one necessary to notice, is "that the judgment appealed from is absolutely void, because the mayors of cities and towns in the Indian Territory are without jurisdiction to render judgment in civil cases." The court overruled the demurrer, and the exception to this ruling is the only question the record presents for our consideration.

Joseph G. Ralls, for plaintiffs in error.

W. A. Ledbetter and S. T. Bledsoe, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The contention of the plaintiffs in error is that the act of congress conferring on mayors of cities and towns in the Indian Territory jurisdiction to try civil actions at law where the amount in controversy exceeds $20 makes no provision for allowing, and does not allow, an appeal in such cases to a court of record, and that, for this reason, it is unconstitutional, and mayors have no jurisdiction of such cases, and their judgments are void.

The action of the plaintiffs in error is not consistent with their contention; for, while contending the act of congress allows no appeal from the judgment of a mayor of a city or town, they have taken an appeal from the judgment of a mayor, and have prosecuted it through three courts. If the law allowed them no appeal, their appeal would give them no standing in an appellate court, which could do no more than dismiss the unauthorized appeal, not the suit, and leave the parties where they stood before such appeal was taken. If the law allowed them no appeal, they plainly mistook their remedy. Since the judgment of the supreme court in the case of Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. Ed. 873, it must be accepted as law in the courts of the United States that under the seventh amendment to the constitution of the United States the parties to suits at common law, where the value in controversy exceeds $20, are entitled to a trial by jury, and that a trial by jury, within the meaning of the constitution, is not merely a trial by a jury of 12 men before a justice of the peace "vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." It is, nevertheless, competent for congress, when invested with the power of legislation over a district or territory, to provide for the trial of civil cases by a justice of the peace, or in his presence, by a jury of 12 or any less number, allowing to either party, where the value in controversy exceeds $20, the right of appeal from the judgment of the justice of the peace to a court of record and to have a trial by jury in that court. While a trial

by jury of 12 or any less number before a justice of the peace is not, and a trial by jury in an appellate court is, a trial by jury, within the meaning of the common law and the seventh amendment to the constitution, the constitutional right of trial by jury is not infringed if only the right of appeal is allowed from the judgment of the justice of the peace to a court of record where such a trial by jury as the constitution contemplates can be had.

That the right of appeal from the judgments of mayors in the Indian Territory to the United States court is given in all civil cases cognizable before such magistrate where the amount in controversy exceeds $20 will clearly appear by a brief reference to the acts of congress relating to the subject. There are no justices of the peace in the Indian Territory by that name. The Territory is not, however, without these important and indispensable officers. They are there under other names. In that Territory the United States commissioners and mayors of cities and towns are invested with the jurisdiction and powers of justices of the peace within their respective territorial jurisdictions. The act of congress approved May 2, 1890 (26 Stat. 98, c. 182, § 39), adopted and put in force in the Indian Territory chapter 91 of Mansfield's Digest of the Statutes of Arkansas defining and regulating the jurisdiction and powers of justices of the peace and the practice and mode of proceeding in justices' courts. This chapter confers jurisdiction on justices of the peace in matters of contract where the amount in controversy does not exceed $300, and provides for appeals from their judgments to the circuit court and for a trial by jury on the merits in that court. The act of congress invested United States commissioners in the Indian Territory with all the powers and jurisdiction conferred on justices of the peace in Arkansas by this chapter, and provides that "appeals may be taken from the final judgment of said commissioners to the United States court in said Indian Territory in all cases and in the same manner that appeals may be taken from the final judgments of justices of the peace under the provisions of said chapter 91." By act of congress approved March 1, 1895 (28 Stat. 695, c. 145, § 4), this provision was, in substance, re-enacted, with a proviso that no appeal shall be allowed in civil cases where the amount of the judgment, exclusive of cost, does not exceed $20. The act of congress approved June 28, 1898 (30 Stat. 499, c. 517, § 14), adopted and put in force in the Indian Territory chapter 29 of Mansfield's Digest of the Statutes of Arkansas relating to the incorporation of cities and towns, and provided that the cities and towns organized thereunder should possess all the powers and exercise all the rights of cities and towns in Arkansas, and in terms provides "that mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory." Another clause of this same section declares, "For the purposes of this section all the laws of said state of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory."

Chapter 29 of Mansfield's Digest is not only referred to in "this section," but is actually adopted and put in force for the organization and government of cities and towns in the Indian Territory. Beyond question, this section adopted and put in force in the Indian Territory all the provisions of chapter 29 of Mansfield's Digest, "so far as applicable."

Now, among the provisions of chapter 29 of the Arkansas statute thus adopted is the following:

"Sec. 797. The mayor of the corporation shall be a conservator of the peace throughout its limits, and shall have within the same all the power and jurisdiction of a justice of the peace in all matters, civil or criminal, arising under the laws of the state, to all intents and purposes whatever; and appeals may be taken in the same manner as from decisions of justices of the peace."

Manifestly, the provision of this section allowing appeals from the judgments of mayors in the same manner as appeals from the justices of the peace is "applicable" to mayors in the Indian Territory, and was adopted by section 14 of the act of congress. It was the intention of the act of congress to adopt every provision of chapter 29 of the Arkansas statutes not locally inapplicable or inconsistent with the provisions of the act of congress. The provision allowing appeals from the judgments of mayors is in harmony with the whole scheme of congressional legislation for the administration of justice in the Indian Territory. At the very beginning of legislation establishing courts in that Territory, congress adopted and put in force in the Territory the laws of Arkansas relating to the jurisdiction, pleadings, practice, and modes of proceeding in the courts in that state, from those of justices of the peace up to the supreme court. Where any change in those laws was necessary to meet the different conditions existing in the Indian Territory it was usually made by express exception or addition.

It is inconceivable that congress intended to impair the harmony and symmetry of this system of laws by denying an appeal from the judgment of a mayor when exercising the jurisdiction of a justice of the peace and allowing an appeal from the judgment of a United States commissioner when exercising precisely the same jurisdiction. No reason can be suggested for allowing the right in one case and denying it in the other.

When chapter 29 of Mansfield's Digest was adopted and put in force in the Indian Territory the provision of that chapter allowing appeals from the judgments of mayors was adopted and made applicable to the judgments of mayors in that Territory.

The judgment of the United States court of appeals in the Indian Territory, and the judgment of the United States court for the Southern district of the Indian Territory, are each affirmed.

THOMAS LAUGHLIN CO. v. AMERICAN SURETY CO. OF NEW YORK. BLAKE et al. v. SAME. BOYD v. SAME. CLEAVES v. SAME. POST v. SAME. JOHNSON v. SAME.

(Circuit Court of Appeals, First Circuit. April 16, 1902.)

Nos. 405, 406, 407, 408, 409, 410.

1. SURETY—LIABILITY.
   A surety's liability does not ordinarily extend beyond the penal sum of the bond,—as, for instance, to costs and interest,—unless he has in some way resisted or obstructed the recovery of the claim against him.
2. SAME—CONTRACTOR'S BOND—CLAIMS ACQUIRED BY THIRD PARTY CONTRACTING TO INDEMNIFY SURETY.
   In computing the pro rata to be paid creditors of a defaulting contractor by the surety on his bond (the penalty of the bond being insufficient to satisfy the claims in full), claims which have been acquired by a third party, who has contracted to indemnify the surety, should be considered.

Appeals from the Circuit Court of the United States for the District of Maine.

Benjamin Thompson, for appellants.

Thomas L. Talbot (Henry C. Wilcox, on the brief), for appellee American Surety Co. of New York.

Harry R. Virgin (Franklin C. Payson, on the brief), for appellees Allen and Hutchinson.

Before COLT, Circuit Judge, and BROWN and LOWELL, District Judges.

LOWELL, District Judge. Morgan contracted to build for the United States a battery on Diamond Island. The American Surety Company was the surety furnished upon his bond in accordance with chapter 280 of Acts 1894 (28 Stat. 278). Morgan broke his contract, having become indebted to a considerable number of persons while engaged upon the contract work. Some of these persons brought suits against the surety company under chapter 280. The surety company filed a bill in equity, ancillary to these suits, for the purpose of settling its liability both to the plaintiffs in the suits mentioned and to other creditors of Morgan, so far as these creditors should come in. The penal sum of the bond is probably insufficient to pay the statutory claims in full. The claims against the surety company thus arising under chapter 280 were referred to a master. Exceptions were taken to his report, and were dealt with by the circuit court. The appellants now seek to reverse the action of that court in dealing with certain claims.

The circuit court disallowed certain claims for labor, tools, and other supplies, and for the transportation of material to Diamond Island. For the purposes of this case, it is not necessary to decide if the statute of 1894 should be held to cover more than is covered by the ordinary lien statutes of the states. However this may be, we are of opinion that the labor and materials here in controversy are plainly without the purview of the statute. All the appeals except that taken by the Laughlin Company are thus disposed of.

That company has contended that the surety company is liable, over and above the penal sum of the bond, for interest thereon, and for the costs of the suits brought against the surety company. A surety's liability does not ordinarily extend beyond the penal sum of the bond, unless he has in some way resisted or obstructed the recovery of the claim against him. No acts of resistance or obstruction have been shown in this case, other than those which have been already compensated by the allowance in the suits at law of costs accrued up to the time of the filing of this bill. This court is not now asked to decide if costs or interest should be allowed the claimants as against the fund arising from the penalty of the bond, but only if costs or interest should be allowed as against the surety company outside that fund. To some extent the former appear to have been allowed, and to some extent allowance has been suspended to await the further action of the circuit court.

The Laughlin Company further contended that in computing the claims which are to be satisfied by the surety company out of the penalty of the bond there should be excluded certain claims now held for the benefit of one Allen, who had contracted to indemnify the surety company from loss on its bond. The evidence does not show, as was contended, that Allen was a partner of Morgan, and so the claims are not to be excluded on that ground. It follows, therefore, as stated by the learned judge below, that in computing the pro rata to be paid the other creditors these claims must be taken into consideration, "as any other ruling would compel Allen to now reimburse the complainant the full penal amount of its bond, notwithstanding he had acquired these claims; and it would also give the other creditors a larger percentage than they are technically entitled to." If these claims—some purchased by Allen, and others already paid by the surety company, which has been reimbursed by Allen—be not reckoned among the liabilities of Morgan to be charged against the fund furnished by the penalty of the bond, Allen will be required under his guaranty to pay not only the penalty of the bond, but also an additional sum equal to the amount expended by him in this purchase and reimbursement.

In each case the decree of this court is as follows:

The decree of the circuit court is affirmed, and the costs of appeal are awarded to the appellee.

DOUGLASS v. DAISLEY.

(Circuit Court of Appeals, First Circuit. April 16, 1902.)

No. 385.

1. MERCANTILE AGENCIES—COMMUNICATIONS—WHEN PRIVILEGED AS MATTER OF LAW.

A mercantile agency received a report from one of its agents that plaintiff had made an assignment. The report came in on a general assignment form; but, under a heading requiring the agent to furnish every possible particular, was a statement that it was made to secure the assignee for indorsing a note. The agency sent out a communica-

tion that plaintiff had assigned for the benefit of creditors. *Held* not a privileged communication, as matter of law, because of substantial departure from information received.

2. SAME—LOSS OF PRIVILEGE—NEGLIGENCE.
If the mistake was one which could not have been avoided by reasonable care, the privilege was not lost; but if the result of carelessness, the privilege failed.

3. SAME—QUESTION FOR JURY.
The question whether the mistake in the present case was due to carelessness, so as to destroy the privilege, was for the jury.

4. SAME—LOSS OF BUSINESS AND CREDIT—GENERAL ALLEGATION.
Plaintiff, where his complaint contained a general allegation of loss of business and credit, could recover by showing immediate diminution to business, etc., and was not required to connect the loss with the communication by evidence of particular instances.

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

G. Philip Wardner and William W. MacFarland (Carver & Blodgett, on the brief), for plaintiff in error.

Charles F. Choate, Jr. (Josiah H. Benton, Jr., on the brief), for defendant in error.

Before COLT, Circuit Judge, and ALDRICH and BROWN, District Judges.

ALDRICH, District Judge. The defendant is a mercantile agency, known as the R. G. Dun & Co. agency; and on the 28th day of March, 1898, sent out a notice to its subscribers that the plaintiff had assigned for the benefit of his creditors; and the plaintiff brings his action in tort for libel. The defendant does not justify by showing that the communication sent was true, but claims that, by reason of the character of the business of the agency and of the occasion, the communication was privileged, in the sense that the occasion and the relations of the parties exempt the defendant from liability.

In jurisdictions where such communications are treated as privileged, the privilege is a qualified one, and when information is furnished under circumstances which give it a privileged character, though false, recovery cannot be had unless malice or bad faith is shown. In other jurisdictions, like Georgia, Texas, Missouri, Wisconsin, and in some of the cases in the federal circuits, like Locke v. Bradstreet Co. (C. C.) 22 Fed. 771, the privilege is made to depend somewhat upon the question of due care in the matter of selection of agents, and in respect to the means and manner of communication; and Mr. Francis Wharton, in his valuable note to Trussell v. Scarlett (C. C.) 18 Fed. 214, would seem to give some indorsement to the latter view. In New York and many other jurisdictions, if the requisite occasion and relations exist, such communications, speaking in general terms, are treated as privileged, and the doctrine of immunity from liability is recognized, except in cases where malice or bad faith is shown; and the doctrine is not made to depend much, if at all, upon the question of due care.

It is not necessary in this case that we should examine into the origin, the reason, or the wisdom of the rule of privilege and nonliability as it has been applied in the cases to which we have been referred.

Under the defendant's main contention here in respect to the question of privilege, they largely rely on Ormsby v. Douglass, 37 N. Y. 477, which is supplemented by numerous authorities sustaining the view of that case. Ormsby v. Douglass has been frequently referred to in decisions in jurisdictions where the rule of that case obtains, and the weight of authority, both English and American, would seem to be in accord with the principle of that case, and we may well enough, we think, without going into a history of these decisions, accept the rule of such cases as the law.

The rule of immunity from liability, in cases where it applies, results largely from the necessities of business and the strong presumption of absence of malice; and the rule of the New York cases unquestionably is that, in the absence of actual proof of malice or bad faith, the privilege justifies the agency in transmitting the information it receives. But, conceding the full force of the New York cases and those holding the same view, the defendant is not within the doctrine there established. The general information which it received upon the blank which it had furnished its agent at South Framingham, Mass., was that James Daisley, the plaintiff, had made an assignment to B. T. Thompson, of Framingham, and, under a heading upon the blank which required the agent to furnish any particulars possible, was an exact and particular statement of what the assignment was; namely, to secure the assignee for indorsing a note. Such was the information received at the office of the agency at Boston; but, instead of sending out the information received, they sent a communication saying, "James Daisley, of South Framingham, Massachusetts, has assigned to B. T. Thompson for the benefit of his creditors." This was a plain and substantial departure from the information received. Therefore, it was not sending information received or information accurate in substance. They were informed that the plaintiff had assigned to secure the indorser of a note, and the information was not that he had made a general assignment for the benefit of creditors. The first, in the ordinary acceptation, would not necessarily be injurious to the party's credit or business, while the other, in the ordinary acceptation, means a general failure, and would necessarily be injurious.

The case of Ormsby v. Douglass, supra, distinguishes itself at once from the situation here, for the rule is there distinctly stated that "so long as the defendant acted in good faith in reporting facts which came to his knowledge," etc. The later New York case of Haft v. Bank, 19 App. Div. 423, 46 N. Y. Supp. 481, on which the defendant largely relies, bases its decision upon the same ground; that is to say, that the bank, in the due course of its business, forwarded the precise information which it received from its messenger. The English case of Lawless v. Oil Co. (1869) L. R. 4 Q. B. 262, 267, is in the same line, and the decision is based, as in the other cases, upon the ground that "what the directors did was this: In

their report to a meeting of the shareholders they appended the statement which had been made to them by the auditors." The case of Robinson v. Dun, 24 Ont. App. 287, 289, treats a privileged communication as one made on a privileged occasion, and fairly warranted by it. It in no sense goes beyond the doctrine of the New York cases in respect to the idea that the communication is privileged, as a rule of law, when limited to the information received, but its reasoning would seem to tend somewhat in the direction of making the question whether the information was fairly warranted an element, or, in other words, in the direction of the other line of authorities, which make the privilege depend somewhat upon the question of due care.

We recognize the exigencies of business and the demands of public policy in respect to information as to the standing of business men in their trade and calling, and we carry to the defendant, for the purposes of this phase of the case, the full force of the authorities upon which it relies. But we are not inclined to extend the privilege, as a rule of law, beyond that of protection, so long as the agency acts in good faith in reporting, with substantial accuracy, information which comes to its knowledge; in other words, beyond the rule of the cases most favorable to the defendant, that the agency, in the absence of bad faith, is privileged in communicating information received, although it may prove to be false.

Where a false report originates in the office, and is not based upon information, the circumstances and the occasion do not necessarily involve a privilege. Carrying the qualified privilege to communications of the character in question, by rule of law, would be carrying the doctrine of immunity beyond the rule in respect to absolute privilege. Mr. Bigelow, in his work on Torts (7th Ed.) § 332, in treating of the higher privilege of the publication of court proceedings, and speaking of the report of such proceedings, says:

"If, however, the same should be so incomplete or so stated as to give a wrong impression, or, though full, if it is followed by comment containing defamatory matter, the privilege would fail."

The case of King v. Patterson, 49 N. J. Law, 417, 9 Atl. 705, 60 Am. Rep. 622, presents a careful review of the American and English cases, with reasoning which would seem to be sound, as to why the rule of privilege should not be extended beyond its present limit. In that case, the general rule is recognized; but, on the question of extending it further, and to include communications to those who are not subscribers, it is observed that "neither the welfare nor the convenience of society will be promoted by bringing the publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast throughout the land, within the protection of privileged communications." In that case it is further suggested that, while the subject in relation to which the communication is made may be privileged, the communication may be unprivileged, and the matter of duty to send the information is made an important element of the question; and, though the doctrine of privilege was there recognized while communicating to its patrons information received, it was observed that

the agency, in its conduct and management, must be subjected to the ordinary rules of law, and the proprietors and managers held to the liability which the law attaches to like acts of others.

We think the privilege in a business situation like this, which results as matter of law, rests upon the right to send information received, and upon the duty to send with substantial accuracy such information as is received. The communication in question does not rest wholly or with substantial accuracy upon information received. How can it be said, as a matter of law, either that the agency was privileged to send something plainly and substantially different from what had been received, or that any duty rested upon it to send information substantially different from that which it had received? Neither the right nor the duty to send different information exists in this case; consequently there was no privilege which can be ruled as matter of law, and the defendant is liable unless, under proper instructions, facts necessary to clothe the transaction with the immunity of privilege shall be found by a jury. As said in King v. Patterson, supra (page 427, 49 N. J. Law, and page 710, 9 Atl., 60 Am. Rep. 622):

"A defendant intends to send a communication derogatory to the plaintiff's character or circumstances to A, where it would do no harm. By inadvertence he sends it to B, which produces the injury complained of. It is obvious that it would be a plain transgression of legal principles to excuse the act he did because he intended to do an act from which no injury to the plaintiff would have resulted."

We have seen that the communication in question was not based upon information received; neither was it based upon anything known at the home office. A communication cannot be accepted as privileged as a matter of law which is neither warranted by information received nor by facts known at the home office. It was neither the right nor the public or private duty of the agency to send a communication which was not based upon fact or information. The communication, therefore, not being based upon information from an agent whose business it was to gather information, or upon foundation of fact, it is not a privileged one in the sense of clothing the defendant with immunity from liability through an arbitrary rule of law. In short, we find no case which pretends, through a rule of law, to bring a communication like this within the domain of privilege; nor do we see any reason for carrying absolute privilege to such a communication.

The English case of Tompson v. Dashwood, 11 Q. B. Div. 43, was a case where a communication was intended to be made on a privileged occasion, but was sent to the wrong person; and, while the case is not like the one here, for there it was a mistake in sending to the wrong person rather than a mistake in sending wrong matter, the privilege was held to exist. This case is, perhaps, the most favorable to the defendant's position of any that has come to our attention. But this authority is criticised by Mr. Pollock in his treatise on Torts, as one not by any means universally accepted by the profession, and as contrary to the earlier decisions. Pol. Torts, 216, 234; Webb, Pol. Torts, 309. We are not disposed to adopt the doc-

trine of this case, and hold, as a matter of law, without regard to the question of due care, that the communication was privileged.

We think the circuit court was right in holding that the communication in question was so substantial a departure from the information received that it could not be accepted as privileged, as a matter of law, and that the defendant was not within the rule which gives immunity as a matter of law upon the ground of privilege. So, upon this phase of the case, we hold against the defendant, for the reason that the circumstances are not such as to bring it within the doctrine of the cases upon which the defendant relies.

This disposes of the first assignment of error, which, in substance, is that the defendant was entitled to a verdict as a matter of law, upon the ground of privilege.

Having considered the question whether immunity resulted by rule of law under the circumstances of this case, we come, at the next step, to the question whether, on the other hand, liability resulted by rule of law, and this is the precise question raised by assignments 2, 3, and 4; and we think there was error here, for the reason that the situation was one which, under the circumstances, involved a question of fact which should have been submitted to the jury. The occasion, which was that of receiving and communicating information relating to the subject-matter in question, was privileged; and, the occasion being privileged, the Boston agency, in the ordinary course of its business of receiving information and imparting it to its subscribers in the business world, was in the exercise of a privilege in the nature of a private right, or, as expressed by some of the authorities, a public right. Therefore, starting with this right, if unwarrantable and injurious consequences result, it cannot be said, except in a very clear case, that liability results as a matter of law from a variance between the information received and the communication sent.

No case like the one here presented has been called to our attention, and we do not find that the precise question has been passed upon either by the supreme court of the United States or by the courts of Massachusetts, nor do we find that the precise question has been dealt with elsewhere. We must, therefore, deal with it somewhat as a new question.

The occasion being privileged, we do not think the general rule of law that liability results from accidental or inadvertent slander, and that the accident or inadvertence only operates to remove malice and limit the damages, applies to this case, and it is for the reason that the occasion was privileged, and the defendant was in the exercise of a right. It being a business right, however, or a private right, to gather and impart information to such members of the business world as were its subscribers, it must exercise the right reasonably, to the end that unnecessary harm shall not come to business men about whom the information is furnished. It is not a right which can be exercised heedlessly or carelessly. It is difficult to find a principle of law which would justify the careless and wanton exercise of a right of this character, and afford immunity on the ground of privilege. It is equally difficult, starting with a privileged occasion, to find a principle which would justify an absolute ruling of law upon

the question of liability upon the ground of variance between the information received and that sent, and this is for the reason that the variance may be susceptible of explanation. Reasonable care and prudence with respect to forwarding information may, therefore, continue the privilege and clothe the acts of the agency with immunity, and, on the contrary, negligence may destroy the privilege and leave the parties responsible for acts which are culpable. Though the occasion is privileged, the privilege does not carry immunity to heedless and careless management in forwarding information. While the question whether an occasion is privileged is one of law, the ultimate question of privilege may become a mixed question of law and fact, through a variance between the information and the communication, and under such circumstances the question would be whether the privilege was carried to the communication through a reasonable and careful exercise of the right, or whether the privilege was lost by indifferent and careless management, or through inattention and want of due regard to the interests of others. If it was a pure mistake, involving no negligence or culpability, the privilege would not fail. On the other hand, if, by the exercise of such care as men ordinarily exercise in like business affairs, the true character of the information would have been discovered and correct information sent out, rather than that which was not warranted, then the privilege would fail. The communication sent being substantially different from the information received, the question whether it was libelous and injurious was quite likely one for the court; but the question whether it was a privileged communication, though different from the information, depended upon the question of fact whether the variance resulted from an excusable mistake, or from indifference or heedlessness.

Even the privilege of regular process does not protect against unreasonable and careless use. Any right or privilege may be so carelessly used as to lose the protection which it would otherwise afford. No privilege which affects the public at large grants immunity from negligent and careless acts. So, in the case under consideration, the question for the jury, under the circumstances, was not whether the communication was a libel,—not whether the variance was a substantial departure,—because such were questions of law, but whether the defendant's conduct was such as to give immunity, on the one hand, or so wanting in care, or so indifferent, as to make the privilege fail.

The contract between the agency and the subscribers contemplates verbal, written, and printed information, and provides that the agency shall not be responsible for neglect, unfaithfulness, or misconduct of agents; but this stipulation, of course, does not bind a member of the public who is not a party to it, and, as against such parties, to be within the privilege, the home office, in transmitting information, must be in the exercise of reasonable care. We do not look upon this holding as a departure from the principle which applies to reports of public proceedings, where the privilege is lost by an unreasonable exercise of the right, or by an unreasonable or unnecessary mode of communication, like sending a privileged com-

munication by telegraph or postal card, where the communication becomes unprivileged. Indeed the recognized and controlling general principle is that a report, in order to be privileged as a matter of law, whether it be a report of a judicial proceeding or of a commercial agency, shall be a fair report; and in cases where the report is not fairly warranted by the information, exemption from liability upon the ground of privilege, or, what would be a more exact expression, upon the ground of excusable libel, may and should depend upon reasonableness of skill and care in reporting, and the question of skill and care becomes a question of fact for the jury. See Paterson, Liberty of the Press, Speech, and Public Worship, 184, 185, 192, 193, 203, 204.

In the regular course of the business of the agency the report came in from the Framingham agent on a general assignment form; and the mistake, quite likely, although the question is one of fact, resulted from the assumption that the assignment was a general one. Still, while the general statement in the body of the form in a sense indicated a general assignment, under the head which calls for particulars the report was clear as to the nature of the assignment. So, under such a situation, we think the communication sent out was neither so clearly an excusable mistake that it can be ruled a privileged communication as a matter of law, nor so clearly a wanton and heedless variance between the information received and the communication sent as to justify a ruling that the privilege failed absolutely, and that the defendant was liable. While the variation was a substantial one, in the absence of malice the situation does not present a case where it can be said that it was "as completely an invention of an untruth by the defendant as though he had received no information whatever," and that "the information received afforded no justification, no palliation, no excuse," and "as though he had sent out this untrue statement without a shadow of any information on his records about James Daisley"; nor was it a situation which justified the assumption and instruction that "it was made out of whole cloth, and was a mere blunder." And, while the variance between the information and the communication was so substantial and so injurious as to render the communication actionable per se, in the absence of privilege, still there was a reasonable question for the jury as to whether it was a pure mistake, and one which could not have been avoided by careful business management, or, on the other hand, whether the privilege of furnishing information in the ordinary course of business was carelessly exercised. It was for the jury to say whether reasonable care required the home office to read the whole paper and gather all the information that it contained, and whether it was reasonable to act upon the general appearance of the assignment form, and send the information which it did. If it was carelessness, the privilege was lost. If it was a mistake which could not have been avoided by the exercise of reasonable care, privilege and immunity were not lost. In other words, if the home office was reasonably careful and prudent in respect to this transaction in the ordinary course of its business, the privilege continued, and would cover the mistake; but if

the departure from the information was the result of want of care and heedlessness, the privilege failed.

The erroneous communication did not originate with the agent furnishing the information, but resulted from an attempt in the home office to transmit information received; and there is no pretense that they acted upon information other than that received from the Framingham agent; therefore the erroneous communication resulted from the conduct of an agent for whose acts the defendant is responsible. Still, if the mistake was one which could not have been avoided by the exercise of reasonable care, the privilege of the occasion would afford immunity; while, on the other hand, if the mistake was the result of heedlessness and want of reasonable care, the privilege would fail, and immunity would not result from the privilege of the occasion. Neither the privilege of the occasion nor the privilege of sending in good faith information received, though false, furnishes immunity from careless management in the home office, or the careless exercise of the right; nor does the privilege arbitrarily fail by reason of a pure mistake of the home office involving no negligence or culpability. One may lose the protection of this privilege, like any other, through negligence, or he may safeguard himself by its protection through the exercise of such a degree of care at the home office as would be exercised by men of ordinary circumspection, care, and prudence in similar situations. If the privilege is lost through carelessness, then the defendant is answerable for the consequences of circulating injurious reports, and the rights would be determined regardless of the question of privilege, under the ordinary rules which obtain in libel cases.

In Trussell v. Scarlett (C. C.) 18 Fed. 214, 216, the privilege was made to depend upon reasonable caution, and in Locke v. Bradstreet Co. (C. C.) 22 Fed. 771, 774, in submitting the question to the jury, the question of privilege was made to depend upon the exercise of ordinary care and caution.

The error being in the home office, there is no question raised for us as to the responsibility of the defendant in respect to the care of the agent who furnished the information. When there is a departure at the home office from information received, as is often the case in business in condensing, summarizing, and forwarding the reports, management and superintendence are necessarily involved, and, as all this affects the standing and the interests of one who is a stranger to the contract between the agency and the subscriber about whom the report is made, why should not the immunity of privilege depend upon the exercise of reasonable care?

It is fully recognized and established by the authorities that sending out from the home office the report received, knowing it to be false, or sending a true report in bad faith, or sending a true report unnecessarily or maliciously, makes the privilege fail. Inquiries in respect to all these elements involve fact, and it is perfectly clear and logical that the same principle makes privilege depend upon the fact of careful and prudent conduct and management in the home office when there is a departure from the information sent and a misstatement like the one in question here. It is not the question

whether the communication was actionable under the general law of libel, but the question whether privilege exists as a protection to the defendant. That depends upon the rule of reasonableness in respect to the conduct and care of one who invokes the immunity of its protection. If the jury should find the necessary fact of careful and reasonable exercise of the right, then the privilege would exist, and the defendant would be within its protection and immunity, and, if not, it would be subject to the ordinary rules of law.

Making the question of privilege and immunity depend upon the question of fact as to the reasonable exercise of the right is not, in principle, altogether unlike, but is somewhat analogous to, the probable cause doctrine, which involves a question of fact for the jury in cases under circumstances where it is an admissible ground of defense (Folk. Starkie, Sland. & Lib. [6th Ed.] 34, 349–352), and in cases where it is received in mitigation of damages.

The very nature of the business of mercantile agencies makes it impracticable to apply the old rule as to presumption of malice from publication or from gross mismanagement. The reports are gathered from all parts of the country, and in the ordinary course of business there is no such thing as malice in the transaction. No one claims it in this case. Much of the confusion in the books results from attempts to apply ancient rules of presumption, and we have no hesitation in saying that we think the safer and the better rule, in a situation like this, where neither actual malice nor bad faith is suggested, is the ordinary rule that, in the exercise of the privilege or the right, one should be held to the ordinary rule of due care. Mr. Bigelow has aptly said:

"It is, indeed, common to say that malice is presumed or implied upon proof of the publication; but that means nothing, and is only misleading, for the presumption or implication cannot be overturned by evidence of want of malice. Malice, touching the making a prima facie case, is only a name arbitrarily applied; simply a fiction." Bigelow, Torts (7th Ed.) § 319.

In a case where malice is not an active question, why should not the existence or nonexistence of privilege be made to depend upon the existence or nonexistence of due care, and upon a reasonable exercise of the right, rather than upon illogical presumptions one way or the other as to malice, and, in a case where malice becomes an actual element, let the question of malice be tried like any other question of fact.

In this case all questions of malice and bad faith, and all questions as to vindictive damages, were properly eliminated by the position of the parties and by the court, and we are now brought to the questions raised by assignments 14, 15, and 16, which relate to the allegation of damages, to the sufficiency of proofs, and to the instructions upon the question of damages; and we find no error here. We do not understand that, in this class of cases, the general allegation of injury to business and credit is treated as an allegation of special damages, in the sense of requiring specific allegations of loss of particular customers in order to recover for general diminution. The proof was general as to the immediate diminution of business and loss of credit. There was no evidence of loss of par-

ticular customers or contracts, and the instructions distinctly eliminated all such considerations, and confined the jury to such injury by way of diminution of business and loss of credit as they should find from the general facts and the whole situation was caused by the publication.

No question is raised as to the sufficiency of the proofs, provided such damages are recoverable under the allegation set forth, nor as to the sufficiency of the instructions as to the measure of damages. The general rule of compensation for injury was given to the jury with a limitation in general terms that, in order to recover for diminution, the injury suffered must have resulted directly from the wrongful publication. No point was taken that the instructions were not sufficiently full or explicit upon the line that the injury must have been the natural consequence of the injurious publication, or such as naturally and proximately resulted; so there are no questions of that kind for us to consider.

The general rule in libel and slander cases is aptly stated in Hamilton v. Walters, 4 U. C. Q. B. (O. S.) 24, 27, that the plaintiff "may state his case in either of two ways. He may aver a general diminution of business, in consequence of the slander, relying upon his ability to make that appear to a jury, or he may aver a particular instance of damage, knowing that he can give evidence of loss in a specific case." The plaintiff in the case at bar, in his general allegation and proofs, proceeded in the first way. That a plaintiff may do this is, of course, not the result of a rule which is general in its application to all actions of tort, but of one which is, perhaps, peculiar to those of libel and slander. The reason for the rule may be that evil report is insidious, that it travels and does damage in the dark, meandering in ways whereof it is difficult for man to find out, or because, as said in Bergmann v. Jones, 94 N. Y. 51, cases may arise where, from the nature of the business in which the party is engaged, it would be almost impossible to prove the loss of trade by witnesses who had dealt with the party bringing the suit.

Such rule, in this class of cases, is probably limited to cases where the words are actionable per se, where the words, in their natural and ordinary meaning, import a crime, or such as are clearly injurious to one's business, profession, or trade. We do not find any express decision in Massachusetts upon this question, but it would seem to be the English rule, the rule in New York, and the rule quite generally adopted in this country. See cases in 18 Am. & Eng. Enc. Law (2d Ed.) 1084 (4), note 1; cases in 5 Enc. Pl. & Prac. 768d; Associated Press v. Heath, 49 App. Div. 247, 253, 254, 63 N. Y. Supp. 96; Bergmann v. Jones, 94 N. Y. 51, 60, 61; Hale, Dam. 226, and cases in note 23; Folk. Starkie, Sland. & Lib. (3d. Ed.) 347, 348.

Under the general allegation in this case, the plaintiff introduced evidence tending to show general loss of business and general loss of credit immediately following the publication complained of. In such a situation, under proper instructions (and no exceptions were taken to the instructions to the jury on the question of damages in this case), we think the jury were warranted, in view of all the evidence and under the circumstances disclosed, in estimating the damages to

determine what part, if any, of the loss was attributable to the publication, and that it was not necessary for the plaintiff to connect the loss with the publication by direct or positive evidence of particular instances.

The result is that the judgment should be set aside, upon the ground that the question of defendant's liability should not have been ruled as a matter of law under the circumstances.

The judgment of the circuit court is reversed, the verdict is set aside, the case is remanded to that court for further proceedings, and the plaintiff in error recovers costs in this court.

LAMSON CONSOL. STORE SERVICE CO. v. BOWLAND.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 999.

1. LEASE—RESUMPTION OF POSSESSION BY LESSOR—EFFECT.
   Resumption of possession by the lessor of the thing leased operates as a surrender of the lease, and puts an end to the lessee's liability for future installments of rent, unless otherwise plainly provided.

2. SAME—CONSTRUCTION OF LEASE.
   A lease of a store service apparatus reserved a stipulated annual rent, payable quarterly in advance, provided that, if any installment remained unpaid for 90 days, the rental for the entire term should become at once due, and declared that the lessee should make no alterations in the mechanism, or remove it or use it elsewhere than in the store, and should neither sell, assign, nor underlet the same. The agreement concluded "that in case of a breach of any of the covenants or agreements to be observed on the part of the lessee, or attached by process of law, by proceedings in bankruptcy, or insolvency, or otherwise, the lessor may * * * enter * * * and take possession of said system, * * * and thereby determine all right and interest the said lessee may have in such system. * * * No removal of said system made by the lessor during the term * * * on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of the lease." On November 30th, the day before an installment of rent became due, a petition in involuntary bankruptcy was filed against the lessees, and on December 6th an adjudication of bankruptcy was entered. The installment falling due December 1st was not paid in full, and the lessors retook possession. *Held*, that if the resumption of possession was for any reason other than the termination of "the lessee's tenancy," or "some default by the lessee," the lease would be determined, and the lessee would not be liable for future installments of rent.

3. SAME.
   The reference to a removal "on account of any determination of the lessee's tenancy" referred to another paragraph in the lease, providing for notice to the lessor "of any determination of the lessee's tenancy in said store, so that the lessor may have the right to remove said system if necessary."

4. SAME.
   If the lessor resumed possession because of the adjudication of bankruptcy against the lessee, the lease was determined, and no right to exact future rents would remain.

5. SAME—RIGHT TO RESUME POSSESSION—DEFAULT IN RENT.
   Default in the installment of rent due December 1st would not justify the lessor in resuming possession at all, where it did not appear that any formal demand for the rent was made on the day it was due.

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

This is an appeal from a judgment disallowing a claim filed by the appellant against the estate of a bankrupt firm doing business as George G. Moler & Son. From the facts certified by the referee to the court below, it appears: (1) That the appellant constructed a store service apparatus in the store of the bankrupts under an agreement by which the bankrupts agreed to use same for a term of five years, and to pay "an annual rental in equal quarter-yearly installments, in advance, upon the first days of March, June, September, and December in each and every year during the term of this lease, or any extension hereof," at the rate of $20 for each station. There being nine stations constructed, the yearly rental was $180, and the quarterly installment payable in advance was $45. It was further provided that, "if any installment of said rental shall remain unpaid for sixty days after it becomes due, the entire rental to the end of the lease shall become at once due and payable." It was further provided that the lessee should not, without the consent of the lessor, make alterations, or remove the apparatus, or use elsewhere than in said store, and that the whole mechanism should continue the sole and exclusive property of the lessor, the lessee "not to sell, assign, or underlet" said system, and that at the end of the lease same should be delivered up to the lessor in good order and condition. The lessor, on its part, agreed, at its own expense, "to supply all parts necessary to keep said Cable cash-carrier system in proper repair, excepting, also, when there is rental on said system overdue and unpaid." The rental agreement concluded with the provision that the contract was subject to the condition "that in case of a breach of any of the covenants or agreements to be observed on the part of the lessee, or attached by process of law, by proceedings in bankruptcy, or insolvency, or otherwise, the lessor may, while such default or neglect continues, or at any time after such attaching or taking by process of law, without any notice or demand, enter upon the said store premises, or wherever said system may be, and take possession of said system, or any part thereof, and thereby determine all right and interest the said lessee may have in said system; and may remove the same, forcibly, if necessary, without let or hindrance from the lessee. In case of removal of the system, the lessor shall not be required to put the store of the lessee in its former condition. No removal of said system made by the lessor during the term of this lease, or any extension hereof, on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of this lease." (2) On November 30, 1900, the day before an installment of rent fell due, a petition in involuntary bankruptcy was filed against the lessees; and on December 6, 1900, an adjudication of bankruptcy was entered. All installments of rent accruing prior to December 1, 1900, had been duly paid, and no default existed at the date of the filing of the petition in bankruptcy, on November 30, 1900. The installment which became due under the lease on December 1, 1900, was not paid, except in part, as hereinafter shown. The appellant filed a claim for the entire remaining term of the lease, claiming that the failure to pay the installment accruing December 1, 1900, precipitated the maturity of the entire rental to the end of the lease, in 1905. The claim filed is therefore for $773.50, less a credit of $12 for rent collected by the lessor for a part of the month of December. The referee certified that the lessors had taken possession of the store service apparatus, and had received rent from some one other than the lessees from December 1, 1900, to December 24, 1900, and had credited same on the account rendered. The referee disallowed the claim upon the ground that it was not a fixed liability, absolutely owing, at the time of the filing of the petition against the bankrupt. The district judge affirmed this judgment, without an opinion.

Lincoln Fritter, for appellant.
Charles I. Stauffer, for appellee.

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

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

What are the rights of the lessor of this store service apparatus in respect to rents which had not accrued when the petition in bankruptcy was filed against the lessee company? The lessors invoke the third clause of the lease contract, which provides that, "if any installment of said rental shall remain unpaid for sixty days after it becomes due, the entire rental to the end of the lease shall become at once due and payable." It is entirely competent to contract that the consequence of a default in the payment of an installment of interest for the use of money, or of rent for the use of property, shall be the precipitancy of the maturity of the principal of the money loaned, or of future installments for the rental of the property in respect to which default has been made. Rent is the compensation for the use and enjoyment of the thing rented, and is ordinarily demandable whether the tenant actually enjoy the use and possession of the subject of the rent or not, unless the failure is due to some fault of the letter. But in this case the letter demands that the lessee shall continue to pay rent, although it has repossessed itself of the thing for the enjoyment of which the rent is to be paid. The resumption of possession by a lessor operates as a surrender of the lease, and puts an end to the liability of the lessee for future rents, unless otherwise provided. A covenant in a lease authorizing a landlord, on default in rent, to take possession, and relet, if possible, for the benefit of the tenant, and that in such case the tenant shall remain liable for the deficiency, or for the whole rent if a reletting is impossible, has been held valid. Hall v. Gould, 13 N. Y. 127. In case of a covenant such as that just mentioned, the lessor's possession would be as agent for the lessee; and the liability of the lessee would be contingent upon a deficiency, and clearly not such a fixed and absolute liability as would be provable in bankruptcy. In the lease here under consideration, the lessor has reserved the right to resume possession in quite a number of contingencies, the effect of which the contract declares shall be to "determine all right and interest the said lessee may have in said system." Without more, it cannot be that the lessee shall be liable for the future rents, when the effect of the act of the lessor has been to determine all of his right and interest in the subject of the lease. Forfeitures are never favored, and when it is claimed that the lessor of property may resume possession of the subject-matter of the lease, and continue to hold the lessee liable for future rents, although deprived of the use and enjoyment of the thing leased, the terms of the bond must be exceedingly plain. Liability under such circumstances for future rents would be in the nature of a penalty, and the covenant by which the lessor may have both the use of the thing rented, and the compensation which the lessee was to pay for its use, must be so specific as that no other reasonable interpretation can be placed upon it. Hall v. Gould, 13 N. Y. 127. We have heretofore set out the clause of the lease upon which the lessor's right to resume possession and exact future rents, also, must rest. The contention is that under the provision quoted the lessor may resume possession of the leased property upon the happening

of any one of the contingencies mentioned, without the surrender of the lease as a consequence. The catalogue of contingencies authorizing a resumption of possession and a removal of the leased mechanism is followed by a declaration as to the effect of the lessor's act, in these words: "And thereby determine all right and interest the said lessee may have in said system." The necessary consequence of a determination of the lessee's right and interest at the election of the landlord must be to put an end to the lessee's liability for future rents, in the absence of some specific agreement otherwise. That this was the intention of the parties seems very plain from the last sentence of the clause, which provides that "no removal of said system made by the lessor * * * on account of any determination of the lessee's tenancy, or on account of any default by the lessee, shall constitute a surrender of this lease." It is plain, then, that if the lessor has resumed possession and removed the system for any reason other than the termination of "the lessee's tenancy," or some "default by the lessee," the effect must be the usual and legal consequence of a resumption of possession by a lessor, the determination of the lease. The reference to a removal "on account of any determination of the lessee's tenancy" refers to the seventh paragraph of the lease, providing for notice to the lessor "of any determination of the lessee's tenancy in said store, so that the lessor may have the right to remove said system, if necessary, without hindrance on the part of the landlord." The only other case, then, in which a removal by the lessor of the system is not to constitute a surrender of the lease, is when the possession has been recovered in consequence of some "default by the lessee." On what authority has the lessor taken possession of the leased store service? That the lessor did take possession about the date of the adjudication in bankruptcy is reported by the referee. But on what ground is this justified? Unless the appellant can show that this conceded possession was taken upon some ground which kept the lease alive, the appeal must fail.

It was stated at the bar, and in the printed brief of counsel, that "the Lamson Consolidated Store Service Company, in accordance with its custom in case of bankruptcy, removed its system from the store of the bankrupt, as a protection to its own business, and to prevent such system from falling into the hands of persons unauthorized to use the same." An adjudication of bankruptcy against the lessee would seem to justify the lessor in recovering possession. But the result would be the surrender of the lease. Thereafter no right to exact future rents would remain. If this appellant has the right to collect future rents after recovering the possession and enjoyment of the leased property, it must make out a clear case. As we have seen, counsel have attempted to justify the possession upon a ground which leaves no foot to stand upon, when asserting a claim for future rents. But can the dispossession of the lessee be justified by the default in payment of the installment of rent due December 1, 1900? We think not, and for more than one reason. But it is sufficient to say that it does not appear that any formal demand was made for the rent on the pay day. Before a re-entry can be made

for default in rent, demand must be made for the precise dues at a convenient time before sunset on the day when the rent was due. Connor v. Bradley, 1 How. 217, 11 L. Ed. 105; Prout v. Roby, 15 Wall. 471, 476, 21 L. Ed. 58; Henderson v. Coal Co., 140 U. S. 25, 33, 11 Sup. Ct. 691, 35 L. Ed. 332; Parks v. Hays, 92 Tenn. 161, 22 S. W. 3; Smith v. Whitbeck, 13 Ohio St. 471; 18 Am. & Eng. Enc. Law, p. 375. Of course, it was competent to provide for a forfeiture without demand, but the contract in question contains no stipulation to that effect. Inasmuch as the agreement does not provide in express terms that the liability of the lessee should continue after the re-entry of the lessor, we must conclude that no liability for future rents was intended. There was no liability for past rents, for the lessor has either enjoyed the rents, or the use of the system, since December 1, 1900.

The judgment of the court below is accordingly affirmed.

SWIFT v. BANK OF WASHINGTON.

(Circuit Court of Appeals, Eighth Circuit. March 17, 1902.)

No. 1,578.

1. CHATTEL MORTGAGE—ASSIGNMENT OF NOTE—RIGHTS OF ASSIGNEE—PAYMENT TO ORIGINAL MORTGAGEE—EFFECT.
   Assignment of a note before maturity to a bona fide holder carried with it a chattel mortgage executed as security therefor, and the assignee alone could thereafter discharge the mortgage lien; payment of the indebtedness to the original mortgagee by a purchaser of the mortgaged property being insufficient, though the latter had no notice of the assignment.
2. SAME—CONSTRUCTION OF MORTGAGE.
   A provision in a chattel mortgage that when the mortgaged property was ready for market it would be consigned to the mortgagee, and the proceeds applied on the mortgage debt, did not authorize payment of the indebtedness to the mortgagee after the note had been assigned by him to some one else.
3. SAME.
   A provision in the mortgage that it was intended as security for the mortgagee as long as he was "in any manner interested in the payment of the indebtedness, * * * whether as payee, indorser, or guarantor, or otherwise, as well as for the security of the assignee or indorsee, and such transfer or assignment shall not carry with it the sole right to enforce the mortgage, but the same shall be vested severally in said second party [mortgagee] concurrently with said assignee or transferee," did not authorize payment to the mortgagee after the note had been assigned to some one else.
4. SAME—ANSWER—PLEADING NONJOINDER OF PARTIES—SUFFICIENCY.
   A clause in the answer in replevin by the assignee of the note to recover the mortgaged property, averring that, by reason of the stipulation last quoted, the mortgagor had the right to pay and the mortgagee a right to receive payment of the mortgaged debt and discharge the mortgage lien, was insufficient as a plea in abatement for nonjoinder of proper parties.

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

On the 31st day of July, 1899, F. M. Overlees executed and delivered to W. B. McAllister & Co. his negotiable promissory note for $2,264.58, payable at their office at Kansas City Stock Yards, Kansas City, Kan., 10 months after date. For a valuable consideration McAllister & Co. indorsed and delivered the note before its maturity to the Bank of Washington, the defendant in error and plaintiff below. Of even date with the note, the maker thereof executed a chattel mortgage on certain cattle to secure its payment. In the month of November, 1899, C. W. Swift, Jr., the plaintiff in error and defendant below, without notice that the note the mortgage was given to secure had been assigned to the plaintiff, purchased the mortgaged cattle from Overlees, the mortgagor, and in December, 1899, paid or caused to be paid to McAllister & Co., the mortgagees, the full amount of the mortgage debt, and received from them a release and discharge of the mortgage. Afterwards the plaintiff, the Bank of Washington, brought this action of replevin against the defendant Swift to recover the cattle. The court sustained a demurrer to the defendant's answer, and, the defendant declining to plead further, final judgment was rendered for the plaintiff, and the defendant sued out this writ of error.

A. L. Redden (H. M. Beardsley, on the brief), for plaintiff in error.

J. D. McCue (L. C. Boyle, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The first and principal question raised by the demurrer to the answer is: Who has the better right to the cattle, the plaintiff, which purchased the note secured by the mortgage for value before maturity, relying on the mortgage as security for its payment, or the defendant, who purchased the cattle from the mortgagor, and paid or caused to be paid to the mortgagees the amount of the mortgage debt, without notice of the previous sale and transfer to the plaintiff of the note the mortgage was given to secure? This is no longer a debatable question in the federal courts. In Carpenter v. Longan, 83 U. S. 271, 21 L. Ed. 313, the supreme court, after reviewing the cases and admitting "there is considerable discrepancy in the authorities on the question," declared the sound doctrine to be that the note and the mortgage given to secure it are inseparable; the former as essential, the latter as an incident. "An assignment of the note," says the supreme court, "carries the mortgage with it, while an assignment of the latter alone is a nullity. * * *" "The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter. * * * All the authorities agree that the debt is the principal thing, and the mortgage an accessory." This case is cited and its doctrine affirmed in later cases in that court. In Kenicott v. Supervisors, 83 U. S. 452, 469, 21 L. Ed. 319, the court says "that where a note secured by a mortgage is transferred to a bona fide holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defenses are allowed as against the mortgage than would be allowed were the action brought in a court of law upon the note." And this doctrine is reaffirmed in Sawyer v. Prickett, 86 U. S. 146, 166, 22 L. Ed. 105, where the court say: "We have recently decided that the rule of bona fide holding applies to a case where the proceeding is to foreclose a mortgage accompanying a note with the same force as when the suit is brought upon the

note itself." In Banking Co. v. Montgomery, 95 U. S. 16, 24 L. Ed. 346, the court said: "The deed of trust securing the payment of the notes was an incident, and accessory to them. The transfer of the notes carried with it to the transferees the benefit of the security." This is also the doctrine in many of the states. Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274; Williams v. Keyes, 90 Mich. 290, 51 N. W. 520, 30 Am. St. Rep. 438; Lee v. Clark, 89 Mo. 553, 558, 1 S. W. 142; Cummings v. Hurd, 49 Mo. App. 139, 147; Gabbert v. Schwartz, 69 Ind. 452; Preston v. Case, 42 Iowa, 551; Logan v. Smith, 62 Mo. 459; Hagerman v. Sutton, 91 Mo. 532, 4 S. W. 73; Webb v. Hoselton, 4 Neb. 318, 19 Am. Rep. 638; Paige v. Chapman, 58 N. H. 334; Bamberger v. Geiser, 24 Or. 207, 33 Pac. 609; Weldon v. Tollman, 15 C. C. A. 138, 67 Fed. 986.

It is the debt that imparts vitality to the lien. The payment of the debt extinguishes the lien. There can be no lien separate from the debt. The owner of the mortgage debt owns the lien as an incident to the ownership of the mortgage debt, and he alone can discharge the lien. This was the law, which the defendant was bound to know.

Moreover, the mortgage in terms declared that it "is intended for the security of any assignee or indorsee" of the mortgage debt. The answer alleges that the defendant purchased the cattle from Overlees, the mortgagor, in November, 1899, "and that at the request of said Overlees he agreed to remit the purchase price thereof to said W. B. McAllister & Co. to pay and discharge said mortgage, * * *" and that "in pursuance of the request of said Overlees, so as aforesaid made, there was transmitted and forwarded to said McAllister & Co., about the 8th day of December, 1899, an amount and sum of money sufficient to pay said mortgage, and for the purpose of payment of said mortgage, which said money was received by said McAllister & Co. for said purpose and as payment of said mortgage, and said McAllister & Co. in consideration of said payment, then and there duly executed a release and discharge of said mortgage. * * *" It thus appears from the defendant's answer that he knew when he purchased the cattle that the mortgage was of record, unsatisfied, and the mortgage debt unpaid. If the defendant desired to have the cattle released from the lien of the mortgage, he should have required the production and cancellation of the note the mortgage was given to secure. Instead of doing this, he remitted the money to pay the mortgage debt to McAllister & Co., in the confidence that they would apply it to that purpose. His confidence was misplaced. They had before that sold and transferred the note to the plaintiff. They did not apply the money to its payment, but instead applied it to their own use, and wrongfully executed a release of the mortgage, that is of no value against the plaintiff.

It is said that by the terms of the mortgage McAllister & Co. were made agents of the holder of the note, and were authorized to receive payment thereof. The mortgage contains no such provision, either in terms or by implication. On the contrary, the rights of the "holders" and "assignee or indorsee" of the mortgage indebtedness is expressly recognized, secured, and protected by numerous provisions of the mortgage. There is nowhere in the instrument any hint that after

the mortgagees have assigned and transferred the mortgage debt they can act as agents of the holder to receive payment.

The mortgage contains this provision:

"When marketed, the consent of the second party having been first obtained, said property shall be consigned to the second party at the Kansas City Stock Yards, Kansas City, Kansas, or Kansas City, Missouri, and the proceeds applied to the payment of the above-mentioned indebtedness, the surplus being paid to the first party."

This provision is commonly found in mortgages taken by commission merchants. It is designed to secure to them the commissions on the sale of the property. To this end, the mortgagor in this case covenanted that when the cattle were ready for market he would consign them to the mortgagees, and apply the proceeds of the sales to the payment of the mortgage indebtedness. There is no intimation here that the mortgage debt is to be paid to any one but the lawful holder thereof. Another and conclusive answer to the defendant's contention is that the cattle were not disposed of in the manner contemplated by this clause. They were not consigned to the mortgagees for sale, but purchased by the defendant of the mortgagor at his farm in the Indian Territory, in express violation of the terms of the mortgage. By its terms the mortgage was intended to secure, in addition to the note, any sums advanced and expended for the care and transportation of the cattle, commissions, and any indebtedness afterwards contracted. The mortgage contains this further provision:

"This mortgage is intended and shall be held and construed to be as and for the security of said second party, so long as said second party may be in any manner interested in the payment of the indebtedness hereby secured, or any part thereof, whether as payee, indorser, or guarantor or otherwise, as well as for the security of any assignee or indorsee of said notes or any of them, or of said indebtedness or any part thereof; and, in the absence of any express agreement between said second party and any assignee or transferee of any part of said indebtedness or notes, such transfer or assignment shall not carry with it the sole right to enforce this mortgage, but the same shall be vested severally in said second party concurrently with said assignee or transferee."

The defendant's answer, after quoting this provision of the mortgage, avers:

"That, by reason of such stipulation and condition, said Overlees had the right to pay, and said McAllister & Co. had the right to receive payment of, said mortgage, and to release and satisfy and discharge the same, and to release and discharge the lien of said mortgage made upon the cattle that were described therein."

There is nothing in this clause of the mortgage which lends any support to the contention that McAllister & Co. had authority to receive payment of the mortgage debt after they had sold and transferred it, and the answer does not allege that they had.

Nor can this clause of the answer be treated as an answer in the nature of a plea in abatement setting up the nonjoinder of proper parties. It complies with none of the requirements of such a plea. This stipulation contemplates that the mortgagor may become indebted to the mortgagees for advances for the purposes we have mentioned after the execution of the mortgage, and in that event, in the absence of any agreement to the contrary, the assignment of a

part of the mortgage indebtedness shall not carry with it the sole right to enforce the mortgage. Whether this would have been the rule independent of this stipulation we need not inquire. It is enough to say that the defendant is not prejudiced by it because it is not alleged in the answer, and it does not appear elsewhere in the record that there ever was, or is now, any debt secured by the mortgage other than the note held by the plaintiff. A thing neither alleged nor proved for any legal purpose is nonexistent.

As we construe the defendant's answer, it raised no material issue of fact to go to the jury, and set up no legal defense to the action.

The judgment of the circuit court is affirmed.

BOYD et al. v. LEMON & GALE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1902.)

No. 1,025.

BANKRUPTCY—ACTS OF BANKRUPTCY—TRANSFER TO PREFER CREDITORS.

It is an act of bankruptcy for an insolvent debtor to sell all of his property to one not a creditor, and then to apply the proceeds to the full payment of a part of his creditors, leaving others unpaid; the transaction being a transfer of property with intent to prefer certain creditors, within the intent and meaning of Bankr. Act 1898, § 3, par. a, cl. 2.

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

Boyd & Baker, the appellants, were adjudicated involuntary bankrupts by the United States district court for the Northern district of Mississippi, from which judgment they prosecute this appeal. The petition seeks to charge them with the first and second acts of bankruptcy, as laid down in paragraph a, § 3, Bankr. Act 1898. That part of the petition is in the following language: "The said Boyd & Baker committed an act of bankruptcy in that they did heretofore, to wit, on the 8th day of January, 1900, convey and transfer their entire property, consisting of a stock of goods, wares, and merchandise, with intent to hinder, delay, or defraud their creditors, or a part of them; and that they did on the 8th day of January, 1900, while insolvent, sell and convey their entire property, consisting of a stock of goods, wares, and merchandise, and applied the proceeds arising from said sale to the payment of their indebtedness to the Bank of Pontotoc and to the Bank of Tupelo, with intent to prefer said creditors over their other creditors, all of which was known to said Bank of Pontotoc and Bank of Tupelo." Boyd & Baker interposed a demurrer to "all that part of the petition in the following language, to wit: 'And that they did on the 8th day of January, 1900, while insolvent, sell and convey their entire property, consisting of a stock of goods, wares, and merchandise, and applied the proceeds arising from said sale to the payment of their indebtedness to the Bank of Pontotoc and to the Bank of Tupelo, with intent to prefer said creditors over their other creditors, all of which was known to said Bank of Pontotoc and Bank of Tupelo,'—(1) because it does not constitute an act of bankruptcy; (2) because the transfer of their property by said Boyd & Baker to a person not a creditor, and the payment of the proceeds to their creditors, is not an act of bankruptcy; (3) because under the law the payment in money by a debtor of one or more creditors, to the exclusion of others, is not an act of bankruptcy." This demurrer was overruled by the court, and leave given Boyd & Baker to answer the petition filed against them to have them declared involuntary bankrupts, and thereupon they filed their answer denying the material allegations of the petition. There was then a trial of the issues raised by the petition and answer, on an agreed

state of facts between the petitioning creditors and Boyd & Baker. The court adjudicated them bankrupts. The agreed facts are recited in the judgment of the court in the following language, to wit: "That on the 8th day of January, 1900, said Boyd & Baker, a firm of merchants composed of E. R. Boyd and W. E. Baker, doing business in Pontotoc, Miss., sold their entire stock of goods, wares, and merchandise for cash to Knox Bros., and took the proceeds of such sale, and applied a sufficiency of the same to the debts due by them to the Bank of Tupelo and the Bank of Pontotoc and Clark, Hood & Co., and left petitioners unpaid, not having paid them anything; that at the time of filing the petition in this cause, and at the time of said sale, and now, they were and are insolvent." Appellants' assignment of errors is as follows: "First. The court erred in overruling appellants' demurrer to appellees' petition to have appellants declared involuntary bankrupts. Second. The court erred in adjudging appellants involuntary bankrupts, because the sale by them of their goods, wares, and merchandise, while insolvent, to a party not a creditor, for cash, and the application of a part of such proceeds of sale to the payment of a part of their creditors, and leaving others unpaid, was not, under the law, an act of bankruptcy."

W. D. Anderson, for appellants.

J. D. Fontaine, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The same question was raised by the demurrer as is involved on the merits, and it is this: Whether it is an act of bankruptcy, under the bankruptcy act of 1898, for an insolvent debtor to sell all of his property to one not a debtor, for cash, and then apply the proceeds to the full payment of part of his creditors to the exclusion of others. Counsel for appellants contends that it is not an act of bankruptcy for an insolvent debtor to sell all of his property for cash, nor is it an act of bankruptcy for an insolvent debtor to fully pay off some of his creditors in money, and leave the balance of his creditors unpaid; and he apparently concedes that under the present bankruptcy law it is an act of bankruptcy for an insolvent debtor to transfer his property to some of his creditors in full payment, and leave others unpaid, but he denies that money is property, within the meaning of the bankrupt law. He argues very plausibly upon his separate propositions, supporting the same by authorities, but he does not answer the proposition that the sale of property for money, and then the payment of the money to creditors, produces the same result as if the property is transferred directly to the creditors; and we do not think that the insolvents in this case, in taking two steps to avoid the effect of the bankrupt act, advanced any further, or secured any other result, than if they had taken the one full step.

But it is not necessary to elaborate our views in this direction; for we are clear that as the agreed statement of facts shows that Boyd & Baker, while insolvent, took the money proceeds of the sale of all their property, and applied the same to the full payment of the debts due by them to several of their creditors, leaving others unpaid, it is sufficiently proved that they thereby made a transfer of their property while insolvent to one or more of their creditors with intent to prefer such creditors over their other creditors, within the intent and meaning of Bankr. Law, § 3, par. a, cl. 2.

There can be no doubt the insolvents transferred money to some of their creditors with intent to prefer them, and money is property, as the term "property" is used in defining the word "transfer," in clause 25, § 1, Bankr. Act. And this has been distinctly held by the supreme court in Pirie v. Trust Co., 182 U. S. 438, 443, 21 Sup. Ct. 906, 45 L. Ed. 1171, in which case the court say:

"It will be observed that payments in money are not expressly mentioned. Transfers of property are, and one of the contentions of appellants is that by 'transfers of property' payments in money are not intended. The contention is easily disposed of. It is answered by the definitions contained in section 1. It is there provided that 'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolute or conditional, as a payment, pledge, mortgage, gift, or security.' It seems necessarily to mean that a transfer of property includes the giving or conveying anything of value,—anything which has debt-paying or debt-securing power. We are not unaware that a distinction between money and other property is sometimes made, but it would be anomalous in the extreme that in a statute which is concerned with the obligations of debtors and the prevention of preferences to creditors the readiest and most potent instrumentality to give a preference should have been omitted. Money is certainly property, whether we regard any of its forms or any of its theories. It may be composed of a precious metal, and hence valuable of itself, gaining little or no addition of value from the attributes which give it its ready exchangeability and currency. And its other forms are immediately convertible into the same precious metal, and even without such conversion have at times even greater commercial efficacy than it. It would be very strange, indeed, if such forms of property, with all their sanctions and powers, should be excluded from the statute, and the representatives of private debts which we denominate by the general term 'securities' should be included. We certainly cannot so declare upon one meaning of the word 'transfer.' If the word itself permitted such declaration,—which we do not admit,—the definition in the statute forbids it. 'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicalities and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.' But it is said 'that congress in passing the law had in mind the distinction between the payments of money and the transferring of property, otherwise they indulged in tautology,' in subdivision d, § 60. By this it is provided: 'If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.' That all the words of a statute should, if possible, be given effect we concede, but tautology sometimes occurs. Is there not an example in subdivision 'e' of section 67 (which, by the way, and notwithstanding, is relied on by the appellants)? It provides that 'all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt,' in fraud of creditors, shall be null and void as to them. Manifest tautology, but certainly not used to detract from the definition of 'transfer' in section 1, or to exclude application of that section in proper cases. Conveyances, assignments, and incumbrances of property are but modes of its absolute or conditional disposition (transfer), as payment of money is a mode of its disposition (transfer), and there was a particular expression of each mode on account of the primary purpose to be secured in

each case,—the purpose being in 60d to control payments to attorneys; in 67e the purpose being to prohibit the disposition of property by the debtor to persons other than creditors in fraud of the act."

And so we hold that when the insolvents in this case paid some of their creditors in full they committed an act of bankruptcy.

The judgment of the district court is affirmed.

In re HOLDEN et ux.

(Circuit Court of Appeals, Ninth Circuit. January 16, 1902.)

No. 729.

1. BANKRUPTCY—EXEMPTIONS—LIFE INSURANCE POLICIES.
   The provision of Bankr. Act 1898, § 6, giving the bankrupt the benefit of the exemptions prescribed by the state laws, does not pervade the entire act, and as to life insurance is controlled by the proviso to section 70a, cl. 5, under which title to all policies having a cash surrender value payable to him, his estate or personal representative, vests in his trustees for the benefit of his creditors.
2. SAME—PROPERTY PASSING TO TRUSTEE—INTEREST IN LIFE INSURANCE POLICY.
   Where a husband and wife were each adjudged bankrupt, policies of insurance on the life of the husband, having a cash surrender value and payable to the wife if she survived him, and to his personal representatives if he survived her, passed to the trustees under Bankr. Act 1898, § 70a, cl. 5, as assets of their respective estates, each having an interest therein which amounted to an insurance policy within the meaning of such provision, the wife's being payable to herself, and assignable by her under the laws of the state, which made it her separate property, and the remaining contingent interest being payable to the husband's estate.

Petition for Revision of Proceedings of the District Court of the United States for the Northern Division of the District of Washington, in Bankruptcy.

Bausman & Kelleher, for appellant.

J. A. Stratton and Carroll & Carroll, for appellees D. N. & Lizzie Holden.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

McKENNA, Circuit Justice. This is a petition filed under section 24b of the bankruptcy law of 1898 to review an order of the district court for the district of Washington, Northern division, made and entered in the above-entitled cause. The said D. N. Holden and Lizzie Holden were separately proceeded against in bankruptcy by their creditors. The causes were consolidated by consent, and "one and the same answer" filed to the petitions. Subsequently it was adjudged that the "respondents and each of them are bankrupts within the true intent and meaning of the acts of congress relating to bankruptcy." The respondents then prayed exemption from the claims of creditors of two life insurance policies. The claim was disallowed by the referee, who made due report of his action to the court. The re-

spondents filed exceptions to the report, and, after hearing, the court, by an order duly entered on the 16th of July, 1901, vacated the report, and adjudged the policies to be exempt. To review this order of the district court the present petition was filed by J. A. Stratton, the duly appointed trustee of the estates of said bankrupts. No answer has been filed to the petition, and the question is whether upon the facts stated the order in the district court should be revised.

The policies in question were issued on the 15th of June, 1894, by the Northwestern Life Insurance Company of Milwaukee, Wis., and were respectively numbered 206,383 and 303,921, and were, respectively, for the amounts of $5,000 and $2,000. Daniel N. Holden was the insured in both, and Lizzie Holden was the beneficiary in both, with the provision, however, that if she should not survive him payment should be made to his executors, administrators, and assigns. It was provided in the policy No. 206,383 that it is "issued on the semitontine plan, and its tontine dividend period is twenty years," and the following is indorsed on the policy:

"Upon surrender by the insured and beneficiary of a policy of $10,000, of like number and kind, dated May 2, 1890, this policy for $5,000 is issued at their request in lieu of one-half of the former policy. In all other respects this policy is made and accepted pursuant and subject to the application upon which the original policy was issued. A full-paid life nonparticipating policy, No. 303,921, for $2,000, is issued in consideration of the surrender of one-half of the original policy."

It is alleged in the petition that the policies have a present cash surrender value combined of about $2,200, and it was stated on the argument that the creditors of each of the bankrupts are the same.

It is provided by the laws of the state of Washington "that the proceeds or avails of all life insurance shall be exempt from all liability for any debt." Laws 1895, p. 336. By section 70a of the bankrupt law of 1898 it is provided that:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment or qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests and patents, patent rights, copy rights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Section 6 of the bankrupt law is as follows:

"Exemptions of Bankrupts.—(a) This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force

at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition."

The effect and extent of section 6 was considered by this court in Re Scheld, 44 C. C. A. 233, 104 Fed. 870, 52 L. R. A. 188, and it was said that the purpose of the section did not pervade the whole act, but was controlled by section 70a; and that under the latter section policies of insurance payable to the bankrupt himself, his estate or personal representatives, passed to the trustee of the estate. But we also said:

"It will be seen that the clause of section 70, above quoted, does not include policies of insurance payable to the wife, children, or other kin of the bankrupt, but is limited to policies the proceeds of which are payable to the bankrupt himself, his estate or personal representatives. The enactment does not deprive the family of a debtor of the protection which he may have secured to them in taking out policies for their benefit payable at his death, but it does prevent debtors from availing themselves of the opportunity of making investments for their own benefit in the form of endowment policies, or policies payable to themselves, and holding the same, while seeking a discharge from their debts through the bankruptcy act."

What is the character of the policies in the case at bar? Are they covered by the proviso of section 70? It will be observed that the policies were not payable to either Holden or his wife absolutely, but to her only if she survived him, and to his personal representatives if he survived her. Subject to such contingent interest in him, the policies and the money to become due under them belong to her, and it is beyond his power to transfer them to any other person or to surrender them. In re Heilbron's Estate, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602, citing Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370, and other cases. Under the laws of Washington her interest in the policies became her separate property, and was assignable by her. 2 May, Ins. 399q, and cases cited. Each, therefore, has an interest in the policies, and each must be held to have an insurance policy which has a cash surrender value payable to him or to her, his or her estate or personal estate or personal representatives, and subject, therefore, to the provisions of section 70; in other words, passed to their respective trustees as assets of their respective estates. It may be that neither could surrender the policies without the consent of the other, but such right of surrender passed with the policies to their respective trustees. In Steele v. Buel, 44 C. C. A. 287, 104 Fed. 968, the circuit court of appeals of the Eighth circuit has decided that the rule of exemption of section 6 pervades the whole act, and is to be read into every other section and provision of the act. The difference of opinion between that learned court and this court demonstrates the ambiguity of the bankrupt act, and, while not insensible to the necessity of harmony in the decisions of the courts of appeal, we are not disposed to depart from the ruling in Re Scheld. There is a way open to respondents for a further review of the questions involved.

It follows that the order of the district court should be revised in accordance with this opinion; and it is so ordered.

PYNCHON v. DE BLOIS et al.

(Circuit Court, D. Connecticut. March 12, 1902.)

PATENTS—INFRINGEMENT—TROUSERS HANGER.

The Pynchon patent, No. 662,656, for a trousers hanger, claims 1 and 5, construed, and *held* not infringed.

In Equity. Suit for infringement of letters patent No. 662,656, granted to L. F. L. Pynchon November 27, 1900, for a trousers hanger. On final hearing.

Charles L. Burdett, for complainant.

Gross, Hyde & Shipman, for defendants.

TOWNSEND, District Judge. Final hearing on bill and answer raising questions of validity and infringement of complainant's patent, No. 662,656, granted him November 27, 1900, for a trousers hanger. The complainant, Pynchon, has made a cheap, strong, light, simple, and efficient trousers hanger, and patented it as his invention. It found a ready market; some seventy or eighty thousand having been sold in the space of about fifteen months, without special advertising. One of the defendants (Lester), taking advantage of his acquaintance with Pynchon, learned from him all the details of his business, got a sample for the ostensible purpose of acting as Pynchon's selling agent, and shortly after appeared as one of the defendants, selling the hanger alleged to infringe, known as the "Delespo Hanger," and which is manufactured under a design patent granted July 31, 1900, to H. R. Williams. In general appearance and function, the two devices very nearly resemble each other. The first and fifth claims, only, are in issue, and are as follows:

"(1) In combination, a supporting bracket member, a frame-like member composed of branches extending back and forth, providing jaws opening alternately at opposite ends thereof; said frame-like member being supported at one end by the bracket member, whereby, beginning at the bracket member, each successive branch of the frame-like member is located farther from the support than the preceding branch."

"(5) As an improved article of manufacture, a trousers hanger, comprising a bracket having a socket and a clamp, the latter formed of a rod of spring metal, one end of which is bent at an angle to the plane of the clamp, and fits said socket, and the rest of the rod being bent back and forth to form substantially parallel jaws opening on opposite ends of the clamp."

The defense of lack of invention is chiefly supported by patent No. 242,225, granted to Sampson, May 31, 1881, for a rein holder; patent No. 399,552, granted to Patton, March 12, 1889, for an appliance for hanging and exhibiting boot and shoe laces; and patent No. 617,130, granted to Skinner, January 3, 1899, for a trousers hanger. As the Skinner patent alone is a sufficient defense, the others will not be discussed. The Skinner trousers hanger consists of a continuous piece of wire bent backward and forward in a horizontal plane like the trousers hanger in suit, except that the wires contiguous to each other, instead of being parallel, are so bent as to come together at the ends, and thus form a series of resilient clamps to hold the trouser ends in place. But the patentee says:

"The remainder of said spaces, which tapers to said openings, is yielding to a degree necessary to allow the said sides to become parallel when the said trousers bottoms are between them," etc.

Thus, when the Skinner hanger is in use, the location and relation of the branches or wires are identical with those of the hanger in suit; or, if the wire of which the Skinner branches are composed were of inferior steel, the branches, after use, would become parallel. The hook by which the hanger is suspended is shown as placed in the center of the device, while in the patent in suit it is at one end. But as to his hook, Skinner says:

"It is evident I may place said hook upon one of the outmost sides, 1 or 5, for that purpose [to suspend it], in which case the device, when so suspended, hangs vertically."

The construction shown by this suggested change in the location of the hook, or by cutting off one-half of the hanger shown in the drawing, is the defendants' construction, except that, in order to substitute horizontal suspension for vertical suspension, the hook is bent at right angles to the branches of the hanging arms. In these circumstances, the complainant is forced to rely on the contention that Pynchon's inventive idea was that of a supporting bracket member, having a socket and clamp, all being integral. But it is admitted that the original application described the hanger "as composed of two members, a 'bracket' * * * and 'a clamp or holder,'" and the file wrapper shows this idea of separableness maintained during the proceedings in the patent office until the amendments of August 18, 1900, after defendants had begun to put their hanger on the market. It is true that the fifth claim, now in suit, was one of the original claims, and it may be that its language, "a trousers hanger comprising a bracket having a socket and clamp, the latter formed of a rod of spring metal, one end of which is bent at an angle to the plane of the clamp, and fits said socket," etc., does not necessarily negative separableness; but the drawing shows and the specifications forcibly suggest that the clamp member is distinct from and fitted into the bracket member. In the defendants' hanger the hook and clamp are made of a single piece of wire. The plate by means of which the screw holds the hook is not a bracket. This construction, therefore, does not infringe. The same result could be obtained by a hook with a smaller eye, and a screw with a larger head. These conclusions dispense with the necessity of considering the other alleged anticipations,—the further limitations shown by the file wrapper, or the contention of lack of novelty in the bracket member.

Let the bill be dismissed.

HUTTER v. BROOME.

(Circuit Court, D. New Jersey. March 4, 1902.)

1. PATENTS—INFRINGEMENT—BOTTLE STOPPERS.
The Hutter patent, No. 491,113, for a bottle stopper, construed, and *held* not anticipated, and to disclose patentable invention. Also *held* infringed.

2. SAME—DESIGNS.
In considering the question of infringement of a design patent, the article of the patent and that alleged to infringe must be viewed as wholes, and infringement may be found if they are so similar that one would readily be mistaken for the other by an ordinarily intelligent observer, notwithstanding real, but minute, differences which may be discovered by expert examiners.

3. SAME—DESIGN FOR BOTTLE STOPPER.
The Hutter design patent, No. 25,435, for a design for a bottle stopper *held* valid and infringed.

In Equity. Suit for the conjoint infringement of letters patent No. 491,113 for a bottle stopper, issued to Karl Hutter February 7, 1893, and design patent No. 25,435 for a design for a bottle stopper issued to the same patentee April 28, 1896. On final hearing.

Arthur v. Briesen and Hans v. Briesen, for complainant.
George H. Fletcher, for defendant.

GRAY, Circuit Judge. This is a suit in the usual form for an injunction and accounting, brought by Karl Hutter against Lewis H. Broome, doing business under the name and style of the Victor Bottle Stopper Company, for the conjoint infringement of letters patent No. 491,113, of February 7, 1893, and of design patent No. 25,435, of April 28, 1896. Both of these patents relate to bottle stoppers, and both were issued to Karl Hutter, the complainant. The defenses are a denial of infringement, an alleged want of novelty or invention, and of consequent patentability in the mechanical patent, and of want of similarity between the design described in the design patent and that of defendant's structure.

The object of the invention, as stated in the specifications of the letters patent No. 491,113, is as follows:

"The chief object of the invention is to provide a bottle stopper with a plug so constructed that the bent ends of the bail can be passed through it, and also to provide such a plug with means for hermetically sealing the bottle. The invention consists more especially in providing the tapering plug with a substantially triangular or heart-shaped slot, through which the inwardly bent ends of the bail wire can be inserted."

The claim of the patent is single, and is as follows:

"What I claim as my invention is the combination of the bottle stopper plug, e, having substantially heart-shaped slot, i, the apex of said slot being lowermost and centered in said plug, e, with the bail wire, d, having bent ends, d^2, and means substantially as described for connecting said bail wire to the bottle, the slot, i, being wider than the bend, d^2, of the bail wire is long, as and for the purposes described."

The state of the art at the time of the issue of this patent is sufficiently shown by the references made by the patent office in denying the first application by the patentee. The references are to White-

man, No. 284,523, September 4, 1883, and an English patent to Michel, No. 1,601 of 1878, for stopper fasteners and swing stoppers and yoke. In the patent in suit the bail wire, the eccentric lever, and the general mechanism for producing and maintaining pressure upon the stopper, together with the rubber band interposed between the shoulder of the stopper and the top of the mouth of the bottle, elements of the combination, are old; but the heart-shaped slot or hole in the top of the stopper, with the apex of the heart pointing downwards, and the top thereof wide enough to allow the bent end of the bails to readily pass through, are claimed to be new, and, in combination with the other elements described, to produce a new and patentable result. We have examined the other patents referred to by defendant as anticipations, but do not find that, in the restricted form in which the patent was finally granted by the commissioner, they can be relied upon as such. Prior to the patent in suit, bail wires have been passed over the top of flat metal stoppers, as in the Whiteman patent and the Quillfeldt reissue patent. They were unsatisfactory, the metal corroding and disintegrating the rubber, and in other respects they were insufficient for the purpose of a secure and durable stopper. There had also been other devices for porcelain stoppers or glass stoppers with slots through the top of the stoppers, sufficient to hold the wire, but not to allow the bent end to pass through. One patented device allowed the bent end to pass through a horizontal slot, and then down another vertical slot, at right angles to it. The thing desired in the art seems to have been what has now been produced under the patent in suit; that is, a stopper of porcelain, or other like material, with a sufficiently large but shapely head, containing an aperture large enough to allow the passing through readily of the bent end of the bail piece, in combination with mechanism for producing and maintaining pressure, and, with the adjustable rubber bands, to render air-tight the contact between the top of the mouth of the bottle and the stopper. The peculiar device of the patent in suit is not only for an opening or slot in the head of the stopper large enough to admit readily the bent end of the bail piece, but also that it should be triangular, or heart-shaped, with the apex pointing downwards towards the mouth of the bottle, so that the bail piece readily and necessarily centers itself through the stopper, thus insuring equally applied pressure to the stopper when the lever is thrown down. It is the enlarged aperture and this peculiar shape together, both claimed in the patent in suit, which give the device its peculiar value and advantage over anything theretofore existing in the art. Incidental advantages claimed by the patentee, though not specified in the claim, are ease of cleaning and keeping clean the stopper and aperture, and increased facility of adjustment, when the stopper is hanging loose on the bail piece, for the purpose of entering it into the mouth of the bottle. The great advantage, however, of the device of the patent in suit is that, besides furnishing an easily adjustable stopper, the capacity of the aperture to receive the bent end of the bail piece preserves the bail mechanism for use again should the stopper be broken. That these results should have been accomplished by so simple a change in the prior

art, suggests, it must be admitted, a possible want of invention. As said by the commissioner of patents, in rejecting the first application, the mere enlargement of the aperture in the top of the stopper did not involve invention. It was merely a matter of degree, more or less, that would have suggested itself to ordinary mechanical skill. The claim, however, as finally granted, is not for the mere enlargement of the hole, through which the bail piece passed, but for an enlarged aperture of triangular or heart-shaped character. The advantages of this device, as appears from the testimony, are that it will permit the removal of an old or broken plug from the bail wire, and the substitution of a new plug; that the bail wire will automatically center itself in the plug, and apply its pressure at the proper place, when the lever is turned down, with the other incidental advantages spoken of above.

It is easy to belittle the invention involved in a simple device, such as this, but the fact that it had not occurred to any one before to make such a combination for the attainment of so many useful results appeals strongly in favor of the conclusion that there is here a true invention. The presumption, too, in favor of the action of the patent office in issuing the letters after protracted consideration, is, as always, an important factor in determining the presence of invention in a given patented device. The testimony in this case does not, in my opinion, overcome this presumption, and the patent, therefore, must be pronounced valid.

No serious contention is made by the defendant as to the validity of the design patent No. 25,435, of April 28, 1896. Infringement, however, is denied, on the ground of certain differences discovered between the form of complainant's and defendant's stoppers. The existence of such differences depends principally upon the testimony of defendant's experts. By that testimony it is also pointed out that the button at the bottom of the stopper actually made by complainant differs from the drawing in his design patent, in that the former extends to the outer limit of the bead, D, while the latter is slightly offset from the edges of said bead. A careful inspection, however, of the design patent and of the exhibits of the defendant's stopper convinces me that these differences, whether between the drawing of the design in the patent and complainant's actual structure or between either of these and defendant's structure, are too minute and unimportant to overcome the charge of infringement. The design of the patent and the alleged imitation must be viewed as wholes, and judged by the impression made upon the eye of an intelligent observer not unaccustomed to observe the same. If to such an eye—for instance, that of a dealer in the articles in question, or one interested commercially in their use—the appearance of the two articles is so similar as that one could readily be mistaken for the other, ground for alleging infringement may be said to exist. And this is so notwithstanding that real, but minute, differences of outline, not affecting the general contour and form as apparent to the ordinary observer, may have been discovered by expert examiners. The testimony of several witnesses, accustomed to handle such goods, establishes such substantial similarity between the design of

complainant's stopper, as protected by his patent, and that of defendant's stopper, as to justify and support the charge of infringement.

The two inventions which are the subject-matter severally of the patents in suit being, in my opinion, capable of conjoint use in one and the same bottle stopper, and it appearing from the testimony that the defendant actually conjointly was using the said two inventions in single bottle stoppers made, used, and sold by him, let a decree be drawn in conformity with this opinion and the prayer of the said bill.

AMERICAN SURETY CO. v. WORCESTER CYCLE MFG. CO. et al.

(Circuit Court, D. Connecticut. March 17, 1902.)

MORTGAGE—CONTEST BETWEEN RECEIVER AND ATTACHING CREDITORS—APPORTIONMENT OF EXPENSES.

Where attached property was claimed by a receiver appointed in a suit to foreclose a mortgage, and a sale under the attachments thereby prevented, on its subsequent sale under a stipulation that one-half the gross proceeds should be held subject to the rights of the attaching creditors, and its being adjudged to them, the term "gross proceeds" may properly be construed to mean the proceeds after deducting the necessary expenses of sale; but such creditors should not be charged with any part of taxes, insurance, and other expenses which would no have been incurred but for the claim of the receiver.

In Equity. On motion to approve special master's account. See 100 Fed. 40.

Watrous & Day, for complainant.
Seymour C. Loomis, for trustee.
Breed & Abbott, for defendant.
Butler, Notman, Joline & Mynderse, for Central Trust Co. of New York.
C. Walter Artz, for F. S. Smith, Receiver Worcester Cycle Mfg. Co.

TOWNSEND, District Judge. The property in the possession of the receivers was sold by a special master under an order of court. As to a part of the property sold, known as "First Parcel," it was impossible to tell how much of it was acquired by the company before, and how much after, the execution of the mortgage. This property was included in the order of sale, and it was, therefore, stipulated between the surety company and the trustee in insolvency that the trustee should have one-half of the gross proceeds. At the time of the sale, counsel for the attaching creditors threatened to prevent the sale unless their rights were protected, and thereupon a stipulation was made that the net proceeds of the sale of that portion of said first parcel claimed by the trustee, being one-half of such net proceeds, should remain subject to the lien of the attachments of any of the attaching creditors, and that if the surety company should purchase said first parcel it should not be required to pay into court more than one-half the purchase price. The American Surety Company claims that the proceeds of said one-half of the first parcel, viz., $3,000, should

be charged with a proportionate share, viz., 3/87, agreed to amount to $433.76, of certain costs and expenses, of which $2,170 were expenses of sale, including the services of the special master, and the remainder consisted of counsel fees, taxes, and insurance.

This property would have been sold shortly after the attachment had it not been claimed by the receiver, and the interest of the attaching creditors and trustee should be preserved as nearly as may be to the same extent as if it had not been so claimed by the receiver. It is just that this property should pay its share of the $2,170 expenses of sale, $74.83, as this amount is probably no greater than the expense of sale by a sheriff would have been. It is not just that it should pay its share of taxes and insurance and other expense which would not have been incurred but for the claim of the receiver.

By holding "gross proceeds," in the first stipulation to mean gross proceeds of the sale after deducting necessary expenses of sale, but not deducting other charges, and by holding "net proceeds" in the second stipulation to mean the net amount which would be coming to the trustee or attaching creditors, except for the claim set up by the receiver, justice will be done, the real intent of the parties effectuated, and both stipulations construed in accordance with each other and in accordance with what is most probably the meaning of the parties.

Let the $3,000 be charged with its 3/87 of the $2,170, and not with any part of the remaining $8,888.55.

CENTRAL TRUST CO. OF NEW YORK v. WORCESTER CYCLE MFG. CO. et al.

(Circuit Court, D. Connecticut. March 17, 1902.)

No. 927.

1. ATTACHMENT—DISSOLUTION BY APPOINTMENT OF RECEIVER—CONNECTICUT STATUTE.

The provision of the Connecticut statute (Pub. Acts 1895, p. 491) that attachments shall be dissolved by the appointment of a receiver for a corporation within 60 days is intended to apply only to general receivers of all the property of the corporation situated in the state for the purpose of protecting the creditors of the corporation generally, and the appointment in a suit to foreclose a mortgage given by a corporation of a receiver for the mortgaged property to protect the rights of the mortgagee therein does not have the effect of dissolving a prior attachment under such provisions.

2. RECEIVER IN FORECLOSURE SUIT—CONSTRUCTION OF ORDER APPOINTING.

An order appointing a receiver in a suit to foreclose a mortgage, although broad in its terms, and purporting to extend to all the property of the mortgagor which was claimed to be covered thereby, should not be construed to cover property not in fact included in the mortgage, so as to affect rights which were paramount to the mortgage.

3. ATTACHMENT—SURRENDER OF PROPERTY TO RECEIVER UNDER STIPULATION—EFFECT.

Where an attaching creditor surrenders the attached property to a receiver appointed in a suit against the debtor, who claims the same under a stipulation that such surrender shall be without prejudice to his legal rights, which is approved by the court, it does not operate to

terminate the attachment, but the possession of the receiver is his possession, as against all other claimants.

4. SAME—FAILURE TO LEVY EXECUTION.
Under the Connecticut statute (Gen. St. 1887, § 922) providing that an attaching creditor shall lose his rights if he fails to take out and levy an execution within 60 days after recovery of judgment unless such issue or levy is prevented or stayed by some legal proceeding, an attachment creditor who, prior to judgment, has surrendered the attached property to a receiver, under a stipulation and order of court that it should be without prejudice to his rights, and that in case the property should be sold by the receiver his rights should be transferred to the proceeds, does not lose his rights by failing to take out execution on his judgment within 60 days, since the possession of the receiver effectually prevented a levy.

5. SAME—SURRENDER OF PROPERTY TO RECEIVER—PROTECTION OF RIGHTS UNDER STIPULATION.
Where an attachment creditor, to avoid a conflict of authority, surrenders the property to a receiver of a federal court claiming adversely, under an order of court providing that his rights shall not thereby be prejudiced, the court will see that the provision of such order is carried out in good faith, and that he is paid from the property or its proceeds in case his priority of lien is established.

In Equity. Suit for foreclosure of mortgage. On motion to dismiss petition of attaching creditor.

Butler, Notman, Joline & Mynderse, for complainant.
C. Walter Artz, for receiver.
H. D. McBurney, for Thomas Towne.
Perkins & Jackson and Seymour C. Loomis, for trustee.
Watrous & Day, for special master.
Breed & Abbott, for J. Burnett Nash.

TOWNSEND, District Judge. The history of this case will be found in the various opinions filed on questions heretofore raised. 86 Fed. 35; 90 Fed. 584; 91 Fed. 212; 35 C. C. A. 547, 93 Fed. 712; 110 Fed. 491. This hearing was on motion to dismiss the petition of one Camille Weidenfeld, an accommodation indorser of the note of defendant held by J. Burnett Nash, who, as holder of said note, brought suit prior to the appointment of the receiver, and levied an attachment on the property of defendant, and who, on February 4, 1898, obtained judgment thereon against defendant. Afterwards, said Nash obtained judgment against said Weidenfeld as indorser of said note, and Weidenfeld paid the amount thereof to Nash, and is now the owner and holder of said note and the assignee of said judgment recovered against the defendant the Worcester Cycle Company.

Weidenfeld, therefore, became subrogated to all of the rights accruing to Nash in the various proceedings herein, and Nash now prosecutes said claims for the benefit of said Weidenfeld and as his trustee. Nash and Weidenfeld join in this petition, which is for an order for the payment to Nash, as such trustee, of certain moneys in the hands of the special master, and granting leave to Nash to issue execution against the property of defendant in possession of the receiver, and authorizing the sheriff to levy thereon and sell so much of the same as shall be sufficient to satisfy the balance of petitioner's attach-

ment claim, and for an order that, in case the proceeds from such sale shall be insufficient to pay such balance, said receiver shall pay the balance thereof, or, in case of dispute as to the facts alleged, the same may be referred to a master, and for general relief.

Goodrich, the trustee in insolvency, moves to dismiss said petition on the ground that "upon the facts stated in said petition the petitioner is not entitled to any relief, inasmuch as the said petitioner's attachment has been dissolved, and for that and other reasons the property now in the hands of the receiver is not subject to any attachment lien in favor of said Nash or anyone claiming under him."

The receiver herein, appointed on June 26, 1897, having claimed that his appointment dissolved two prior attachments, those of said Nash and one Towne, the property was turned over to him under a stipulation that this should be done without prejudice to any rights under said attachments, and that said rights should be afterwards determined by the court. Subsequently, by decree of this court, which, as to the personal property involved herein, was affirmed by the circuit court of appeals, it was determined that said personal property, as against the trustee in insolvency, was free from the lien of the mortgage, but subject to the rights, if any, of attaching creditors, which rights were reserved for future determination. Goodrich was appointed trustee in insolvency of defendant on November 5, 1897, by the Connecticut probate court, and, as already stated, Nash took judgment against defendant on his claim February 4, 1898.

The trustee, Goodrich, in support of the motion to dismiss, claims first that said attachments were dissolved by the appointment of the receiver, or of the trustee. The provisions of the Connecticut statute relied on by the trustee are as follows:

"The commencement of proceedings for the appointment of a receiver of a corporation or a copartnership shall dissolve all attachments and all levies of executions, not completed, made within sixty days next preceding, on the property of such corporation or copartnership; but if the property is subsequently taken from the receiver, so that it cannot be used for the benefit of the creditors of said corporation or said copartners, nor made subject to the orders of the court in the settlement of the affairs of said corporation or copartnership, or if the receivership shall be terminated by order of the court, pending the settlement of the affairs of the corporation or copartnership, said attachments and levies of execution shall revive, and the time from the commencement of such proceedings to the time when the receiver shall be dispossessed of the property, or the finding of the court that said property is not subject to the orders of said court, or when said trust shall be terminated, shall be excluded from the computation in determining the continuance of the lien created by such attachment; but the attaching or levying creditors shall be allowed the amount of their legal costs, accruing before the time of the appointment of a receiver, as a preferred claim against the estate of said corporation or copartnership, if their respective claims upon which the attachments are founded shall, in whole or in part, be allowed." Pub. Acts Conn. 1895, p. 491.

The bill filed by the bondholders was for the foreclosure of their mortgage, which purported to cover the real and personal property of the defendant, alleged that it was expedient that all of said mortgaged property should be placed in the possession and control of a receiver, and prayed for the appointment of such a receiver. The court appointed Smith receiver of the property of defendant, being the mort-

gaged property described in the bill of complaint. 86 Fed. 35, 35 C. C. A. 547, 93 Fed. 712.

Counsel for the trustee lays great stress on those portions of the order in which the receiver was directed, inter alia, to take possession of all the "above-described" property of the company, "and to wind up its affairs," and was authorized to conduct the prosecution or defense of any suit which will "be for the interest and rights of creditors interested therein." In view of these circumstances, counsel for the trustee says:

"The court had jurisdiction of the parties and of the bill, and had jurisdiction to make the order that it did make. The fact that afterwards it turned out that the statements of the bill were not true, and that the mortgage was invalid as to the personal property, does not affect the jurisdiction of the court in making the appointment and in giving the receiver the power and authority which it did give. It is true that the receiver ought to have been appointed only of the property legally covered by the mortgage, but the court appointed him a general receiver and gave him general powers to act for, and in place of, the corporation."

Upon the ex parte application it appeared that said mortgage purported to cover all property owned by said corporation at the date of the mortgage, and which might thereafter be acquired by it, and also its corporate franchise. It is not clear that the order as drawn embraced property not covered by the mortgage, as between mortgagor and mortgagee, and it should not be so construed as to affect rights which were paramount to said mortgage.

In Smith v. McCullough, 104 U. S. 25, 26 L. Ed. 637, in a mortgage foreclosure suit where a receiver was appointed, the supreme court said:

"Notwithstanding the broad terms of the order appointing him [the receiver], we are satisfied that the court had no purpose to appoint him receiver of any property except that covered by the mortgage."

As to the jurisdiction of a court under such a petition to empower a receiver to appropriate property not covered by the mortgage, the court of appeals in the Eighth circuit says:

"When a bill is filed to foreclose a mortgage, the court may, upon a proper showing, appoint a receiver to take into his possession and control the mortgaged property. But the jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the court in such a suit rightfully make any order that will prevent, hinder, or delay the other creditors of the mortgagor from subjecting property not included in the mortgage to the payment of their debts." Scott v. Trust Co., 16 C. C. A. 358, 69 Fed. 17. See, also, United States Trust Co. v. New York, W. S. & B. R. Co., 101 N. Y. 478, 5 N. E. 316; Tyler v. Hamilton (C. C.) 62 Fed. 187.

The Connecticut courts have held that a receiver appointed under the provisions of the statutes of that state is like a trustee in insolvency, and holds all the property of the debtor for equal division among creditors, and is not in any sense a receiver such as is appointed pendente lite under the ordinary powers of a court of equity to preserve property pending the determination of a suit involving title to the property in dispute. Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668; New Haven Wire Co. Cases, 57 Conn. 352, 18 Atl. 266, 5 L. R. A.

300; In re Waddell-Entz Co., 67 Conn. 324, 35 Atl. 257; In re E. S. Greeley & Co., 70 Conn. 494, 40 Atl. 233; In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163. The distinction between the two classes of receivers is recognized and stated in the text-books. Beach, Rec. Introduction, par. 3; High, Rec. pars. 313–357.

Inasmuch as at the time of the receiver's appointment the property in question was already in the custody of the law, subject to the determination of the rights of the parties in interest, and the facts now appearing were not before the court when it made the appointment, these questions may now be considered as though they had been raised upon the original application. It is clear that upon proof that said personal property was in the possession of attaching creditors the court would not have appointed a receiver thereof upon the application of holders of bonds under a mortgage which, as to said property, was subject to the lien of such attachment.

The provisions of the Connecticut statute, that attachments shall be dissolved by the appointment of a receiver for a corporation within 60 days, are intended to apply only to general receivers of all the property of a corporation situated in the state, appointed for the purpose of protecting the creditors of a corporation generally; and it is not intended that attachments shall be dissolved by the appointment of courts of equity of receivers of mortgaged property merely for the sake of protecting a mortgagee under an invalid mortgage.

Unless the appointment of a receiver in this action was of such a nature as to secure for the benefit of the general creditors such assets as a trustee in insolvency thus appointed would have held for their benefit, these attachments ought not to be held to be dissolved by such appointment.

That this receiver, appointed upon the application of the bondholders, was not constituted either a statutory or equitable general receiver of the corporation, but merely a custodian of the mortgaged property, further appears from the whole history of this litigation. This court, in its original opinion, stated that Smith was appointed "receiver of the mortgaged property," and that these attaching creditors would be permitted a hearing as to the superiority of their rights over those of the mortgagee (86 Fed. 35); this trustee was permitted to intervene by the circuit court of appeals, upon the theory that he represented creditors whom the receiver did not represent; although this court refused to turn the property over to the trustee until the amount of these claims under the attachment was ascertained, it held the mortgage invalid as against them as to personalty situated in Connecticut (90 Fed. 584); and in the opinion of the circuit court of appeals Judge Lacombe stated that "a receiver of the property described in the bill was appointed," approved the foregoing ruling, and held that the appointment of the receiver did not affect the title or the ultimate right of possession. This attachment was not dissolved by the appointment of said receiver.

Under the Connecticut statute an attachment is dissolved by the appointment of a trustee in insolvency within 60 days after the

attachment. Counsel for the trustee contends that the attachment only continued until the taking possession by the receiver, and that, therefore, the property had not been under attachment for 60 days, although the trustee was appointed more than 60 days subsequent to the attachment. This claim is untenable. The possession of the receiver is the possession of the attaching creditor. If the attaching creditor had surrendered the property to the owner, this would have dissolved the attachment, but placing it in the hands of a third person under an agreement and order of court that such action should be without prejudice to his rights under the attachment, does not terminate the attachment, and the appointment of a trustee after 60 days from the attachment did not dissolve it. Nor does the decree of foreclosure cut off, as claimed by the counsel for the trustee, the rights of the attaching creditor. The property was allowed by him to go into the possession of the receiver under the pledge of the court that his action should be without prejudice, and the decree of the court should not be so construed as to violate said pledge.

Counsel for the trustee further contends that this Nash attachment has been lost because the time of its duration given it by statute after judgment rendered has expired. Counsel for Towne, the other attaching creditor, joins in this contention. The Connecticut statute pertinent to this question is as follows:

"No estate, which has been attached, shall be held to respond to the judgment obtained in the suit, either against the debtor or any other creditor, unless the judgment creditor shall take out an execution and have it levied on the personal estate attached, or demand made on the garnishee in cases of foreign attachment, within sixty days after final judgment, or levied on the real estate attached, and the same appraised, and the execution and proceedings thereon recorded within four months after such judgment; or if said goods or estate are encumbered by any prior attachment, unless the execution shall be so levied, within the respective times aforesaid, after such encumbrance is removed; excepting only in case of a foreign attachment against an executor, administrator, or trustee in insolvency, upon whom the demand shall be made within the times limited in sections 1261, 1262, and 1263. But in reckoning said periods within which the attaching creditor is so required to take out and levy execution, any time during which the issue or levy of an execution may be prevented or stayed by the pendency of a writ of error, or by an injunction or other legal stay of execution, shall be excluded from the computation." Gen. St. 1887, § 922.

On February 4, 1898, Nash took judgment for the amount of his claim. No execution has been taken thereon. The property on which the attachment was levied was surrendered to the receiver under a stipulation and order of court that such surrender should be without prejudice to the rights of the attaching creditors thereunder; that the present rights of said Nash and the said Towne to the said attached property shall, if the same be sold by the said receiver, be transferred to the proceeds of the said property in the hands of the said receiver, who shall hold the said proceeds subject to the said rights, and said property and its proceeds have since remained continuously in the possession of said receiver.

It is contended by counsel for the trustee that, even if such possession might originally have been such a stay as would have oper-

ated to prevent a levy of execution, the court, on November 23, 1898, ordered that it be turned over to the trustee, subject to the rights of attaching creditors. The court did not so order. The property remained in the possession of the receiver until the rights of the parties should be finally determined.

It is further suggested that Nash might have allowed the attachment to continue by delaying to take judgment. But a judgment was necessary in order to establish the validity and determine the amount of the claim, and to preserve the lien under said attachment in case of the dissolution of the corporation. If the corporation should be dissolved before entry of final judgment, the attachment lien would be lost. Morgan v. Association, 73 Conn. 151, 154, 46 Atl. 877. The property in question is in the custody of the receiver of the court under its original order, which has never been vacated or modified except as aforesaid. During the whole course of the proceedings the question as to the rights of the attaching creditors has been recognized, and the receiver has been treated as a custodian of the property under authority of the court. As was stated by the circuit court of appeals (35 C. C. A. 547, 93 Fed. 712):

"The property is taken by the court, and is put into the hands of its officer to hold for the benefit of 'whom it may concern.' He holds and manages it for the benefit of the party to whom the court may ultimately decide that it belongs. * * * The property is put into the hands of the receiver only to preserve it from harm, to secure its accretions, and to insure its delivery unimpaired to the successful litigant; but the custody of the receiver should not be held to make any change in the status of any litigant's title."

That such possession operates to prevent a levy of execution does not seem to be open to question. Smith, Rec. § 45; High, Rec. § 141; Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322.

In Woerishoffer v. Construction Co., 99 N. Y. 398, 2 N. E. 47, the question was whether the court below had had authority to forbid in its order appointing a receiver further interference, by levy and seizure on execution or attachment, with the property placed in his possession. It was held that not only had the court authority to make such restraining order, but that the mere appointment of a receiver operated ipso facto to restrain such interference. The court says:

"Both parties concede that the possession of the court must not be invaded; that its officer cannot be sued without its permission; and that he cannot be dispossessed except at the peril of a contempt. What then must needs be the effect of the order in this case? It commands nothing which was not already commanded; it forbids nothing which otherwise was permissible; it takes away no right or remedy which the appointment of the receiver had not already taken away. Its sole practical effect was to give notice of that appointment and the rights secured by it, and charge the specific creditor with a conscious and willful contempt if he assailed the possession of the court."

As was said by Judge Taft in Vance v. Manufacturing Co. (C. C.) 82 Fed. 251:

"The receiver agreed with the sheriff that his taking possession should not affect the validity of any lien which might have been created by the sheriff's levy and continued in force until the receiver's taking possession. The arrangement made by the sheriff and the temporary receiver is to be commended. It was a judicious compromise to avoid a conflict between

jurisdictions, and certainly this court will not permit the commendable spirit of confidence which the sheriff showed in the justice and equity of this court to be made a ground for depriving him or those whom he represented of the rights in the property which had been acquired and maintained by lawful levy and subsequent official custody. The finding of the master that the judgment creditors, by reason of these levies, acquired a priority of lien, is confirmed."

The present case is substantially similar. Good faith requires that the confidence reposed by the attaching creditor in the order of this court that his rights be preserved shall not prove to have been misplaced.

The motion to dismiss the petition is denied.

RATICAN v. TERMINAL R. ASS'N OF ST. LOUIS.

KINNAVEY v. SAME.

(Circuit Court, E. D. Missouri, E. D. March 11, 1902.)

Nos. 3,969, 3,970.

1. LIMITATIONS—ACTIONS BASED ON INTERSTATE COMMERCE ACT.
   The interstate commerce act prescribes no limitation of time within which actions based thereon shall be instituted, and therefore such actions must be governed, as to limitation, by the statutes of the state wherein they are brought.

2. SAME—PLEADING STATUTE—DEMURRER.
   The bar of limitations may be invoked by demurrer in a federal court in an action at law in all cases where it could be done under the statutes of the state, and where such is the practice the petition or complaint must contain a statement of any matter relied on to avoid the running of the statute.

3. SAME—MISSOURI STATUTE—ACTION TO RECOVER PENALTY.
   In view of Rev. St. Mo. 1899, § 4292, contained in chapter 48, relating to the limitation of actions generally, which provides that "the provisions of this chapter shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute," the provision of section 4290, found in the same chapter, which extends the time for the commencement of an action when the same has been prevented by some improper act of the defendant, has no application to an action brought to recover a penalty under a statute, which is limited by section 2425, relating to criminal and penal actions.

4. SAME—PLEADING IN ANTICIPATION OF DEFENSE—SUFFICIENCY OF ALLEGATIONS.
   An allegation in plaintiff's petition in an action against a railroad company, based on section 2 of the interstate commerce act, to recover damages for discrimination in rates, in effect, that defendant announced publicly at the time of the shipments complained of that it made no discrimination in rates, and that plaintiff did not learn of the falsity of such statement until shortly before the action was commenced, does not state sufficient facts to suspend the running of limitations against the action, under the provision of Rev. St. Mo. 1899, § 4290, which extends the time when the action was prevented by some improper act of defendant, where there is no allegation that plaintiff believed and relied on defendant's announcement, or that he exercised diligence to ascertain the facts.

5. SAME—STATUTE GOVERNING—ACTION TO RECOVER DAMAGES UNDER INTERSTATE COMMERCE LAW.

The interstate commerce act is a penal statute, and an action to recover damages for a violation of section 2, prohibiting discrimination in rates, is one to recover money in the nature of a penalty, and, when brought in Missouri, is governed, as to limitation, by Rev. St. Mo. 1899, § 2425, which requires actions "upon any statute for any penalty or forfeiture, given in whole or in part to the party aggrieved," to be brought within three years.

At Law. Action under interstate commerce act to recover damages for discrimination in rates. On demurrer to amended petition.

F. A. Wind and C. G. B. Drummond, for plaintiff.

McKeighan, Barclay & Watts and H. S. Priest, for defendant.

ADAMS, District Judge. The petition in this case is based upon section 2 of the interstate commerce act (24 Stat. 379). That section is as follows:

"If any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Plaintiff alleges in the separate counts of his complaint that at divers times between the 1st day of May, 1891, and the 1st day of October, 1892, he was engaged in the business of coal merchant in the city of St. Louis, and that during the same period the Consolidated Coal Company was also engaged in the same business at the same place; that between the dates aforesaid the defendant, as common carrier, at his request, transported from East St. Louis, Ill., to plaintiff's switch in the Union Depot yards in St. Louis a large quantity of coal, the same being specifically set forth in the petition; that the defendant charged the plaintiff, and plaintiff paid to the defendant, for such service, at the rate of 30 cents per ton; that during the same period defendant performed like service in the transportation of coal under substantially similar circumstances and conditions for the Consolidated Coal Company, and charged the last-named company for the same service 25 cents per ton only; that thereby the defendant was guilty of unjust discrimination against plaintiff, and violated section 2 of the interstate commerce act, hereinbefore set forth. Plaintiff's suit was instituted June 26, 1896, —more than three years after the alleged wrongful act of the defendant.

The foregoing facts appearing in the complaint, the defendant demurs thereto on the ground, among others, that each and all of the alleged causes of action set forth in the petition accrued more than three years prior to the filing of the original petition herein, and are barred by the statute of limitations of the state of Missouri in such case made and provided. Section 2425, Rev. St. Mo. 1899, provides as follows:

"All actions upon any statute for any penalty or forfeiture, given in whole or in part to the party aggrieved, shall be commenced within three years after the commission of the offense, and not after."

This statutory provision was in force, as section 4005, Rev. St. 1889, at the time plaintiff's cause of action accrued. It is contended by the defendant that the foregoing statute of limitation is an effectual bar to plaintiff's right of recovery in this case. Whether such contention is sound is the proposition now to be considered.

The interstate commerce act prescribes no limitation of time within which actions based thereon shall be instituted. Such being the case, the statute of limitations of the state in which the action is brought must apply and control. Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; Metcalf v. City of Watertown, 153 U. S. 671, 14 Sup. Ct. 947, 38 L. Ed. 861; Balkam v. Iron Co., 154 U. S. 177, 14 Sup. Ct. 1010, 38 L. Ed. 953; Campbell v. City of Haverhill, 155 U. S. 610, 15 Sup. Ct. 217, 39 L. Ed. 280.

Under the Code of Civil Procedure of Missouri, the ancient distinction between legal and equitable actions is abolished, and but one form of action for the enforcement or protection of private rights and the redress or prevention of private wrongs is recognized. The petition must contain a plain and concise statement of the facts constituting a cause of action, and a demurrer is the recognized pleading to test the sufficiency of the facts stated in the petition to constitute such cause of action. The demurrer must distinctly point out the grounds of objection to the petition. Sections 539, 598, 599, Rev. St. Mo. 1899. The foregoing provisions of the Code have been held by the supreme court of Missouri to permit a defendant to invoke the protection of the statute of limitations of the state by demurrer. Boyce v. Christy, 47 Mo. 70; Henoch v. Chaney, 61 Mo. 129; Heffernan v. Howell, 90 Mo. 344, 2 S. W. 470. Such being the construction placed upon the provisions of the Code by the supreme court of the state, the federal courts are bound thereby.

The supreme court of the United States, in Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806, had occasion to consider the question of practice now before the court. It arose in a case from Wisconsin, where the provisions of the Code of Practice were quite similar to those of Missouri already adverted to, and the conclusion was there reached that the courts of the United States will permit a defendant to invoke the protection of the statute of limitations by a demurrer in all cases where the same could be done under the statutes of the state in which the action arose. The court there said, adverting to the contention that there might be exceptions which would take the plaintiff's cause of action out of the statutes, as follows:

"If the plaintiff relies on a subsequent promise or on a payment to revive the cause of action, he must set it up in the original complaint, or ask leave to amend. Without this precaution the complaint is defective, in not stating, as required by the statutes, facts sufficient to constitute a cause of action. But although defective, advantage cannot be taken of the defect on motion, or in any other way than by answer, which answer, however, we have seen, may be a demurrer."

Following the intimation of the foregoing opinion, counsel for plaintiff in this case undertook to plead facts in the petition to avoid the running of the statute of limitations. The averment is as follows:

"Plaintiff further states that it was publicly announced by defendant during said period that all coal dealers were paying the rate charged and paid by plaintiff for said services, and plaintiff did not learn that said representations were false, and that he was being unjustly discriminated against as aforesaid, until, to wit, the 1st day of March, 1896, when the fact was elicited by a committee appointed by the legislature of the state of Illinois, and reported in the daily press."

Plaintiff's counsel contends that the foregoing averment brings his case within the provision of section 4290, Rev. St. Mo. 1899, which reads as follows:

"If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented."

This last section is found in chapter 48 of the Revised Statutes, relating to the limitations of actions generally. Defendant's counsel contends that the last-quoted section has no application to the statute of limitations which he invokes, found in a different chapter of the statutes, under article 11, concerning limitations of criminal actions and prosecutions, which contains section 2425, already quoted as relied upon by defendant's counsel, namely:

"All actions upon any statute, for any penalty or forfeiture given in whole or in part to the party aggrieved, shall be commenced within three years after the commission of the offense, and not after."

There is much reason in the contention of the defendant's counsel on this proposition. Section 4290, supra, by its terms, relates to the commencement of such actions as are "herein" limited, and refers, obviously, to those personal actions which are the subject-matter of article 2 of chapter 48, under consideration. Moreover, section 4292 of the same statutes enacts as follows:

"The provisions of this chapter shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute."

It seems obvious from plain reading of the foregoing section that section 4290, exonerating the plaintiff from the effects of the general statute of limitations in case the defendant has been guilty of some improper act which has prevented commencement of an action, has no relevancy to an action upon a statute for a penalty or forfeiture, referred to in section 2425, supra, because such actions are, in the language of section 4292, "otherwise limited," namely, they must be commenced within three years after the commission of the offense, "and not after." Such is the conclusion reached by the supreme court of Missouri in Revelle v. Railway Co., 74 Mo. 438. But if section 4290, supra, which extends the time for the commencement of an action when the same has been prevented by the defendant's improper act, is applicable to an action founded upon a penal statute, the plaintiff is not at all relieved. The allegation of the petition obviously intended to excuse the delay in instituting the suit, already quoted, fails to disclose any such improper act on the part of the defendant

as should have prevented the commencement of the action. The substance of the allegation is that the defendant, during the time it was performing the services for the plaintiff already referred to, announced publicly that all coal dealers were paying the same rate as that charged and paid by plaintiff for the services rendered, and that plaintiff did not learn that that public announcement was false until a short time before he instituted his suit. This allegation, when reduced to its plain and simple meaning, is certainly no broader or more comprehensive than would have been the averment that the defendant told the plaintiff that it was treating everybody alike. This certainly does not constitute an "improper act" contemplated by section 4290, supra. There is not even an averment here that the plaintiff believed the statement contained in defendant's public announcement, or relied upon the same, or that he exercised any diligence to ascertain the falsity of the fact stated. The supreme court of Missouri, in Shelby Co. v. Bragg, 135 Mo. 291, 36 S. W. 600, in dealing with this subject, says:

"Statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself directly within some exception. A party seeking to avoid the bar of the statute of limitations because of the fraud must aver and show that he used due diligence to detect it, and, if he had the means of discovery in his hands, he will be held to have known it."

The case of Murray v. Railway Co., 35 C. C. A. 62, 92 Fed. 868, was based on section 2 of the interstate commerce act, to recover damages against the railroad for unjust discrimination. The plaintiff, in his petition, after setting forth the difference in the tariff rates charged to him and the lower rates charged to other shippers, with a view of excusing his delay in instituting suit for the recovery of the damages, and thus avoiding the statute of limitations, alleged as follows:

"That defendant, at the time these shipments were made by plaintiff, kept posted at its stations freight tariff lists showing the tariff rates of freight for the transportation of such articles from its stations to Chicago, and informed plaintiff at the time he made his shipments that no deviations were made from these rates, and no rebates, drawbacks, or concessions from the posted rates were made to any shippers, and that plaintiff had equal rates and proportions of rates with other shippers from its stations to Chicago, and that no discriminations were made against him; that plaintiff believed these statements and relied on them, but that they were untrue and fraudulent, and that defendant was in fact at that time making such discriminations in favor of other shippers; that defendant fraudulently concealed that fact as to the giving of rebates; that plaintiff only ascertained the facts within 18 months before bringing suit."

To this petition there was a demurrer on the ground that the action was barred by the statute of limitations. The demurrer was sustained, and final judgment entered in favor of the defendant. Judge Caldwell, in delivering the opinion of the court of appeals in that case, made use of the following language:

"In cases where concealment and ignorance of the facts suspend the statute, there must have been such concealment as would prevent a person exercising due diligence from discovering the facts; and what diligence was used is a question of law, to be determined by the court from the petition, and not a mere statement of a conclusion of law. The allegation of the petition

is that 'the plaintiff had no reason to believe or suspect that said statements made to him as aforesaid were untrue, or that he had been discriminated against, and deceived as aforesaid, until within the eighteen months last past, when for the first time he learned of such facts.' Just such a general allegation as this was held bad in Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. 807, where the rule on this subject is succinctly and clearly stated. 'Statutes of limitations,' says the court, 'are vital to the welfare of society, and are favored in the law. They promote repose, by giving security and stability to human affairs. While time is constantly destroying the evidence of rights, they supply its place by presumption which renders proof unnecessary. * * * A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * Whatever is notice enough to excite suspicion, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. * * * Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same thing, in effect, as knowledge itself. The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.' The allegation in the petition in this case amounts to no more than 'ignorance at one time and knowledge at another.' The petition does not state what he discovered, how he discovered it, or show any reason why he did not discover it sooner. There is no allegation that he ever at any time made the slightest effort to discover whether he was being discriminated against, and there is no averment that such an effort would have been unavailing. The suspicion entertained by the public generally, and which found daily expression in the public prints, and an occasional judicial verification, and which was probably the origin of the interstate commerce act itself, that railroad companies did discriminate between shippers, particularly in shipments of the character the plaintiff was making, seems not to have shaken the plaintiff's perfect faith in the veracity of the railroad agent who billed his shipments."

The judgment of the trial court was therefore affirmed.

The petition in that case certainly stated all and much more than is stated in the present case, by way of showing concealment or wrongful act on the part of the defendant, such as would operate to suspend the running of the statute. On the authority of that case, and of others therein cited, the conclusion is unhesitatingly reached that plaintiff has stated no grounds in his petition for suspending the running of the statute of limitations in favor of the defendant.

The only question now remaining for determination is whether plaintiff's action in this case is upon a statute for a penalty given in whole or part to the party aggrieved, and therefore, within the purview of section 2425, Rev. St. Mo. 1899, barred by the lapse of three years' time, which intervened before this action was brought. The plaintiff, in direct terms, bases his right of recovery on the interstate commerce act (section 2), which declares discrimination between shippers for services in the transportation of like kind of traffic under substantially similar circumstances and conditions to be an unlawful act, and declares that any carrier indulging in any such discrimination shall be deemed guilty of unjust discrimination. Section 8 of the interstate commerce act makes any such common carrier liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions

of the act, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery. Section 10 of the same act subjects any common carrier, and also the officers, agents, and directors of any such common carrier, to a fine not exceeding $5,000 for each offense. Accordingly it may be safely stated that the act in question is a highly penal statute, conferring certain rights upon the party aggrieved, recoverable by him in a civil action, and also subjecting the party offending to its pains and penalties. The supreme court of the United States, in Parsons v. Railroad Co., 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231, has finally and conclusively settled this question. That case was one wherein the plaintiff sought to recover damages against the railroad under the interstate commerce act. The supreme court disposed of that case by holding that the interstate commerce act was a penal statute, and that the action of the plaintiff thereon was to recover money in the nature of a penalty. See, also, to the same general effect, the case of Revelle v. Railway Co., supra.

It follows as a necessary consequence from the foregoing that plaintiff, by postponing the institution of his suit for a longer period than three years after his cause of action accrued, is barred from recovery by the statute of limitations applicable to the case, and that the demurrer of the defendant to the petition for that specific reason is well taken. The demurrer is sustained.

THE MINNEHAHA.

(District Court, S. D. New York. March 31, 1902.)

ADMIRALTY — ACTION FOR PENALTY UNDER HARTER ACT — PARTIES ENTITLED TO SUE—TEST CASE.

An action cannot be maintained to recover the penalty for a violation of Act Cong. Feb. 13, 1893, known as the "Harter Act," requiring the owner, master, or agents of any vessel transporting merchandise from or between ports of the United States and foreign ports to issue to shippers bills of lading or shipping documents, by a party put forward by an organization of lumber exporters for the mere purpose of making a test case, and not himself having any interest in the lumber shipped, not even being in the lumber business, where it further appeared that the lumber shipped was properly delivered at the destination, and that no one was injured.

In Admiralty. Action for penalty under the Harter Act.

John J. McKelvey, for libelant.
Convers & Kirlin, for claimant.

ADAMS, District Judge. This is an action brought by the libelant to recover such penalty as the court might fix, with costs, for a violation by the owners or agents of the steamship Minnehaha of the provisions of the act of congress of February 13, 1893, known as the "Harter Act." Sections 4 and 5 of the act provide:

"Section 4. That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any law-

ful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

"Sec. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the government of the United States."

It appears that the libelant was put forward by the National Lumber Exporters' Association, an organization of lumber exporters, for the purpose of making a test case, which would, if decided favorably to the libelant, as stated in the brief of the advocate for the libelant, "mean a warning to the ocean carriers that the law must be complied with, and an assurance to the shipper that he may demand his rights under the law without running the risk of a boycott by the carriers." It is shown that the organization, in December, 1891, arranged a plan of shipping to London two car loads of lumber in the libelant's name upon one of the claimant's steamers, with a view of exacting such bill of lading as the members thought they would be entitled to under the act. The shipment was made, and the shippers obtained two receipts therefor, in the name of the libelant, from the claimant for the lumber, which was delivered to the steamer in question, each containing the words "More or less," "Not accountable for marks or splits." These receipts were afterwards presented at the claimant's office with bills of lading prepared for the association by certain freight brokers, which did not contain the quoted words. The bill of lading clerk of the claimant took the papers, and, after stamping on the bills of lading the words, "More or less all on board to be delivered," "Not responsible for marks or splits," signed and returned the bills of lading, retaining the receipts. These bills of lading were accepted at the time in lieu of the receipts, but afterwards the libelant, claiming that they were not in conformity with the statute, returned them with a demand that a bill of lading be issued to him for the lumber received, stating, among other things, the number of packages of lumber and the number of pieces, or the number of feet of lumber not made up into packages, without any qualification. The claimant contends that it did furnish shipping documents in conformity with the statute.

I do not think it necessary to enter into the merits of the controversy, because it is clear at the outset that the libelant has no interest whatever in the matter, and is not entitled to recover. The lumber was not his, and there was no way in which he could possibly have been identified with any loss or damage which could occur. He was not in the lumber business, and did not even have such a general interest as that fact might have given him. He was

a mere figurehead or dummy in the transaction, and not only did not suffer any injury, but could not possibly have suffered any. Indeed, it appears affirmatively that the lumber was properly delivered at its destination, and that no one was or could be injured in the matter. I do not see how the statute can be invoked under the circumstances. It seems that the court is not asked to decide a real case but merely to express an opinion which might hereafter be of some possible advantage to lumber exporters. Courts do not sit for such a purpose. Legal actions are designed to afford redress for injuries already inflicted and rights of persons or property actually invaded, not to pass upon abstract questions of law for the benefit of individuals who may desire the court's opinion for their benefit, or, as stated here, to be a warning or menace to others. Thomas v. Protective Union, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175.

Libel dismissed.

In re DAYVILLE WOOLEN CO.

(District Court, D. Connecticut. March 5, 1902.)

No. 780.

BANKRUPTCY—APPOINTMENT OF TRUSTEE.

A trustee for a bankrupt should be impartial, and free from all entangling alliances; and, when an attorney representing a majority of the creditors at the election of trustee had been attorney for the bankrupt, it was proper for one representing other creditors to ask him whether any of the claims he represented were held in the interest of the bankrupt, and upon his refusal to answer it was the duty of the referee to put the question and permit a full investigation into the relations between the attorney and the bankrupt and the creditors he represented, and, if any collusion appeared, to decline to receive the collusive votes or to approve the election.

In Bankruptcy. On question certified by referee.

Arthur L. Shipman, for opposing creditors.
Donald G. Perkins, for trustee.

TOWNSEND, District Judge. In this case the referee certifies certain questions to me for opinion and action thereon. It appears that at the meeting for the proof of claims and election of a trustee, and after the claims had been approved and the referee was proceeding to take the vote for trustee, Attorney Shipman, for certain creditors, asked Attorney Perkins, counsel for a majority of the creditors, as to whether or not any of the claims attempted to be voted by said Perkins had been assigned to any person or corporation in the interest of the bankrupt. Counsel refused to answer this question, and claimed that Attorney Shipman had no right to ask such a question. Said Shipman then requested the referee to ask the question, which the referee refused to do, on the ground that the previous reply was sufficient to raise the question. Said Shipman then asked the referee not to permit to be received or counted votes cast by said Perkins on account of such refusal, and on the further ground that

said attorney was the attorney for the bankrupt. The referee ruled that these objections to the vote were insufficient, and confirmed the election of the trustee voted for by said attorney for the bankrupt. It is admitted that said Perkins had been counsel for the bankrupt during proceedings in insolvency. In these circumstances it was his duty to answer said question, and, upon his refusal, it was the duty of the referee to put said question and permit a full investigation into his relations to the bankrupt and the creditors. The trustee should be free from all entangling alliances. The question as to whether there is any collusion with the bankrupt is one which should be definitely disposed of before the appointment, and, if there appears to be reasonable cause to believe such collusion exists, the referee should either decline to receive the collusive votes or to approve the election. In re Rekersdres (D. C.) 108 Fed. 206; In re Houghton, 2 Low. 243, Fed. Cas. No. 6,729; In re McGill, 45 C. C. A. 218, 106 Fed. 57; In re Henschel (D. C.) 109 Fed. 865.

The action of the referee in confirming the election of William P. Kelley as trustee is disaffirmed and set aside, and the referee is directed to call a new meeting for the election of a trustee.

In re DIXON.

(District Court, N. D. California. April 8, 1902.)

No. 3,590.

BANKRUPTCY—COSTS AND FEES.

Bankr. Act, § 40, subd. "a," provides that "referees shall receive as full compensation for their services, * * * a fee of ten dollars, * * * and from estates which have been administered before them" certain commissions. General Orders in Bankruptcy, No. 35, pt. 2, declares that the compensation of referees prescribed by the act shall be in full "for all services performed by them * * * but shall not include expenses * * * necessarily incurred in the performance of their duties." *Held*, that the expenses incurred in the publication of notice of application for discharge, and for stationery, were chargeable against the bankrupt, but that the referee could not charge for his own services in making copies of the petition for discharge.

John Goss and T. W. McDonald, for petitioner.

DE HAVEN, District Judge. Upon filing the bankrupt's petition for discharge, his attorney was required by the referee to make a deposit of $8 for the following purposes:

For publication of notice of application for discharge, as required by prescribed form (57) of G. O. in bankruptcy (voucher No. 1).....	$2 50
For seven copies of petition of bankrupt for discharge, and the order fixing time of hearing, in accordance with the G. O. and form (57) prescribed, at 20c. per folio.....	5 25
For stationery	25
	$8 00

The bankrupt paid the deposit, but took exceptions to the order of the referee in the matter, and the question of the right of the

referee to demand such deposit has been properly certified to the court for decision.

The bankruptcy act (section 40, subd. "a") provides:

"Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

In harmony with this statute, the supreme court has, in the general orders in bankruptcy adopted by it (general order 35, pt. 2), declared as follows:

"(2) The compensation of referees, prescribed by the act, shall be in full compensation for all services performed by them under the act, or under these general orders; but shall not include expenses necessarily incurred by them in publishing or mailing notices, in traveling, or in perpetuating testimony, or other expenses necessarily incurred in the performance of their duties under the act and allowed by special order of the judge."

It is obvious that the cost of the publication of the necessary notices upon application for discharge, and for stationery, are expenses properly chargeable to the bankrupt or his estate, under the general order just quoted; but the referee is not entitled to charge for his own services in making copies of the petition for discharge at the rate of 20 cents per folio, or at all. It may be necessary in some cases for the referee to employ clerical assistance in giving such notices, and then the expense actually incurred by him for such assistance would be a charge against the bankrupt or his estate, but the referee is not entitled to make any charge for clerical services rendered by himself in cases pending before him. The fee of $10 allowed by the statute to the referee includes full compensation for all such personal services.

The bankrupt is entitled to recover the sum of $5.25 from the amount deposited with the referee.

CHICAGO & A. RY. CO. v. GREEN.

(Circuit Court, C. D. Missouri, W. D. January, 1902.)

No. 2,250.

1. REFORMATION OF INSTRUMENTS—GROUNDS FOR RELIEF—MISTAKE.
   A court of equity has jurisdiction to reform a release in which, through a mutual mistake, the name of the party paying the consideration was erroneously stated, and by inserting therein a part of the consideration which in fact entered into the settlement, whether the same was omitted through mistake of fact or of law.

2. SETTLEMENT—VALIDITY—IMPEACHMENT FOR FRAUD OR INCAPACITY.
   A settlement of a disputed claim against a railroad company for a personal injury should be sustained where fairly made, and evidence of fraud or incapacity to impeach such settlement should be clear and persuasive. A court is not justified in setting it aside because of an impression that the amount paid was inadequate.

8. SAME—EVIDENCE TO IMPEACH.

Defendant was injured by the breaking of his leg while in the service of complainant railroad company. Three days afterward an agent of complainant, after investigating the accident, visited defendant, and in the presence of others, some of whom were friends of defendant, a settlement was made, and a release was signed by defendant of all claims against the company on account of the injury, in consideration of the payment to him by the agent of $50. After the release had been signed and handed to the agent, he further agreed to pay the bill of defendant's physician, and thereafter read the release to defendant, to which the latter made no further objection. There was no evidence of any fraud or misrepresentation on the part of the agent, but it fairly appeared that he was justified in believing, and did believe, from statements made to him by others, that the company was under no legal liability for the injury, and the weight of the evidence tended to show that defendant was in a condition to fully understand the transaction and the purport of the release. *Held*, that no ground was shown which would justify a court of equity in setting it aside.

In Equity. Suit for reformation of release.

The defendant, Squire L. Green, brought an action against the Chicago & Alton Railroad Company in the state court to recover damages for personal injuries. The cause was removed into this court, whereupon the complainant, the Chicago & Alton Railway Company, presented its bill in equity, in the nature of a cross action, against said Squire L. Green, alleging that the defendant at the time of the injury was an employé of the Chicago & Alton Railway Company, and that any cause of action which he had was against the latter company. The bill further alleges that, after said injury, said defendant,—for a valuable consideration to him paid by the complainant shortly after the injury,—in writing, executed a release to said company for any and all liability resulting therefrom; that by the mutual mistake of the parties the said release was executed to the Chicago & Alton Railroad Company, instead of to the complainant, the Chicago & Alton Railway Company, and that, as a further consideration for the execution of said release, the complainant assumed the payment of the services of the physician and surgeon who attended upon the defendant; and that this consideration, through a misapprehension of the parties as to the necessity of incorporating it into the release, was omitted therefrom. The bill prays for a reformation of the said release to make it conform to the facts of the case. The further facts sufficiently appear in the following opinion of the court:

Lathrop, Morrow, Fox & Moore, for complainant.
E. W. Henry, for defendant.

PHILIPS, District Judge (after stating the facts). That there was a mistake in the written release executed by the defendant, in inserting therein the "Chicago & Alton Railroad Company" instead of the "Chicago & Alton Railway Company," was not contested by defendant's counsel at the hearing; and, if it had been, the evidence is clear that it was a mistake of both parties. It is the special province of a court of equity to rectify such mistakes. "If, by inadvertence, accident, or mistake, the terms of a contract were not fully set forth in the policy, the plaintiff is entitled to have it reformed so as to express the real agreement, without the necessity of resorting to extrinsic proof." Thompson v. Insurance Co., 136 U. S. 296, 10 Sup. Ct. 1019, 34 L. Ed. 408. See, also, Snell v. Insurance Co., 98 U. S. 88, 25 L. Ed. 52; Trenton Terra Cotta Co. v. Clay Shingle Co. (C. C.) 80 Fed. 46. This is equally true where the failure to express in the written instrument "resulted from a mistake as to the legal meaning

and operation of the terms and language in the writing." Corrigan v. Tiernay, 100 Mo. 281, 13 S. W. 401. So, in Parlin v. Stone (C. C.) 48 Fed. 808, Judge McCrary, on this circuit, said: "When the mortgage shows on its face that the consideration moved from a certain person, and it appears that his name as mortgagee was omitted by mistake, equity will reform the instrument by inserting his name."

The fact that a check was given, instead of money, can make no difference. The giving of the check evidenced the purpose on the part of the agent of the railway company to extinguish the debt; and, when the defendant accepted it without the objection that it was not money, he also evidenced the fact that he received it as payment. This was emphasized by the statement made at the time by the agent, Anderson, to the defendant, that he could cash it by presenting it to the agent of the complainant.

The same rule respecting the province of a court of equity to correct mistakes is laid down by Bispham in his work on the Principles of Equity (4th Ed.) § 185, as follows:

"A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do some act, which, but for the erroneous conviction, he would not have done or omitted."

And this principle has application to the omission to write into the release the additional consideration of the undertaking that the railway company would assume the payment of the doctor's bill. Thus, Mr. Bispham, at section 190, says that:

"Where there was an agreement that part of the purchase money of certain real estate should be paid by a judgment note for a certain sum, 'with interest,' and the words 'with interest' were omitted from the note by the mistake of the scrivener by whom it was written, it was held that this was such a mistake as equity would correct."

And if in fact this additional consideration to pay the doctor's bill entered into the contract of settlement, and was not inserted in the release, either from inadvertence, or misconception of the law as to the necessity of inserting it in the instrument to make it operative as a release, such fact does not deny to complainant the assistance of a court of equity to reform it in this respect. As said by the supreme court of this state in Corrigan v. Tiernay, supra:

"In such cases equity will reform the contract, and this, too, though the instrument fails to express the contract which the parties made, by reason of the mistake of law. Says Pomeroy, 'In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms or language employed in the writing.'"

Neither can importance attach to the contention of defendant's counsel that the promise to pay the doctor's bill in addition to the $50 was made after the defendant signed the release and handed it to Anderson, or whether the promise was made contemporaneously (as testified by complainant's witnesses) with the act of handing the release by defendant to Anderson. The defendant's testimony is that when he had signed the release, and Anderson took it, the latter said to him it was his duty to read it to him. If so, the transaction was

yet in fieri until this duty was performed. And as soon as it was read over to him, and he fully realized that its effect was a complete settlement of any claim he might have for damages, he said, "This will not more than pay my doctor's bill," or words to that effect; and thereupon the additional promise was made to pay the doctor's bill. Whether or not the defendant then said "Well," his silence gave consent, accentuated by no further objection, and acquiescing in Anderson taking away the release, while the defendant retained the check. It was a part of the res gestæ, and the whole transaction was a unit. Defendant's witnesses claim that the additional promise of Anderson was that the railway company would "pay for the first aid," which, as I gather from the incidents of the case, meant the doctor's service for setting the leg; but, as complainant's witnesses testified it included the whole of the doctor's bill up to the settlement, the defendant cannot complain if the court reforms the instrument to include the larger obligation on the part of the complainant.

Defendant's contention at the hearing was confined to two propositions: First, that Anderson obtained defendant's signature through deception and fraud; and, second, that defendant was so far non compos as not to fully comprehend his acts.

It should be the inclination of every court to closely scan and scrutinize such settlements, to see that they are absolutely free from deception and imposition. The injury in question occurred on the 21st day of the month, and Anderson, the railroad's agent, came on the 24th day of the month to investigate it. I am unable to discover any artifice or deception employed by Anderson to justify the judicial mind in denouncing his conduct as fraudulent and wrongful. In the first place, on his arrival at the place of the accident he instituted inquiry among the colaborers of the defendant present at the injury to learn the particulars thereof, and obtained their statements, which are filed with the depositions herein, which showed that the accident resulted from an unforeseen cause in tearing down or removing portions of a bridge, under circumstances both of contributory negligence on the part of the defendant, or where the danger resulted in the progress of the work of tearing down, where the conditions were constantly changing, and in the absence of the overseer, and which, under the ruling of the court of appeals of this circuit in Gold Mines v. Hopkins (recently decided) 111 Fed. 298, presented the state of case where a servant undoubtedly assumes the risk of the place and conditions under which he works. While the merits of the defendant's claim for damages are not on trial in this case, it was competent for the complainant to show this information thus obtained, as evidence of its good faith and motive in proffering the settlement proposed at $50; believing, as the testimony of complainant shows, that there was no actual liability on the part of the railway company. It is true that Anderson took with him when he called to see the defendant an employé of the complainant, to show him where to find the defendant. He held no secret interview with him. On the contrary, the whole interview was in the open, in the presence of the defendant's son, a man of mature years, and defendant's friend, whose hospitality and nursing he was receiving. It is not important to find what were the precise

words used by Anderson when he opened the conversation with the defendant, as there is no ground for question that the defendant understood that Anderson was there as the representative of the railway company, and that what he was doing was in the interest of the company.

The only pretense based upon the defendant's evidence for any artifice practiced by Anderson is that, when he handed the defendant the release in duplicate to sign, they were folded up. If they were folded when handed to the defendant, there was nothing whatever to prevent him from unfolding a loose paper before signing it, and there is nothing to indicate that there was any design in this incident. The excuse given by the defendant for not reading it himself is that he could not read without his eyeglasses. This is without force, for the reason that he stated that his eyeglasses were then in the room, and he could have had them for the asking. There was nothing done or said by anyone to prevent him. He did not even suggest the want of his glasses. It is the well-settled rule in this state that if a person so signing such a paper, having the opportunity and ability, neglects to read all of the receipt releasing the company from any and all claims on account of and arising from injuries received by him while in the service of the company, and signs the same, he will not afterwards be heard to say that he did not read it. Mateer v. Railway Co., 105 Mo. 320, 16 S. W. 839. The court further said:

"He could read it. No one connected with the company had made any statement to him of what it contained. He was told to sign it. It was his duty to read it before signing it, and he will not now be heard to say that he did not, when every opportunity was afforded him to do so. To permit such a rule would unsettle the business affairs of this country."

So the court of appeals of this circuit, in Insurance Co. v. McMaster, 87 Fed. 63, 30 C. C. A. 532, said:

"If one can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice, or fraud of the other party to the agreement."

And what is still more conclusive on the defendant is the admitted fact that, just after he did sign it, Anderson said to him, in substance, that it was his duty to read the paper to the defendant, and he did thereupon read it to him. So that as a matter of fact the defendant was fully advised at the time of the nature and effect of the instrument he signed,—as much so as if he had read it over himself. The incident further demonstrates the fact that Anderson, in saying that it was his duty to read the paper to the defendant, recognized that he did not regard the transaction as closed by the mere act of obtaining the defendant's signature.

The only remaining question for consideration is, did the defendant understand what he was doing? Reliance is placed by the defendant upon the testimony of Dr. Pritchett, who attended upon the defendant as his physician, and expresses the opinion that the defendant's mind at the time was not normal, and hardly in condition to fully comprehend his act. Although Pritchett was the local surgeon of the railway company, in attending upon the defendant at his instance he

was defendant's physician. He did not even see the defendant that day. He had not prescribed an opiate for him for a day or two previous, and it is exceedingly doubtful if one had been administered within the preceding 12 hours. That the defendant understood full well what he was doing, the moment the release was read to him, he comprehended that he had, for $50, conceded away any further claim against the company, by saying that the sum would not pay his doctor's bill. And when Anderson, in reply, said to him, "We will pay for that," he was satisfied, and acquiesced, by making no further objection. And his own son, and the party with whom the defendant was staying in his tent, both testified that all understood that it was a full settlement. The defendant further heard Anderson then say to the man waiting on defendant, "Send in your time for payment for your attendance up to this time, and hereafter you must look to [the defendant]," or words to that effect. The naked statement of the doctor, who had not seen him that day, and whose opinion was necessarily more or less speculative, ought not to prevail over the substantially established fact that the defendant did intelligently and fully comprehend what he was doing, and the effect of the release.

Since this cause was submitted to the court, defendant's counsel invites attention to the ruling in Wilcox v. Railway Company (C. C.) 111 Fed. 435. The substantive effect of that decision is that where an injured party was induced to make a settlement and give a release under the impression, created by the agent of the railroad company and the attending surgeon, that her injuries were not of a permanent character, and that, in the opinion of the physician, she would fully recover within one year, and thereupon the settlement was based upon an estimate of the value of one year's services, if it turned out afterwards that she did not fully recover within the year, and that her injuries were permanent, the release should be set aside, notwithstanding it was expressly found that the evidence failed to show "fraud or wrongdoing" on the part of the company's agent or the surgeon. This ruling is not in harmony with that of the supreme court of this state in Homuth v. Railway Co., 129 Mo. 629, 31 S. W. 903. In that case, as the syllabus recites, "defendant's physician called to see her, and, in answer to a question as to her condition, stated that she would be well within fourteen days. Her own physician, who was present at the time, expressed a similar opinion. A settlement was effected and a release executed on the basis of a recovery by the time stated by defendant's physician. Plaintiff did not recover for several weeks thereafter. Held, the evidence did not sustain the charge of fraud in obtaining the release, and the trial court should have directed a verdict for defendant." See, also, Railway Co. v. Bennett (Kan.) 66 Pac. 1018. But conceding, for the purposes of this case, the correctness of the ruling in Wilcox v. Railway Co., supra, the facts which influenced the conclusion of the court there are not present in the case at bar. There were no representations of a similar character whatever made by the complainant's agent to the defendant. The defendant's leg was broken, and had been set, and there was no representation made or opinion expressed as to the length of time of recovery, and no indication of any serious complication resulting therefrom. As was said by

the supreme court of this state in Mateer v. Railway Co., 105 Mo. 354, 16 S. W. 839:

"The law favors the compromise and settlement of disputed claims. If these settlements, fairly made and entered into, are to be disturbed upon frivolous grounds, it will often deter these companies from doing justice to their employés who have received injuries, for fear of future litigation. A wise policy would dictate that they be encouraged to do justice in these cases outside of the courts, and that their settlements should be sustained when they are just and fair."

And I may add that, if such settlements are to be disturbed because of the impression the judge may entertain that the amount of compensation was inadequate, it would establish a most uncertain and dangerous rule of law. If the employer, believing from the facts in his possession that there was no legal liability for the injury sustained by his employé, nevertheless recognizes a moral obligation to contribute aid of a substantial character to the unfortunate, under the circumstances surrounding his situation at the time, and the employé is willing to accept it, before a court takes upon itself the function of undoing such settlements the evidence of fraud or incapacity ought to be made clear and persuasive.

Decree for complainant as prayed.

UNITED STATES ex rel. COFFMAN v. NORFOLK & W. RY. CO. et al.

(Circuit Court, S. D. West Virginia. April 17, 1902.)

1. MANDAMUS—PLEA IN ABATEMENT.
   The pendency of another mandamus may be pleaded in abatement of a second mandamus proceeding instituted in the same jurisdiction, wherein the parties and the questions involved are the same.[1]
2. SAME—IDENTITY OF CONTROVERSY.
   Where a final judgment has been rendered in a former proceeding, but an appeal has been taken, and such judgment suspended by a supersedeas bond, and the pendency of such appeal is pleaded in abatement to a second mandamus proceeding, upon consideration of such plea the court is not confined to the pleadings in the former proceeding for the purpose of determining what the real issue therein was, but may look to the pleadings, the evidence, and the opinion of the court filed in support of, and as a part of, the judgment appealed from.
3. SAME—INTERSTATE COMMERCE.
   C. instituted mandamus proceedings against the Norfolk & Western Railway Company et al. under an act of congress of March 2, 1889, alleging unjust discrimination against him, and in favor of C., C. & B. in the shipment of coal in interstate trade from the Pocahontas coal field, and procured an alternative writ commanding the railway company to furnish cars for the shipment of a specific cargo of coal. The railway company denied the allegations of the alternative writ, including the charge of unjust discrimination; and, by written stipulation, matters of law and fact were tried by the court. At the trial the railway company showed by the evidence that it had a system of car distribution, and that it furnished cars, under such system, uniformly to all shippers alike. The district judge found, as a matter of fact, that the system existed, and that it had been uniformly applied, and held, as matter of law, that such system was reasonable and lawful, and refused the peremptory,

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[1] See Abatement and Revival, vol. 1, Cent. Dig. § 67.

and discharged the alternative, writ of mandamus. The judge so finding filed a written opinion, as a part of the record, in support of his judgment. C. took a writ of error to the circuit court of appeals, and executed a supersedeas bond. Subsequently, the writ of error still pending, C. instituted another mandamus proceeding against the same respondents, alleging the same unjust discrimination, charging the same to be the result of the railway company's arbitrary and unlawful system of car distribution, and praying that a specific number of cars be furnished to him daily. The railway company pleaded the pendency of the first proceeding in abatement of the second. *Held*, upon an inspection of the record upon a replication of nul tiel record, that the parties and subject-matter involved in the two proceedings were the same, and that the second should be abated.

(Syllabus by the Court.)

Mandamus.

Harold A. Ritz and B. M. Ambler, for relator.
Campbell, Holt & Duncan and Jos. I. Doran, for respondents.

KELLER, District Judge. This case comes up upon the alternative writ of mandamus issued therein, and upon a plea of abatement interposed by respondents to said writ, setting forth that on January 15, 1901, in the circuit court for the district of West Virginia, a certain other mandamus proceeding was instituted by the relator against the respondents to compel the furnishing of cars and shipping facilities for transporting coal for the relator, and that in said proceeding the same right of the relator and the same duty on the part of respondents were alleged which are averred in the petition filed in this proceeding, and recited in the alternative writ issued herein; that the respondents in said former proceeding made return, denying the allegations of relator's petition; that issue was joined thereon, a jury waived by written stipulation of attorneys for all the parties, and the issue tried by the Honorable John J. Jackson, judge of said court, in lieu of a jury; that evidence was taken on behalf of both relator and respondents, and the pleadings and proofs submitted to the court and argued by counsel; and that such proceedings were had thereon that on June 15, 1901, a judgment was entered against the relator, and in favor of respondents, denying the peremptory writ of mandamus, quashing the alternative writ, and ordering that the respondents recover of the relator their costs. 109 Fed. 831. The plea then alleges that the parties to the former action were the same as the parties to this action, and that the matter in controversy in that action was and is the same as the matter in controversy in this action, namely, the legality of the said Norfolk & Western Railway Company's basis and method of coal-car distribution in the Pocahontas coal region; that the said matter in controversy in said former action was determined on its merits therein by the final judgment of the circuit court of the United States for the district of West Virginia, and that said judgment still remains in full force and effect; that from said final judgment a writ of error was allowed, on the petition of the relator, to the United States circuit court of appeals for the Fourth circuit, at Richmond, Virginia, and is still pending, undetermined, in said last-mentioned court; and respondents proffer to verify this plea by the record remaining in said last-men-

tioned court, a certified copy whereof is filed with the plea, and asked to be taken and read as part of the plea. Under the practice prevailing in West Virginia, the respondents at the same time tendered a motion to quash the alternative writ herein, and a plea in bar vouching the record remaining in the United States circuit court for the district of West Virginia in the former mandamus. To the filing of these pleas and this motion the relator, by his attorneys, objected, and at the same time tendered his motion to strike out said pleas and motion, and, in the event said motions should be overruled, offered his replications of nul tiel record to the plea in abatement and plea in bar tendered. This action was taken for the convenience of both counsel and court, and it was understood and agreed that, while all the questions involved were argued, the decision of the court should take up the matter in legal sequence, and only such matters should be decided as were essential to a final determination of the pleadings herein.

We have first, then, the plea in abatement tendered by the respondents, with an objection interposed to its being filed, which I treat as a demurrer to the plea. The question, then, is whether a former action in mandamus, resulting in a final judgment adverse to relator, which judgment was carried by writ of error to an appellate court for review, and is still there undetermined, is sufficient to abate a subsequent action between the same parties, and involving the same subject-matter. The relator argues that the very terms of the statute (the interstate commerce act as amended; section 10, Act March 2, 1889) provide that the circuit and district courts of the United States shall have jurisdiction, upon the relation of any person or persons alleging such violation of said act as prevents relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus, etc., and that the terms of the statute contemplate the possible necessity and the certain power to issue more than one writ in favor of a relator. To this there may be several replies. It may be that the words "a writ or writs" were inserted to meet the grammatical necessities arising from the use, in the beginning of the section, of the words "upon the relation of any person or persons," as, if several persons asked the aid of the court, it might be necessary that several writs issue. Again, it may be that more than one writ might be awarded in favor of a single relator on account of repeated violations of the act in respect of such relator; and it might arise that a writ might be refused upon one application by a relator, and subsequently, upon a second application setting forth a different state of facts, a writ might be allowed. But the question now presented upon the objection to the filing of the plea is whether the pendency of a former mandamus proceeding in a court of competent jurisdiction is pleadable in abatement of a second action between the same parties, and with the same matter in controversy. I have no doubt that such is the law. As a general proposition, the pendency of a former suit between the same parties, and involving the same subject-matter, may be pleaded in abatement of a subsequent suit. Hogg, Pl. & Forms, pp. 168, 169, §§ 213, 308; Id., § 245, note; Insurance Co. v. Brune's Assignee, 96

U. S. 588, 24 L. Ed. 737; Cook v. Burnley, 11 Wall. 659, 20 L. Ed. 29; Stephens v. Bank, 111 U. S. 198, 4 Sup. Ct. 336, 337, 28 L. Ed. 399. Merrill, in his work on Mandamus, says (page 343): "The pendency of another mandamus proceeding, wherein the parties and the questions involved are the same, may be pleaded in abatement." See, also, 13 Enc. Pl. & Prac. p. 728, and cases there cited; Merrill, Mand. § 315, and cases cited.

The question then arises as to the status of the mandamus proceeding referred to in the plea as pending in the circuit court of appeals of the United States for the Fourth circuit. From the allegations of the plea, it appears that the action was heard upon its merits, and resulted in a final decision by Judge Jackson adverse to the relator; that a writ of error was allowed to the relator, by virtue of which said proceeding is now in the circuit court of appeals. Is this proceeding now a pending proceeding, in which case it is pleadable in abatement, or a final judgment, in which case, under the authorities cited in Merrill, Mand. § 315, it would be pleadable in bar? The answer to this question can make but little difference, save as it causes us to examine and try the plea in abatement or the plea in bar. In Boswell v. Tunnell, 10 Ala. 958, it was held that where the suit was pending on appeal the same rules will apply as where it was pending in the original court. In Illinois a writ of error may be pleaded in abatement to an action on a judgment if the writ was sued out before the action was commenced, and the writ of error acts as a supersedeas. McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449. It appears from the record filed with the plea herein that a supersedeas bond was given, and hence the writ of error in the case now in the court of appeals acted as a supersedeas under section 1000, Rev. St. I think it unnecessary to refer to all the authorities cited to show that a supersedeas does not suspend the operation of a judgment as an estoppel. They are very numerous and conclusive. I cite Ransom v. City of Pierre, 101 Fed. 665, 41 C. C. A. 585; Freem. Judgm. §§ 328, 433; Black, Judgm. § 960.

For the foregoing reasons, I have overruled the objection to the filing of the plea in abatement, and also the motion to strike the same out. The plea in abatement now coming on for trial upon the replication nul tiel record thereto, I have examined the record vouched in the plea, and now offered in evidence in support of the allegations thereof, with considerable care. The gist of the contention is that the identical matter in controversy in this action was also in controversy and was decided in the former mandamus proceeding, tried in the circuit court of the United States for the district of West Virginia, the record of which case is now offered in evidence, and that said matter in controversy was the legality and reasonableness of the basis, system, or method of coal-car distribution for interstate traffic in what is known as the "Pocahontas Coal Field." Objection was made on behalf of the relator that the pleadings and judgment in the record do not show, or even tend to show, that this basis was at all in controversy in the former proceeding; that the only place where this becomes apparent is in the opinion of the court setting forth the reasons for its judgment; and that this opinion is neither in form nor effect a special finding of facts, and hence forms no part of the record, and cannot be looked to

to determine what matters were actually in controversy in that proceeding. This conclusion does not appear to be supported in toto by the authorities cited, namely, Parks v. Turner, 12 How. 39, 13 L. Ed. 883; Stone v. U. S., 164 U. S. 380, 17 Sup. Ct. 71, 41 L. Ed. 477; Egan v. Hart, 165 U. S. 188, 17 Sup. Ct. 300, 41 L. Ed. 680. It is true that it has been held that an appellate court cannot, upon writ of error or appeal, refer to the opinion of the court below for the purpose of eking out, controlling, or modifying the scope of the findings of that court. Stone v. U. S., supra. But the opinion of the court is to be treated as part of the record, and may be examined in order to ascertain the questions presented. Egan v. Hart, supra. To the same effect are Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 684, 688, 15 Sup. Ct. 733, 39 L. Ed. 859; Baker v. Cummings, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776, and the recent case of National Foundry & Pipe Works v. Oconto City Water Supply Co. (decided January 6, 1902, by the supreme court of the United States, and reported in advance sheets of the opinions of the United States supreme court) 22 Sup. Ct. 111, 46 L. Ed. ——. In this case the opinion of the court in writing was made a part of the record by the order entered on June 15, 1901, and the order specifically says that, "in conformity to the views in said opinion expressed, doth order and adjudge that the peremptory writ of mandamus herein be, and the same is, denied," etc. If, therefore, the opinion of the court is ever a part of the record, it is in this case. Whatever may be the true scope of the rule when applied to appeals and writs of error (and I think the weight of recent authority is in favor of the doctrine that the opinion of the court may be looked to, to determine the questions in controversy), a somewhat different question is presented when the matter at issue is not whether the court committed any error in its findings, but whether it did in fact decide a certain matter, and whether that matter was in dispute. In such a case I think the opinion of the court is properly a part of the record, and might be looked to in order to ascertain what was decided. But in this case it is not necessary to do this. The evidence, or a great part thereof, has been made part of the record by bills of exception, and shows that the material question submitted to the court for decision was the legality and reasonableness of the "oven basis" of car distribution. See bills of exception Nos. 1 and 2, record.

It also appears, upon the hearing, and after the evidence was submitted, that the relator presented to the court 11 propositions of law, and requested rulings thereon in his favor; that the court overruled each and all of said propositions of law, and refused to affirm any of them. Several of these propositions of law embody the idea that under the evidence in the case the relator, as matter of law, is entitled to have awarded a writ of mandamus as prayed. The refusal to affirm these propositions is made the basis of numerous exceptions in the record. The tenth proposition refers in direct terms to the so-called coke-oven basis of distribution, and the eleventh proposition requested the court to find, as matter of law, that it was the duty of defendant to distribute its available cars upon a basis therein set forth. These propositions, all of which were rejected, taken in connection with the evidence detailed and set forth in the several bills of exception, show

that the substantial matter in controversy was whether the so-called coke-oven basis of distribution, as operated by the respondent, was a legal and reasonable one; and I think that the court held, and intended to hold, as matter of law, that it was, and, by denying at the hearing all the propositions of law asked by relator, gave evidence, negatively it may be, of his findings of law upon the evidence. I may say further that the relator, in his twentieth exception (page 130 of record), evidently adopts the view that the court ruled and decided that the so-called coke-oven basis of car distribution did not work an unjust discrimination against relator. Quite a number of authorities were cited by counsel for the respondents to the proposition that the breadth of the issue determined by the court in rendering judgment in the former proceeding is not determined by the pleadings, but that the evidence heard on the trial may be looked to for the purpose of determining whether or not the questions in the two suits are the same. Black, Judgm. § 614; Wood v. Jackson, 8 Wend. 9, 22 Am. Dec. 603; Smith v. Town of Ontario (C. C.) 4 Fed. 386; Nesbit v. Independent Dist., 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; Wandling v. Straw, 25 W. Va. 692; Sayre's Adm'r v. Harpold, 33 W. Va. 553, 11 S. E. 16; Harshman v. Knox Co., 122 U. S. 306, 7 Sup. Ct. 1171, 30 L. Ed. 1152. I think this is the correct doctrine, and applying it, and looking to the evidence in the former proceeding, we easily ascertain that the whole question was as to whether the system of car distribution adopted by the railway company in the Pocohontas coal field was unjust and discriminative against relator.

A point was made by the relator in argument to the effect that the present suit should not be abated even though I held that the record showed that the former suit involved, as the great question, the so-called coke-oven basis of car distribution, because the present proceedings, in addition to charging that said basis is unjust and discriminative against relator, also charge a number of other matters violative of the interstate commerce act. For example, on page 9 of the printed alternative writ it is charged that the railway company has furnished transportation to relator so irregularly as to disorganize the force at the mine and subject the relator to disadvantage, while no such irregularities are inflicted on other shippers, to wit, Castner, Curran & Bullitt. I confess that this question has given me great difficulty, as it seemed possible that, although one of the questions presented by the present alternative writ had been decided adversely to relator, still, if the specific violations charged by him in it were not all referable to the system or basis upheld by the former decision, they might present a case for relief. I have made diligent search, in the limited time I have had for the investigation of the intricate questions presented, for authority directly upon this proposition, and I have found one case which seems directly in point. In Buffum v. Tilton, 17 Pick. 511, it was held, in a case involving the pendency of a former suit between the same parties, that "where it appears by inspection that the cause of action in the second suit is, in a material and substantial part, the same as in the first, although other causes of action are inserted in the second, it is, within the meaning of the rule of law, an action instituted for the same cause of action, and is a good cause of abatement." Upon re-

flection it has seemed to me that this decision is founded in wisdom, and I therefore adopt and follow it.

A further contention is made by the relator that it is a non sequitur that because the oven basis was reasonable in January, 1901, it is reasonable now; but I think, if it was not violative of law then, it cannot be now. If conditions have so changed that such basis is no longer reasonable or legal, such change should be averred, as otherwise the principle of res adjudicata between the parties is as applicable in the case of car distribution as in the case of any custom or usage of trade, or, as I believe, in any other case,—even one involving the construction or validity of a positive law.

For the reasons given, I find for the respondents upon the issue joined upon the plea in abatement; and, so finding, it is unnecessary for me to consider the other matters presented.

LOGANSPORT RY. CO. v. CITY OF LOGANSPORT et al.

(Circuit Court, D. Indiana. March 8, 1902.)

No. 10,031.

1. EQUITY JURISDICTION—CONTRACTS BETWEEN STREET RAILROAD COMPANY AND CITY.

Before a street railroad company can complain, in a court of equity, of the violation by a city of its contract rights, it must show that it has a contract which is free from fraud and enforceable at law, and one which is fair and reasonable in all its parts, and within the power of the city lawfully to enter into. If it is unfair, unreasonable, or against good conscience, a court of equity is justified in refusing to enforce it, and in leaving the complainant to its remedy at law.

2. STREET RAILROADS—AUTHORITY TO USE STREETS—LAW OF INDIANA.

Under the law of Indiana, by which the fee of streets in cities is in the abutting lot owners, and exclusive authority, jurisdiction, and power over the streets of a city are vested by statute in the common council, such authority is held in trust for the benefit not alone of the city, but for that of all the people of the state, and extends only to the regulation of the use of streets for ordinary public purposes. The authority to lay tracks and operate a street railroad thereon can only be conferred by statute, in express words, or by language from which such power must be necessarily implied.

3. SAME—POWERS OF CITY COUNCIL.

By Act Ind. Sept. 7, 1861 (2 Burns' Rev. St. 1894, § 5450 et seq.), authority was conferred to organize street railroad companies, and to construct and operate street railroads, but it is provided that "nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets * * * within the corporate limits of such cities; and all street railroad companies * * * shall first obtain the consent of such common councils to the location, survey and construction of any street railroad through or across the public streets of any city, before the construction of the same shall be commenced." By Act March 3, 1891 (2 Burns' Rev. St. 1894, § 5473), horse railroads were authorized to use electricity for motive power; but the same reservation as to the power of city councils was made, and it was provided that companies desiring to change to electricity should first obtain the consent of the common councils, which might give such consent "upon such terms and conditions as they may see fit to impose." *Held*, that neither of

such acts conferred on the common council of a city, either expressly or by necessary implication, the power to grant to a street railroad company either an exclusive or a perpetual use of its streets for railway purposes.

4. SAME—ULTRA VIRES GRANT.
The common council of a city in Indiana, vested by statute with exclusive authority, jurisdiction, and power over the streets of the city, cannot alienate such power by a grant to a street railroad company in perpetuity of the right to build and operate railroads through such streets as it may from time to time elect to use and occupy.

5. SAME—CONTRACT CREATED BY ORDINANCE.
Such a grant, even if authorized and valid, amounts merely to an offer, which creates no contract as to a particular street until accepted and acted upon; and until such time the offer may be withdrawn by a repealing ordinance.

6. SAME—NECESSITY OF CONSENT OF CITY COUNCIL TO USE OF STREET—INDIANA STATUTE.
Under the statute of Indiana (2 Burns' Rev. St. 1894, § 5464) which requires all street railroad companies to first obtain the consent of the common council "to the location, survey, and construction of any street railroad through or across the public streets of any city," an ordinance giving general consent to a company to occupy and use any or all of the streets of the city for railway purposes, at its election, does not obviate the necessity of a specific consent to the location, survey, and construction of a road upon any particular street selected; and the company acquires no vested right to the use of such street until such consent has been given.

In Equity. On demurrer to bill.

Winter & Winter, Nelson & Meyers, and Charles A. Dryer, for complainant.

John G. Williams, McConnell, Jenkins & Jenkins, and Frank M. Kistler, for defendants.

BAKER, District Judge. The question for decision is raised by a demurrer to the bill of complaint. The bill is brought by the Logansport Railway Company against the city of Logansport, and the mayor and members of its common council, to enjoin them from enforcing an ordinance adopted on October 30, 1901, on the ground that it is void because it impairs the contract rights of the complainant. The bill is in the nature of a bill for the specific enforcement of the complainant's contract rights against alleged infringement by the enforcement of the later ordinance. Before the complainant can, in a court of equity, complain of the violation by the city of its contract rights, it must show that it has a contract, and that such contract is free from fraud and enforceable at law, and one that is fair and reasonable in all its parts, and within the power of the city lawfully to enter into. If the contract is unfair, unreasonable, or against good conscience, a court of equity would be justified in refusing to enforce it, and would leave the party to its remedy at law. The court, too, must enforce the contract, if it enforces it at all, just as it is written; and it has no power, by changing or varying material terms, to make, in effect, a new contract for the parties.

By an act of the legislature of this state in force on September 7, 1861 (2 Burns' Rev. St. 1894, §§ 5450–5454, 5463, 5464), authority

was conferred on any number of persons, not less than five, to incorporate as a street railway company in perpetuity; prescribing its powers, and providing generally for the construction of the street railway. By section 5464 it was enacted that:

"Nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities; and all street railroad companies which may be organized under the provisions of this act shall first obtain the consent of such common councils to the location, survey and construction of any street railroad through or across the public streets of any city, before the construction of the same shall be commenced."

By the first section of an ordinance adopted on December 6, 1882, the consent, permission, and authority of the city of Logansport were given, granted, and duly vested in the Logansport Railway Company, to lay and construct a single or double track for a street railway, with all necessary and convenient tracks, turn-outs, etc., in and along the course of the streets and bridges of the city of Logansport hereinafter mentioned, and the same to occupy, maintain, and use, and to operate thereon street railway cars, etc., in perpetuity, and in the manner and upon the conditions set forth in the ordinance. By the second section of the ordinance it was provided that said railway company, its successors and assigns, were exclusively authorized to construct, own, and keep, maintain and operate, street railways therein provided for, as follows: Commencing at the center of Fourth street, on the north line of Canal street, thence southerly through Fourth street to Market street, thence easterly through Market street to Second street, thence northerly through Second street to Broadway, thence easterly through Broadway to the easterly limits of the city; also through such other streets and over such bridges in said city as the said company, its successors and assigns, might from time to time elect to use and occupy: provided, that the common council reserves the right to ordain and direct said company to build and operate a line of railway through other streets, and if the company, its successors or assigns, fail or refuse to construct and operate such line on such streets within one year, then and in that event the common council may grant the privilege to any other company. The power to be employed in moving the cars was restricted to animal power. By an act of the legislature in force on March 3, 1891 (2 Burns' Rev. St. 1894, § 5473), it was enacted that:

"Any street or horse railroad heretofore or hereafter organized in this state may, with the consent of the common council of the city in which the railroad or any part thereof is located and operated, and with the consent of the board of commissioners of the county where such railroad or any part thereof is operated beyond the limits of such city, use electricity for motive power: provided, that nothing in this act contained shall be so construed as to take away from the common councils of incorporated cities the exclusive powers now exercised over the streets, highways, alleys and bridges within the corporate limits of such cities, and all such street railroad companies shall first obtain the consent of such common councils for the operation by electricity of their cars along, through or across the public streets or alleys of any city before the operation by electricity of their cars shall be commenced: provided, that in giving such consent such common council or board of county commissioners may do so upon such terms and conditions as they may see fit to impose."

After the enactment of this statute, on July 3, 1891, the common council of the city of Logansport adopted an ordinance by the first section of which it was provided:

"That consent, permission and authority be and are hereby given, granted and hereby vested in said Logansport Railway Company, its successors and assigns, to operate by electricity its cars, carriages and vehicles of any kind and character along, through, on, over and across the streets, and alleys, bridges and highways in the said city of Logansport now existing or that may be hereafter established or constructed as it may from time to time elect, in perpetuity."

There was the same reservation to the city as is contained in the ordinance of 1882 in respect to the right to require the company to construct a railway and operate cars on other streets than those occupied by it.

The statute of this state confers exclusive authority, jurisdiction, and power over all streets, highways, alleys, and bridges within the corporate limits of cities in this state on the common council. In Eichels v. Street Ry. Co., 78 Ind. 261, 41 Am. Rep. 561, it was held that the authority to lay the tracks and operate a railway on the streets of a city can only be conferred by statute in express words, or by language from which such power must be necessarily implied. Such a power, it was said, is an extraordinary one, and one which cannot be implied from a charter of a municipal corporation which confers only the usual powers ordinarily bestowed upon such corporations. Hence the sole power possessed by the city of Logansport to grant an exclusive and perpetual right to the complainant to occupy and use such streets of the city for street railway purposes as it might from time to time elect depends upon the acts of 1861 and 1891 above mentioned. We are not concerned with the question whether or not the legislature possesses the constitutional power to grant to the cities of this state the authority to confer upon street railway companies the exclusive and perpetual use of such streets of the city as they may from time to time elect to use and occupy. The question in hand is, has the legislature conferred upon the city of Logansport any such power? The fee of the streets in cities in this state resides in the abutting lot owners, and the city possesses only an easement of way in the streets. It does not hold title to the easement as a private property right, which it may alienate at pleasure, as it might alienate property belonging to the city by a title unimpressed with a trust. The city holds the easement in the streets in trust not simply for the city alone, but for the benefit and use of all the people of the state. In interpreting the statutes, the court ought never to lose sight of the fact that in dealing with the use of the streets the common council of a city is acting as a trustee for the benefit and advantage of the public.

It is manifest from a reading of the above-mentioned statutory provisions that the legislature has not conferred, in explicit and express words, on the city of Logansport, the power to grant to a street railway company either an exclusive or a perpetual use of its streets for railway purposes. The act of 1861 simply provides that the street railway company shall first obtain the consent of such common council to the location, survey, and construction of its railroad, before the con-

struction of the same shall be commenced. No words of perpetuity are expressly employed. The same is true of the act of 1891. There being no express words of perpetuity in the legislative grant, is such power necessarily to be implied from the language employed? In Detroit Citizens' St. R. Co. v. Detroit Ry., 171 U. S. 48, 18 Sup. Ct. 732, 43 L. Ed. 67, the question for decision was whether the legislature of Michigan had conferred power on the city of Detroit to grant to a street railway company the exclusive use of its streets. The statute provided that:

"All companies or corporations formed for such purposes [the railway purposes mentioned in the act] shall have exclusive right to use and operate any railways constructed, owned or held by them: provided that no company or corporation shall be authorized to construct a railway under this act through the streets of any town or city without the consent of the municipal authorities of such town or city, and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe."

The court says:

"It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes."

And so it must be held here that similar and no broader language employed in the acts of 1861 and 1891 above mentioned does not explicitly and directly confer the power on the common council of the city of Logansport to grant either an exclusive or a perpetual privilege to occupy its streets for railway purposes. The court further says:

"There were many reasons which urged to this; reasons which flow from the nature of the municipal trust,—even from the nature of the legislative trust,—and those which, without the clearest intention explicitly declared, insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

And how much stronger are the reasons which insistently forbid that the future should be committed and bound in perpetuity by the conditions of the present time, and that functions delegated for public purposes should be forever paralyzed in their exercise? That such powers must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly established.

The power to grant the use of its streets in perpetuity not having been granted to the city of Logansport in explicit and express words, is it granted by a necessary implication? The supreme court, in the above-cited case, further says:

"Mr. Justice Jackson, in Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co. (C. C.) 33 Fed. 659, says * * * 'that municipal corparations possess and can exercise only such powers as are granted in *express words* or those *necessarily* or *fairly* implied, *in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable.*' The italics are his. This would make 'necessarily implied' mean inevitably implied. The court of appeals of the Sixth circuit, by Circuit Judge Lurton, adopts Lord Hardwicke's explanation, quoted by Lord Eldon in Wilkinson v. Adam, 1 Ves. & B. 422, 466, that 'a necessary implication means not natural necessity, but so strong a probability of intention that an intention

contrary to that which is imputed to the testator cannot be supposed.' If this be more than expressing by circumlocution an inevitable necessity, we need not stop to remark, or, if it mean less, to sanction it, because we think that the statute of Michigan, tested by it, does not confer on the common council of Detroit the power it attempted to exercise in the ordinance of 1862. To refer the right to occupy the streets of any town or city to the consent of its local government was natural enough,—would have been natural under any constitution not prohibiting it,—and the power to prescribe the terms and regulations of the occupation derive very little, if any breadth, from the expression of it."

But assuming that the power "to give consent upon such terms and conditions as the common council may see fit," found in the act of 1891, does acquire breadth from such expression, surely there is sufficient range for its exercise without extending it so as to embrace the power to grant the use of the streets in perpetuity. The supreme court, further on, says:

"Easements in the public streets for a limited time are different, and have different consequences, from those given in perpetuity. Those reserved from monopoly are different, and have different consequences, from those fixed in monopoly.. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them."

Can it be successfully contended that the perpetual use of the streets of a city is indispensable to their use for railway purposes?

But there are other reasons why the bill cannot be maintained. The ordinances of 1882 and 1891 grant the exclusive right to use in perpetuity certain streets, designated by name, and also the right to use and occupy such other streets and bridges in the city as the street railway company, its successors and assigns, may from time to time elect to use and occupy. The repealing ordinance expressly excepts from its operation all the streets and parts of streets occupied and in use by the complainant at the time of its adoption. Its effect is simply to repeal so much of the ordinance of 1882 as purported to grant to the complainant the right to use and occupy such other streets of the city as it might from time to time elect to use and occupy, and also to repeal so much of the ordinance of 1891 as purported to grant to the complainant the right to use and occupy, at its election, all the streets of the city then existing or thereafter to be established, in perpetuity. The right granted, except as to the designated streets, was a mere offer, which could only become a contractual obligation by the election of the complainant to use and occupy the streets for railway purposes. Such election must be made in good faith, and evidenced by some open and notorious act brought to the notice of the common council. Until the offer was accepted by such an election, it could be withdrawn.

But the grant is open to a more serious objection. It was ultra vires of the common council to surrender its control of the streets of the city in perpetuity to the complainant. The municipal authorities had no power to grant forever to the complainant the right, at its own uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect. The right to determine for itself from time to time what streets could be used and occupied for street railway purposes consistently with the public safety and welfare

is a power incapable of absolute alienation by the common council. By these ordinances the common council has undertaken to surrender this power, and to remit it to the uncontrolled election of the complainant. The only power reserved is the power, if the common council wishes the railway to be extended along a particular street, to notify the complainant of such desire; and, if it fails within one year to construct and operate its road on such street, then the use of such street may be granted to another railway company. But no right or power is reserved to prevent the railway company, at its election, from using with a double or single track any and all the streets of the city, however injurious it may be to the public convenience, safety, or welfare. The public convenience, safety, and welfare, in this regard, are surrendered to the complainant. By these ordinances, if valid, to the complainant's election is relegated the question whether or not a street can, with due regard to the comfort and safety of the people, be occupied by a single or a double track railway. Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to its charge, to be administered in the interest of the public, and not for the private advantage and gain of railway or other corporations.

But if the granting ordinances are not invalid and unenforceable so far as the repealing ordinance affects them, still the bill cannot be maintained for another reason. It was ruled in the opinions of Judge Woods and myself, both concurring in this particular, in Citizens' St. R. Co. v. City R. Co. (C. C.) 64 Fed. 647, that, under ordinances similar to those granted to the complainant, the Citizens' Street Railroad Company acquired no vested right to commence the construction of a particular line of street railway on an unoccupied street without first obtaining the consent of the common council to "the location, survey, and construction" of such proposed line. No such consent is alleged to have been obtained before the complainant began to construct its railway on George street, High street, Erie avenue, and Seventeenth street. It is simply averred that the complainant gave notice of its intention to construct such street railway, and then, without asking or waiting for the consent of the common council, it began to tear up these streets and to lay down its tracks. By the ordinances of 1864 and 1865 the city of Indianapolis granted to the Citizens' Street Railroad Company the right to enter upon, use, and occupy for the term of 30 years all the streets of the city then existing and thereafter to be established, for street railway uses and purposes. Under this grant the company had constructed and had in operation about 40 miles of street railway. In 1889 the common council and board of aldermen of the city of Indianapolis adopted an ordinance prohibiting the railway company from entering upon or constructing its railway on any unoccupied street until it had first obtained the consent of the city street commissioner. In 1893 the city granted to the City Railway Company the right to enter upon and construct a street railway system on and along 29 specified routes, embracing a great proportion of the most important streets of the city, and including many of the streets on which the Citizens' Street Railroad Company had construct-

ed its railroad, and had it in operation. It was claimed by the Citizens' Street Railroad Company that the two later ordinances infringed the contract rights secured to it by the earlier ordinances of 1864 and 1865. In discussing this question, Judge Woods said:

"I am of the opinion that the complainant is not entitled to equitable relief in respect to its alleged rights in the streets so designated for the use of the defendant. Prior to that designation the complainant had no lines upon those streets, except a fragment on Pennsylvania street, which had been practically, if not legally, abandoned. By its own charter, as I construe it,—indeed, according to the plain letter,—it had no right to commence construction on a particular line without first having obtained the consent of the common council to the 'location, survey, and construction' proposed. The necessity for this consent was not affected, as I think, by anything contained in the ordinance of January 18, 1864, or in the supplemental ordinance of September 18, 1865. Besides, the entry of the complainant upon those streets was in violation of the ordinances of 1889 and 1893; and, if rights were thereby acquired, the complainant, in view of all the circumstances, should rely upon the courts of law for their defense, rather than look to equity for their establishment. The question whether the last-named ordinances are valid or not need not be considered, because, by its own charter, the complainant had no right to enter upon a street without the consent of the city; and the city was free, with or without reason, to give or withhold its consent."

This was said by the learned judge notwithstanding the city of Indianapolis had given a general consent, permission, and authority to the Citizens' Street Railroad Company to enter upon, use, and occupy for railroad purposes, all of the streets of the city. In the same case Judge Baker said:

"Prior to the designation of the additional north and south streets for the use of the defendant, the complainant had no lines upon those streets, except a fragment upon South Pennsylvania street, which had been practically, if not legally, abandoned. I do not think the complainant, under the ordinance of 1864 or 1865, had any vested right to commence the construction of a particular line without first obtaining the consent of the common council to the location, survey, and construction of such proposed line. Therefore the complainant, having obtained no consent from the city to occupy the streets in question, has no right to complain of their occupation by the defendant company."

The consent conferred upon the Logansport Company by the ordinances of 1882 and 1891, so far as the ordinance of October 30, 1901, affects them, is not so clear and explicit in giving consent and granting authority to enter upon the streets of the city of Logansport as were the ordinances of 1864 and 1865 adopted by the common council of the city of Indianapolis. Judges Woods and Baker, in the above-cited case, held that the general consent conferred by the original ordinances to occupy and use all of the streets of the city for railway purposes did not satisfy the statute, nor take away from the common council the right, before the railway company should construct a street railway upon an unoccupied street, to require it to obtain the consent of the common council to its location, survey, and construction.

For these reasons I am of opinion that the demurrer to the bill should be sustained, and it is so ordered.

In re BOORSTIN.

(District Court, N. D. Georgia. March 7, 1902.)

No. 778.

BANKRUPTCY—EXEMPTIONS UNDER LAW OF GEORGIA—GOOD FAITH OF BANKRUPT.

Under the law of Georgia, which requires a debtor claiming exemptions from personal property to "act in perfect good faith," and to "make a full and fair disclosure" of all his property, a bankrupt will not be allowed exemptions from a stock of goods, as against the creditors who sold him such goods, where he fails, on his examination, to make any satisfactory showing as to the general conduct of his business, to explain circumstances which are strongly indicative of fraud or concealment of property, or to answer questions in relation to his business which any man of ordinary intelligence should be able to answer.

In Bankruptcy. On review of referee's decision denying the bankrupt's claim to exemptions.

The following is the report of the referee, Clifford M. Walker:

B. Boorstin, a merchant of Covington, Ga., was on December 23, 1901, adjudicated bankrupt on his own petition. He scheduled debts aggregating $8,151.96. His assets he schedules as a stock of goods worth $2,000, and open accounts worth $500. The first meeting of creditors was held January 6, 1892, and a trustee elected. The trustee filed his report, setting aside homestead exemption in certain articles of merchandise composing a part of his said stock, selected by the bankrupt, amounting to $1,500. Before the expiration of twenty days after the filing of the trustee's report, certain creditors, whose claims had been filed and allowed, filed exceptions to said report, alleging that the bankrupt had not acted in perfect good faith, and had not made a full and fair disclosure of all his personal property, including money, stocks, and bonds, as required by the laws of Georgia in reference to exemptions. All creditors having been duly notified thereof, the issue so made came on to be heard before the referee February 7, 1902. A full stenographic report of the evidence then taken, together with evidence taken heretofore,—it being agreed to use the same for this hearing,—is of file in the referee's office. Counsel for bankrupt demurred to the exceptions, insisting that the allegations therein made were too general and vague, and not specific. Amendments were proposed and allowed, and the demurrer overruled. What purports to be bankrupt's ledger, his invoices now shown on the ledger, his bank-deposit and check-stub books, and the canceled checks were presented in evidence. In the earnest effort to arrive at the truth in this case, all this mass of evidence has been gone over minutely, and in the investigation the referee has spared no time or labor. That such exertion was necessary is largely due to the failure of bankrupt to keep any cash book, and only a semblance of a record of his liabilities.

While bankrupt shows payment of large sums of money on account and for expenses, and says he has acted in good faith, without concealing any property whatever, there is much damaging evidence against his contention. Among the very few entries on his ledger bearing any definite information is one presenting a statement of his condition on January 1, 1900, showing his stock to be worth $4,500, and his liabilities to be $2,419, or a net worth, without including bills receivable, of $2,081. Bankrupt testifies that the year 1900 was a remarkably fine business year, and his evidence is corroborated by the fact that his cash deposits for the last three months average $1,555 per month. Carefully avoiding the dangers of estimating, we can safely conclude from this evidence that on January 1, 1901, bankrupt's net worth must have been as great as on January 1, 1900, or $2,081. His schedules show that on December 23, 1901, less than 12 months thereafter, his liabilities exceed his assets $5,551.95. When bankrupt filed his schedules he valued his stock at $2,000. Fifty days afterwards, when called upon by the creditors to ac-

count for his property, he swears that his stock is worth $3,500. Waiving this strange change of view, giving to the bankrupt the benefit of any possible doubt by allowing the valuation of the stock at $3,500, instead of $2,000, as scheduled, there still remains $6,732.95, and the profits on sales during the year, if any, to be accounted for in expenses, losses in accounts receivable, and depreciation in stock. The bankrupt himself attributes his failure to expenses alone, and the referee is of the opinion that this enormous loss in a business carried on in a small town, with store rent at $27.10 per month, and house rent at $9 per month, even with a family of six children, has not been satisfactorily explained. The only reasonable conclusion to be arrived at is that the bankrupt has concealed from his creditors and the trustee in bankruptcy a considerable portion of his property, and has failed to make a full and fair disclosure thereof. Significantly throwing light on this question of the perfect good faith of the bankrupt are many other circumstances of more or less import. One M. Levin, of the same nationality as bankrupt, boarding with bankrupt, and paying nothing for it, though bankrupt says his contract included board, closely associated with bankrupt before and after the adjudication, present in several private consultations between bankrupt and bankrupt's attorney, was bankrupt's clerk. On May 25, 1901, he swore before the tax receiver of Newton county that $100 in money, $125 in notes and accounts, and $350 in merchandise (furniture) comprised "every species of property that I own in my own right or have control of." The evidence shows that his furniture business was sold out in the summer, and in August Levin entered into clerkship with bankrupt. From this time to December 28, 1901, he deposited in bank $1,401.31 in cash; and bankrupt's schedules a large sum of money due to Levin, besides his claim for services, not one cent of which had Levin collected. Though there is evidence going to show that Levin sold furniture on the installment plan, and collected installments which fell due from time to time, it staggers one's belief that such a business could have been conducted on the basis of a $350 stock. On December 3, 1901, less than three weeks before the filing of bankrupt's petition, but several months after the sale of Levin's stock of furniture, Levin shipped to the city of Atlanta a box which he says contained dry goods consigned to his brother. The explanations of Levin, as well as of his brother, are suspicious, to say the least. Bankrupt schedules no household furniture, and asks no exemption as to such personalty, though on June 20, 1901, he swore before the tax receiver of Newton county that he owned such property, and gave in taxes thereon. He schedules these taxes as a debt due by him, though now he swears that such taxes are due by his wife; and such duplicity is contrary to every principle of good conscience, and does violence to the tenor of the act of the Georgia legislature, already too liberal with a claimant of homestead exemption, which requires that such claimant must present clean hands before any allowance can be made to him. For five days before adjudication, bankrupt made no deposits in bank. Though he attempts to explain that his receipts were applied to creditors' claims, he shows no vouchers for same, and makes absolutely no explanation of the whereabouts of proceeds of sales for several hours after the petition was filed, during which the store was open. Bankrupt suspiciously carried several trunks to Atlanta within three months of his adjudication. He received a sum of money from M. Levin a few days before adjudication, although Levin is scheduled a creditor for a large amount. On November 15, 1901, bankrupt gave a check to J. Turner for $300, which he utterly fails to explain, stating that he does not know how it is. He "does not remember" several material matters tending to show fraudulent acts. There are other suspicious circumstances, but those hereinbefore set out are enough for the purposes of this opinion.

In anticipation of a possible finding that bankrupt had not scheduled all his property, counsel for bankrupt earnestly insisted that in such event intentional fraud must be shown. The Code of Georgia requires that a full and fair disclosure of all property must be made. The supreme court of this state has declared (Torrance v. Boyd, 63 Ga. 23) that "any failure, until satisfactorily explained and accounted for, and the consequences repaired, is to be deemed intentional, and therefore fraudulent." In a long line of deci-

sions, the United States courts have held that, when properly placed on notice, bankrupts must make a satisfactory account of their assets, from which a reasonable conclusion can be arrived at that the bankrupt has acted in perfect good faith. The supreme court of Georgia cites with its approval In re Salkey, 6 Biss. 269, Fed. Cas. No. 12,253 (Ryan v. Kingsbery, 88 Ga. 390, 14 S. E. 605), the facts in which present an analogous case to the case at bar. It also approves the opinion of Judge Drummond, expressed in this language: "The court is not bound to accept his [the bankrupt's] answer that he has told all that he knows about his property, if it clearly appears that there is still property unaccounted for." As to the badges of fraud partly set out in this opinion, the laws of Georgia declare (Code, § 4029) that "fraud may not be presumed, but being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence."

The referee has rarely seen such ability as has been shown in the presentation of the bankrupt's contentions by his counsel in this case. Their earnest efforts and evident honesty of belief in the honesty of their client have elicited the most painstaking investigation of the record on the part of the referee. But it is his opinion, after such an investigation, that the bankrupt has not acted in perfect good faith, and has not made a full and fair disclosure of his property. An order will therefore be entered denying the application for exemption, and it is considered and ordered that the exceptions to the report of the trustee setting aside the exemption be, and the same are hereby, sustained.

Capers Dickson, Foster & Butler, J. M. Pace, and L. L. Middlebrooks, for creditors.

James F. Rogers and E. F. Edwards, for bankrupt.

NEWMAN, District Judge. The above is the report of the referee on the right of the bankrupt to have the exemption allowed by the constitution and laws of Georgia out of his stock of merchandise, which has passed into the hands of his trustee in bankruptcy. The referee, as will be seen, refuses to approve the exemption. In view of the fact that counsel were somewhat restricted in their oral argument before the court on these exceptions, I have examined the evidence in the case, and the entire record, very carefully, and have considered the case, as counsel for the bankrupt urges it should be considered, only with reference to the admitted condition of the bankrupt in June, 1901, and the situation subsequent thereto. That which operates most strongly against the bankrupt, to my mind, is not so much the amount of goods on hand in June, the amount afterwards purchased, and the small amount on hand at the time the petition in bankruptcy was filed, and the failure to account for the proceeds, although this is not at all satisfactory, but it is the failure of the bankrupt to make any satisfactory showing as to the general conduct of his business. His testimony is a succession of failures to answer questions which any business man of ordinary intelligence could answer with reference to the conduct of his own business. He utterly fails to make a full, frank, and complete disclosure as to his affairs, which is required of one seeking an exemption under the laws of Georgia. Section 2830 of the Code of Georgia provides that:

"It shall be the duty of each and every person who claims the benefit of the exemption allowed in this article, as the allowance is a liberal one, to act in perfect good faith; and as it is in the power of the debtor, claiming the exemption of personal property, to conceal part of his property or money, and to claim the balance as exempt, it shall be the duty of such debtor, when he takes steps in the court of ordinary to have said exemption of personal prop-

erty set off to him, to make a full and fair disclosure of all the personal property, including money, stocks and bonds, of which he may be possessed at the time, and all such money or property which he may hold in excess of the said exemption shall be subject," etc.

Another part of the same section is as follows:

"The debtor guilty of wilful fraud in the concealment of part of his property from his creditors, of which he is possessed when he seeks the benefit of the exemption, shall, on account of his fraud, lose the benefit of such exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed."

It is impossible to read the examination of this bankrupt, and believe that he has acted "in perfect good faith," as the statute requires, with his creditors.

Questions similar to that presented here have been before this court. In re Waxelbaum, 101 Fed. 228; In re Williamson (in the Northwestern division of this district) 114 Fed. 190, and In re Stephens (in this division) 114 Fed. 192. In the Williamson Case referred to, this language is used:

"In Georgia the exemption from levy and sale provided by statute will not be allowed unless the person claiming the same comes into court with clean hands; and certainly, in order to justify the allowance of an exemption out of a stock of goods, as against the creditors who sold the goods with which the business has been conducted, a case should be shown of fair dealing on the part of the debtor."

I think the conclusions reached by the referee are fully justified by the record in this case. As I was impressed with the argument of counsel for the bankrupt that he had not had opportunity to present the bankrupt's condition prior to June, 1901, I have, as stated, confined my examination of the case to the condition of the bankrupt at that time, and to facts which are developed subsequent thereto, and really mainly as to occurrences at the time and just before the failure of the bankrupt, which seem to me amply sufficient to justify the refusal of the exemption claimed.

It is well understood that the court will not interfere with a finding of the referee on the facts of a case unless it is manifestly erroneous, and certainly this cannot be said of the referee's report in this matter. The action of the referee denying the exemption is approved.

CARTERSVILLE LIGHT & POWER CO. v. MAYOR, ETC., OF CITY OF CARTERSVILLE, GA., et al.

(Circuit Court, N. D. Georgia, N. W. D. March 13, 1902.)

No. 3.

PRELIMINARY INJUNCTION—GROUNDS—QUESTIONS CONSIDERED ON APPLICATION FOR.

Where it appears on an application for a preliminary injunction that doubtful questions, both of fact and law, are involved in the case, the court will not enter upon the merits, but will grant the injunction, if necessary to preserve the status of the parties until the final hearing.

In Equity. On motion for preliminary injunction.

Gray, Brown & Randolph, for complainant.

John H. Wilkie and J. M. Neel, for defendants.

NEWMAN, District Judge. A brief statement of the facts in this case will be sufficient for the purposes of the decision now made. On August 6, 1888, the city of Cartersville, Ga., entered into a contract with the Orient Illuminating Company by which the city granted to the illuminating company the exclusive privilege of furnishing gas and lighting the city at a fixed price for the period of 20 years. The contract also provided that upon the request of the city, and under certain circumstances, and upon certain conditions, the Orient Illuminating Company should erect and operate an electric lighting plant in the city of Cartersville, in which case the exclusive privilege of lighting the city should be extended for 20 years from the date of such request. Subsequently the rights and privileges of the Orient Illuminating Company were, with the consent of the city, transferred and assigned to the Cartersville Improvement, Gas & Water Company, which latter company erected and put in operation a gas plant in the city of Cartersville, and the same was accepted by the city. In October, 1888, the gas and water company executed a mortgage upon all of its property, rights, easements, and franchises to the International Trust Company of Boston, Mass., to secure an issue of $100,000 of bonds. This mortgage was afterwards foreclosed in this court, and all of the property mentioned therein was sold under order of the court, and bought by John W. Akin and assigns, on January 5, 1895, and afterwards transferred by said Akin and assigns to the Cartersville Light & Power Company, the complainant in this case. In 1894 the International Trust Company of Boston sought to amend its original bill for foreclosure of the mortgage by making the city of Cartersville a party defendant thereto, and asking for damages against the city for the breach of the contract of August 6, 1888, on account of the city's repudiation of the contract and refusal to comply with its provisions, which amendment was stricken on demurrer. 63 Fed. 341. In 1898 Norbert Becker, the president of the complainant company, purchased all of its capital stock, since which time the company has continued to furnish gas and to light the town of Cartersville. On May 15, 1901, the mayor and aldermen of the city of Cartersville passed a resolution providing that an election be held in the city of Cartersville to pass upon the question of issuing bonds for the purpose of erecting an electric lighting plant to furnish light for the city. The election was duly held on June 22, 1901, and the result declared to be in favor of issuing bonds and erecting an electric lighting plant to provide light for the city of Cartersville; whereupon the complainant filed its bill to enjoin such action by the city, and to require it to specifically perform its original contract of August 6, 1888. This case has now been heard on the bill, answer, certain records and documents, and ex parte affidavits, on an application for injunction pendente lite.

If it was clear that the plaintiff would not, on the final hearing, be entitled to an injunction, it would be proper to determine this controversy now on its merits; but such is not the case. There are very interesting and doubtful questions of law involved, and sharp conflict in the evidence as to some very material facts.

Since the oral argument of the case counsel on both sides have furnished me with full and elaborate briefs. With the benefit of these

I have, as soon as opportunity offered, gone over this entire record, and my judgment is that it is a case which should not be disposed of on this application for preliminary injunction. It should not be determined on its merits until the evidence can be taken by depositions on examination and cross-examination of witnesses. The proper course for the court in a case like this is to preserve the status until a final hearing can be had. The rule is stated in 10 Enc. Pl. & Prac. p. 1010, in this way:

"It is not proper, on an application for a preliminary injunction, to decide, or to consider with a view to a final decision, the merits of the controversy, especially where grave questions of law are involved; and the court should do no more than determine that the bill, assuming its allegations to be true, sets forth facts sufficient to warrant the issuance of an injunction."

To the same effect is the case of New Memphis Gas & Light Co. v. City of Memphis (C. C.) 72 Fed. 952; and it is also very strongly stated by the circuit court of appeals for the Eighth circuit in City of Newton v. Levis, 25 C. C. A. 161, 79 Fed. 715.

An injunction may be issued to remain of force pending the litigation, unless counsel can continue the agreement which has heretofore existed between them to the effect that the city of Cartersville will take no further steps towards issuing bonds or erecting its own electric light plant until this case is determined.

FOSHA et ux. v. WESTERN UNION TEL. CO.

(Circuit Court, W. D. Pennsylvania. April 26, 1902.)

No. 18.

FEDERAL COURTS—JURISDICTION—RESIDENCE OF PARTIES—WAIVER OF OBJECTIONS.

Act March 3, 1887 (24 Stat. 552), as corrected by Act Aug. 13, 1888 (25 Stat. 433), providing that "no civil suit shall be brought" before either a district or circuit court of the United States "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or defendant," confers a mere personal privilege or exemption on the defendant, which he waives by a general appearance to the suit.

John O. Petty, for plaintiffs.
J. S. & E. G. Ferguson, for defendant.

ACHESON, Circuit Judge. The first section of the act of March 3, 1887 (24 Stat. 552), as corrected by the act of August 13, 1888 (25 Stat. 433), gives, generally, to the circuit court of the United States, jurisdiction of controversies between citizens of different states where the matter in dispute exceeds the sum of $2,000 exclusive of interest and costs. This case presents such a controversy. Therefore we have here a controversy of which a circuit court of the United States has jurisdiction. Railroad Co. v. McBride, 141 U. S. 127, 131, 11 Sup. Ct. 982, 35 L. Ed. 659. Now, upon the authority of a long line of decisions, it must be held that the provision of the statute,

"no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," merely confers a personal privilege or exemption which a defendant may waive. Toland v. Sprague, 12 Pet. 300, 330, 331, 9 L. Ed. 1093; Ex parte Schollenberger, 96 U. S. 369, 378, 24 L. Ed. 853; Railroad Co. v. McBride, supra; Railroad Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829. And it must also be accepted as a settled principle applicable to the act of 1887–88, that the objection that the suit is brought in the wrong district is waived by the defendant by a general appearance to the suit. Levy v. Fitzpatrick, 15 Pet. 167, 171, 10 L. Ed. 699; Foote v. Association (C. C.) 39 Fed. 23; 2 Enc. Pl. & Prac. 639; Southern Pac. Co. v. Denton, 146 U. S. 202, 206, 13 Sup. Ct. 44, 45, 36 L. Ed. 942. In the last-cited case the supreme court said: "It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction." Here, at the institution of the suit, the plaintiffs filed their statement of claim, which disclosed as well the diverse citizenship—that they were citizens of the state of West Virginia and the defendant a corporation of the state of New York—as the cause of action. The defendant, with full knowledge of the facts, entered its general appearance; and it was not until nearly two months later, and three days after the expiration of the time within which a new action could be brought, that the defendant, by this plea to the jurisdiction, raised the objection that the suit was brought in the wrong district.

The plea to the jurisdiction is overruled, with leave to the defendant to plead to the merits within 20 days.

UNITED STATES v. LEUNG SAM. SAME v. LEE YEE et al. SAME v. LEUNG FOO et al.

(District Court, W. D. New York. March 13, 1902.)

1. DEPORTATION OF CHINESE—FINDINGS OF COMMISSIONER—REVIEW.
   A finding of a United States commissioner that a Chinese person is not lawfully in the United States will not be disturbed unless clearly against the weight of evidence.
2. SAME—WHO ENTITLED TO REMAIN IN UNITED STATES.
   A person born in the United States, of alien Chinese parents, permanently domiciled here, is a citizen of the United States, and cannot be excluded therefrom or denied the right of entry.[1]
3. SAME—EVIDENCE—SUFFICIENCY.
   The father of a deported Chinaman testified that he had been in the United States 30 years; was married in San Francisco and had one child, the one in question; that at the age of 12 the boy's mother re-

[1] See Aliens, vol. 2, Cent. Dig. § 83; 1899B Dig. § 5 [c]; Citizens, 1898 Dig. § 2 [d].

turned to China, the boy remaining and accompanying his father to New York, where he lived with his father three years, and then obtained employment with a third party, working for him five years; that shortly thereafter the boy returned to China to visit his mother, staying three years. He testified that he had received letters from the son while in China, but could not produce any of them. The son testified that he was born in San Francisco; that he visited his mother in China in 1898, remaining until 1901, when he returned, landing in Vancouver, and paying the head tax, and coming into the United States from Canada. No other testimony was offered in his behalf. *Held*, that the commissioner's order deporting the son would not be disturbed.

Charles H. Brown, U. S. Dist. Atty.
Roswell R. Moss, for defendants.

HAZEL, District Judge. This is a proceeding for review of five orders of deportation of Chinese persons made by United States Commissioner Dyott in each of the above-entitled cases. I have examined the evidence upon which the orders of removal are based, and the authorities of analogous cases, to which I am referred by counsel. It does not appear from the record that the commissioner arbitrarily exercised the power given him by the statute in cases of this nature, or that he was lacking in conscientious and sound judicial discretion. It was entirely for the commissioner to determine the credibility of the witnesses and the sufficiency and weight of their testimony, and it is uniformly held that his finding will not be disturbed unless clearly against the weight of evidence. Quock Ting v. U. S., 140 U. S. 417, 11 Sup. Ct. 733, 35 L. Ed. 501; Elwood v. Telegraph Co., 45 N. Y. 549, 6 Am. Rep. 140; Kavanaugh v. Wilson, 70 N. Y. 177; Gee Fook Sing v. U. S., 1 C. C. A. 211, 49 Fed. 147; In re Jew Wong Loy (D. C.) 91 Fed. 240; U. S. v. Chung Fung Son (D. C.) 63 Fed. 261; Lee Sing Far v. U. S., 35 C. C. A. 327, 94 Fed. 834; In re Louie You (D. C.) 97 Fed. 580.

It is undoubtedly true that a person born in this country of Chinese parents, who are permanently domiciled here, though aliens, is a citizen of the United States, and cannot be excluded therefrom or denied the right of entry. U. S. v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. But the question here is whether the evidence offered on behalf of Leung Sam is sufficiently clear and satisfactory upon that point to justify the court in deciding that the commissioner, who had the witnesses before him and heard their testimony, erred in the exercise of sound judicial discretion in entering judgment remanding him. Leung Fong testifies that he came to this country 30 years ago, was married in San Francisco, and had one child, a boy. At the age of 12 his mother went back to China, the boy remaining in this country, accompanied his father to New York City, and lived with him for three years, and then obtained employment with Leung Hor, by whom he was employed for a period of five years. Shortly thereafter he returned to China to visit his mother, and remained for three years. On cross-examination he testifies that, although he received letters from his son while he was in China, he has none that he is able to produce; that his son never took out any papers to show his right to remain here. Leung Sam gave testimony in his own behalf. He states that he was born in San Francisco, and that he is a son of Leung

Fong; that in 1898 he returned to China to visit his mother; that he remained there until October, 1901, when he returned to this country, landing at Vancouver, and paid the head tax; that he came, with the other defendants, into the United States from Canada. That is substantially all the evidence offered in his behalf. No presumption arises from the presented facts that Leung Sam was born in the United States. His right to remain must be affirmatively established to the satisfaction of the commissioner who heard the case, and in whom congress lodged the power and duty to remand. Undoubtedly the commissioner was impressed by defendant's failure to insure his safe re-entry to the United States when, as he claims, he departed therefrom in 1898. Assuming his contention to be true, he would be presumed to have knowledge of the drastic inhibitions of the exclusion act, and therefore the inference is warranted that he would have exercised diligent care to establish his right to entry. Payment by him of a head tax at Vancouver; failure to show by disinterested proof that he formerly resided in this country, which undoubtedly would have been available had he resided in New York for 20 years, as he testified; unfamiliarity to any extent with the English language; failure to show facts from which it could be fairly assumed that he had an acquaintance with the environments of New York or San Francisco,—were pertinent circumstances which justified the commissioner in concluding that an imposition was attempted, the consummation of which it was his duty to prevent.

The case at bar is analogous to that of Gee Fook Sing v. U. S., supra. In that case the petitioner's right to remain in the United States on account of his birth therein was quite similar to that urged here. I quote from the opinion:

"As to each of the cases, we consider that the evidence as a whole does not make as good a case for appellant as it might be reasonably expected a man would make out in his native city, after time for ample preparation, and the case is such as any impostor could easily make. We hold that when, upon a candid consideration of all the evidence in a case, there appears to be room for difference of opinion as to the material facts in issue, this court ought not to reverse the judgment on a question of fact alone."

A cursory examination of the evidence offered in behalf of the other defendants to establish their right to remain in this country reveals the presence of sufficient improbability so that the commissioner was justified in giving it no weight.

I have read the exhaustive brief of defendant's counsel, but, as the other questions raised have been fully passed on and decided adversely by undoubted authority, it seems to me unnecessary to give these questions any further consideration.

The order of removal in each case is affirmed.

JACOBSEN et al. v. DALLES, P. & A. NAV. CO.

(Circuit Court of Appeals, Ninth Circuit. April 7, 1902.)

No. 728.

COLLISION—STEAMER AND SAILBOAT.

Where it was found, on evidence which supported such finding, that a sailboat, when being overtaken by a steamer, was on a course nearly parallel to that of the steamer, and at such a distance as to involve no danger of collision if both vessels kept their courses, the steamer was not in fault for not reducing speed, although, by the navigation rules (20 and 23), she was required to keep out of the way, and, "if necessary, slacken her speed or stop or reverse," since by rule 21 the sailboat was required in such case to keep her course and speed; and the latter must be held solely in fault for a collision brought about by her changing her course and attempting to cross the steamer's bows, when, on seeing such maneuver, the steamer at once reversed, and did all that was possible to avert the collision.[1]

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

See 93 Fed. 975; 106 Fed. 428.

T. J. Geisler and W. W. Cotton, for appellants.

Carry & Mays, for appellee.

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

MORROW, Circuit Judge. It appears that on August 14, 1898, a collision occurred between the river steamer Sarah Dixon, operated by the respondent, and a sailboat, in charge of the libelant Jacobsen on the upper Columbia river, resulting in the wreck of the sailboat, personal injuries and loss of property to the libelants Jacobsen and Forde, and the death of Hansen, whose administrator appears herein as a libelant.

The steamer was going up the river to the Dalles, Or. The sailboat was beating down the river towards White Salmon, Wash. The day was bright and clear, but a strong wind was blowing up the river, so that the sailing vessel was obliged to tack to and fro across the river to keep under way and proceed on its course.

The libelants charge that, by reason of the courses of the vessels lying in opposite directions, and the fact that it was necessary for the sailing vessel to tack and cross the course of the steam vessel, it became the duty of both vessels to comply with the rules of navigation for such cases established and provided; that under these rules it was the duty of the steamboat to proceed cautiously and so navigate as to keep out of the way of the sailing vessel, by directing its course astern of the sailing vessel, by timely slackening of speed, or stopping; that the officers of the steamboat did none of these things, and that the collision was therefore wholly occasioned by the negligence and improper conduct of the respondent, its agents and servants. It is alleged that the libelant Jacobsen was and is an experienced sailor,

[1] Collision rules, see notes to The Niagara, 28 C. C. A. 532; The Mount Hope, 29 C. C. A. 368.

and properly navigated said sailing vessel, and that the libelant Will E. Forde and one Harper L. Hansen were with him in said sailing vessel.

The respondent answers these charges by averring that on said 14th day of August, 1898, the steamer Dixon, being in good condition, well equipped and manned, arrived at a point on the Columbia river opposite Eighteen Mile Island, going up stream, and on a course slightly east of north, nearer to the Washington shore than to the Oregon shore; that at that point there appeared in view a small fishing boat under sail, bearing down the river and diagonally crossing on a course from near Mosier Rock, on the Oregon side, toward Eighteen Mile Island, on the Washington side, and on such a course as would have carried her far behind the said steamer; that the wind was blowing up stream at an average rate of 25 miles an hour, and when said sailboat had approached within some 500 feet of the path of the steamer, and in advance of her, the course of the sailboat was changed by tacking to starboard, so as to run on a course nearly parallel with the course of the steamer, but slightly converging toward the line the said steamer was pursuing; that on this latter course the sailboat was traveling in the same general direction and in advance of the steamer, and in such a position the steamer would have overtaken and passed her on the sailboat's port side, at an ample distance to have avoided any possible chance of collision; that when the steamer had almost overtaken the sailboat, and the latter was some 100 feet off the starboard bow of the steamer, the course of the sailboat was suddenly and without warning, and without any reason or excuse, turned to port, and so changed as to direct her course directly across the path of the steamer and under her bows; that the officers and crew of the steamer perceived that a collision was impending, and signaled and shouted to warn the sailboat occupants of the danger, and at once stopped and reversed the engines of the steamer, and began to back her, and turned her aside to avoid the accident; that the steamer was under full control, but was a large and heavy vessel, and was running with the wind astern, so that, in spite of the efforts made as aforesaid, she continued to go forward after the engines were reversed and the wheel turning backward, and struck the sailboat about 10 feet from the bow. It is averred that the said Jacobsen, in charge of the sailboat, was in an intoxicated condition, and utterly unfit to manage the boat; that he could have avoided any accident by not attempting to cross the bows of the steamer, or by promptly diverting the course of his boat when warned and signaled that a collision was impending. It elsewhere appears that the steamer was some 140 feet long, and the sailboat about 26 feet in length.

A number of witnesses were called, and testified in the presence of the court as to the change of course of the sailboat, the action of the steamer thereafter, and as to the intoxicated condition of the libelant Jacobsen. Jacobsen and Forde, libelants herein, testified that the course of the sailboat was not changed prior to the collision, and that Jacobsen had not been drinking. But their testimony was discredited by the court below, it being entirely unsupported by the testimony of the other witnesses, and, in fact, impeached by some, while the circum-

stances of the case and the proofs made warranted a finding in favor of the respondent. The court therefore found that the officers and agents of the steamer were without fault, and that the said collision was wholly caused by the negligence and want of care of the libelant Jacobsen. The libel was accordingly ordered dismissed. Upon petition for rehearing, the cause was reargued before the court, and reconsidered by the court, resulting in the same decree as before.

The libelants assign as error these findings of the court, and the failure of the court to apply the rules of navigation to the facts of the case, under which, it is claimed by the libelants, it was clearly the duty of the steamer to keep out of the way of the sailboat. These rules are contained in the act of June 7, 1897 (30 Stat. 96, 101), and are as follows:

"Art. 20. When a steam vessel and a sailing vessel are proceeding in such direction as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

"Art. 21. Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

"Art. 24. Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

There is some question whether these rules were intended to apply to a case where the sailing vessel is a mere rowboat equipped with a sail; but it will not be necessary to discuss that question in this case. It will be assumed that these rules do apply to the navigation of such a vessel. What, then, do these rules require? They require, among other things, that, when a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. This is a very important rule in the law of navigation, and often prevents collisions between steam vessels and sailing vessels; or, where collisions do occur between such vessels, determines their duty and liability. But an appeal to this rule does not determine any question of negligence in this case upon the facts as found by the court. The court found as a fact that the sailboat was proceeding on a course with respect to the steamer which did not at first involve a risk of collision, but that it changed its course and sailed directly into the pathway of the steamer, incurring the peril of an immediate and unavoidable collision. The finding of the court in this respect is as follows:

"That, at the time of the collision mentioned in the amended libel and answer, the respondent was the charterer and was operating the steamer Sarah Dixon, near Eighteen Mile Island, on the Columbia river, when there appeared in view a small fishing boat under sail, in which were the libelants Jacobsen and Will E. Forde and Harper L. Hansen, now deceased, which said sailboat was in charge of the said Jacobsen, and was bearing down the river, and on a course from near Mosier Rock, on the Oregon side, toward the shore opposite Eighteen Mile Island, on the Washington side of the river, and on such course as would have carried her behind the said steamer, the wind at the time blowing up stream; and, when the said small boat had approached within some distance of the above steamer, she changed her course

by tacking to the starboard, so as to run on a course nearly parallel with the course of the steamer, but slightly converging toward the line the steamer was pursuing, traveling in the same general direction in advance of the steamer, and thereupon the course of the said sailboat was again so changed when the steamer had almost overtaken the said sailboat as to direct her course across the path of the steamer and under her bows; the day being bright and clear and both vessels distinctly visible."

The conduct of the sailboat, under these circumstances, was not justified by any rule of navigation. On the contrary, it violated the rule which requires that where, by other rules of navigation, one of two vessels is to keep out of the way, the other shall keep her course and speed. This rule has been construed as requiring that a sailing vessel in the near presence of a steamer must beat out its tack where there are no exigencies of navigation to prevent it. The W. C. Redfield, 29 Fed. Cas. 477; The Clara Davidson (D. C.) 24 Fed. 763; The Philadelphian, 10 C. C. A. 127, 61 Fed. 862; The Illinois, 103 U. S. 298, 26 L. Ed. 562; Spencer, Mar. Coll. § 91. In the case of The Illinois, supra, the supreme court said:

"Because a steamer must keep out of the way of a sailing vessel, it by no means follows that a sailing vessel may unnecessarily throw herself across the bow of an approaching steamer. It is as much the duty of the sailing vessel to be diligent in the performance of her duty as it is that of a steamer to be mindful of hers."

Under the facts as found by the court in the present case, the act of the sailboat in attempting to cross the bow of the steamer was an act of culpable negligence, rendering it responsible for the collision.

With respect to the findings of fact, it is sufficient to say that a reading of the evidence satisfies us that not only is the evidence sufficient to support the findings of the district court, but the presumptions and weight of evidence are in favor of the conclusions reached in the decree dismissing the libel.

The decree of the district court is therefore affirmed.

MEXICAN CENT. RY. CO. v. WILDER.

(Circuit Court of Appeals, Fifth Circuit. March 4, 1902.)

No. 1,073.

1. APPEAL—REVIEW—HARMLESS ERROR.
   Where a railroad company by plea tendered an issue as to the condition and inspection of its roadbed and track, and evidence on the subject was introduced by both parties without objection, it was not prejudicial error for the court, over defendant's objection, to permit an engineer who had been employed on the road at the time referred to to testify that it was common for him to receive orders at terminal stations to look out for broken rails.

2. SAME—QUESTIONS NOT PRESENTED TO TRIAL COURT.
   Defendant railroad company pleaded a release in defense to an action for a personal injury, and plaintiff in his replication admitted the signing of the same, but denied its validity. It did not appear from the record that the release was introduced in evidence, that any evidence was taken with reference to it, or that it was in any manner brought to the attention of the court. *Held*, that in such state of the record the appellate court would not consider an assignment of error based on the failure

of the trial court to make such release the basis of a special instruction directing a verdict for defendant.

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

T. A. Falvey and Waters Davis, for plaintiff in error.

Thomas J. Beall and Wyndham Kemp, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. This is a suit brought by Halbert Wilder to recover damages from the railway company for personal injuries sustained by him about March 17, 1900, through the derailment, near Puerto Hill, in the state of Chihuahua, republic of Mexico, of one of the railway company's freight trains on which Wilder was employed as a brakeman. It was charged that said train broke or struck a broken rail, about six feet of which was thrown out of place; that said rail was old and worn; that the cross-ties thereunder were old and out of repair, thereby causing the derailment aforesaid. The railway company answered with a general denial, and a plea to the effect that the plaintiff's injuries resulted through one of the risks incident to his employment, and that the railway company's track and roadbed were properly constructed, inspected, and maintained, and that the rails and cross-ties of said company's track were of good and suitable quality; that said rails were to all appearance good and sufficient for the purpose, and no inspection could have determined or discovered any vice or fault therein; that caution and prudence were exercised in keeping in condition and inspection; and that the accident was fortuitous, without fault or neglect on the part of the railway company. And for a further plea the railway company pleaded a written agreement entered into by Wilder whereby he relinquished all his right and claim to damages for a valuable consideration, and to the said plea annexed a copy of a written release, purporting to be signed by Wilder and witnessed by the surgeon in charge of the railway company's hospital, and executed the 21st of May, 1900, wherein it is recited as follows:

"For and in full release, discharge, and satisfaction of all claims, demands, or causes of action arising from or growing out of an accident occurring at kilometer 1,727 on the Chihuahua division of the Mexican Central Railway, March 17, 1900. While riding on caboose, car was derailed by broken rail, turning over, causing injuries to head, producing concussion of the brain. Received of the Mexican Central Railway Company, Limited, one dollar in full payment of above claim ($1.00). In consideration of the payment of said sum of money, I, Harry Wilder, of Fairfield, state of Iowa, United States of America, hereby remise, release, and forever discharge the company of and from all manner of actions, causes of action, suits, debts, and sums of money, dues, claims, and demands whatsoever, in law or equity, which I ever had, or now have, against said company, by reason of any matter, cause, or thing whatever, whether the same arose upon contract or upon tort."

To this last-mentioned plea Wilder filed a replication, denying that the company's track and roadbed were properly inspected and maintained, and admitting his signature to the release, but alleging that at the time of—

"* * * the execution of said instrument he was suffering from the severe injuries which he had sustained through the negligence of the defendant company in his back and spine and head, and that he was so enfeebled in mind and body at the time of the execution of instrument that he was incapable of understanding the contents of said instrument, if the same was read to him, which he does not now remember; that he is informed and believes, and so charges, that he was in a condition of unconsciousness for several weeks after he was injured, and while confined to his bed in the hospital of the defendant company in the city of Chihuahua, Mexico; that the said instrument of release referred to was presented to him by the company's physician, in whose charge he was a patient, being treated, as he is informed and believes, for concussion of the brain, from which he has not entirely recovered; and plaintiff charges and avers that the execution of said instrument at the time, in the manner and under the circumstances, was a fraud upon his rights, and was and is without any sufficient consideration to support it. Plaintiff avers that, owing to his enfeebled condition of mind on the date of the execution of said instrument, he did not know or realize the extent of his injuries, both physical and mental, and that the same were continuing and permanent. Wherefore plaintiff says that said instrument so signed by him, under the conditions and circumstances aforesaid, was procured by fraud, as aforesaid, and ought not to be held to bar the plaintiff's action."

On the trial of the case, as shown by first bill of exceptions, several witnesses were examined on behalf of plaintiff and for the defendant in the court below touching the condition of the railway company's track at the place where the accident occurred, and as to the general condition of the track in the neighborhood, all apparently without objection. Among other witnesses called was one George A. Lambeth, for the plaintiff, who was examined, cross-examined, re-examined by the plaintiff, recross-examined, re-examined again by the plaintiff, and recross-examined, and subsequently was recalled and re-examined by the plaintiff, recross-examined, twice again re-examined, and again recross-examined. In his evidence he testified, apparently without objection, among other things, as follows:

"I had been running on the Mexican Central Railway as engineer between four and five years. I know where kilo 1,732 is on the Chihuahua division. It is about six kilometers this side of Puerto,—north of Puerto. I had been running over that piece of road as engineer, off and on, ever since been with the company,—between four and five years. I was well acquainted with the condition of the roadbed, ties, and track at that place,—that kilo,—I guess. I was no more familiar with kilo 1,732 than any other part of the road. I had been running over it off and on between four and five years. The rails that were on that kilo were steel rails, 56 pounds to the yard,—56 pounds steel. I do not know just how long those rails had been in use, except ever since the track was laid there. The rails on the line of the road at that place were old ones. As to the condition of the ties just under that particular rail I could not say. I passed two or three days after the wreck, and it looked to be in a bad condition. The ties were badly decayed. I passed on the 20th, the third day after the wreck occurred. I saw where the wreck occurred, and the ties were pretty badly decayed. On every trip at terminals we got orders to look out for broken rail on every kilo. That would be the nature of the order we would get. That was common, and included this kilo."

Cross-examination:

"I mean that I would get orders at the different terminals to look out for broken rail on 1,750, another time for kilo 1,872, etc.,—different kilos on the same section of the road,—not that this kilo was any worse than any others, but that the whole track from here to Chihuahua was in bad condition.

They had the same kind of rails from here to the end of this division at that time,—56 pound rails. The rails for the whole division were apparently of the same age, in the same condition. I did not make any complaint about this kilo merely, but the whole division was in about the same condition. We would strike places where the ties were not so bad. This kilo (1,732) was no worse than any of the others,—all bad. I was not any more familiar with this kilo than any other kilo. When running over it I could not discern that it was any worse than any of the rest. If I ever got an order to look out for any broken rail on kilo 1,732, I cannot remember the date, but it was issued over the road master's signature. I do not know that I ever got an order to look out for a broken rail on that particular kilo. * * *"

Recross-examination:

"I passed by there three days after the accident on an engine. They had put on new ties before I got there. The engine and cars had torn up the others,—ground them up considerably. The ties were crumbled up where they were decayed. I cannot say they had new rails in before I got there. Probably a different rail had been taken from a side track to repair it. I reduced speed down to a very slow walk—probably to three or four miles an hour—where the wreck had occurred. I did not stop to inspect the place,—just what I could see from my engine."

Redirect examination:

"The ties that were there as I saw them were rotten. * * * The ties that were thrown out from the place of this wreck were all rotten. They seemed to extend from where the wreck began to where it stopped. They repaired the track entirely all along, and put in new ties, but they seemed to be in about the condition it was, I could see. The ties seemed rotten all along the track. I could only see, as I passed over where they were taken out, where the good ones had been put in, but they seemed to be rotten where they were thrown out. Their condition was all rotten, it seemed to me. They had a little crust over the top of them where the sun had shone on, but underneath that, say 1½ inches, they were all rotten at the ends. That extended the whole distance. I was traveling at a rate of speed that I could see the condition of the ties just as well as if I was walking along. Of course, I could not see right down under the engine, but I could see ahead, and see how the track was being repaired, and how it was being got in line."

Cross-examination:

"I could not tell the particular place where the rail broke. I do not know the condition of the ties under the particular place where the rail broke. I could only tell from the condition of the ties thrown out. They had repaired right over where the cars jumped the track. I do not know where the rail was broken, but where the cars jumped the track. They had repaired the ties from the rails where the wheels of the cars got off the irons and on to the cross-ties. I could not tell where the cars got off the track. Every tie apparently had been ground up and thrown out. It seems to me that all the ties, commencing where they began to be broken up by the wheels of the cars, had been thrown out, but I could not say positively. Under the circumstances, I could not observe so closely as to be able to say. It seemed to me as if all the ties had been removed. I could not tell about what was the number. The whole mass was piled up, and I could not tell whether they had ever been in there or not. I do not know the condition of the broken rail, or the condition of the ties underneath the broken rail. I could not say whether the ties under it were removed or not."

Redirect examination:

"I do not know where that particular rail broke, nor where the particular broken rail was, but where the track had been repaired up all along the line. I was coming north. Of course, I could see where they had commenced repairing the track and where it ended. I could not see where the new rail had commenced. As I came on, the ties at the north end right

opposite that place were in about the same condition. In fact, the north section they were about all the same condition. You could not say just how they were, because the top of the ties seemed to be sound when not more than an inch below. They were simply dry on top, but underneath were rotten, and by just passing over it with your finger you could see whether they were sound or not; but you could get down—I have very often done that—to pick the spikes out. I could not tell whether these ties right opposite the place where they had been repairing on the north end were decayed or not. The ones taken out were all rotten. They would not have left them in while rotten. They were nothing but dust. They extended up to where I could see the new rails commenced. The ties they had taken out were rotten. They were all broken into dust. I could not tell you they had been ties. They extended the whole length, from the beginning to the end. They had been thrown backwards and forwards, and you could not tell just where they came from. That was their general appearance,—general condition. To all appearance, in passing right over them, they appeared to be sound, but only about an inch and half before you would find that the ties were decayed. The top of the ties where the sun had come out and dried it after the rains would leave a crust on top, but underneath that the ties,—there was nothing underneath them; all of the rest of the tie appeared to be rotten. Those extending along the sides—extending from the new rail—were all rotten."

A second bill of exceptions shows that some time during the examination of the said George A. Lambeth he was asked by the plaintiff's counsel the following question:

"About the time and before this wreck occurred I will ask you with reference to the condition of the rails that you say had been in use so long, as to whether there was any other breaking of rails, whether that was common or uncommon, and what your orders were with respect to running over the road, if you had any?"

The defendant objected to this question, assigning as a reason that it was not competent to prove other accidents and notice with reference to the breaking of other rails at different times and places; but the objection was overruled, and the witness permitted to answer, and did answer, as follows:

"A. I had such instructions,—got them at every trip. At terminals we got orders to look out for broken rail on every kilo. That would be the nature of the order we would get. Q. Was that common? The Court: Did that include this kilo? A. Yes, sir."

This ruling of the court was duly excepted to, and is the substance of the first assignment of error in this case. Considering that the railway company by its plea tendered an issue as to the condition and inspection of its roadbed, and that evidence was offered in relation thereto by both plaintiff and defendant unobjected to, we are inclined to the opinion that the ruling of the court admitting this particular question propounded to witness Lambeth, and the answer thereto, was correct; but, whether correct or not, we are satisfied that, in the mass of evidence offered on both sides on the condition of the railway company's roadbed, the admission of the answer to the question propounded to Lambeth did not prejudice the railway company to any appreciable extent.

The only other assignment of error in the case is as follows:

"(2) The court erred in submitting this cause to the jury, and erred in refusing to give defendant's special charge wherein it asked the court to instruct for defendant, for the reason that under plaintiff's allegations the negligence of defendant in having rotten ties in its track was the basis of plain-

tiff's claim, and for the reason that the testimony wholly failed to establish this allegation or to show that plaintiff was entitled to recover a verdict herein, as shown by defendant's last bill of exceptions."

Counsel contends that the court erred in submitting this case to the jury, because no explanation or avoidance of the recital and release pleaded in the railway company's first amended original answer was proven by the plaintiff, counsel contending that the plaintiff had relieved the defendant of the necessity of any proof of this instrument by admitting that he had signed the same in the replication filed to the first amended original answer. The record does not show that the defendant offered said release in evidence, and no reference appears to have been made to it during the trial either in the evidence offered or in the charge of the court, nor in the motion for a new trial, nor in the special instructions asked for by the defendant. Not having been offered in evidence by the defendant, nor in any wise called to the attention of the court and jury on the trial, we are of opinion that no error can be predicated upon the failure of the court to make it the basis of a special instruction to find a verdict for the defendant. While not offered in connection with the release, there was undisputed evidence showing that at the date of the release Wilder was in no condition of mind and body to make a valid contract.

We have herein recited enough of the evidence adduced on the trial to show that the negligence vel non of the railway company in maintaining its track was properly submitted to the jury.

The judgment of the circuit court is affirmed.

THE NEWPORT.

(Circuit Court of Appeals, Second Circuit. March 18, 1902.)

No. 54.

1. MARITIME LIENS—TOWAGE SERVICES—CONTRACT FOR LIEN.
   Evidence *held* to sustain a finding that there was a common understanding between the parties to a contract for towage services to be rendered to a dredge and scows that the services were rendered upon the credit of the vessels and not of the owner.
2. SAME—JOINT LIEN FOR SERVICES RENDERED TO SEPARATE VESSELS.
   A joint lien cannot be enforced against a dredge and a number of scows used in connection therewith for towage services rendered to all the vessels, although they were rendered under a single contract.

Shipman, Circuit Judge, dissenting upon the facts.

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

This cause comes here upon appeal from a decree of the district court, district of Connecticut (107 Fed. 744), in favor of libelant for $1,947, with interest and costs, out of the proceeds of sale of a dredge and four scows.

Le Roy S. Gove, for appellant.

Howard H. Knapp, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The Bridgeport Towing Line is a partnership, of which John McNeil was managing partner. Morris B. Brainard was a contractor to dredge New London Harbor, and in 1899 hired of the towing line a tug to do the towing necessary for the dredge Newport and four scows, 6, 7, 9, and 10, in the harbor of New London, for the sum of $800 per month. The tug Confidence was sent to New London, and performed the required services for the dredge and scows from August 3, 1899, to December, 1899. A balance of $1,947 was and is unpaid. Brainard was a nonresident of Connecticut, and was apparently not a permanent resident in any state. He made the agreement by letter and telephone or telegraph, and in October, 1899, wrote Capt. McNeil to send bills for towing made out for the months worked and against the dredge worked for. He was in poor credit, in straits for money, and the services were rendered upon the credit of the dredge and scows. In December, 1899, he became deeply insolvent, his creditors, among them the Bridgeport Towing Line, libeled the vessels, and his conduct showed that he knew that the debts had been incurred upon their credit. The claims amounted to some $15,000 or $16,000. By agreement of the claimant, Laughlin, and all the other parties, the dredge and scows were sold, and the proceeds, amounting to some $9,000 or $10,000, were paid into court. The Bridgeport Towing Line libeled the dredge and scows in one libel for its entire debt. A decree for $1,947, interest and costs, amounting to $2,180.93, against the dredge and scows and their avails, was rendered, from which Joseph Laughlin, the claimant, appealed. He had made claim to the scows, averring that he was their owner, and had filed a libel against the dredge for moneys advanced for her benefit and for the charter hire of the scows. The commissioner found that the evidence did not show a bona fide valid transfer of the scows to Laughlin, and dismissed his claims for advances and charter hire. The disallowance was sustained by the court. The evidence fully justifies the finding of the commissioner that the alleged transfer was fraudulent and void as against the creditors of Brainard. From the decree of the court dismissing his libel Laughlin did not appeal, and he is now, as against creditors, without title to any of the avails of the vessels.

We agree with the district judge, who said that "upon the practically undisputed evidence" he found "that there was a common understanding and intention that there should be a lien for these supplies and repairs." The case is eminently one where "personal credit of the owner, instead of the vessel, was in the highest degree improbable." The Havana (D. C.) 54 Fed. 201.

The claimant specifically objected to the libel, and attacks the decree because it established a joint lien against the avails of the five vessels, and for services rendered by contract to or for the benefit of a number of vessels a joint lien is not permissible, and should not have been sought in a single libel.

In Saylor v. Taylor, 23 C. C. A. 343, 77 Fed. 476, the court of appeals for the Fourth circuit affirmed a decree of the district court for the Eastern district of Virginia, which sustained a libel in be-

half of the owners of a tug for services in towing a dredge and scows, and decreed a lien on the proceeds of the sale of the dredge and scows, but it does not appear that any question was raised as to the validity of a joint lien. In Munn v. The Columbus (D. C.) 65 Fed. 430, the precise point was presented, libelant undertaking to enforce a supposed joint lien against a dredge and scows for the entire price of all the services rendered to these vessels and others of the same plant. The district court held that there could be no joint lien for several services. Appeal was taken to the circuit court of appeals for the Third circuit, which affirmed the decision below, saying:

"To sustain this libel would be to apply the law of admiralty lien in a manner for which there is no precedent. The cases cited for the appellant do not support his contention. The Alabama (C. C.) 22 Fed. 449, decided nothing but that a dredge which is used in connection with a scow is itself a vessel, within the maritime law; but, conceding this, it does not follow that several dredges and several scows, even when used together, constitute but a single vessel; and the cases which hold that the wrecking apparatus of a wrecking schooner (The Edwin Post [D. C.] 11 Fed. 602), the whaling boats of a whaling ship (Hoskins v. Pickersgill, 3 Doug. 222), and the boats carried on deck or towed astern a fishing schooner (The Merrimac [D. C.] 29 Fed. 157), may be regarded as part of the craft to which they respectively belong, are not authority for the proposition that a number of distinct vessels are to be treated as one thing, merely because they happen to be associated in the same enterprise."

We concur in this conclusion.

The circumstance that in the proceeding brought by Laughlin to enforce claim for advances and charter it was held that the transfer of the vessels to himself was not bona fide and void as to creditors does not change the situation. As against Brainard the transfer was valid. Laughlin is the claimant, has appealed, and is as much entitled to raise the objection as Brainard would be if he were claimant. What disposition may be made of the money in the registry of the district court—which that court decreed should be paid to the towing company—is a question which we cannot determine on the present record, since we are not advised whether all others who were held entitled to share in the proceeds were paid in full. As against creditors of Brainard, whatever title Laughlin got by the attempted transfer cannot avail him.

The decree is reversed, with costs, and cause remanded to the district court, with instructions to decree in conformity with the views expressed in this opinion.

SHIPMAN, Circuit Judge. I dissent from the conclusion of the majority of the court in the above-entitled cause, which reverses the decree, and directs the district court to enter a new decree in accordance with the opinion, because I think that the original decree should not be changed. I concur in the conclusion that a joint lien for the entire value of the services separately rendered to a number of vessels is not, as a rule, to be enforced against the whole number of vessels, although they were associated in one enterprise, and the services were performed under a single contract, but do not think that a reversal of the decree is called for under

the circumstances of this case, as disclosed in the opinion of the majority. Services were rendered by the libelant to the dredge and four scows, upon their credit, for which about $2,000 are due. The amount and value rendered to each vessel could have been ascertained by the district court. The record shows that the services were rendered about equally. The aggregate amount is unquestioned, and the money in the registry of the court due to other lienors has been distributed without objection.

Laughlin alone makes the point that, as the decree was for a joint lien, it should be reversed. The opinion of the majority finds that he is, as against creditors, without title to any of the avails of the vessels. He is entitled to raise the objection because there was a paper transfer of the scows to him from Brainard, but, as against creditors of Brainard, whatever title he got by the attempted transfer cannot avail him. In this position of affairs, Laughlin being the only appellant and being unable to gain any advantage by a new decree or to vary the old decree in favor of himself, and there being no other dissatisfied lienor, I see no advantage in reversing the decree or of having an additional hearing in the district court. The money now in the registry of the court from the avails of the libeled vessels equitably belongs to the Bridgeport company, complete justice will be done by an affirmance of the decree, and I do not think that the payment of this debt should be delayed by the interposition of this court.

LANGAN v. TYLER.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 42.

1. MASTER AND SERVANT—CREATION OF RELATION—VOLUNTARY ASSISTANCE OF SERVANT.

   One who renders temporary service in assisting a servant in his work, at the latter's request, without expectation of pay, and where the master had no knowledge of the performance of the services, and the servant no authority to employ help, does not thereby become a servant of the master so as to charge the latter with the active duty of providing him with a safe place in which to work.

2. SAME.

   Plaintiff's intestate, at the request of defendant's servant, employed to run an elevator in defendant's building, assisted the latter in taking apart an electrical machine used to furnish power for the elevator, which the servant thought did not work properly. The servant had no authority to have the work done, his instructions being to report any defects or needed repairs in all cases to defendant's agent in charge of the building. Neither defendant nor his agent had any knowledge of the service, which was rendered without expectation of pay. After the machine had been put together again and started, plaintiff's intestate was killed by the giving way of a hanger in the machinery room. *Held*, that the deceased was not a servant of defendant to whom the latter owed the duty of care in providing a safe place to work, and that defendant was not liable for his death, even though defendant may have been chargeable with the notice of the defective condition of the hanger.

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

This cause comes here upon a writ of error by the plaintiff below to review a judgment of the circuit court, Eastern district of New York, entered upon direction of a verdict in favor of defendant below. The facts appear in the opinion.

R. J. Moses, for plaintiff in error.

F. V. Johnson, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Plaintiff sued as administratrix of Thomas Langan, deceased, to recover damages, on the theory that the accident which caused his death was the result of negligence for which the defendant should be held responsible to his estate. Langan, a man 33 years of age, was the brother-in-law of Anthony Brennan, aged 22, who was in the employ of defendant. He himself was engaged running a stationary engine on premises a few blocks away from defendant's, and used to do odd jobs as he got a chance, putting in batteries and electric bells and repairing electrical apparatus. Brennan was employed in defendant's building 39 Great Jones street, having been hired by a Mr. Talmadge, who represented the owner as agent, in charge of the premises. Brennan's duties were to run the elevator and take care of the boiler and keep the place clean. He had been instructed that if anything was the matter with the machine, if he needed any assistance, he was to report to Talmadge; that, no matter what was out of order, he was to see him first. Talmadge used generally to come on Tuesdays to inspect the premises, though some times he would not come for two weeks. The accident happened on February 9, 1899. For some time prior thereto the elevator had been "running all right." Brennan testified that he ran the elevator throughout the day (February 9 from 7 a. m. to 5 p. m.); that he ran it the day before, and everything ran properly; that the only thing he noticed about it was that it did not make, as he thought, its proper speed; that in all other respects he saw nothing defective; he could control it to stop it anywhere he saw fit; that there was no apparent defect in it; and he ran it up till 5 o'clock, and the only objection he found was that it ran slowly. After he had shut down at 5 o'clock Brennan tried to telephone to Talmadge, but the latter was not in. He then, about 5:15 p. m., went where Langan was employed, and asked him to come over. On one occasion, about three months before the accident, when the commutator was sparking, he had, of his own motion, brought Langan over to fix it. He had subsequently mentioned this circumstance to Talmadge. On the occasion in question here, Langan came over to defendant's premises about 7 p. m., and went with Brennan into the machinery room. The two men took the machine apart, and after working over it about an hour put it together and started it. The details of the accident are not material,—decedent was killed by the giving way of a hanger; and there was evidence in the case, somewhat contradictory it is true, from which a jury might perhaps have reached the conclusion that the defendant was charge-

able with the knowledge that for some time past its fastening had not been secure.

The brief of plaintiff seeks to sustain a right to recover upon the principle that a master is bound to provide a safe place to work in, and is responsible to his employé for an injury sustained by the latter from a defect in the building where he works, which the employer knew of, or might have known of, by the exercise of ordinary care. The only question in the case, as presented here, is whether or not Langan's legal relation to defendant at the time of the accident was that of servant to master. Langan was not employed by Tyler, nor by Tyler's agent, Talmadge. He was a volunteer, assisting his brother-in-law at the latter's request, without expecting any compensation therefor from defendant. There are many cases in the books treating of the legal relation of a volunteer who undertakes to assist the servants of a master. Most of them deal with the question whether the master is liable to him for the negligence of the servants with whom he works. Where there is some personal interest on the part of the plaintiff in having the work done, as where a passenger on a street car helps to push it back over a switch, or a teamster helps the driver of a team ahead of him to repair some break-down which obstructs the road, or helps the servants of another to load his own cart with coal, it has been held that the relationship between the volunteer and the servant's master is not such as to warrant the application of the rule which relieves the master from any obligation to respond. Railway Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333, 54 Am. Rep. 803; Holmes v. Railway Co., L. R. 4 Exch. 254, L. R. 6 Exch. 123. There are other cases which hold that a mere volunteer, without any personal interest, cannot recover when the injuries result from the negligence of those servants with whom he works, not upon the ground that by volunteering he has made himself their fellow servant and established with their employer the legal relation of master and servant, but upon the ground that he cannot thus put himself in a better position than the servants he volunteers to help. So where servants of a railroad company were busy at a turntable, which moved with difficulty, and the plaintiff, observing them, called out to wait a moment and he would help them, and did so, and was injured by their negligence, the court said: "He cannot, by volunteering his services, have any greater rights, or impose any greater duty, on the defendant than if he was a hired servant." Degg v. Railway, 1 Hurl. & N. 773. So, in another case, the court said:

"One who volunteers to associate himself with the defendant's servant in the performance of the defendant's work, and this without the consent, or even the knowledge, of the defendant, cannot stand in a better position than those with whom he associates himself in respect of their master's liability. He can impose no new or greater obligations on the employer than those to which he was subject in respect of the employed." Potter v. Faulkner, 31 Law J. Q. B. 30.

These authorities, however, come far short of sustaining the proposition that the volunteer may by volunteering to act make himself a servant, and impose upon the master obligations which the latter owes only to his servants.

As was stated before, neither defendant nor defendant's agent ever employed Langan. To Brennan no authority to employ extra help, or to select individuals to make repairs, or to improve the running of the elevator, was ever intrusted. The mere circumstance that three months before he had invited his brother-in-law to remedy the sparking at the commutator, and had told Talmadge he did so, to which the latter did not object, is not sufficient evidence of authority to employ an additional temporary servant to help do the master's work. The plaintiff's counsel submits the following proposition:

"Where the services are rendered by request of the man in charge, though the person assisting expects no pay, and is employed for a mere temporary purpose, he is for the time being a servant, and entitled to the same protection as any other servant."

The cases cited on the brief, however, do not support this broad statement. Railway Co. v. Bolton, 43 Ohio St. 224, 1 N. E. 333, 54 Am. Rep. 803; Degg v. Railway Co., 1 Hurl. & N. 773, and Potter v. Faulkner, 31 Law J. Q. B. 30, have been referred to supra. In Bradley v. Railroad Co., 62 N. Y. 99, the track master, who engaged plaintiff to scrape snow with his team, had express authority to hire extra help when occasion required. The language of the proposition in the brief is evidently taken from Johnson v. Water Co., 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243, where the court says:

"Plaintiff was engaged in defendant's work at the request of the man in charge of the work; and although it may be said that he was working for a mere temporary purpose, and that the plaintiff was not expecting any pay for the work done, and in that sense the employment was voluntary, still, being in the defendant's employment at the request of its servant or foreman, he was not a trespasser, and he was at the time being the servant of the defendant, and entitled to the same protection as any other servant of defendant, and probably subject to the same risks of injury from the negligence of his fellow servants."

In that case plaintiff was in the employ of contractors who were digging a ditch for defendant. Other men were in the same trench, laying pipe and calking it for defendant. He was called by one George G. to help them, and the accident happened apparently because an insufficient force was employed in the laying and calking. But it should be noted that the case came up on demurrer, and the complaint alleged that one "Pooley was the superintendent of said defendant, and as such superintendent had charge of said work of calking, and employed men to do such work, and when he was off George G. was authorized by Pooley to have control of the work and of the men who were assisting in such work." In Wiggett v. Fox, 11 Exch. 832, it was held that a subcontractor and his servants were the fellow servants of workmen employed by the contractor. In Warburton v. Railway Co., L. R. 2 Exch. 30, the porter of a railroad company was held not to be the fellow servant of an engine driver of another railroad, both roads using the same station. In Abraham v. Reynolds, 6 Jur. (N. S.) 53, it was held that the servant of a carter who called to receive a bale of cotton and brought the rope with which to lower it was not the fellow servant of the employés of the owner of the bale who undertook to lower it. In Railroad Co. v. Harrison, 48 Miss. 112, 12 Am. Rep. 356, the injured person was defeated on the ground of contributory negligence.

The last case cited to sustain the proposition that the request of an unauthorized servant is sufficient to transform a volunteer into a servant supports no such proposition. A fireman, acting as engineer on a railroad train, which was at a water station, asked a young boy to turn on the water. The boy was climbing on the tender to put in the hose, when other cars struck the car attached to the engine and knocked him off. The court said:

"In climbing the side of the tender at the request of the fireman, to perform the fireman's duty, he did not come within the protection of the company. To recover the company must have come under a duty to him which rendered his protection necessary. * * * The boy was where he had no right to be, and where he had no right to claim protection,—where the company was in use of its private ground, and was not abusing its privileges, or trespassing on the rights or immunities of the public. The only apology for his presence there is the unauthorized request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act." Flower v. Railroad Co., 69 Pa. 210, 8 Am. Rep. 251.

To the same effect is Rhodes v. Banking Co., 84 Ga. 320, 10 S. E. 922, 20 Am. St. Rep. 362, where brakemen asked a boy to help them pull a car, and he did so. "The plaintiff's son," says the court, "was not a fellow servant with the servants of the defendant in error. To be the servant of another, there must be some contract or some act on the part of the master which recognizes the person as a servant, either express or implied." In Everhart v. Railroad Co., 78 Ind. 292, 41 Am. Rep. 567, plaintiff was returning home along a street intersected by defendant's tracks on which several flat cars were slowly moving. An employé of defendant, who was employed about such tracks, requested plaintiff to get upon one of said cars and apply the brake. He did so, and was injured. The court says:

"If the plaintiff were to be regarded as having been the servant of the defendant, it would seem that he could not recover for the injury caused by the negligence of his fellow servants. But it seems to us that * * * he cannot be regarded as having been the servant of the defendant. He was not requested or directed to man the brake by any one that is shown to have had authority from the defendant to make such employment. * * * The plaintiff was a mere volunteer, consenting, at the request or direction of the defendant, to perform service which should have been performed by the employés themselves, and, while he cannot be regarded as an employé, he is in no better condition than if he had been. Nor is he in any better condition legally than if he had been a mere intermeddler, undertaking to perform the service without request or direction from any one, because, as we have seen, he was not requested or directed to get upon the car and apply the brake by any one having power from the defendant to authorize him to do so. The defendant owed him no duty either as an employé, passenger, or traveler upon a highway crossed by the railroad. Under the circumstances, the authorities above cited make it clear that the defendant is not liable. If there had been an urgent necessity for some one other than an employé of the defendant to get upon the car or cars and apply the brakes, in order to prevent a destruction of human life or valuable property, possibly the case might be different, but no such necessity was shown."

See, also, Church v. Railway Co., 50 Minn. 218, 52 N. W. 647, 16 L. R. A. 861. In that case plaintiff was requested by the head brakeman of a wrecking train to assist in switching the cars. The court held that it "was necessary for the plaintiff to establish, as the essential foundation of his right to recover, the existence of the relation of master and servant between himself and the defendant company,

and this, in turn, depended upon the authority of the head brakeman to employ him to assist in the switching." It says:

"In our opinion, none of the evidence introduced or offered had any tendency to prove any such relation between plaintiff and defendant, or any such authority on the part of the head brakeman. The fact that plaintiff had been or was in the employment of the defendant elsewhere is wholly unimportant. He was not at the station on defendant's business. He was not an employé of defendant at that place or as to the switching of that wrecking train. The case stands precisely as if the head brakeman had called on any other bystander at the station to assist. While the head brakeman had charge of the movements of the train in doing this switching during the temporary absence of the conductor from the cars on other business, yet this was the entire scope and extent of his authority. The conductor had not abdicated the general charge and control of the train or turned it over to the brakeman. The latter had no authority, actual or apparent, express or implied, either from custom or from any present pressing emergency, to employ additional brakemen, either permanently or temporarily. It was wholly immaterial whether two brakemen were or were not sufficient to do the switching. Even if they were not, that fact would not, under the circumstances, give a mere brakeman authority to employ an additional force. If any one on the ground had any implied authority to do so it was the conductor, who had charge and control of the train. In doing what he did the plaintiff was, therefore, a mere volunteer, and as such assumed all the risks incident to the position. The defendant did not bear to him the relation of master or employer, and owed him no duty as such."

In Morris v. Brown, 111 N. Y. 318, 18 N. E. 722, 7 Am. St. Rep. 751, plaintiff's intestate was an engineer, who, when going to inspect the tunnel for the Croton aqueduct, rode (as he often had ridden before) on a returning dump car of the defendants, who were excavating the tunnel. Eventually this turned out to be an unsafe way of getting to his destination. In the opinion is found the following:

"Plaintiff did not acquire any right to be upon the car through any consent or act or acquiescence on the part of the defendants. The brakeman of the car had known it, but neither his knowledge nor assent could bind defendant. He was not their agent for that purpose. It is a general proposition that a master is chargeable with the conduct of his servant only when he acts in the execution of the authority given him. * * * In the case before us the brakeman was never told or authorized to carry any person, and if he acquiesced in, or by silence consented to, the intestate's going in upon the cars, there is no evidence that in doing so he was acting in the line of his duty or within the scope of his employment. The deceased had, in fact, ridden upon the car. He had done so under no other permission,—a volunteer, but in safety. In each instance, however, he must be deemed to have assumed the risk, and this last time he was unfortunate. The consequences of that misfortune should not be thrown upon the defendants."

It will be remembered that the only negligence charged upon defendant in the case at bar is the failure to keep the hanger securely affixed to its place, or to discover from reasonably careful inspection that it was loose and likely to give way under strain. This measure of active vigilance to secure a safe place to work in and safe appliances to work with may be required of the master by the servant he has employed, but is not due to a stranger. A leading case in this state is Larmore v. Iron Co., 101 N. Y. 393, 4 N. E. 752, 54 Am. Rep. 718. There plaintiff went upon premises of defendant to solicit employment. He passed near a piece of machinery for raising ore. The machine was defective, and by its breakdown while he was near it he was injured. He insisted that defendant was negligent in omitting to take

affirmative measures to ascertain and remedy defects. The court held that as to persons standing in certain relations to defendant a duty rested upon the company to exercise reasonable care in the maintenance and reparation of the machine; "but the plaintiff stood in no such relation to the defendant as imposed upon it the duty to keep the machine in repair. He was in every legal sense a stranger to the defendant. * * * There is no negligence, in a legal sense, which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons and not as to others, depending on peculiar relations and circumstances. * * * In the case before us there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the machine in repair. * * * The machine was not intrinsically dangerous. The plaintiff was a mere licensee. The negligence, if any, was passive, and not active of omission and not of commission." The same principle is enunciated in Nicholson v. Railway Co., 41 N. Y. 529, where the court says:

"Plaintiff had an implied license to cross at that point, and hence he was lawfully there. He was not there by invitation of the defendant nor in the business of defendant. * * * While he was lawfully there he had no right, as against the defendant, to be there. It could at any time have revoked the license. * * * Defendant owed the intestate no active duty. It owed him no duty whatever, except such as every citizen owes another. It had no right intentionally to injure him, and would be liable if it needlessly or carelessly injured him while performing its own business. It owed him a duty to abstain from injuring him either intentionally or carelessly, but it did not owe him the duty of active vigilance to see that he was not injured while upon its land merely by permission."

In our opinion, the direction of a verdict in favor of defendant was correct, and the judgment is affirmed.

UNITED STATES v. ST. ANTHONY R. CO.

(Circuit Court of Appeals, Ninth Circuit. March 3, 1902.)

No. 731.

1. PUBLIC LANDS—CUTTING TIMBER—RIGHT OF RAILROAD.
   Under Act March 3, 1875, § 1, granting railroad companies the right of way through public lands, with right to take from public land "adjacent" to the line of railroad timber necessary for the construction of the road, timber cut at a distance from the road of 17 to 23 miles by air line, 20 to 25 miles by wagon road, and 22 to 26 miles by the windings of a river down which some of it was floated, was taken from "adjacent" land, within the meaning of the act; it appearing that it was a barren, frontier country, with no suitable timber nearer than that taken, and that the lands from which it was taken were materially benefited by the road, and the timber could be hauled that distance with reasonable profit.
2. STATUTE—CONSTRUCTION.
   In Act March 3, 1875, § 1, the meaning of the word "adjacent," as applied to public lands, should be determined by the evidence in each particular case.

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

This is an action to recover from the defendant in error the value of timber cut by it upon the public lands of the United States in Idaho for use in the construction of the railroad of the defendant in error. After the filing of complaint and answer, the case was submitted to the lower court upon an agreed statement of facts, substantially as follows: The plaintiff in error was the owner and in possession of the lands described in the complaint. During the summer and fall of the year 1889 the defendant in error, an Idaho corporation, entered upon the said lands, and, through its agents and representatives, cut and removed therefrom 1,682,975 feet of timber, of the manufactured value of $12.35 per thousand feet, and of a stumpage value of $1.50 per thousand feet, and used the same in the construction of its railroad between Idaho Falls, in Bingham county, and St. Anthony, in Fremont county, state of Idaho, a distance of approximately 40 miles. Said railroad passed through public lands of the United States, and the defendant in error had duly complied with all the requirements of the act of March 3, 1875, granting to railroad companies the right of way through the public land of the United States, and became entitled to the benefits and privileges therein granted to railroad companies. The timber was cut at a distance from the road of 17 to 23 miles by air line, from 20 to 25 miles by wagon road, and from 22 to 26 miles following the windings of the river, down which much of the timber was rafted. The remaining portion was hauled by wagon, the road being a good one, with no unusual grades; and the timber could be hauled by wagon to the place where it was used with reasonable profit. There was no other suitable timber-bearing land upon either side of the line of the railroad as near as were the lands in question, and said lands were so situated with reference to said railroad as to be benefited thereby. It is admitted that the defendant in error, in going upon said lands and cutting and removing timber therefrom, did not act under a mistake of fact, but believed that it had the right to do so, using ordinary care and prudence, and acting under the advice of its counsel. Upon the questions involved in this statement of facts the court below rendered its decision in favor of the defendant railroad company, and the plaintiff sued out a writ of error thereupon to this court.

R. V. Cozier, U. S. Atty.

P. L. Williams and F. S. Dietrich, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The assignments of error present this question: Were the lands from which the timber was cut by the defendant in error "adjacent" to the line of its railroad, within the meaning of the act of March 3, 1875? Section 1 of the said act provides:

"The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, * * * which shall have filed with the secretary of the interior a copy of its articles of incorporation and the proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public land adjacent to the line of said road, material, earth, stone and timber necessary for the construction of its said railroad." 18 Stat. 482.

It is contended by the plaintiff in error that the word "adjacent," in this section, should be construed to mean "in proximity to," "contiguous," or "near" the line of the railroad, and that the distance of 17 to 26 miles cannot reasonably come within such a definition. The section has been variously construed by the trial courts, but not definitely passed upon by the court of last resort. In U. S. v. Denver & R. G. R. Co. (D. C.) 31 Fed. 886, the court construed the language of the act as intending to indicate such timber and other materials as

could be conveniently reached by ordinary transportation by wagons. In U. S. v. Chaplin (C. C.) 31 Fed. 890, land was declared to be "adjacent," within the purpose and intent of the act, when by reason of its proximity thereto it is directly and materially benefited by the construction of the railroad. And in U. S. v. Lynde (C. C.) 47 Fed. 297, 300, the court expressed the opinion that just what should be considered adjacent land must be determined by the evidence in each particular case. The latter view has met with the approval of this court, as indicated by the opinion of Judge Hawley in Stone v. U. S., 12 C. C. A. 451, 64 Fed. 667, 29 U. S. App. 32. No exact definition was there attempted, the court merely holding that, "under the facts presented," a reasonable construction of the language of the act would not permit the timber land in question to be deemed adjacent to the line of railroad of the defendant company. This decision was affirmed by the supreme court of the United States (Stone v. U. S., 167 U. S. 178, 191, 17 Sup. Ct. 778, 42 L. Ed. 127), without further determining the boundary of adjacency contemplated by the act of congress. The court concurred with the view expressed in Denver & R. G. R. Co. v. U. S. (C. C.) 34 Fed. 838, 841, that congress did not intend to grant anything like a general right to take timber from land where it was most convenient, but, other than this expression, did not attempt to interpret the language of the act, and left the decision dependent upon the particular facts presented.

It is well settled that, while public grants are to be construed strictly against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. And to ascertain that intent it is often necessary to look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together. Railroad Co. v. Barney, 113 U. S. 618, 625, 5 Sup. Ct. 606, 28 L. Ed. 1109. In U. S. v. Denver & R. G. R. Co., 150 U. S. 1, 15, 14 Sup. Ct. 11, 37 L. Ed. 975, this rule of construction was held to be properly applicable to the act of 1875 in controversy in the present action. In that case the timber was cut from lands adjacent to the line of railway of the defendant, but was used in the construction of its road at points distant from the place at which it was taken. Under the rule of construction above stated, it was held to be the purpose of congress to aid railroad companies entitled to the benefits of the act by conferring the right to take timber necessary for road construction from adjacent public lands, and use it upon distant portions of their lines. Applying, then, this liberal construction of the act to the facts before us, we are entitled to consider that the road under construction passed through a barren, frontier country; that, according to the admitted facts, there was no suitable timber upon either side of the said road nearer than the lands in question, and that said lands from which the timber was cut were near enough and so located with reference to said road as to be directly and materially benefited thereby; that said timber could be hauled by wagon to said railroad with reasonable profit. These conditions are important in considering whether the privilege conferred by congress has been properly exercised, and whether the mutual benefits contemplated by

the act are likely to be realized. The case of Bacheldor v. U. S., 28 C. C. A. 246, 83 Fed. 986, presented a similar state of facts to the one at bar. Bacheldor, acting for the Denver & Rio Grande Railway Company, had cut timber from government land some 25 miles distant by wagon road from the line of railroad, in the construction of which it was to be used. No suitable timber could be found nearer. The trial court instructed the jury that the word "adjacent," as used in the act of congress authorizing the cutting of timber for railroad construction, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the proposed railroad passed. The supreme court of the territory of New Mexico affirmed the conviction of Bacheldor, but the judgments of both courts were reversed by the circuit court of appeals for the Eighth circuit; Judge Thayer, speaking for the court, declaring that no court can say, as a matter of law, that a trespass was committed because timber was taken from a place 25 miles distant by wagon road from the right of way of the railroad, but it should be left to a jury of the vicinage to determine, under proper instructions from the court, whether the right accorded by the statute was fairly exercised, as congress intended it should be. The fact that congress did not in definite terms limit the right to take timber and other materials to adjoining townships, but used the word "adjacent,"—a purely relative term, which may be understood differently when applied to different objects or under different circumstances,—was there considered very persuasive evidence that congress did not intend to fix an arbitrary line, beyond which the right to take timber and other materials should not extend, but that its purpose was to leave such right to be governed by circumstances. It was further said:

"Congress intended to offer substantial inducements for the construction of railroads in certain sections of the country where timber suitable for railroad construction was known to be scarce, and in many places distant from the lines of road to be benefited, as they would be projected and built. For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the land department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised. It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those whose duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land from which material had been obtained was adjacent to the right of way, within the spirit and intent of the act."

We are in accord with this construction of the act. And while, under some circumstances, the cutting of timber from public lands at a distance of from 17 to 26 miles from the line of railroad under construction would undoubtedly be deemed a trespass, as without the meaning of the word "adjacent" in said act, the circumstances of the present case do not warrant such a holding. No injury appears to have been suffered by the plaintiff in error by reason of the act of the defendant in error. On the contrary, the land from which the timber was cut is admittedly benefited by the construction of the railroad, and, under all the conditions existing, it should be considered to be

"adjacent" to the line of railroad constructed by the defendant in error, as contemplated by the act of 1875.

The judgment of the circuit court is affirmed.

PHILIPS v. TURNER.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,121.

BANKRUPTCY—JURISDICTION AS DEPENDENT ON CONSENT.

Bankr. Act, § 23b, provides that suits by the trustee shall only be brought in courts where the bankrupt might have brought them unless by consent of the proposed defendant. Creditors filed a petition in involuntary bankruptcy on the ground that their debtor had sold his property to P. with intent to prefer him, and at the same time obtained an injunction restraining an attaching creditor from proceeding with his attachment and the bankrupt and P. from attempting to take possession of the attached property, etc. P.'s motion to dissolve the injunction was denied, and a referee appointed to examine into the good faith of the sale to P., etc. Thereafter, the adjudication in bankruptcy having meanwhile been entered by default, the referee reported that P. had reasonable cause to believe the debtor insolvent at the time of the sale. P. filed a petition in the district court reciting the prior proceedings and praying to have the referee's finding reviewed and the injunction dissolved. The trustee in bankruptcy answered, the answer being made a cross petition, and prayed an order requiring P. to account for and turn over the property. *Held*, that the district court had jurisdiction to make orders directing P. to account for and turn over the property, the record sufficiently showing that he had consented to the litigation.

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of Mississippi.

It appears from the record that several creditors of A. B. Wolf, holding claims for an amount sufficient, filed a petition in the district court to have him adjudged a bankrupt. The ground of bankruptcy alleged was that within four months then next preceding he had sold and delivered to the petitioner Philips, one of his creditors, all of his property, consisting of real estate, merchandise, choses in action, etc., with intent to give said Philips an unlawful preference. Simultaneously a petition was filed by the same creditors against the New Orleans Chemical Company, the sheriff of Scott county, Miss., and said Philips, reciting the fact of the petition in involuntary bankruptcy having been filed, and the further facts that the said sale had been made to Philips with fraudulent intent; that the New Orleans Chemical Company had a few days before procured a writ of attachment against Wolf, which the plaintiff had levied upon a large part or the whole of the property of said Wolf, and was in possession of the sheriff, unless it should, before action on the petition, be replevied by Wolf or Philips. It was charged that, if the chemical company should be allowed to proceed with its attachment, it would be disposed of if not replevied, and would be dissipated, or be so intermingled or confused as to defeat the purpose of the bankruptcy proceedings. An injunction was prayed for to restrain the further prosecution of the attachment suit, and to prevent Wolf, Philips, and the sheriff from intermeddling with or recovering any of the property, and for the appointment of a receiver to take charge of the same until a trustee could be appointed after an adjudication of Wolf as a bankrupt. An injunction was granted upon petitioner entering a bond in the sum of $2,000 to plaintiff Philips. Philips, having been duly summoned, moved for

a dissolution of the injunction four days later on affidavits and testimony. At the same time he filed an answer, claiming to have acquired the property from Wolf in good faith; that the price in hand paid was all cash except $1,850 borrowed money owing to him by Wolf. He also alleged that a small lot of flour, of the value of $125, which had never belonged to Wolf, was in his store with the stock bought of the latter. He denied the charge of having acquired Wolf's property in contravention of the bankrupt law. The motion to dissolve, after argument by both parties, was denied, but the injunction was modified to the extent of allowing Philips to recover his flour. In the same order the matter was referred to the referee, Nugent, for full investigation and finding as to the solvency of Philips, the bona fides of the transfer of said property, and of the solvency or insolvency of Wolf, and all other material facts. On December 3, 1900, Wolf was adjudged bankrupt by default. The referee reported, on December 28th, the facts as found by him. He found: (1) That Wolf was insolvent at the time of the transfer of the stock of merchandise and accounts to Philips; (2) that $1,800 of the consideration was a pre-existing debt; (3) that Philips had reasonable cause to believe that Wolf was insolvent at the time of the conveyance. The report was filed December 28th. Subsequently Philips filed a petition in the district court reciting all prior proceedings and the appointment of a trustee; averring that the referee erred in his finding that petitioner had reasonable cause to believe that Wolf intended to prefer him over his other creditors; alleged that the evidence, all of which was on file, showed the contrary; and that he purchased the property in good faith for an adequate consideration. He prayed that his petition be taken as an exception to the finding, and that the court would review the said evidence and finding of the referee, and dissolve its said restraining order. The attorneys for the creditors and for E. L. Turner, the trustee, who had been appointed by the district court, accepted service of said petition, and for the purpose of a speedy hearing on said petition and such pleas, answers, or demurrers as they might present thereto waived notice, and agreed that the same should be heard before the district judge on April 5th thereafter. This agreement and waiver was made on March 29, 1901. On the next day a separate answer to Philips' petition of review was filed by E. L. Turner, the trustee of the bankrupt, which maintained the correctness of the referee's finding, and repeated the allegation of the unlawful preference. This answer was made a cross petition, and upon an averment that Philips had secured possession of the bankrupt's property, and had disposed of a portion of it, it was prayed that he be required to account for and pay over the proceeds, as well as to surrender what remained. Philips, who had filed the petition which provoked this answer and cross petition, and who had alleged the appointment or election of a trustee for Wolf's estate, entered a motion to strike out the answer of Turner, trustee, upon the grounds: First, that Turner was not a party, and was without interest; and, second, because the court had no jurisdiction to determine the alleged interest of said trustee touching the matter about which relief was sought. He also interposed a demurrer to the cross petition for want of jurisdiction, and because, as alleged, there was no law for granting the relief prayed for. The court entered a decree or order on May 9, 1901, overruling Philips' demurrer and motion, and directing Philips to render an account to the referee of all property and effects received by him from Wolf, the bankrupt, and to turn over and deliver to E. L. Turner, the trustee, the accounts and property remaining in his hands, and that he pay the ascertained value of such portion of the property as should not be surrendered. On the same day the court made an order reciting that, it having been made to appear on the hearing of the issues on petition of the creditors and of P. Philips, the claimant, that a portion of the assets and effects of the bankrupt were still in the possession of the sheriff of Scott county under writs of attachment, and that Philips, out of whose possession the same had been taken, had been required to surrender the same to E. L. Turner, trustee, it was therefore ordered that the sheriff deliver same to Philips, or, in his absence, to E. L. Turner. An application was made for a writ of seizure and sequestration of Wolf's effects in Philips' hands, adjudged to have been transferred in fraud of the bankrupt law, and same was

granted. The petition filed by Philips in this court is to review these orders of the district court.

Geo. S. Dodds, Charles J. Boatner, and Mark M. Boatner, for petitioner.

L. H. Doty and T. M. Miller, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The only material question raised is as to the jurisdiction of the district court to make the orders and decrees relating to the property transferred by the bankrupt, Wolf, to Philips. The petitioner, Philips, having voluntarily entered into the litigation in that court, cannot now be heard to deny its jurisdiction. By the terms of the bankruptcy act (section 23b) Philips consenting, the district court had jurisdiction of the questions litigated with him. The record, we think, shows that Philips consented to the litigation in the district court.

On the authority of Bardes v. Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, the judgment of the district court is affirmed.

TEXAS & P. RY. CO. v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,101.

1. RAILROADS—HAND CARS—INJURY TO EMPLOYÉ—NEGLIGENCE OF FELLOW SERVANTS.

   A hand car is within the meaning of Acts Tex. 1897, p. 14, § 1, providing that railroad companies shall be liable for all damages sustained by any servant or employé, while engaged in the work of operating their "cars, locomotives, or trains," by reason of the negligence of any other servant or employé, and the fact that such servants or employés were fellow servants shall not destroy such liability.

2. SAME—VICE PRINCIPAL—RIGHT TO RECOVER FOR INJURIES.

   A foreman of a gang of men engaged in repairing the tracks of a railroad company is within the protection of the section recited (Acts Tex. 1897, p. 14, § 1), and the fact that by section 2 he is made a vice principal does not bar his recovering for injuries resulting from the negligence of the men under his control.

   Pardee, Circuit Judge, dissenting.

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

By an action commenced in the circuit court of the United States for the Northern district of Texas, Mrs. F. S. Smith, for herself and as next friend and guardian of her two minor children, C. F. and B. S. Smith, sued the Texas & Pacific Railway Company for damages on account of the death of F. S. Smith, her deceased husband, and the father of the minor children. In her petition she alleges that on April 11, 1899, Smith was in the employ of the defendant company as foreman of an extra gang of trackmen, whose duty it was to lay steel, etc., and, while thus employed, received certain personal injuries which resulted in his death, while exercising due care; that the company was negligent in delivering to Smith a defective and unsafe hand car to be used by him and his men in the performance of their duties; that at the time of receiving the injury Smith was riding on the front hand car, with a number of his men, returning from their work, and

that the rear hand car was defective, and, being operated by some of the other men, was permitted by them to run into and collide with the front car, and caused Smith to be thrown off and killed; that one of the causes of the collision was the inability of the men on the rear hand car to control the same, by reason of its being in defective condition. It is also alleged that the accident was directly caused and contributed to by reason of the negligence and carelessness of the agents and servants in charge of the rear hand car, in permitting the same to run into and strike the front hand car, and that the company was liable by reason of such negligence; that the agents of defendant on the rear hand car were not fellow servants of Smith, under the statutes of Texas, and were engaged in the operation of one of the cars of the defendant, within the meaning of the Texas statutes relating to the liability of railroad companies for personal injuries; and that the railroad company was liable to plaintiff for the negligence of its servants and agents. The defendant answered, among other things pleading general denial, contributory negligence, act of fellow servant, and that Smith could, by ordinary care, have known of and had knowledge of the condition of the hand car which was being operated, and of the results which would follow, and that he remained in the service with such knowledge, and assumed all risk arising from the condition of the car.

On the trial the material evidence was substantially as follows: That F. S. Smith was dead. That he left the plaintiff Mrs. F. S. Smith, his surviving wife, and two minor children, Courtney F. Smith and Bert S. Smith, and that during his lifetime he had contributed toward their support an amount sufficient to warrant the jury in the verdict given. The evidence also showed that the deceased was in the employ of the Texas & Pacific Railway Company just prior to his death as foreman of what is known as the "extra gang." This force consisted of from 15 to 20 men, whose business and duty it was to look after and repair the track, and to perform such other duties as might be required in the maintenance of said track. This extra-gang force had their headquarters at the town of Eagle Ford, on the line of the Texas & Pacific Railway Company, and their section extended several miles west. All of this force, except the deceased, Smith, were negroes; and all worked together while engaged in the repairing and keeping the track in order, and were under the supervision and control of Smith. He kept their time, and had the power to hire and discharge them, and had, in fact, hired the most of the gang or force of men working under him at the time. He had been working as foreman of this extra gang for about six weeks. Prior to that time he had been regular section foreman, working for the defendant company. He had worked awhile as extra-gang foreman in the yards at Ft. Worth, and then was moved with his force to Eagle Ford; had been there just one day prior to the accident. This force had in use at the time two hand cars, which were used to carry the men and tools out to their work in the morning, and bring them in to their quarters in the evening. It was usual and customary for eight or ten men to ride upon each hand car. These cars were propelled by levers, usually from four to six men on the car, working the lever while in motion, unless same should be going down grade. It appears that on the 11th day of April, 1899, this extra gang had used two hand cars to go out to work about four miles from Eagle Ford, and after the day's work was through they got upon the hand cars for the purpose of returning to Eagle Ford. Smith, the foreman, got upon the front car, and took his seat upon the front part of the front hand car, with about six men with him. This car was set in motion, going toward Eagle Ford. Shortly afterward the remainder of the men, to the number of about six or eight, got on the second car, and followed them. After proceeding on their way about 1½ miles, the first or front car was run into or struck by the rear car, which caused Smith, who was seated on a water keg, to fall or be thrown forward, so that the front car ran over him, inflicting injuries upon him from which he died. The evidence shows, also, that this rear car which ran into the one upon which Smith was riding had been delivered to Smith, by the direction of the defendant's road master, that morning, at Eagle Ford, for use.

E. Greer, a witness for the plaintiff, testified by deposition that the acci-

dent occurred about 20 minutes after 6, after they had done the day's work, and had gone a distance of about 1½ miles from where they had been at work during the day. The front car, on which he was riding, was larger than the second car. One Les Johnson, one of the laborers, was in charge of the second car, and, when the order to quit work was given in the evening by Mr. Smith, the hand cars were placed on the track by the men, and everything gotten ready to go back to Eagle Ford, and they started, and after they got started the car was going at a rapid rate of speed. At the time of starting, the front car was about 120 feet ahead of the second car, and when they reached the top of the grade, and started down, the second car ran into the first car, on which Smith was riding, which threw him over, and the car ran over him, which resulted in his death. The front car at the time of the accident was going about 10 or 12 miles an hour, and where the accident occurred the ground was practically level. He gave it as his opinion that the brakes of the second car were in good condition, and it could have been stopped in about 60 feet, but did not know when the man on the rear car first applied the brakes. Will Hurd, another of the laborers, testified with reference to the accident, and testified that the brakes on the rear hand car were not in good condition, and that the brakes were defective. John Page and Wheeler testified to the same effect. The testimony of Murphy, Lothron, and Fitzgerald was to the effect that the rear hand car was in good condition; that the accident was caused by the negligence of the men on the rear car, in allowing it to run too close to the front hand car, and in not stopping it in time to avoid the collision; and that, if the brakes had been properly applied, the hand car could have been stopped. There was testimony also tending to show that Smith, the foreman, was guilty of negligence in allowing the men on the rear hand car to run too close to the front hand car. The testimony of the plaintiffs' witnesses Lesser and Lambert was to the effect that the hand cars were kept a reasonably safe distance apart. Murphy, road master of the Texas & Pacific Railway Company, testified that he had general supervision over the foreman, Smith; that he had been employed by him as foreman of the extra gang, and that he had been acting as such for about six weeks; that prior to that time he had been a regular section foreman, and, as extra-gang foreman, Smith had power to employ and discharge all hands who worked under him; that he had employed some of those working under him at the time of the accident; that the car which caused the accident had been shipped to Smith for his use prior to that time, while Smith was working in the yards at Ft. Worth, and then taken off and reshipped to him at Eagle Ford; that it had not been in the shop, but had been in use, and each foreman was supposed to inspect the hand cars and see that they were kept in proper condition, and, if anything was wrong about them, he was supposed to report it for repairs; that the foreman was supposed to look after and be responsible for hand cars, as there was no hand-car inspector, but this duty rested upon Foreman Smith, and he had never made any report or complained to him of the condition of the car.

The provisions of the Texas statute drawn in question are as follows:

"Section 1. 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.

"Sec. 2. All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, who are entrusted 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.

"Sec. 3. 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." Acts Sp. Sess. 1897, p. 14.

Geo. Thompson and T. J. Freeman, for plaintiff in error.

R. L. Carlock, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Substantially, only two questions appear to be presented by the record in this case: (1) Is a hand car within the meaning of the provisions of section 1 of the Texas statute? (2) Was the deceased, F. S. Smith, such an employé of the defendant that, under the terms of section 1 of the act, his representatives can recover for his death, if caused by the negligence of the men working under him?

Without rehearsing or attempting to extend or elaborate the reasoning that we find in reported cases infra, we content ourselves with expressing the view that the fair construction of the Texas statute requires that the first question stated above be answered in the affirmative. We cite, with approval both of its decision and of the reasoning contained in the opinion, the case of Benson v. Railroad Co. (Minn.) 77 N. W. 798, 74 Am. St. Rep. 444; also the decision of the supreme court of Alabama in Railroad Co. v. Crocker, 11 South. 264. And we concur in the suggestion of counsel for the defendants in error that this construction of the statute receives substantial support from the decision of the court of civil appeals of Texas in the case of Railroad Co. v. Baker, 58 S W. 965.

We come to the second question. As we understand it, the contention of the plaintiff in error is that by reason of the fact that under section 2 of the Texas law the deceased was a vice principal of the plaintiff in error, and not a fellow servant with his co-employés, had his injuries not resulted in his death he could not have recovered on account of the negligence of these co-employés. While not distinctly so expressed, the argument seems to be that, from the fact that the deceased had the authority to choose his subordinates in the extra-gang force over which he was foreman, he assumed the risk of any injury resulting to himself from the negligence of any one of these 15 or 20 men under his charge, and that, as against him, evidence of such negligence on their part is evidence of contributory negligence on his part, such as would bar him from recovery for injuries not resulting in his death, and therefore would bar the defendants in error from recovery in this case. If such is not the purpose and effect of the argument, we are not able to see its application. If such is its purpose and effect, it does not appear to us to find any support in the authorities cited, and seems to us to be manifestly unsound. A careful consideration of the provisions of the present statute given in the statement of the case, and of the precedent legislation on that subject set out in the brief of the plaintiff in error, which we do not deem it

necessary to quote, does not lead us to conclude that the other sections of the statute should receive a construction that would bar the foreman of a gang from the protection afforded by such section 1.

We do not deem it necessary to notice the other matters suggested in the argument by counsel for the plaintiff in error, further than to say that they do not commend themselves to us as having sufficient force to warrant us in setting aside the judgment of the circuit court.

We conclude that that judgment was right, and it is therefore affirmed.

PARDEE, Circuit Judge, dissents.

CENTRAL OHIO R. CO. et al. v. MAHONEY.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 765.

REMOVAL OF CAUSES—REMOVAL TO FEDERAL COURT—JOINT DEFENDANTS.

Under Rev. St. Ohio, § 3305, declaring that, notwithstanding an Ohio corporation leases its railroad, it shall remain liable as if it operated the road, and "both the lessor and lessee shall be jointly liable" to any person for negligence, and "may be jointly sued" in the state courts, an action by a citizen of the state, brought in the state courts, for a joint tort, against the lessor of a railroad, a state corporation, and the receivers of the lessee, citizens of another state, was improperly removed to the federal court on the petition of the receivers, alleging that the other defendant "had no interest or liability jointly with the receivers"; plaintiff's petition not presenting a separable, but a joint, controversy, though at the time of filing the petition for removal the lessor had not been served with the summons, the sheriff's return showing that it had not been found.[1]

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This was an action brought in a state court of Ohio by Mahoney, the defendant in error, against the above-named plaintiffs in error, to recover damages for a personal injury sustained by him from the negligence of the above-named receivers while they were operating the railroad of the Central Ohio Railroad Company under an appointment made by the circuit court of the United States for the Southern district of Ohio, in a case therein pending, in which the Mercantile Trust Company of New York was complainant, and the Baltimore & Ohio Railroad Company was defendant; the last-named company having theretofore been in possession of the railroad under a lease from the Central Ohio Railroad Company. The petition alleged the joint liability of the Central Ohio Railroad Company and the receivers, and prayed a joint judgment against them upon the ground that a statute of the state imposed a joint liability upon the lessor and the lessee for damages arising from the negligence of the lessee in operating the railroad. Section 3305 of the Revised Statutes of Ohio provides that, when one railroad company leases its road to another, "the company to whom any railroad is leased, if a corporation of any other state, shall be subject to all the restrictions, disabilities and duties of a railroad company incorporated within this state; and notwithstanding such lease the corporation of this state,

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[1] Removal of causes in cases involving separable controversies, see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co., 35 C. C. A. 155.

lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in any wise connected therewith, and may be jointly sued in any of the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability." Process was duly served upon the receivers, but the sheriff returned that the Central Ohio Railroad Company was not found. At this stage of the case the receivers removed the case into the circuit court of the United States upon their petition setting forth that they were citizens of Maryland, and that the plaintiff was a citizen of Ohio, and further that "the defendant the Central Ohio Railroad Company had no interest or liability jointly with the said receivers of the Baltimore & Ohio Railroad Company." The plaintiff moved to remand upon the ground that the circuit court of the United States had not acquired jurisdiction. This motion was overruled, and thereupon the Central Ohio Railroad Company appeared and filed a demurrer to the petition. The receivers also demurred. Both demurrers were overruled. The defendants severally answered,—the receivers as well as the Central Ohio Railroad Company,—averring, among other things, that the receivers were not operating the railroad under the lease at the time of the plaintiff's injury. The issues being formed, the case was brought to trial, and resulted in a verdict and judgment for the plaintiff, and the case was brought here on writ of error.

J. H. Collins, for plaintiffs in error.

Emmett Tompkins and Thomas Steele, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

When this case was reached for hearing at a former term, the question of jurisdiction was brought to the attention of the court, and a grave doubt was expressed whether the case was properly removed from the state court; but the case was permitted to be argued on the merits, and subsequently the following question was certified to the supreme court of the United States:

"Is a suit removable from a state court to a United States court upon the petition of the receivers alone, when the action is against receivers appointed by a United States court, and also against a corporation created under the laws of the state of which the plaintiff is a citizen, when the action is a single action against both defendants for a joint tort?"

The question has been answered in the negative, and that answer practically determines the course which we should take. For the statute upon which the action is founded, in creating the liability, declares that it shall be joint, and that the lessor and lessee may be jointly sued; and the plaintiff, in his petition, pursues the defendants upon their alleged joint liability.

Only one further question requires consideration. It appears from the preceding statement of the proceedings in the case that there had been a return by the sheriff that the Central Ohio Railroad Company was not found at the time when the petition for removal was filed. But this did not discharge that defendant from the case. The plaintiff might still take steps for bringing the railroad company in, by taking out an alias summons. Moreover, the receivers did not pray for the removal upon the ground that the suit had become one against them alone, but claimed the right to remove upon the ground that the

other defendant had "no interest or liability jointly with the said receivers." The Central Ohio Railroad Company appeared in the court below after the removal, and defended the suit upon the footing that it had been removed as a joint action, and a joint judgment was rendered against the railroad company and the receivers. We are therefore of the opinion that the circumstance that there had been a return of non est inventus as to the railroad company when the petition for removal was filed was unimportant. As the case made by the plaintiff's petition did not present a separable controversy, it could not be removed by the receivers alone. We cannot for the present purpose consider the question of the validity of the defense made by the railroad company, since the right to remove is determined by the case made by the plaintiff's petition. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511.

The judgment must be reversed, and the cause remanded, with a direction to remand it to the state court from which it was removed. The plaintiffs in error (the receivers, who wrongfully removed the case from the state court) will pay the costs of the court below and of this court.

GANS v. ELLISON et al.

(Circuit Court of Appeals, Third Circuit. April 22, 1902.)

No. 9.

BANKRUPTCY— CREDITORS—PREFERENCE — RETURN — SUBSEQUENT CREDITS—RIGHT TO PROVE CLAIM.

Under Bankr. Act, §§ 57g, 60a–60c, defining a "preference," and the rights of creditors who have been preferred, where within four months of the institution of the bankruptcy proceedings a creditor of the bankrupt has innocently received payments, and thereafter given the bankrupt further credit, without security, for property which becomes a part of his estate, such creditor will be required to return only the excess, if any, of such payments over such subsequent credits, as a condition precedent to the right to prove his claim.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Julius C. Levi, for appellant.

H. C. Thompson, Jr., for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by Aaron Gans, trustee of the estate of E. O. Thompson's Sons, bankrupts, from an order of the district court approving the allowance by the referee in bankruptcy of the claim of John B. Ellison & Sons, creditors, and the claim of Harrington & Goodman, creditors, against the estate of the bankrupts. The same question of law is common to these two cases brought up by appeal. The facts in the respective cases are these: E. O. Thompson's Sons were indebted to John B. Ellison & Sons in the sum of $6,671.89 for merchandise sold and delivered by the latter to the former. Within four months before the petition in bankruptcy was filed, these creditors, without knowledge that their

debtors were insolvent, innocently received on account of this indebtedness two payments of $900 each, and afterwards, in good faith, sold and delivered to the debtors upon credit, without security of any kind, additional merchandise to the value of $1,703.15, which became a part of the estate of the debtors. These creditors, tendering to the trustee in bankruptcy $96.82, the excess between the payments and new credits, claimed the right to prove against the estate for a dividend upon $6,671.89, the amount of the indebtedness as it originally stood. The referee allowed the claim, and the court approved the allowance. E. O. Thompson's Sons were indebted to Harrington & Goodman in the sum of $3,113.46 for merchandise sold and delivered by the latter to the former. Within four months before the petition in bankruptcy was filed, these creditors, without knowledge that their debtors were insolvent, innocently received on account of this indebtedness payments amounting in all to $540.65, and afterwards, in good faith, sold and delivered to the debtors upon credit, without security of any kind, additional merchandise to the value of $586.56, which became a part of the debtors' estate. Taking into account the excess of new credits over the payments, the amount due these creditors was $3,159.37, which they claimed the right to prove against the estate. The referee allowed the claim, and the court approved the allowance. All the above-mentioned transactions occurred in the regular course of business dealings between the parties. In the case of John B. Ellison & Sons, the appellant, the trustee in bankruptcy, contends that the entire sum of $1,800 so paid to these claimants must be refunded by them to the bankrupts' estate before they can prove against the estate; the claimants being entitled upon such refunding to a dividend upon the amount of the whole indebtedness to them. And the appellant takes a like position as to the claim of Harrington & Goodman.

The solution of the question now before us involves a particular consideration of the following cited paragraphs of the bankrupt act:

Paragraph "g" of section 57:

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Paragraph "a" of section 60:

"A person shall be deemed to have given a preference, if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Paragraph "b" of section 60:

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, 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."

Paragraph "c" of section 60:

"If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which be-

comes a part of the debtors' 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."

These paragraphs are closely related. They are parts of a system which aims at equality between creditors of the same class. They should then be read together, and in such manner as to harmonize the several clauses with each other, and to promote the general scheme of the act. It is hard to believe that it was the intention of congress to put a creditor who had innocently taken a preference in a worse plight than a creditor who had knowingly done so. But to that conclusion we are asked to come. The appellant's argument runs thus: That although if the appellees had acted with guilty knowledge, their claims as allowed would stand; yet, having taken a preference ignorantly and in good faith, they cannot have the benefit of their subsequent credits which augmented the bankrupts' estate. Certainly a construction leading to a result so unreasonable is not to be adopted unless it is unavoidable by reason of the language employed by the lawmakers. But we think that we are not shut up to such a construction of the act. In the first place, we do not discover in subdivision "c" of section 60 any language which excludes from the equitable principle of that paragraph creditors who have taken preferences innocently. We do not see that we are bound to give to the words "set off" and "recoverable" such a technical meaning as will lead to unjust discrimination. The clause does not say recoverable "by suit." The views expressed by the circuit court of appeals of the Seventh circuit in McKey v. Lee, 45 C. C. A. 127, 129, 105 Fed. 923, 926, commend themselves to our judgment as sound. It is there well said by Judge Grosscup, speaking for the court:

"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 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 a 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."

We know that in Pirie v. Trust Co., 182 U. S. 438, 455, 21 Sup. Ct. 906, 913, 45 L. Ed. 1171, the supreme court, in discussing a different question, incidentally remarked:

"Nor, again, do we find anything which militates against our conclusion in subdivision '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."

But this observation by no means implies that subdivision "c" is applicable only to such cases, and does not apply to cases of preferences innocently received, and followed by new credits given in good faith, and to the enhancement of the bankrupt's estate.

While there is a conflict of opinion between district judges and between the circuit courts of appeals as to the meaning of the terms used in subdivision "c" of section 60, we think, with the learned judge below, that the weight of authority sustains the construction which the referee in bankruptcy adopted here, and the court below approved.

But the case is open to another view equally favorable to the appellees. Upon the true interpretation of paragraph "a" of section 60, the preference in such case as this is the net gain to the creditor upon the transactions between him and the debtor. The net balance in favor of the creditor is the real preference under the law. For only to the extent of such net gain does the creditor "obtain a greater percentage of his debt than any other creditors of the same class." And so, on the other hand, only to the amount of the net gain to the creditor is the estate of the debtor impaired. If, then, a creditor innocently preferred has given return credits afterwards, he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered in the case of a creditor who innocently has received preferences, and afterwards in good faith has given the debtor further credit, without security, for property which has become a part of the debtor's estate. Otherwise it is plain that such innocently preferred creditor would be compelled to surrender his preference a second time before he could prove his claim against the bankrupt's estate. We find support for these latter views in the decision of the circuit court of appeals for the First circuit in the case of In re Dickson (Dickson v. Wyman), 49 C. C. A. 574, 577, 111 Fed. 726, 728. And we cannot do better than here quote the forcible observations of Judge Putnam, who, speaking for the court, said:

"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."

We need do no more than add that we are clearly of opinion that the order here appealed from was rightly made; and accordingly it is affirmed.

MEXICAN CENT. RY. CO., Limited, v. TOWNSEND.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,117.

INJURY OF BRAKEMAN—NEGLIGENCE—DEFECTIVE CAR—DIRECTION OF VERDICT.

Where, in an action by a brakeman to recover for injuries resulting from a fall from the top of a car, caused by the breaking of a running board, the evidence was conflicting as to whether the board was rotten or sound, and it appeared that the brace which supported the end of the board was loose, and hanging down, after the accident, but the evidence did not conclusively show that it was in that condition when the car was last inspected, or when it should have been inspected, it was error to direct a verdict for plaintiff, as the question of defendant's negligence should have been left to the jury.

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

The plaintiff (defendant in error here) was employed as a brakeman by the defendant (plaintiff in error). On the 9th or 10th of February, 1901, while so engaged in the service of the defendant company, the plaintiff, in the performance of his duties, was required to be on top of the defendant's train, and to go from one car to another. The running board on one of the cars on which the plaintiff was walking suddenly broke and gave way, and the plaintiff was thrown from the top of the car to the ground, and as he fell his left hand, arm, and wrist were caught under the wheels of the cars, and so mangled and bruised that it became necessary to amputate his hand about the wrist. D. S. McCurdy, a witness for the plaintiff, describes the condition of the car as he found it immediately after the accident: "We found the running board on one of the cars with about five or six feet broken off. Only one of the planks was broken. We examined this plank, and found it was dry rot and cross-grain board. We also found that the brace was not attached to the end of the car and the end of the running board, but was hanging downward, and pushed to one side towards the right. The running board is composed of three pieces of plank nailed on the top of the car, and projects over the ends of the car. All of these pieces of plank compose the running board, and extend over the end of the car about eight inches. These boards are nailed on top of the car, and have a brace underneath the ends of the running board, which is fastened with a bracket to the side of the car and the projecting ends of the running board. When we examined this brace, we found it hanging downward to the right. This brace was detached from the end of the car and the end of the running board. We examined the end of the running board that was broken. It was broken or split off with the grain of the board for about six inches. I also examined the running board to see whether it was nailed or not. I only examined at the rear end. This end was nailed. The rear end was nailed. That would be about the center of the car. We also examined the drawheads between these two cars, and found the drawheads all right. * * * The car was No. 1,423. * * * The running board was broken off, and was dry rot, wind-shaken, or dry rot cross-grain. I mean by 'wind-shaken' the same as dry rot. I cannot explain dry rot except that it is dry rot. This was a dry-rot board and also cross-grain. The grain went across the board instead of straight. The plank did not have a hole rotted through it, but was just wind-shaken all through. It was dry rot all of the way through. You can see by looking at the end of the board. I found a dry rot through the end of the board that was left. The bracket was hanging down about six inches, and pushed to the right, and was loose on one end. The bracket was not on top of the car, but was on the end. It was loose from the end where the brace had come loose. There was nothing the matter with it except it was loose. I cannot tell exactly how many minutes it was after the accident until we examined this car. It was just as quick as we could get plaintiff into the caboose, and I could notify the engineer and fireman, when we made this examination." The condition of the car after the accident as described by this witness is confirmed by the evidence of Herman Baker and the plaintiff. Baker said: "I made a very careful examination of this piece of plank, because I wanted to see what caused it to break. The piece that was broken off was between four and six feet long, and at the place where it was broken it was somewhat decayed and rotten, and also seemed to be very old, and the end was freshly broken. I also looked at the top of the car, and saw where this piece of plank had been broken off. I think the running board was made of two or three boards laid together, but only one of the boards on the outside was broken. I think the car on which this board was broken was C. M. No. 1,423." Plaintiff, testifying himself, described the particulars of the accident and the condition of the car as he found it after the accident, and also testified to facts tending to show his suffering, the extent of his injuries, and the extent of his damages. C. E. Meyer, a witness for the defendant, testified as follows: "My business is car inspector for the Mexican Central at Torreon. I am

acquainted with car No. 1,423, Mexican Central. It is a beer car. I do not know anything about when the car was overhauled. There is that board (pointing to the board on floor) that has been on it. I had something to do with the taking of that board from the car. That board came off of the left side of the car. There was no more of the board of the left-hand side of the running board than that. There are two lengths of boarding on the car. There are three boards on the car of that size. This is the one on the outside. That is the full length of it. I sawed that board in two. Complete, it would measure sixteen feet. The board is about eight foot six inches long. There is about seven feet six inches gone. I got that board about a month or five weeks ago. The car was at Torreon at that time, in cold storage, to be overhauled. (Witness examined board.) This board is not rotten. This is where it was turned up, so as to be exposed to the weather (indicating). This is the bottom. That is put on cleats. This part (indicating upper part) is turned towards the sun. There were three boards there when I took this off. The cleats of this board are just about two feet apart. Cleats are the pieces where the nails go. They were still there, and in good condition. Three boards still remained on the car. A board is five inches wide. Five inches width of board was still there when I took this off." Cross-examination: "I saw this car No. 1,423, just as I said, five or six weeks ago. It was about the 24th of July when I took that board off. I didn't see the car from the time of the accident until I took this board off, and didn't pay any attention to it. I took this board off at Torreon. It was taken back there. I believe that the company permitted this broken running board to be on the car from the 10th day of February until the 24th day of July, 1901. If Mr. McCurdy, the conductor, and Mr. Townsend, the brakeman, say that there were three running boards on there, they are mistaken. I do not claim to know this was the car Townsend was hurt on. I do know whether I took that board from the car on which Townsend was hurt on or not. Mr. Cox told me to take it off. I do not know what position he occupies with the Mexican Central. I know that he is an official of that road. I cannot say exactly just what official he is. I do not know just exactly whether I had any orders to obey his request in taking that off or not. He came and asked me to take it off, and I took it off. Had you (to Patterson) asked me to take it off, I would have done so. I do not know who you are. This was a beer car, white painted on the sides, and the ends and roof were red. The running board was of the color red. I mean by 'cleats' the cleats under the running board. I mean the cleats were pieces that ran across the car, and this rested on it. The nails hold up the balance, but I took them off. The balance of the nail holes are the same now as when I took it off the car. The cleat was in the bottom, and these boards were then just like I took them off the cleat. (The boards are shown to the jury.) I have been in the railway service since 1881. I have had considerable experience with cars. It is the only thing I have had to do since that time. About seven and a half feet were gone from this. It extended over the end of the car six inches. If there was a high car, and a man would jump down on it, it might split. A couple of jumps might crack it, and it might open a little. A brace under the end would have a good effect. It would have a good effect for a man to jump here as on there (indicating with reference to table). If a cleat had been there, and a man stepped on it there, it would have been solid. It could not have been broken there. The effect the nails would have on the solidity of the board would be its strengthening. It might not be broken if it was properly nailed down. Stepping on the end wouldn't break it. If I tried to make a pretty good jump, it might strike it, and break it. If I were over on this car, and jumped over, it would not break it. Jumping there (indicating) might break it. If the brace were off, it would not interfere much with the board; at the same time, it might break the board." Redirect examination: "The last cleat is about two inches from the end. There is four feet between the bracket and the end of the car. There are four feet between these brackets." Recross: "I am car inspector. On the Mexican Central it is the duty of the car inspector to inspect the box cars. Q. If this running board came over six inches— Had this been taken out on top, and this cleat braced under

it, could a Mexican Central car inspector have seen it? A. Yes, sir. He is there to look at it. That car laid up there about two weeks or ten days. If I didn't find anything the matter with the car, I made no record of it. I did not inspect it from the day before the accident until the 24th of July. That is something I did not do. I did not say the 24th day of July was the day upon which I first saw it. I said I took the board off on that day. I had inspected it before. Those beer cars came there every ten days or two weeks. I have been inspecting this car on and off for the last year. I could not say how many times I inspected it from the 9th of February until I took this off. I inspected that car between the day of accident and 24th of July, and reported it in good order. There are a whole lot of these cars. Anything is safe to run when there is no danger of getting hurt. Anything unsafe to run we report. I considered that running board just as safe as if a new running board was on there, when I took it off. Between February and the time I inspected it, I saw this running board, but didn't notice it before. The chances are I noticed it, and did not. Had I noticed it, I would have considered it safe to run. I didn't see it from the time of the accident until I took it off. The chances are I might have looked over it. If there are two side tracks, I go on one train and look at other. If there was a cleat, and that was the end of the car, or the end of the board, and this was two or three inches higher than the car (indicating), and it was even, I would consider it safe. The end would be about two inches higher than top of the car. The inside would not be quite so much. Saying this (indicating) is the top of the car, this (indicating) would be two inches higher than the top of the car. That is considered as good pine. Now, if a man jumped from one car to the other, although braced, it would crack. It would break at the rotten or weak place, if properly nailed down. So far as I could see, the board was well nailed. Some inspector might have taken the nails out. I might have taken them out myself. A nail sticking out as this was would be safe. It would be safe two inches above the top of the board. The whole board is about two inches higher than the top of the car. I have been caught lots of times. I either drive them down or pull them out. You will find that the widths of most of the running boards are from 12 to 14 and 16, and 18 and 20, some of them. A good many are not wider than 12. When the strips remained, the running board at that place was fifteen inches." The court instructed the jury to find a verdict for the plaintiff for such damages as he sustained by reason of the injuries which he suffered, to which charge the defendant duly excepted. The jury found a verdict for the plaintiff for $13,800, and a judgment was thereon rendered.

T. A. Falvey and Waters Davis, for plaintiff in error.

Geo. E. Wallace, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the facts, delivered the opinion of the court.

In determining the question whether it was proper to give peremptory instructions in favor of the plaintiff, we must look at the case as it appears from that part of the evidence which is most favorable to the defendant; for we must concede to the defendant anything which it could fairly claim from the evidence. It had the right to ask the jury to believe the evidence that was favorable to it. When a party asks for peremptory instructions in his favor, he must concede all that his opponent may fairly claim from the evidence presented. When a passenger sues the carrier, proof of an accident carries with it a presumption of negligence on the part of the carrier. But a different rule prevails in a suit by an employé against the employer. The accident in the latter case carries with it no such

presumption. The employé is required to prove the negligence of the employer. Patton v. Railway Co., 179 U. S. 658, 663, 21 Sup. Ct. 275, 45 L. Ed. 361. The evidence unquestionably shows that immediately after the accident the brace that was intended to support the end of the running board was down. The evidence on the part of the plaintiff also shows that the board which was broken was wind-shaken, cross-grained, and rotten. The evidence on the part of the defendant tended to show that the board broken was sound. There is no conflict, however, in the evidence that the brace or support at the end of the board was loose, and hanging down, when the car was examined after the accident. It appears to us that from the condition of the car either one of two conflicting inferences might have been drawn: The jury might infer that the brace became loose and came down since the last inspection of the car, and at or about the time of the accident; or they might infer that it was for some time—probably a few days—in this condition, with the brace misplaced as described by the witnesses who saw it immediately after the accident. If it was in such condition at the time when the car was or should have been inspected, it would clearly have been negligence in the inspector not to discover and report the defect. On the other hand, other inferences might be made if the car was inspected the day before or shortly before the accident, and the brace was in place, and the part of the running board which broke was sound, and sufficient for the purposes for which it was used; or, if unsound and weather-shaken, it was covered with paint, and the defect hidden, so that it was not perceptible or discoverable by proper inspection. From the fact that the brace was hanging down and misplaced when the accident occurred, the jury might infer that it was in that condition at the time when an inspection was or should have been made. But this inference seems to us, from the facts, not compulsory. A contrary inference is not irrational. The evidence tends to show that an inspection was made before the accident,—probably the day before the accident. Although the witness was examined, cross-examined, and re-examined, he is not asked in what condition he found the car. He does say though, in reference to a later inspection, "Anything unsafe to run we report;" and, as we understand the evidence, this car was not reported. A piece of board was in evidence before the jury. The evidence of the witness producing it tended to show that it was a part of the board which had been broken at the time of the accident; not the part broken off, but the part left on the car at that time. The witness producing it testified that it was sound; that it was not wind-shaken or rotten. If unsound, whether it was so painted as to cover the defects from sight or inspection is left uncertain. It appears, however, to have been painted, but it is left to inference whether it was in such condition that on the day before the accident a proper inspection would have discovered the defects in it, conceding it had defects. It might have been inferred that the defect was perceptible and long-existing; but, to sustain the instruction given the jury, that alone is not sufficient. It must also appear that no other inference was reasonable; that is, to sustain the instructions given, the evidence must be such

that no other inference but that of negligence of the defendant could be reasonably drawn from the facts in evidence. The evidence altogether, as presented in the bill of exceptions, is amply sufficient to authorize a jury to make such inferences as would justify a verdict for the plaintiff, yet we are constrained to say that it is not such as to justify us in saying as matter of law that no reasonable inference could be drawn from it except that of the negligence of the defendant. The evidence in the record tends strongly to sustain the inferences drawn from it by the learned trial judge, but we cannot hold that the jury could have made no rational inference to the contrary, and we are therefore constrained to decide that the case, on proper instructions, should have been submitted to the jury.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

WILSON v. PENNSYLVANIA TRUST CO.

(Circuit Court of Appeals, Third Circuit. April 25, 1902.)

No. 37.

BANKRUPTCY—PREFERRED DEBT—RENT—LEASE FOR FIVE YEARS.

A lease for five years provided that, if the tenant became a bankrupt, the rent for the entire term should be taken to be due and payable forthwith. Within a year he was adjudged a bankrupt, while owing three months' rent. The trustee notified the landlord that the lease would be surrendered at the end of the second month thereafter, but he refused to accept the surrender, and filed a claim for one year's rent as a preferred claim under the Pennsylvania act of 1836, giving a landlord priority of payment for one year's rent out of the proceeds of the sale of the tenant's goods. By an amicable arrangement the premises were occupied by a third person during the seven remaining months, for which rent was claimed, and the landlord then took possession. *Held*, that he was properly allowed, as a preferred debt, three months' rent due when the petition in bankruptcy was filed, and also the rental rate as compensation during the time the trustee retained the premises, and to receive the rent which the temporary tenant was to pay, and the balance of the claim was properly rejected.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

Elias P. Smithers, for appellant.

W. A. Way, for appellee.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. This is an appeal by Albert H. Wilson, a creditor of Speer C. Nelson, a bankrupt, from a decree of the district court, sitting in bankruptcy, disallowing in part the claim of this creditor. The material facts are these: By a written lease dated January 26, 1900, Wilson demised to Nelson a lot of ground and building thereon erected for a term of five years from April 1, 1900, at an annual rent of $1,200, payable in monthly installments of $100 each, the tenant also to pay the water tax; the lessee stipulating that, if he should "become a bankrupt," the whole rent for

the whole term "shall be taken to be due and payable forthwith." On January 4, 1901, Nelson filed his petition in bankruptcy, and was adjudged a bankrupt. On January 5, 1901, the court made an order restraining Wilson from making a distress for rent. On January 28, 1901, Wilson filed a proof of debt under said lease for $1,215, being the rent for one year, from October 1, 1900, to October 1, 1901, and $15 water tax, which sum or debt of $1,215 he claimed had priority over general debts, and was payable in full out of the bankrupt's estate. On February 14, 1901, the trustee in bankruptcy notified Wilson that the lease would be surrendered and the premises vacated on February 28, 1901, but Wilson refused to accept such surrender. Afterwards, under an amicable arrangement entered into without prejudice to the right of either party, the premises were occupied by a third person until October 1, 1901. On the day last mentioned—October 1, 1901—Wilson accepted a surrender of the lease, and his tenant has since occupied the premises. The fund for distribution arose from the sale by the trustee of goods belonging to the bankrupt which were on the leased premises at the time of the filing of the petition in bankruptcy. The court allowed the claimant out of the fund, as a preferred debt, the sum of $300 for three months' rent due and payable when the petition in bankruptcy was filed, and the further sum of $200 as compensation, at the rental rate, for the period of two months the trustee in bankruptcy had occupied the premises; but disallowed the rest of the claim. The court, however, adjudged that the claimant was entitled to receive the rent, to wit, $300, which the temporary tenant was to pay for his occupancy prior to October 1, 1901.

Has the appellant any just cause of complaint? Notwithstanding the ruling in Platt v. Johnson, 168 Pa. 47, 31 Atl. 935, 47 Am. St. Rep. 877, upholding as valid a provision in a lease that the entire rent for the balance of the term should become due if the lessee should become embarrassed, or make an assignment for the benefit of creditors, or be sold out by sheriff's sale, it may well be doubted whether the stipulation here making the whole rent for the whole term due and payable if the lessee "shall become a bankrupt" is enforceable as against the provisions of the bankrupt act. But the court below did not pass upon that question, and we do not find it necessary to consider it. Assuming the validity of the stipulation where the lessee is adjudged a bankrupt, these consequences would follow its enforcement. In the first place, under the Pennsylvania act of 1836 the landlord would be entitled to priority of payment out of the proceeds of sale of the tenant's goods upon the demised premises to the extent of one year's rent. Longstreth v. Pennock, 20 Wall. 575, 22 L. Ed. 451. Secondly, the rent for the entire residue of the term would be provable as an unpreferred debt, entitled only to a pro rata dividend, and the unexpired portion of the term would become an asset of the bankrupt's estate, to be disposed of by the trustee in bankruptcy for the benefit of the estate. The latter result, however, this claimant repudiated altogether. He sought a partial and one-sided enforcement of the stipulation. He attempted to secure a preference for one year's rent, and at the same time retain his

interest as landlord unimpaired in the residue of the term. He took that position at the start, and held it to the end. His proof was only for a single year's rent as a preferred debt, and then, at the expiration of the year, he took, and has since maintained, exclusive possession of the leased premises. The court held—and, we think, rightly—that the claimant could not split up the term in that way. The contract was not divisible. If the claimant desired to avail himself of the stipulation as to bankruptcy for the purpose of securing a preference for one year's rent, he was bound to conform to the contract as a whole. But this he declined to do. We are therefore of opinion that the action of the court was right.

The decree of the district court is affirmed.

LEE v. BOARD OF COM'RS OF MONROE COUNTY.

(Circuit Court of Appeals, Sixth Circuit. April 8, 1902.)

No. 1,025.

COUNTIES—PURCHASE OF BRIDGES—UNAUTHORIZED ACT—FAILURE TO PAY—RIGHT TO REMOVE.

Where the commissioners of a county, representing that they had complied with the law, and had the right so to do, purchased bridges, and issued orders for the payment, and thereafter the payment of such orders was enjoined because the law had not been complied with, the holder of such orders may maintain an action for leave to remove such bridges unless the county pays therefor.

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

The appellant filed his bill in the court below alleging that the defendant (appellee), under the laws of the state of Ohio, is a corporation capable of being sued, and is required to construct and keep in repair all necessary bridges within Monroe county, Ohio; that the Canton Bridge Company and defendant entered into four contracts in writing, by which said bridge company agreed to furnish all the material, except lumber, and construct and complete ready for travel, the superstructure for three iron bridges and the superstructure and substructure for one iron bridge over certain streams in said county, which structures were constructed according to the terms of said written contracts, and were delivered to the defendant and accepted. It is alleged that the Canton Bridge Company was informed and led to believe by the defendant that all of the provisions of law had been complied with in regard to the letting of said contracts; that upon the completion and acceptance of the bridges the board of commissioners paid the Canton Bridge Company on account thereof the sum of $1,240, and, to evidence the balance due, executed and delivered to the Canton Bridge Company five orders, as by law provided, which were presented to the auditor of the county, who executed and delivered to the company five warrants on the county treasurer, directing him to pay to the order of said company the amount thereof out of the bridge funds, which warrants were presented to the treasurer, who indorsed on them, "Not paid for want of funds," together with the date of such presentation; that these warrants were, for a full and valuable consideration, sold and transferred by the Canton Bridge Company to the People's Bank of Canton, and by it sold to the complainant for a valuable consideration, without any knowledge on his part of any infirmity in them, and that he is now the owner of them; that after the sale of said warrants to the complainant certain taxpayers of the county of Monroe commenced in the court of common pleas an action

against the auditor, alleging that all of the contracts with the Canton Bridge Company and the warrants issued in pursuance thereof were illegal and void, because of the failure of the board of county auditors to comply with the provisions of law relative to the purchase and erection of bridges, and on final hearing an injunction restraining the county treasurer from paying said warrants, or any of them, was granted; that after the commencement of the proceedings for injunction, the complainant learned for the first time that the board of commissioners, in attempting to purchase the bridges, had neglected to comply with certain statutory provisions governing and controlling their action in letting contracts, and by reason thereof said contracts and warrants were void; and thereupon the complainant submitted to the defendant a proposition that he would surrender said warrants for cancellation, repay the money it had paid on the contracts with interest from date of payment, first deducting therefrom an amount that should be reasonable for the use of the bridges from the time they were accepted; and in consideration of so doing the defendant should permit the complainant to remove said bridges at his own expense,—all of which the defendant refused to do. It is alleged that the bridge company made a mistake in acting upon the representations of the defendant that it had complied with the provisions of law regarding the letting of contracts for the erection of bridges; and also made a mistake in believing that the contracts were binding on the defendant, and in believing that the acceptance of the bridges by it amounted to a purchase and ratification of the contracts, and bound the county of Monroe to make payment therefor; and it is alleged that keeping and appropriating said bridges to the public use while the county refuses to make any payment for them is a fraud upon the complainant. The complainant asks that on payment of the amount which has been received by the Canton Bridge Company he be adjudged entitled to take down and remove the bridges, and that an account be taken concerning their use by the county of Monroe during the time it has used them, or, if the defendant elects to keep the bridges, it may do so upon condition of paying for them. To this bill of complaint the defendant interposed a general demurrer, which was sustained by the court below, and the complainant appeals.

H. B. Webber, for appellant.

Spriggs & Ketterer, for appellee.

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

WANTY, District Judge, after making the foregoing statement of the case, delivered the opinion of the court.

The provisions of the statutes of the state of Ohio relating to the purchase and erection of bridges were not complied with by the county commissioners before entering into the contracts with the Canton Bridge Company, and it is conceded by both parties to this suit that they were invalid, and no recovery could be had upon them, nor upon the warrants given in payment, for any part of the purchase price of the bridges. These statutes authorizing the purchase and erection of bridges by county commissioners have been before the supreme court of Ohio, which has held that a contract made for the purchase and erection of a bridge in disregard of the statutes on that subject is void, and no recovery can be had against the county on the contract, or for the value of such bridge; that the commissioners, having no power to bind the county except as provided by the statutes, could not, by accepting and retaining a bridge under a void contract, bind the county to pay what it is reasonably worth; and that, when both parties have acted in disregard of the statutes, the court will leave them where they have placed themselves, and refuse to aid either. Bridge

Co. v. Campbell, 60 Ohio St. 406, 54 N. E. 372. The appellee contends that the supreme court of Ohio in that case has announced as the public policy of the state that no court of law or equity will grant relief to parties who have entered into a contract in disregard of its statutes, and quotes the language of Judge Burket, saying:

"Whatever the rule may be elsewhere, in this state the public policy, as indicated by our constitution, statutes, and decided cases, is that, to bind the state, a county, or city for supplies of any kind, the purchase must be substantially in conformity to the statute on that subject, and that contracts made in violation or disregard of such statutes are void, not merely voidable, and that courts will not lend their aid to enforce such a contract directly or indirectly, but will leave the parties where they have placed themselves. If the contract is executory, no action can be maintained to enforce it, and, if executed on one side, no recovery can be had against the party on the other side. * * * It is necessary to so construe the statutes in order to prevent the evils which induced the enactment of them. If such statutes could be evaded, there would always be found some public servants who would be ready and willing to join in transactions detrimental to the public, but favorable to themselves or some favored friend; and, if public officers should be ever so honest, some persistent agent or salesman would impose upon them, and obtain more out of the public treasury than is justly due. When the provisions of the statute are followed, and all is done openly and publicly, the public interests are best conserved; and even then there is often complaint to the effect that some one has been favored."

If this language is susceptible of the construction claimed for it by the appellee, it could have no binding force in a federal court sitting in equity. Bucher v. Railroad Co., 125 U. S. 555, 582, 8 Sup. Ct. 974, 31 L. Ed. 795. But it has no application to the suit at bar. There is no attempt in this case to enforce these contracts, directly or indirectly, or to collect the value of the bridges under an implied promise to pay for them. The supreme court of Ohio has not declared it to be the public policy of the state to allow its municipal officers to induce people to part with their property, and then set up its want of power to pay for it, and thus appropriate it, because it has been able to deceive the persons who furnished it, relying on the ability of the municipality to bind itself. It has announced that contracts made by a municipality in disregard of the statutes of the state are absolutely void, and will not lay the foundation for a recovery of any part of the price stipulated for in the contract; and that a municipality cannot bind itself to pay what property is reasonably worth when it is furnished, in disregard of the statutes. But while the law affords no remedy, equity, although it will not enforce the contract or create a contract between the parties on account of the acceptance and retention of the property, when the property is in existence, and in the hands of the defendant, will not allow it to retain that to which it has no title whatever, and prevent the owner from reclaiming it. The case presented by the bill shows no moral turpitude in the transaction, and, although the bridge company should have ascertained whether each step provided by the statutes had been properly taken, the law placed upon the defendant the duty of taking those steps. It was necessary for it to comply with every provision of the statutes in that behalf before entering into these contracts, and it represented to the bridge company that it had so complied, and thus misled the bridge company into entering into the agree-

ment, the carrying out of which placed these bridges in the hands of the defendant. The complainant has no remedy at law, and to deny him equitable relief would be to enforce the contract on the part of the bridge company, and to allow the defendant to repudiate its part of the same contract, and thereby appropriate, without compensation, property to which it had no legal or equitable right. It was said by the federal supreme court in the case of Marsh v. Fulton Co., 10 Wall. 676, 684, 19 L. Ed. 1040, 1043:

"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."

If there was any fraudulent purpose of the bridge company, or connivance on its part at the action of the defendant in disregarding the provisions of the statutes, so that the purpose for which those provisions were enacted should be thwarted, then neither the bridge company nor this complainant could come into a court of equity and ask any relief, as they could not come into court with clean hands; and the relief would be denied for that reason, and not on the doctrine of the public policy of the state. There is no public policy recognized by the courts which allows any person, natural or artificial, to take the property of another, and appropriate it to its own use, and deny to the person who is innocent of fraud the right to reclaim it. As there was no contract binding on either party in this case, and there was no fraud on the part of the bridge company or this complainant, and the property is in existence and in the hands of the defendant, it seems clear that the relief asked for should be granted. The case seems to come entirely within the principles laid down by the supreme court in the case of Chapman v. Douglas Co., 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378. See, also, Wrought-Iron Bridge Co. v. Town of Utica (C. C.) 17 Fed. 316.

The decree sustaining the demurrer should be reversed, and the demurrer overruled, with leave to defendant to answer.

HALL v. AHREND.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 99.

PATENTS—INVENTION—PROCESS FOR MAKING IMITATION PRESS-COPIED LETTERS.

The Hall patent No. 423,558, for a method of producing imitation press-copied letters, claim 1, is void; the process described for treating printed letters or circulars to give them the appearance of having been press-copied being essentially the same to which letters are subjected in the actual copying, which was old.

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

Alan D. Kenyon, for appellant.

R. B. McMaster, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, District Judge. This cause comes here upon appeal of complainant in the court below from a judgment dismissing the bill alleging infringement of complainant's patent No. 423,558, granted March 18, 1890, to Samuel Hall. The patent is for a process whereby the blurred appearance of press-copied letters may be imparted to printed circulars in great numbers, in rapid succession, and in practically unlimited numbers. The idea was novel; the result was commercially successful.

The first claim, the only one in suit, is as follows:

"(1) The process described, consisting in first printing the original sheets, then placing their printed surfaces in contact with a moist material and passing both together between compression rollers, then removing the ink impression received by the moist material before it is again brought in contact with the printed matter, substantially as and for the purposes set forth."

The process thus claimed consists, as stated by the patentee, in (1) printing the circulars in the ordinary way; (2) placing them face downward on an endless belt of moist material; (3) compressing them together by means of rollers; (4) washing out the ink thus impressed on the moist material; (5) using the moist material over again for the same purpose. The apparatus by which the process is carried out comprises a web, two tanks, one containing water, the other bleaching fluid, and rollers. The web passes under one of the rollers submerged in the water tank, and, thus moistened, passes upward between two adjustable squeezing rollers, which regulate the amount of moisture. The circulars are then placed face downward on the moist web, and are carried thereon between another pair of rollers, "and thus an imprint is taken on the web from the ink on the paper." The circulars then drop off or are removed, and the web passes down into the tank of bleaching fluid, where the ink is destroyed, and then under a roller and between another pair of squeezing rollers, which squeeze out the excess of bleaching fluid, and then over another roller into the water tank, where the bleaching fluid is washed out, leaving the web moist for another printing operation. The patentee, however, expressly disclaims this apparatus, and in the claim in suit does not claim the bleaching fluid, and neither complainant nor defendant uses bleaching fluid in carrying out the alleged process.

If it be assumed that the method employed in this operation of a machine may constitute a true process when no bleaching fluid is used, the question is raised whether such process involved invention in view of the prior art. Letter-copying machines with water troughs, and operated by means of rollers or platens, were old, as shown by the Bailey, Lash, Stiles, and Cope patents. In these presses a process was employed by which copying paper was dampened, and this "moist material" and the printed surface of a letter were passed together between rollers or under a platen, and in some cases the ink was afterwards washed from the rollers. The complainant attempts to differentiate these processes from that claimed in the patent in suit by the contention that the old processes were used to print a copy of the let-

ter on a sheet of interposed paper, but that by the use of the patented process, while a press-copy effect is given to the circular, no real copy of the circular is printed, but only a stain of free ink is imparted to the web, which stain is removed.

But the patentee, describing the operation of his process, says: "Thus an imprint is taken on the web from the ink on the paper." Complainant's expert admits that "the first letter as it is fed through the compression rollers on to the endless belt would be found to contain almost a perfect copy of the letter," and counsel for complainant admits: "In actual practice the printed circular or letter leaves a substantial amount of ink on the moist material; in fact, a complete copy is usually imprinted on the moist material."

The contentions in support of novelty are disposed of by prior patents, notably patent No. 289,983, granted to Ezra Cope in 1883, for a copying press. The chief difference between the patented process and that carried on by means of the Cope patent is in the use by Cope of a platen with his rollers. He uses an endless web of moist material, which, with the letter or circular, is subjected to pressure under the platen. The web passes between rollers into a tank of liquid, which moistens the web, and may serve to wash out the stains of ink. It is true that a sheet of copying paper was interposed between the latter and the web, but this was done only in order to preserve the copy, while in the patented process the copy made directly on the web is destroyed. In each case the ink passing from the letter or circular may afterwards be washed out.

Although the moist material used by the patentee is a cloth web, he does not claim it, but describes the web as made "of cloth or other suitable material," just as Stiles had done in his copying apparatus, patent No. 343,505. And the experts for complainant admit that the process of the patent might be practiced to a limited extent by the use of "moist material," consisting of the dampened paper of copying presses, or by employing the rubber rolls of an ordinary clothes wringer. The old and new processes are the same; in one case the copy is preserved, in the other it is destroyed.

The objection to the Cope apparatus that it could not be speedily operated is met by the proof that the substitution for the platen of the rollers shown in other presses of the prior art would not involve invention, and by the fact that the apparatus by which such speed is accomplished is not covered by the patent. Three-quarters of the Hall specification is devoted to the description of a letter-press copying apparatus of unlimited capacity, designed for speedy and continuous operation, of which he says: "I do not herein claim the apparatus shown and described, * * * since I intend to make that the subject of an application for a patent." His first claim is broad enough to include the old-fashioned letter-press copying system, and therefore cannot be sustained.

The decree is affirmed, with costs.

In re DURHAM.

(District Court, D. Maryland. March 14, 1902.)

1. BANKRUPTCY—JURISDICTION TO DETERMINE VALIDITY OF MORTGAGE—CONSENT OF MORTGAGEE.

A creditor of a bankrupt, who holds chattel mortgages, and who, in response to a petition by other creditors, asking that its mortgages be set aside as illegal preferences, asked and obtained further time to plead, and thereafter answered the petition, asserting the validity of its mortgages, and asking that its claim be allowed and paid from the proceeds of the mortgaged property in the hands of the trustee, thereby consented that its rights might be adjudicated by the court of bankruptcy, and cannot, for the first time, challenge the jurisdiction of such court after the issues have been referred and testimony taken by the referee.

2. SAME—LIENS—VALIDITY OF CHATTEL MORTGAGES.

A bankrupt, before the filing of his petition, was a country merchant, and engaged in the canning of tomatoes, which required during the canning season a large outlay of cash in the purchase of tomatoes and cans. By arrangement with a bank the latter advanced the sums required, taking up the drafts attached to bills of lading for cans, and holding such bills until mortgage bills of sale were executed upon the canned product to secure the advances made, and further advances then made or to be made for the purchase of materials. These mortgages were properly recorded. *Held*, that such mortgage bills of sale created valid liens, which, under Bankr. Act 1898, § 67d, were not affected by the subsequent bankruptcy of the mortgagor.

3. SAME.

A parol agreement between the mortgagor and mortgagee that the canned products should be delivered by the mortgagor to a commission house, and be sold by it, and the net proceeds paid to the mortgagee, did not affect the validity of the mortgages, or constitute a transfer with the intent and purpose to hinder and delay creditors, within the meaning of Nat. Bankr. Act 1898, § 67e.

4. CHATTEL MORTGAGES—VALIDITY—SUFFICIENCY OF DESCRIPTION.

A series of chattel mortgages executed at short intervals, and in effect as a part of the same transaction to secure advances made by the mortgagee to enable the mortgagor to conduct a canning business, and covering the product of such business, are not invalid, under the law of Maryland, for insufficiency of description, although at the date of the first the goods mortgaged were in part to be yet acquired, where they had all been acquired when the last was executed.

In Bankruptcy. Proceeding to set aside certain chattel mortgages from the bankrupt to the Harford National Bank of Bel Air, Md.

John L. G. Lee, W. Irvine Cross, and Harry S. Carver, for E. Savage Shure, John S. Wallis, and other creditors.

Stevenson A. Williams and David G. McIntosh, for the Harford National Bank of Bel Air, Md.

MORRIS, District Judge. The bankrupt, John J. Durham, filed his voluntary petition December 13, 1899, and was duly adjudicated. On April 19, 1900, E. Savage Shure and John S. Wallis, and subsequently other creditors of the bankrupt, filed their petitions, asking that certain bills of sale of the bankrupt's property made by him to the Harford National Bank of Bel Air four months preceding the bankrupt's application be set aside as illegal preferences, and made to hinder, delay, and defraud creditors. An order on the petition re-

quired the Harford National Bank of Bel Air to answer and show cause on or before May 5, 1900. On May 4, 1900, the Harford National Bank of Bel Air filed its petition, asking to have the time for filing its answer extended until May 15th. On May 15th the Bank filed its answer, under oath, to all the allegations of the petition, and, proffering itself ready to furnish such other detailed accounts of its transactions with the bankrupt as might be right and proper, claimed that it was entitled to have the lien of its several mortgage bills of sale preserved, maintained, and enforced, "and its claim therefor allowed out of the proceeds of sale of the property covered thereby now in the hands of the permanent trustee of said Durham." On July 5, 1900, the petition and answer were, by order of the court, referred to the referee to take testimony and report to the court. On July 11, 1900, Thomas H. Robinson, who had been appointed trustee of the bankrupt's estate, and on whom a copy of the creditors' petition had been served, filed his petition, stating that from the information obtained by him he was unable to determine whether the allegations in the petition could be sustained or not, and that for the purpose of bringing the matter properly before this court, and having the allegations investigated, he charged that the bills of sale held by the bank did create illegal preferences, and should be set aside. On July 24, 1900, and after the taking of testimony had been commenced, the bank filed its petition, asking leave to withdraw its answer, and to file a demurrer setting up want of jurisdiction in the court to hear and determine the validity of the bills of sale. This leave was not granted, and the parties proceeded with the taking of testimony.

I am of opinion that the objection to the court assuming jurisdiction came too late. The bank, by its application for further time to answer, and then by answering and submitting to the jurisdiction of the bankrupt court, and asking that its lien be sustained, and its claim allowed out of the proceeds of property in the hands of the trustee in bankruptcy, fully consented that the issues raised by the petition and answer should be heard and determined by the bankrupt court as part of the proceedings in bankruptcy, and as a controversy in relation to the estate of the bankrupt. The Harford National Bank was not a stranger to these proceedings, for on the day that Durham filed his petition, and was adjudicated a bankrupt, it filed its petition stating that it was a creditor for $15,173.28, and asked that receivers be appointed to take possession of all the bankrupt's goods, and that a restraining order issue enjoining all persons from interfering with the bankrupt's property. Upon its petition the court granted the relief asked for. It seems clear, therefore, that the bank made itself a party to these proceedings, asked substantial relief, and consented to the determination of the controversy as to its claim of lien upon certain assets of the bankrupt by this court of bankruptcy.

There were five mortgage bills of sale duly recorded made by Durham to the bank in August, September, and October, 1899, the total of the sums intended to be secured amounting to $29,250. Of these amounts it is admitted by the bank that the sum of $5,000, mentioned in the first bill of sale, was an antecedent debt, carried over from the previous season, for which they held the bankrupt's note, with two in-

dorsers. All the other amounts are claimed by the bank to have been made up either of an advance of money made at the time the bill of sale was delivered to it, or for an advance then agreed to be made and subsequently advanced.

In considering whether this contention has been satisfactorily established by proof, the surrounding facts should be borne in mind. Durham carried on the business of a country storekeeper, and had for several years been engaged during the canning season in canning tomatoes in Harford county, Md. In the season of 1899 he increased his canning business, and had made contracts for cans and other material which had to be paid for in cash, and had made contracts for tomatoes to be grown for him, and contracts for filling empty cans to be provided by him. All these contracts involved the paying out of large sums of cash, the cans not being deliverable until the drafts attached to the bills of lading for them were paid, and other parties having a possessory lien on the cans when filled. No money could be realized from sale of the canned goods until near the end of the season, when they were ready for shipment to purchasers at a distance. It is plainly a case where a large advance upon the cans and other material as delivered to Durham, and upon the goods when packed, was a usual and legitimate transaction, and, for a country storekeeper of small capital, unavoidable. The business of the bank was to loan money, and to loan it securely, and not to put it at the risk of the business enterprises of its customers, as do the vendors of merchandise. The president of the bank, Mr. Williams, testifies that Durham never was allowed to overdraw, or to have money from the bank further than it had securities in hand. This was often by the retention of the bills of lading for cans, which were shipped to Durham in car-load lots, after the bank had paid the drafts for the price of the cans attached to the bills of lading. This security was held, and the cans not delivered by the bank to Durham until a mortgage bill of sale was executed. Durham kept his account at the bank, and it is shown that the sums paid for him by the bank made up of drafts, notes, and checks in the prosecution of his business amounted from July to the end of December, 1899, to $77,521.03. The taking of security by holding title to the goods paid for by the money advanced by the bank, which could not be paid back until the product of the season's packing was sold, is in harmony with the transaction, and with the custom of banks and bankers. In the city it would be done by pledging warehouse receipts, and, where goods are scattered in country canning factories, by mortgage bills of sale. I am satisfied from the testimony that, except as to $5,000, secured by the first bill of sale, the bills of sale were taken by the bank to secure present, and not antecedent, advances, and that the money was bona fide advanced to enable Durham to pay the necessary outlays of his canning business, and procure the necessary material and labor to prosecute it. After he had made his contracts for the canning season of 1899, his only hope of escaping disaster was to obtain the funds required to pay for the cans and other material necessary to prosecute the business. These payments tended to increase his estate in so far as the materials purchased increased his assets and facilitated his business. There was nothing secret about the bank's security.

The several bills of sale were all promptly recorded, according to the Maryland law, on the day they were executed, and every one dealing with Durham was affected with notice of their contents. Their meaning and purpose was obvious and unmistakable, viz. that the bank was furnishing Durham with the funds required to carry on his canning business at the season of its greatest activity, and was taking mortgage bills of sale on the material thus paid for and on the product of the canning factories, almost from week to week, to secure its advances. That these advances were bona fide transactions intended to aid Durham in successfully prosecuting the season's canning business, and, if possible, to pay off the debts contracted in it, I discover no sufficient reason to doubt. It is quite apparent that the canning business is often done on a narrow margin of profit, and that a few cents per dozen difference in the price at which the canned goods are finally sold, or at which the empty cans are bought, determines the success or failure of the season's business. It turned out that the price at which Durham's goods of that season were sold was very low and unprofitable. When the bank, after October 23d, refused further accommodation to Durham, and he could get no more money from that source, and he was unable to receive and pay for many thousand bushels of tomatoes which had been grown for him, and they began to rot in the fields, then his creditors became clamorous, and his application in bankruptcy followed on December 13th. Before the application, the bank, finding that Durham's condition was hopeless, proceeded to get possession, as far as possible, of all the canned goods covered by its bills of sale,—about 15,000 cases,—and made sale of the greater portion of them.

By section 67d of the national bankruptcy act of 1898, it is provided:

"Liens given or accepted in good faith and not in contemplation of or in fraud of this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

The cases interpreting the foregoing and similar provisions in bankrupt laws are carefully cited in the note to In re Little River Lumber Co., 1 Am. Bankr. R. 483, 92 Fed. 585, and it is not, therefore, necessary to refer to them here. They hold that pledges to secure money loaned at the time are valid; that an exchange of a security validly held for a new security, the old one being released, is not a preference; that a fair exchange of values may be made at any time notwithstanding insolvency; that an insolvent is not bound to abandon all dealing with his property, provided he does not give preference to antecedent debts, and does not so deal with it as to evidence a purpose to defraud or delay his creditors, and that preferences can only arise in case of antecedent debts. See, also, In re Wolf (D. C.) 98 Fed. 84; In re Davidson (D. C.) 109 Fed. 882. It is, however, contended by the petitioners that, notwithstanding it may be true that the mortgage bills of sale were made for a valid, present consideration, they were void under section 67e, which enacts that all conveyances, transfers, assignments, or incumbrances given by a person adjudged a bankrupt within four months prior to the filing of the petition, with intent and purpose on his part to hinder, delay, or defraud his creditors, or any

of them, shall be null and void as against the creditors of such debtors, except as to purchasers in good faith and for a present consideration. Bank v. Bruce, 48 C. C. A. 236, 109 Fed. 69.

It is urged that, although the bills of sale were given by the bankrupt as the consideration of obtaining advances from the bank to be used in his business, yet by reason of the manner in which the property mortgaged was dealt with it must be held that Durham's purpose was to hinder and delay his other creditors. There was no agreement in the bills of sale allowing the mortgagee to dispose of the property, but it is proved that by an agreement entered into in September Messrs. Smith, Rouse & Webster, who were commission merchants at Bel Air for the sale of canned goods, and were also dealers in canners' supplies, were authorized to make sale of the canned tomatoes; and Durham agreed that, as soon as they were packed and labeled, he would ship them, according to the instructions of Smith, Rouse & Webster, to the purchasers procured by them, and allow Smith, Rouse & Webster to bill the goods in their own names, and collect the proceeds of the sales. Smith, Rouse & Webster agreed to guaranty the payment of the sales made by them, and to notify the Harford National Bank of each shipment of goods as soon as they received the bills of lading; and further agreed, after deducting their own charges and advances, to pay over the balance to the bank, which claimed the goods under the bills of sale. This was not an agreement allowing the mortgagor to sell the goods and appropriate the money received to his own use, but was an agreement by which the proceeds of the goods were applied to the payment of the mortgage debt, the sale being made in the customary manner by commission merchants, through whom Durham usually purchased his cans and sold his canned goods. Edelhoff v. Manufacturing Co., 86 Md. 595–612, 39 Atl. 314. No inference of purpose to delay or hinder creditors can be drawn from this agreement.

It is further urged that these bills of sale should be held invalid because the description of the goods intended to be conveyed is not sufficiently definite. I think, at least so far as the canned goods are concerned, the description is sufficient to gratify the requirements of the Maryland statute. There were five mortgage bills of sale, viz., August 25, 1899, for $5,000 antecedent debt and $3,000 present consideration; September 5, 1899, for $11,000; September 21, 1899, for $4,250; September 29, 1899, for $3,000; October 23, 1899, for $3,000. It was an almost continuous transaction, and although as to the earlier one the goods mentioned were in part to be after-acquired, they had been all acquired at the date of the latest bill of sale. The description of the personal property conveyed by a bill of sale required by the Maryland Code (article 21, § 41) is only a general description by its location, ownership, and general characteristics, and parol evidence is admissible to show the particular articles included within the general words of the description. Jones, Chat. Mortg. § 56.

The prayer of the petition is that the said several bills of sale may be declared null and void and set aside, and the proceeds arising from the sale of the property described therein distributed under the orders and directions of this court amongst the creditors of said bankrupt

equally. This prayer, except as to the antecedent debt of $5,000, attempted to be secured by the mortgage bill of sale of August 25, 1899, is denied.

THE EVA B. HALL.

(District Court, S. D. New York. April 19, 1902.)

ADMIRALTY—INJURY TO SEAMAN—SUBSEQUENT NEGLECT—LIABILITY.

Libelant, a seaman, had his arm broken through being struck with a capstan bar by the mate of the vessel, and the master, during the 11 days it was at sea before reaching port, required him to continue work to some extent, threatening to put him in irons unless he did so. The perfect rest necessary to insure a natural reunion of the disunited parts of the bone was thereby prevented, and the injury greatly aggravated. Libelant told the master that his arm was broken, and it became swollen and inflamed immediately, and remained constantly in that condition. *Held* that, though there was no fault on the part of the vessel as far as the blow itself was concerned, it was liable for the master's misconduct in compelling the libelant to continue work after he was injured, instead of permitting him to have the necessary rest.

In Admiralty.

Bodine, Quigley & Whiting, for libelant.
Wing, Putnam & Burlingham, for claimant.

ADAMS, District Judge. The libelant in this action was a seaman on the schooner Eva B. Hall, and had his left forearm broken through being struck with a capstan bar by the mate of the vessel on the 4th day of November, 1901, while the vessel was on a voyage from Fernandina, Fla., to New York. He was engaged in the performance of his duties at the time. The mate has disappeared, but the libelant does not seek to hold the vessel for the original injury, nor does the vessel claim that the blow was justified in any way. It is assumed by the parties, for the purpose of this action, that there was no fault on the part of the libelant or of the vessel as far as the blow was concerned, but the libelant complains that, instead of thereafter receiving the care he was entitled to from the vessel, the master wrongfully compelled him to work during the whole of the remainder of the voyage, a period of 11 days, threatening to place him in irons, unless he should do so, with the result that he suffered great pain, and his arm was permanently injured. It is contended by the claimant that, when the injury was reported to the master of the vessel, he examined the arm with all the care and skill of which he was capable, and, supposing the injury to be merely a bruise, treated it daily with liniment; that thereafter until the termination of the voyage the libelant was only required to do such work as he could with the other arm, and, when the vessel reached port, the master and agents of the vessel were willing to send the libelant to a hospital, but he did not request to go to one, but to be paid off, which was done, and he signed clear of the vessel.

There is very little dispute about the facts in the case. The blow caused a simple fracture of one of the bones of the left forearm. The libelant was in a healthy condition, and, if the arm had been properly attended to, and left at rest, there would have been a natural union of

the disunited parts of the bone, so that in a few months the arm would probably have been as good as ever. But, during the 11 days the vessel was at sea before reaching port, the libelant was required to work to some extent, thus preventing the perfect rest which was requisite for the arm, with the result that the broken parts of the bone could not remain in apposition, and the chances the libelant had of his arm healing, or being in a condition for proper treatment when it could be obtained, were destroyed. It now appears that the arm is permanently disabled for any kind of heavy work, unless a surgical operation of cutting down to the bone, and then treating it, should prove successful in getting the parts of the bone to unite properly.

The master could not be expected to know positively that the arm was broken, but it appears that the libelant told him that it was broken. It became swollen and inflamed immediately, and constantly remained in that condition. In view of the complaint and the probability of its truth, I think it was incumbent upon the master to permit the libelant to have absolute rest; but, instead of adopting that humane course, the master threatened to put the wounded man in irons, and forced him, without necessity, to perform duties which would naturally result in an aggravation of the injury. For such action on the part of the master, I think the vessel should be held. The liability of a vessel to her crew ordinarily does not include any compensation or allowance for the resulting effects of an injury received while in her service, but is limited to the expenses of the care, attendance, and cure of the seaman. Where, however, there has been misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, an additional cause of action arises against the ship for consequential damages. The City of Alexandria (D. C.) 17 Fed. 390; Whitney v. Olsen, 47 C. C. A. 331, 108 Fed. 292.

The libelant has been unable to work since the accident, and subjected to living expenses of over $100. He has incurred a surgeon's bill of $50, and paid $1.25 for medicines incident to his injury. He has not released the vessel in any way. Under the circumstances of the case, I think he should be allowed the sum of $800 to cover his outlays and obligations, as well as for some compensation for his sufferings, and to put him into a position by which he may seek such recovery as surgical science may afford him.

Decree accordingly.

THE WILLIAM E. CLEARY.

THE VIVA.

(District Court, D. Massachusetts. March 4, 1902.)

Nos. 607, 608.

MARITIME LIENS—SUPPLIES—MASSACHUSETTS STATUTE.

Vessels which went from Boston to Scituate, where they were employed for two weeks, left the port of Boston, within the meaning of Pub. St. Mass. c. 192, § 14 et seq., giving a lien for supplies where a statement is filed within four days after the vessel departs from the port where the supplies were furnished.[1]

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[1] Maritime liens for supplies and services, see note to The George Dumois, 15 C. C. A. 679.

In Admiralty. Suit to enforce a statutory lien for supplies furnished.

Albert P. Worthen, for libelant.
Frank H. Stewart, for Lockwood Mfg. Co.
David Benshimol and Julius Nelson, for respondent.

LOWELL, District Judge. These are libels to enforce the lien for supplies which is given by Pub. St. Mass. c. 192, § 14 et seq. The goods were supplied in Boston in 1894. More that four days before the statutory statement was filed in the office of the city clerk, the vessels had left Boston, and had gone to Scituate. There they were engaged for about a fortnight in getting coal out of a vessel stranded on the beach. At night they generally went into the harbor of Scituate for a better anchorage, and there procured certain supplies. The question to be determined by the court is this: Had these vessels left the port of Boston, within the meaning of section 15? In The Helen Brown (D. C.) 28 Fed. 111, Judge Nelson held that a trip to Lynn and return, completed on the same day, was a departure from the port of Boston. In The White Fawn (an unreported case, decided in 1898) I held that Weymouth was in the port of Boston, and observed "that the southern limit of the port of Boston must be taken to be, substantially, Point Allerton." In the argument addressed to the court, reference was made to cases and statutes concerned with the delimitation of the port of Boston for pilotage and other purposes unconnected with the lien for supplies. After the cases of The Helen Brown and The White Fawn, it appears to me best to abide by the opinion therein expressed until that opinion shall be overruled by the circuit court of appeals.

Unless it can be shown that some part of the supplies was furnished after the return of the vessels from Scituate to Boston, the libels must be dismissed, with costs.

THE ELIZABETH.

(District Court, E. D. Virginia. April 19, 1902.)

1. ADMIRALTY—COLLISION—VIOLATION OF RULES OF NAVIGATION—LIABILITY.

Act Cong. Aug. 19, 1890 (26 Stat. 320–327) art. 20, requires that, where a steamboat and sailing vessel are in danger of collision, the steamboat shall keep out of the way. Article 21 prescribes that, where one of two vessels is required to keep out of the other's way, the other shall hold its course and speed. Article 22 provides that the vessel required to keep out of the way shall, if possible, avoid crossing ahead of the other. Article 23 declares that the vessel required to keep out of the way shall, if necessary, slacken speed, stop, or reverse. A steam ferryboat came practically to a standstill in Norfolk harbor to permit a steamship to pass, and then rang up, and passed full speed under its stern. At that moment a sloop was observed passing down the harbor immediately across the steamer's bow, and the ferryboat, instead of complying with the rules, whistled for the right of way, without slackening speed or reversing; and a collision resulted, in which libelant's intestate, a passenger on the sloop, was killed. *Held*, that the ferryboat was at fault and liable.[1]

[1] Collision rules, see notes to The Niagara, 28 C. C. A. 532; The Mt. Hope, 29 C. C. A. 368.

2. SAME—RIGHT TO VIOLATE RULES.
The ferryboat had no right to call on the sloop to give way or change its course, there being nothing to indicate peril or difficulty to the former in conforming to the accustomed rules of navigation.

3. SAME.
Even if there had been apprehension of immediate danger, as contemplated by Act Cong. Aug. 19, 1890 (26 Stat. 327), art. 27, requiring due regard to be had to special circumstances rendering a departure from the rules necessary to avoid danger, the ferryboat should have resorted to all other practical methods of avoiding the collision before violating the statutory requirements.

4. SAME—CONTRIBUTORY NEGLIGENCE—ERROR IN EXTREMIS.
Even if the sloop, on the signal from the ferryboat, luffed and changed its course for half a minute, and then suddenly again changed its course across the ferryboat's bow, the ferryboat would still be liable; the sloop's negligence being error in extremis.

5. SAME—NECESSARY DAMAGES.
Libelant's intestate was a colored farm laborer, without any special acquirements; having no trade of any kind. He at times worked in a dairy, making $25 per month, or more. He was 23 years old, of good health, sober and industrious, provided for his family, and left a widow, without children. *Held*, that $1,200 damages should be awarded.

In Admiralty.

A. B. Carney, Jr., and R. W. Peatross, for libelant.
T. J. Wool and Floyd Hughes, for respondent.

WADDILL, District Judge. This libel was filed by the personal representative of George Chatman, deceased, to recover damages occasioned by the death of the said Chatman in a collision between the steam ferryboat Elizabeth and the sloop Martha Jane, upon which sloop the deceased was a passenger. The collision occurred on the 29th of June, 1901, in the harbor of Norfolk. The ferryboat was en route from its slip in the town of Berkley to the city of Norfolk, and the sloop was proceeding down the Elizabeth river. As is usual in this class of cases, the vessels in collision respectively contend that the occurrence was solely the fault of the other. It is not deemed necessary to enter into a lengthy discussion of the evidence, further than to say that it has been fully considered, and the conclusion reached is that the collision must be attributed to the fault of the ferryboat Elizabeth, in not complying with the rules of navigation, by keeping out of the sloop's way, or slackening its speed, or stopping or reversing, or otherwise taking necessary precautions to avert the collision, when it was apparent that it was in such close proximity to the sloop as to make the danger of collision imminent. Articles 20–23 of Act Cong. Aug. 19, 1890 (26 Stat. 320–327), prescribe the rules for the avoidance of collisions between steam and sailing vessels, and the obligation imposed by these rules is imperative; and those violating them, except under circumstances contemplated by other provisions of said act, must bear the consequence, if damage ensues. From respondent's evidence in this case, it is apparent that on the occasion of this collision the Elizabeth failed to comply with either rule 20, 22, or 23; and in fact the violation of all three of the rules is, in effect, conceded. The evidence establishes that the ferryboat came practically to a standstill

in order for an Old Dominion steamship to go by, and, as it did, it rang up, and proceeded to pass full speed ahead under the stern of the steamship; and at that moment the sloop Mary Jane was observed passing down the harbor, and about 75 yards away, having on board some 25 persons, men and women, including libelant's intestate, who were returning from the city of Norfolk to their homes, in the country near by. The sloop was proceeding immediately across the ferryboat's bow; and the latter, instead of complying with the plain rules of navigation, "tooted or popped" its whistle two or three times, without slackening its speed or reversing, which, according to one of the libelant's chief witnesses, the expert Etheridge, who was a passenger on the ferryboat, and an eyewitness, meant to ask for the ferryboat the right of way. In other words, having itself violated the rules of navigation prescribed for its own conduct, it called upon the sloop to do likewise, and violate the rule governing its movements, by keeping its course and speed. Vessels in such close proximity as these were on this occasion, each at the time freighted with passengers, should not have engaged in any such hazardous experiments. It was the duty of the ferryboat, upon her proceeding in such a direction as to involve risk of collision, to keep out of the way of the Mary Jane, and likewise to avoid a collision with her, by crossing ahead of her, and upon approaching her, if necessary, to slacken her speed, or stop or reverse. None of these things the ferryboat did, but elected to follow rules of her own, which resulted in the collision. The ferryboat should have avoided the risk of collision, and for her failure so to do she is clearly liable. The presence of danger, or anticipated danger, was enough to admonish it of the necessity of complying with the rules of navigation. The Carroll, 8 Wall. 302–305, 19 L. Ed. 392; The New York, 175 U. S. 187, 207, 20 Sup. Ct. 67, 44 L. Ed. 126; Steamship Co. v. Low (C. C. A.) 112 Fed. 161, 166, 172; The Richmond (D. C.) 114 Fed. 208. The Elizabeth had no right to call upon the sloop to give way or change her course, under the circumstances of this case, as there was nothing which indicated any peril or difficulty to the Elizabeth in conforming to the accustomed rules of navigation. Maguire v. The Sylvan Glen (D. C.) 2 Fed. 905; Squires v. Parker, 42 C. C. A. 51, 101 Fed. 843, 845. There is no suggestion of inevitable accident in this case, and had there been apprehension of immediate danger, as contemplated by article 27 of the above rules, the ferryboat should have resorted to all other practical methods of avoiding the collision, before it attempted to violate the statutory requirements. The Marguerite (D. C.) 87 Fed. 953; Squires v. Parker, supra.

The position of the Elizabeth, that, upon its "tooting or popping," the sloop luffed, and changed its course for about half a minute, and then suddenly again changed its course across the bow of the Elizabeth, which is claimed by the ferryboat to have been the real cause of the collision, will not suffice to relieve it from responsibility in this case; it having neither slackened its speed, nor stopped or reversed, until this alleged change of course of the sloop. The steamer should not have waited in the position in which it was, either to slacken its speed, or stop or reverse; and if it be admitted that the

sloop did luff, as claimed by the respondent, which is exceedingly doubtful, from the evidence, its negligence in this regard should be treated as error in extremis, brought about by the ferryboat's misconduct.

Some evidence was introduced tending to show that the navigator of the sloop was under the influence of liquor at the time of the collision; but this charge is not borne out by the evidence, and, indeed, there is but little to justify the charge, so far as he is concerned.

Upon the question of the amount of damages that should be allowed libelant, it appears that the deceased was a colored farm laborer, at the time of his death, without any special acquirements, having no trade of any kind, and at intervals he worked in connection with a dairy; making, when so engaged, $25 per month, and at other times something more. He was 23 years of age, of good health, sober and industrious, and provided for his family, and left a widow, without children. Upon these facts, and taking into consideration all of the circumstances of the case, the court thinks an award of $1,200 should be made libelant, in full of all damages arising from the death of her intestate; and a decree may be accordingly so entered.

FAHY v. SOCIETY FOR REFORMATION OF JUVENILE DELINQUENTS.

(District Court, S. D. New York. March 8, 1902.)

WHARVES—INJURY TO VESSEL—EVIDENCE CONSIDERED.

Evidence considered, and *held* not to sustain the claim that an injury to the bottom of libelant's barge was received through the defective condition of the bottom of the river at defendant's wharf, but to show that it was due to a previous grounding of the barge on some rocks.

In Admiralty. Suit for injury of vessel at wharf.

Hyland & Zabriskie, for libelant.

Miller, Decker & Miller, for respondent.

ADAMS, District Judge. The libelant's barge Maggie Eck was injured by striking the bottom at or near the premises occupied and used by the defendant corporation as a house of refuge on Randall's Island, East river, on or about the 4th day of March, 1901. The barge was loaded with about 330 tons of pea coal, which she had taken on board at Hoboken, and had contracted to deliver to the house of refuge. The usual place of delivery was at a wharf maintained by the respondent on the Harlem river side of the island, and it was at such wharf that the libelant claims the injuries were received, through a defective condition of the bottom of the river at or near the wharf, which the respondent negligently permitted to exist, so that when the barge went there in the due pursuit of her business, and upon the invitation of the respondent, she received the injuries without any fault on her part. The respondent contends that the barge received injuries to her bottom by grounding on rocks through being towed out of the channel to reach another wharf on the island, not in any manner

controlled by the respondent, mistakenly supposed by the tug towing her to be the wharf to which she was bound, and that it was through such injuries that the bark sunk at the wharf in question, where there was plenty of water to have floated her if she had not sunk from her previous injuries.

The facts appear to be that the tug first attempted to take the barge to a wharf known as the "North Dock," opposite 125th street, some distance from the one where she was bound, and, in doing so, ran her upon some rocks. She took the ground about 5:30 p. m., and the tug left her there while she delivered another barge in the vicinity, when she came back and dragged the barge off after she had remained fast for probably an hour, and took her to the respondent's wharf. Difficulty in determining the proximate cause of the sinking arises from the absence of reliable evidence as to the time the barge began to leak, or took the bottom at the respondent's wharf. The latter is said to have been 2 o'clock in the morning of the 5th, but that is altogether dependent upon the statements of the master of the barge, whose testimony was not very satisfactory. He said that the barge drew, as she was loaded, 5 or 5½ feet of water. If such were the case, it is clear that the injuries which caused the sinking could not have been received at the place of sinking, because the testimony is convincing that there was a greater depth of water there at all stages of the tide. It is urged by the libelant that the master was mistaken, and that the draft was much greater. I think it was, but the error militates against the master's reliability, and the libelant is dependent altogether on his testimony for an account of what took place after the barge was taken to the lower wharf, excepting that one of the respondent's witnesses saw the boat there about 10 o'clock, with nothing, apparently, the matter with her then. The master says that, when the barge was first taken to the wharf, there was another boat lying there, and his barge lay alongside of her until she was removed, about 11 o'clock, when the Eck was pulled to within about 4 feet of the face of the wharf, and made fast. The master's first testimony in this connection was:

"Q. What did you do after eleven o'clock, when you made your boat fast? A. I measured her, and there was no water into her. Q. What time was it when you measured her? A. I guess it was about eleven o'clock, after I got through at the dock. Q. Then what did you do? A. Then I went down in the cabin, and sat there and read the paper for a while. Q. Until what time? A. Until about twelve. Q. What did you do then? A. Came out and measured it again. The tide had lowered a little bit, and I slacked the lines off a little bit. Q. Did you find any water at twelve o'clock? A. Yes, sir. Q. How much did you slacken the lines then? Ans. A couple of feet, to get her away from the dock if the tide lowered. Q. Was the tide lowering at that time? A. Yes, sir. Q. Then what did you do? A. Went back in the cabin, and then went to bed. Q. What time was it when you went to bed? A. About half past twelve. Q. What next attracted your attention? A. I got up about two o'clock, and found she was aground."

Upon being recalled by the libelant at the end of the case, he testified:

"Q. When did you next sound your pumps after you were hauled off this place opposite 125th street? A. When I got made fast to the dock; about 10 or 15 minutes. Q. Did you find any water? A. No, sir. Q. When next

did you sound? A. After I got to the dock; lying next to the barge. Q. Find any water then? A. No, sir. Q. I thought you said you sounded up to twelve o'clock at night? A. Yes, sir; I sounded twice after that. Q. Find any water in her? A. No, sir."

There is some variation of the statements of the witnesses as to the hour of high tide, but I gather from the testimony and the standard tide tables that it was high water at Hell Gate about 9:15 o'clock, and there could have been little difference at this place. If the barge was leaking at 12 o'clock, it is not probable that it could have been caused by anything that happened at the lower wharf, but apparently was the result of the first injuries. This view is sustained by the nature of a wound on the bottom of the boat, which was described as having been "chewed up," apparently by sharp rocks. There is evidence on the part of the libelant tending to show that there was a spile somewhat outside of the face of the wharf, and projecting a foot or a foot and a half above the bottom of the river, upon which the inward bilge of the barge rested when she was sunk, and that there was a collection of ashes near the face of the dock, upon which the barge also rested when sunk, giving her a strong outward list, but nothing appears which so satisfactorily accounts for the wound as the fact of the bottom of the barge having been in contact with sharp rocks when pulled off by the tug. If the wound existed when the barge was taken to the lower wharf, and at 12 o'clock she had leaked so much, after the intervening hours of natural absorption of the incoming water by the fine coal of which the cargo was formed, that the leakage was evident to the not very vigilant master, it is obvious, the barge then being afloat, that the proximate cause of the disaster was the first grounding, in connection with the master's neglect to pump when he found she needed it. The testimony with respect to the bottom of the river at the lower wharf is in irreconcilable conflict. On the libelant's part, witnesses have testified that at low tide there were not more than 4½ feet at some places where the barge lay sunk, and on the respondent's part it is shown by a careful survey made by the official hydrographer for the department of docks, shortly after the accident, and while the bottom was in the same condition, that there were 8 to 10 feet of water close to the face of the wharf at low water, clear of obstructions, with increasing depths towards the center of the river. The respondent's contention in this respect is sustained by credible testimony that the wharf had been used in the existing condition of the bottom at all stages of the tide for many years, both by vessels of the character of the libelant's and other vessels of greater drafts, without injury of any kind or suggestion of danger.

A review of the whole testimony confirms my impression on the trial that the libelant's allegations of negligence could not be sustained.

Decree dismissing libel.

VENABLE CONST. CO. v. UNITED STATES.

(Circuit Court, N. D. Georgia. February 11, 1902.)

No. 1,543.

1. CONTRACT FOR PUBLIC WORK—LIABILITY FOR EXTRA WORK OR MATERIAL.
Where the engineer in charge of the construction of a government fortification, having authority to designate the work to be done and the materials to be used by a contractor, requires work or materials which are not fairly within the contract, and the contractor complies with such requirement, as he is compelled to do or suffer loss by the abandonment of his contract, he is entitled to recover the extra cost of such work or materials, notwithstanding a provision of the contract that no claim for extra work or material should be made or allowed unless previously agreed upon in writing.

2. SAME.
Where a bidder for government work, as required, submitted a sample of sand proposed to be used, which was approved by the engineer in charge, and the contract was made upon that basis, but a succeeding engineer required the contractor to use a different sand, which was more expensive to him, he is entitled to recover the extra cost of the same in addition to the contract price for the work.

3. SAME.
A contractor for the construction of a government fortification, required by his contract to erect a building suitable for use in testing cement, who at the request of the engineer in charge built a cottage at a considerably greater cost than was necessary for the purpose of testing cement, but without objection or protest, will be deemed to have voluntarily incurred the extra expense, and is not entitled to recover the same from the United States.

4. SAME.
A government contractor who agreed to construct the work in accordance with detail drawings, to be thereafter furnished, is not entitled to extra compensation because the drawings first furnished were changed before the work was done, and the cost of certain work was greater under the second drawing than it would have been under the first; nor can he recover extra pay because the drawings, which were consistent with the specifications, required certain work to be done in a better and more expensive manner than he supposed would be required.

5. SAME—ALLOWANCE FOR EXTRA WORK—PROFIT.
A contractor who has been required to furnish materials and do work not within his contract is entitled to recover, in addition to the actual cost to him of such materials and work, a reasonable sum as profit.

At Law. Action against the United States to recover for extra work done and materials furnished in the construction of a fortification under a contract.

Hoke Smith and H. C. Peeples, for plaintiff.

E. A. Angier, Dist. Atty., and Geo. L. Bell and W. L. Massey, Asst. Dist. Attys., for defendant.

NEWMAN, District Judge. This is a suit brought by the Venable Construction Company against the United States to recover $9,981.07. The suit grows out of a contract entered into by the plaintiff with the United States, through O. M. Carter, the engineer

officer in charge, for the construction of certain fortifications called "gun emplacements," on Tybee Island, near Savannah, Ga. The contract for this work was entered into on November 30, 1896. The character of the contract, so far as material here, will appear in the discussion of the several items embraced in this suit. The case involves a claim for certain work done which is said to have been extra work. The items set out in the plaintiff's declaration and relied on here are as follows:

For additional work upon cut stone	$2,650 00
For 38,649 pounds of conduit pipe, at 4 cents per pound	1,545 96
For change in plan of doors and extra work thereon	900 00
For cottage	949 95
For change in sand	3,935 16
Total	$9,981 07

The United States having filed an answer denying liability for the several items of extra work claimed, the case was, by consent of counsel for the respective parties, referred to an auditor. The auditor made a thorough investigation of the case, and apparently heard the evidence of every one who could throw any light on the transaction, except Capt. O. M. Carter. His testimony was not taken. After hearing the testimony thus presented, the auditor made a report finding in favor of the plaintiff as to each of the items in controversy. The separate claims are here considered in the order in which they can be most conveniently disposed of.

Findings of Fact.

At and before the contract was entered into, on November 30, 1896, plaintiff had only seen what are called "typical plans" of the work to be done; that is, a general outline and plan of the proposed fortification. The detailed plans and specifications by which the work was to be done were furnished later. As to only one of the items involved does any indication appear to have been given as to precisely what would be required. It does appear, so far as can be gathered intelligently from the testimony in this case, that samples of sand such as was to be used in the construction of the battery were furnished, and that an agreement was reached between the engineer officer in charge and the president of the construction company, by which it was understood that the construction company might use one-fourth sharp river sand from the river above Savannah, and three-fourths beach sand, to be obtained from the beach below Savannah, properly mixed and combined. Samples of the sand proposed to be used were furnished by the representatives of the construction company to the engineer officer in charge, and there is sufficient evidence to justify the auditor's conclusion that there was an acceptance on the part of the officers of the government of the proposal to use sand in the proportions above referred to. There was some correspondence on the subject of the character of sand to be used, and a letter from Capt. Carter to the Venable Construction Company of June 9, 1897, shows that the

construction company was required to use all river sand from the river above Savannah. But in a letter written June 16, 1897, this requirement was changed, and the construction company was allowed to use one-fourth sand obtained from above the city, and three-fourths beach sand obtained below the city. After this, and during the time that Capt. Carter was in charge of the work, the construction company was allowed to use sand in these proportions.

On the 20th day of July, 1897, Capt. C. E. Gillette superseded Capt. Carter in charge of the work, and he directed and required that all the sand to be used should be taken from the river above Savannah. The evidence is undisputed that the additional expense of bringing this three-fourths of the sand from the river above Savannah, instead of obtaining it down near where the battery was being constructed, was considerable. The finding of the auditor on this item is as follows:

"Sand: Paragraph 44 of the specifications provides as follows: 'The sand shall be clean, first-class quality building sand, containing a suitable mixture of fine and coarse, sharp grains, free from dirt, organic matter, and other impurities. Bidders will submit with their proposals a sample representing the particular sand they propose to furnish, and will state in their proposals the location of the bank or banks from which it is to be obtained.' Plaintiff's bid contains the following statement: 'Sand, samples of which are furnished, to be of like quality, and acceptable to the engineer; sample came from Savannah river.' I find that plaintiff furnished samples,—one sample coarse, sharp sand, known as 'river sand,' which came from up the Savannah river; and another sample of finer sand, which came from the Savannah river along Tybee Island, and known as 'beach sand.' I find that plaintiff, through its president, W. H. Venable, contracted with Captain O. M. Carter, engineer officer in charge, to furnish and use in the work to be done under the contract in suit a combination sand, composed of one-fourth of said sand known as 'river sand,' and of three-fourths of sand known as 'beach sand.' I find that under this contract the plaintiff proceeded with the work about six months commencing under Captain Carter, and continuing same under Captain Gillette, engineer officer in charge, who succeeded Captain Carter in July, 1897, until December, 1897. I find that this combination sand was clean, first-class quality building sand, containing a suitable mixture of fine and coarse, sharp grains, free from dirt, organic matter, and other impurities, and that the sand used in the work was of like quality to the samples, and complied with the conditions of the contract. I find that in December, 1897, Captain Gillette, engineer officer in charge, who had authority, under paragraph 58 of the specifications, ordered the plaintiff to stop using the combination of sand contracted for, and required him to use exclusively the coarse, sharp sand, known as 'river sand,' from up the Savannah river. The change made in the sand was beneficial to the defendant, the river sand making a better cement than the combination sand contracted for. The plaintiff protested against the change of sand, and furnished the same under protest. The river sand was much more expensive than the beach sand, for the reason that it was several miles distant from the work, and the beach sand was near at hand. Plaintiff was put to additional expense and cost in furnishing the river sand as required by Captain Gillette, engineer officer in charge, to complete the contract, over and above what he has been paid for same by the defendant, the sum of $3,935.16. The defendant was benefited by the change of sand to the extent of said sum of money. It was apparent to the engineer officer in charge who ordered the change in sand that such change would result in large additional expense, and extra expense to the plaintiff."

This finding is adopted as stating substantially and fairly the facts as to this part of plaintiff's claim.

The next item which will be considered is that of ventilating pipe, conduit pipe, 20-inch sewer pipe, and flat iron plates for drains. The auditor's finding of the facts on this subject is as follows:

"Cast-Iron Pipe and Plates: I find from the evidence that plaintiff furnished and put in place 10,261.90 pounds of ventilating pipe; also 8,083 pounds of conduit pipe; also 3,752 pounds of twenty-inch pipe; also 11,915 pounds of cast-iron flat plates for drains. I find that these items were not called for in the specifications or in the contract. I further find that the defendant paid for these items 5c. per pound, the same rate that was paid for drain pipes. I find that these items were not even contemplated by the contract, and that they are extra materials, and putting them in place was extra work, for which the plaintiff is entitled to extra compensation. I find that the ventilating pipe was reasonably worth at current rates, over and above the price paid therefor by the defendant, the sum of $951.16. This sum includes $827.10, the actual cost of furnishing and putting said ventilating pipe in place, and $124.00, the fifteen per cent. profit claimed by the plaintiff. The conduit pipe was reasonably worth, at current rates, over and above the price paid therefor by the defendant, the sum of $511.24. This sum includes $444.56, the actual cost of furnishing and putting said conduit pipe in place, and $66.68, the fifteen per cent. profit claimed by the plaintiff. The twenty-inch pipe was reasonably worth, at current rates, over and above the price paid therefor by the defendant, the sum of $345.00. This sum includes $300.00, the actual cost of furnishing and putting said twenty-inch pipe in place, and $45.00, the fifteen per cent. profit claimed by plaintiff. The cast-iron plates were reasonably worth, at current rates, over and above the price paid therefor by the defendant, the sum of $274.04. This sum includes $238.30, the actual cost of furnishing and putting said plates in place, and $35.74, the fifteen per cent. profit claimed by plaintiff. The profit claimed on the items aforesaid constitutes an element in making up and arriving at the reasonable cost and worth of said items at current rates. The amount paid for the drain pipes was not a proper basis upon which to estimate the price of the items aforesaid. This pipe and these plates not being specified in the contract, and the work of putting them in place being exceedingly difficult, I arrive at the difference in the cost by the figures and estimates given by witness Conant, who was examined in behalf of the defendant. Plaintiff furnished the 8,000 pounds of drain pipe, and was paid 5c. per pound therefor, and this pipe is not included in the item aforesaid. These items properly fall under paragraph 58 of the specifications, which said paragraph is as follows: 'If at any time it should become necessary, in the opinion of the engineer officer in charge, to do any work or make any purchase 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 purchases or work, the current rates to be determined by the engineer officer in charge.' I find from the evidence that the engineer officer in charge of the work under this contract did not determine the current rates of the aforesaid items, and that it was necessary for the plaintiff to institute this suit for the purpose of having the same determined by the court."

This finding by the auditor is supported by the evidence, and seems to state correctly the facts. It is in accordance with the testimony of Mr. Conant, one of the witnesses for the defendant, and is adopted by the court to be the facts in reference to this matter.

As to the item of the cottage for testing cement, I find that the evidence shows that the contractor acquiesced in the requirement of the engineer in charge to construct this cottage. There seems to have been an independent memorandum by which it was understood that a cottage to cost $1,000 was to be erected for this purpose, and that the contractors built this house without any real protest or objection to it. It is entirely clear that no such build-

ing was needed in which to test cement, but it is equally clear that the contractors, for reasons which do not appear, acquiesced in Capt. Carter's request to build a rather expensive cottage. The auditor finds the facts to be as follows:

"Cottage: I find that plaintiff was required by the engineer officer in charge of the work to erect on the defendant's reservation a two-story cottage, at a cost of $1.249.00, which was partially used for the purpose of testing cement. I find that it was the duty of the plaintiff to furnish a building suitable for the purpose of testing cement, and I further find that such a building could have been furnished at a cost not to exceed three hundred dollars. I find that the cottage which the plaintiff erected as aforesaid was a permanent improvement, and that under the contract plaintiff had no right to remove said cottage from the defendant's reservation after the completion of its contract. I find that the engineer officer in charge must have known that this cottage was not necessary for the purpose of testing cement to be used in the work under this contract, and he must have known that he was requiring the plaintiff to do work which was more expensive than that necessary to carry out and perform its contract. I find that this cottage was not specified in the contract, and that it cost the plaintiff $949.00 more than such a building as was necessary for the purpose of testing cement should have cost. I find that the plaintiff, through its agent, protested against erecting such a building for the purpose of testing cement, and offered the defendant a proper building for that purpose, which cost less than $300.00. The defendant's reservation was improved by the erection of said cottage, and enhanced in value to the extent of $949.00, no part of which has been paid."

While this statement of facts is in the main correct, all of the evidence taken together shows the fact to be that, while the contractors may have thought the character of the building required beyond reasonable needs, there was really acquiescence on the part of the officers of the construction company in building it as they did.

The next item is that of cut stone. The facts, so far as they can be ascertained from the record, are as follows: The plaintiff having entered into this contract, as stated, on November 30, 1896, that on January 6th thereafter certain drawings were prepared and shown the plaintiff's representatives, from which it appeared that there was to be in the stone jambs and lintels of the doors only one check or "rabbet," as it is called in the evidence, and subsequently the officer in charge required that the stone should have two checks, or be double rabbetted. The plaintiff, at the time the contract was made, agreed to construct the work according to detail drawings to be furnished; and, while it is a fact from the evidence that the first drawing made showed only one check or rabbet in the stone, it is equally true that at the time the contract was made there was no specific agreement as to the detailed manner in which this work should be done. The most that can be said for the plaintiff is that the engineer in charge changed the detailed plans as the work progressed. This he seems to have had authority to do under the contract.

The next item is as to the plaintiff's claim for extra work in constructing doors. The contract provided that doors should be constructed as follows:

"Doors will be fitted to the magazines, passages, and rooms. They will be made, according to detailed plan, of two thicknesses of sound, well-seasoned 1½-inch white pine, 4 inches wide, tongued and grooved, and planed on both sides. The two thicknesses will be fastened together with bronze bolts, and hung with bronze hinges and gudgeons, as shown on detailed plans. Double doors will have top and foot bolts and plates. All doors will be secured with bronze staples and padlocks of approved design. The wood in the doors will be paid for by the foot, board measure, in place. All bronze door fastenings and fittings will be paid for by the pound in place. The price paid for doors will include painting with three coats of paint, of quality and color to be approved by the engineer officer in charge."

The fact appears to be that the government officers required the construction of the doors in a better manner than the contractors expected. They seem to have required the strips to be laid, in forming the doors, in such manner as to make what is called in the evidence a "mosaic."

Under another provision of the contract it is required that:

"All work will be executed under the direction of the engineer officer in charge, who will prescribe the order and manner of conducting the same in all its parts, and of inspecting and rejecting such material, work, and workmanship as in his judgment do not conform to the drawings that may be furnished from time to time or to these specifications."

It will be seen, therefore, that this work was to be done in conformity to the requirements of the engineer officer in charge. The proof fails to show any such radical departure from what could have been reasonably expected in reference to the construction of the doors in question as justifies a claim for extra compensation. The requirement of the officer in charge seems to have been that the back set of strips in the doors should cover the cracks or joints or any anticipated aperture in the front set of strips. The whole difference relates to the manner of putting the strips together, and, while the method demanded by the engineer officer in charge was more expensive than that expected or desired by the contractors, its only purpose was to get a first-class door.

Conclusions of Law.

The general question necessary to be determined at the threshold of this case grows out of a provision of the contract relied upon by counsel for the government to this effect:

"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 material 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 precise question raised is, where the officer in charge of work and the contractors differ as to whether the work required is extra work or not, and it becomes necessary for the contractors either to abandon their contract or to proceed and furnish the material and to do the work not required by a fair interpretation of the terms of the contract, if the provisions of the written contract entered into between the parties, just quoted, applies. Stating it differently, can the engineer officer in charge require materials to be furnished, or particular pieces of work to be done, not within the contract, and the result be that, because the officer in charge or his superior officers refuse to recognize the same in writing as extra, the contractors, when they elect to do the work or furnish the material rather than have the whole burden and financial loss of abandoning the contract thrown upon them, be thereby prevented from recovering for such items as extra? It seems well settled now that where the claim is clearly meritorious there may be recovery.

In Grant v. U. S., 5 Ct. Cl. 72, it is held:

"Where a written contract, entered into by the war department, contains full specifications of a building to be erected, and limits the cost, with a provision that no extra charge for modification shall be allowed unless agreed upon in writing, and where an appropriation therefor is made by congress agreeing with the contract price, yet if the contractor is directed by an agent of the war department to furnish extra materials and perform extra labor, so that the building is rendered more valuable and useful, and is thus accepted and used by the government, the defendants become liable, in an action on an implied contract, for the fair and reasonable value of the extra materials furnished, and for the extra labor performed, notwithstanding the cost exceeds the appropriation, and notwithstanding Act 2d June, 1862 (12 Stat. 411), limiting the power of the secretary of war, as well as all officers or agents acting under him, in matters of contract, to written agreements."

In Ford v. U. S., 17 Ct. Cl. 60, in the syllabus (3), the ruling is that:

"A provision in a written contract declaring that no claim for extra work shall be made unless it was required and agreed upon in writing is merely a condition, which may be waived by a subsequent oral agreement."

The case of Barlow v. U. S., 35 Ct. Cl. 514, is an interesting case, and particularly applicable here as to the item of sand. A distinction is drawn in that case between the requirement of extra work by a subordinate officer and an officer or agent of the government authorized to contract. The engineer officer in charge in that case had an understanding with the contractors as to the quality of sandstone which would be satisfactory to the government. They incurred expense on the faith of that understanding, and, the sandstone thus agreed upon being subsequently rejected by the chief of the bureau, they were allowed to recover for the damage they had sustained.

In the case at bar it was the engineer officer in charge who made the agreements relied upon for recovery, and it was the engineer

officer in charge who really made the contract as to its details, the character of the materials, etc. In the Barlow Case it was said:

"Where additional work or better material than the contract requires was ordered by a subordinate officer having no such authority, the compliance of the contractor must be regarded as voluntary service, and no contract can be implied, even though the defendants acquired a benefit by the change; that is to say, the government cannot thus be compelled to build a better building than was intended by its responsible contracting officer. Driscoll's Case, 34 Ct. Cl. 508, and cases cited page 524. Where, on the contrary, the alterations or additions were ordered by an officer clothed with responsibility and authority to contract, a contract will be implied to the extent of the benefit which the defendants have received, and the claimant will recover in quantum meruit. Hawkins v. U. S., 96 U. S. 689, 24 L. Ed. 607. Where a contract expressly provides that alterations or additions must be ordered in writing, and the cost be agreed upon before the work be done, the principals to the contract, in ordinary cases between individuals, may waive the requirement. So, in the case of government contracts, the officer who has authority to order or agree in writing must be considered pro hac vice as the principal; and if he orders a change orally, and the contractor acts on the order and performs the extra work, the parties will be deemed to have mutually waived the requirement. Ford's Case, 17 Ct. Cl. 75."

Capt. Carter first, and afterwards Capt. Gillette, were the officers in charge of the construction of these fortifications. They were not such subordinate officers as would classiiy extra work ordered by them as mere voluntary work, on account of the subordinate or inferior character of their duties; but, having the control that has been indicated, they could make such alterations in the character of material, and direct it to be used in such way, it seems to me, as would make their actions binding on the government. Certainly this is true as to the two items in respect to which their action is held to have brought about an implied contract by the government to pay in this case. Counsel for the government rely on the case decided some years ago in this court of Bowe v. U. S. (C. C.) 42 Fed. 761, as authority in this case. I do not think there is anything in that case, or in the authorities there cited, inconsistent with what is determined here.

As to the item of sand, the conclusion of law as to this item is that the contract originally was for the use of a mixture of sand composed of material obtained one-fourth from the river above the city of Savannah, and three-fourths from the beach below the city, which contract was acquiesced in by Capt. Carter, the engineer officer in charge at that time, by allowing the use of the same. The subsequent action of Capt. Gillette in requiring all the sand to be obtained from above the city, at a largely additional cost over the mixture indicated, would justify a recovery by the contractors for such additional cost. The evidence is undisputed as to the cost of the sand as required by Capt. Gillette over that contracted for and allowed by Capt. Carter, to wit, $3,933.16, for which amount the plaintiff is entitled to recover.

As to the item of pipe, the finding of the auditor in reference to this claim is, as has been stated, supported by the evidence. The additional cost of furnishing the pipe referred to, and the expense of laying the same, seems to have been in addition to what was

provided for in the contract, and the plaintiff is entitled to recover for the same. The only matter which involves real difficulty is that of the 15 per cent. allowed as profit. As to this, I am of the opinion that it would not be just to allow the contractors only the absolute cost of the pipe and the expense of laying the same, without anything whatever to cover their own compensation and the reimbursement to them for their attention to the work and their fair profit as contractors. All the witnesses agree, I think, that 15 per cent. on the actual outlay is a reasonable amount in this respect. The plaintiff is entitled to recover as to this item the difference as stated by the auditor, to wit, $2,081.44.

As to the item of the cottage for testing cement, I find that, although the plaintiff was required to construct a cottage wholly unnecessary for the purpose intended, yet, as the officers of the construction company appear to have acquiesced in this, they should not be allowed to recover the additional cost over that which would have been necessary for a structure for the proper testing of cement.

As to the item of cut stone, the claim for the special compensation as to this item is for the manner in which the work was required to be done, which was within the control of the engineer officer in charge, under the contract. The plaintiff was not misled in any way before the contract was entered into, and any misapprenhension which the officers of the company may have had as to the manner in which the engineer officer in charge would require the stone to be cut occurred after the contract was made. Any hardship to the contractors that may have resulted arose simply from the manner in which the work was required to be done, which was not such as to justify a claim for extra work for which a recovery can be had.

As to the item for doors, the same reasons which have been stated as to the claim for extra work on cut stone apply to the manner in which the doors were required to be constructed, and for the same reason the plaintiff is not entitled to recover as to this item.

The conclusion is that the plaintiff is entitled to recover a judgment for the item of sand in the amount of $3,933.16, and for the item of pipe in the amount of $2,081.44, making the aggregate sum of $6,014.60, for which they should have judgment, with interest.

In re B. H. DOUGLASS & SONS CO.

(District Court, D. Connecticut. March 14, 1902.)

BANKRUPTCY—CLAIM OF CREDITOR—CONTRACT FOR REBATE.

The decision of a referee that, under a contract recognized by the previous course of dealing between a creditor and the bankrupt, the latter was entitled to a rebate on his purchases during the year, which should be deducted from the creditor's claim, affirmed.

In Bankruptcy. On question certified by referee.

James D. Dewell, Jr., for Frederick B. Street.
Hobart L. Hotchkiss, for Walter M. Lowney & Co. and others.

TOWNSEND, District Judge. The Walter M. Lowney Company has a claim against the B. H. Douglass & Sons Company for $1,048.86, against which the trustee claims that a rebate should be allowed. The substantial part of the report of the referee is as follows:

"About 1892 the Walter M. Lowney Company adopted a system of rebates to its customers, based upon the amount of their purchases for the year. This rebate, as afterward modified, was two per cent. where sales for the year were from $5,000 to $10,000, three per cent. where the sales were from $10,000 to $20,000, and four per cent. where the sales amounted to over $20,000. The bankrupt corporation was formed about four years ago, succeeding to the partnership of B. H. Douglass & Sons. From 1892 on, the rebate has been allowed as above stated. Thus, in 1899, the purchases were $22,429.99; the rebate, four per cent., being $897.20. In the summer of 1899, Mr. Douglass called upon Mr. Lowney, and, in a conversation referring to the character of the rebate, stated that he supposed, 'of course, we will be subject to that, as usual.' Mr. Lowney's reply was, 'Not having given any contrary notice, so late in the day as this, I should consider myself bound to allow it.' It is claimed by Mr. Lowney that the business was to be done to his satisfaction; that the customers had not been properly served, and the bills had not been paid within ten days; and that he was to be the judge as to whether rebate should be allowed or not. No notice was at any time given to the Douglass Company of any intention not to allow the rebate as usual, and there is nothing to indicate that the rebate would not be allowed if the bankruptcy had not occurred. It was claimed that payments were not made with sufficient promptness, and that orders were not filled in time. It was admitted by Mr. Lowney that the Lowney Company had not goods sufficient to fully supply their customers. I see no reason to discredit the testimony of Mr. Douglass that payments were made with reasonable promptness, and that, if a line of goods had not been withdrawn, and if orders given the Lowney Company had been promptly filled, and the Douglass Company had continued ordering and receiving goods up to January 1, 1901, the output would have exceeded the $20,000, and the rebate to them would have been four per cent."

The referee allowed the rebate of $569.36,—being 3 per cent. on sales of $18,978.74,—and directed that the $479.50 should be paid in full; considering such payment as a reasonable condition of the rebate. The Lowney Company has requested that the question whether the rebate should be allowed should be certified to the court. The trustee also objected to that part of the decision of the referee which allowed the $479.50 to be paid in full, but withdrew his objection.

I have carefully considered the testimony, and am not prepared to say that I should have necessarily reached the same conclusion as

that reached by the referee. The testimony of the creditor to the effect that the rebate was conditioned upon having the business conducted to his satisfaction, and that he was to be the judge as to whether it was so conducted, is perhaps not directly contradicted; but, on the other hand, it is not clear that the bankrupts failed to comply with any of the material conditions of the understanding or contract. In view of the evidence tending to show that the claim of rebate rested on a contract based solely on the volume of the business, and especially because the referee, having the witnesses before him, has reached the conclusion that "the testimony of Mr. Lowney as to the conditions of the rebate seemed to me to be rather indications of his own ideas upon that subject, than testimony as to any contract which can be held to vary that implied from the ordinary course of dealing between the parties," the decision of the referee is affirmed.

In re GREENBERG.

(District Court, D. Connecticut. March 11, 1902.)

No. 446.

BANKRUPTCY—DISCHARGE—FAILURE TO KEEP BOOKS.

A creditor objecting to the discharge of a bankrupt is not bound to prove his specifications beyond a reasonable doubt, and proof that the bankrupt made a written statement within a few months prior to his bankruptcy for the purpose of obtaining credit, in which he did not disclose debts to relatives, which he afterwards claimed to owe, and paid while insolvent, is sufficient to cast upon him the burden of explanation, and of showing that the transactions were fully entered on his books; otherwise the court is justified in denying him a discharge on the ground of his concealment of assets and failure to keep books from which his true condition could be ascertained.

In Bankruptcy. On application by bankrupt for discharge.

Hotchkiss & Asher, for bankrupt.

Fleischman & Fox, Wm. A. Wright, D. Strouse, and others, for creditors.

TOWNSEND, District Judge. About April, 1900, bankrupt closed up his clothing business at New York, and removed to New Haven. Upon opening his New Haven store, he purchased a large amount of goods on credit, and removed the stock of winter clothing, which had cost him between seven and eight thousand dollars, from New York to the New Haven store. On June 14, 1900, bankrupt, having found that he was doing a losing business, sold the stock of winter clothing for $3,617 to a party at New Haven, who had them stored, and during the following fall sold them for about $4,500. The purchaser paid bankrupt $2,000 June 20, 1900, and $1,000 June 25, 1900, both of which sums were deposited in bank; the remaining $617 being paid about July 1, 1900. The only memorandum of the transaction on the

bankrupt's books is a deposit in his bank account of $2,030 June 20, 1900, and of $1,125.22 June 25, 1900, which deposits included said payments of $2,000 and $1,000. Bankrupt testified that out of this money he had paid $2,000 to a sister-in-law in payment of notes for money borrowed the previous year, and $670 to a friend of his brother-in-law for money loaned, and $600 to a daughter in payment of a debt. Papers purporting to be notes duly stamped for the $2,670 were produced. On January 16, 1900, bankrupt made a statement to one of his creditors, Fecheimer, Fischel & Co., the principal petitioning creditor in the bankruptcy proceedings, showing that he had on hand merchandise about $15,000, cash about $1,200, making a total of about $16,200, with total liabilities of $2,200, leaving a balance of $14,000. Bankrupt's testimony that he told Fecheimer, Fischel & Co. at the time he signed the written statement that it only included business debts is incredible. If he had told them so, they should have insisted upon his total indebtedness being included, for they must have known that a debt to a relative is more dangerous to other creditors than an ordinary debt. No memorandum or bank account whatever, made in the ordinary course of business, or which could not have been manufactured, corroborates bankrupt's testimony. The $2,000 loaned by his sister-in-law is testified to have been kept in the house, having been saved by her from time to time. The checks of the friend were made to the brother-in-law, and not to the bankrupt. The $2,000 paid to the sister-in-law was at once deposited by her husband to his own account, although before the loan she had been keeping the money separate in the house. The presumption from the written statement made for the purpose of obtaining credit from Fecheimer, Fischel & Co. should be discredited only upon the clearest evidence. The evidence in such cases is mainly within the power of the bankrupt. A transaction of this sort should be entered upon the books in the clearest way, so as to attract, rather than to evade, the notice of creditors. In the circumstances, the excuses for such action by one on the verge of insolvency should be made out in a satisfactory manner, and by evidence which could not be manufactured. The objecting creditors are not bound to prove their specification beyond a reasonable doubt.

The discharge is refused on the ground of concealment of property and failure to keep books of account or records from which the true condition of the bankrupt could be obtained.

ALEXANDER v. LOUISVILLE & N. R. CO.

(Circuit Court, N. D. Georgia. February 19, 1902.)

No. 1,459.

1. REFERENCE—FINDINGS OF FACT.
   Where, by consent, the issues in an action at law are referred to an auditor, his findings of fact are entitled to the same weight as the verdict of a jury.

2. RAILROADS—INJURY TO PERSON NEAR TRACK—CONTRIBUTORY NEGLIGENCE.
   Evidence considered, and *held* to support a finding that plaintiff, who was caught between a railroad train and a station platform and injured,

was guilty of contributory negligence in attempting to cross the track ahead of the train after he saw it approaching.[1]

At Law. Action for personal injury. On exceptions to report of auditor.

Burton Smith, for plaintiff.
King & Spalding, for defendant.

NEWMAN, District Judge. This is a suit brought by the plaintiff against the defendant for the recovery of damages for injuries alleged to have been received by the plaintiff by being caught between a moving train belonging to defendant and the depot platform in the town of Gadsden, Ala., the plaintiff claiming that he was entirely free from fault, and that said injuries were received on account of the negligence of defendant's servants and employés. The case was referred to an auditor,—an unusual proceeding in actions ex delicto,—but the reference was by consent of counsel, with the usual leave of exception. The auditor having found in favor of the defendant on the questions involved, the case now comes before the court on the exceptions of the plaintiff to the auditor's finding. There were several grounds of negligence alleged, which were as follows: First, that while the plaintiff was crossing the defendant's tracks, going to the depot to purchase a ticket, and in a place where he had a right to be, without any warning or notice to him of any sort a train of the defendant came swiftly upon him, and ran him down, and caught him between the platform and the train; second, that the tracks of the defendant are so arranged that he could not see the train until it was nearly upon him, and too late for him to escape the danger; third, that the train was running at a high rate of speed, and gave no signal or warning; and, fourth, that the defendant was negligent in running its train across the street where the plaintiff was injured at the time when the passenger train which plaintiff expected to board was due.

The auditor found for the defendant because he thought the plaintiff was guilty of contributory negligence in the following way: He thought the plaintiff saw the train, and sought to cross in front of it as it was approaching, so as to mount the steps leading to the ticket office; and in so doing was caught and injured. The auditor believed that this constituted such contributory negligence on the part of the plaintiff as would prevent recovery. If this finding of the auditor has evidence to support it, the duty of the court here is plain. The evidence set out by the auditor and relied on by him is as follows:

Examination of the plaintiff:

"Q. Where were you just before you started to the depot? A. I was standing just across the track from the platform. Q. About how long was that before train time? A. I had been there, I suppose, about a minute, I don't think I had been there longer than a minute. The train was then due there. I cast my eye up at the hotel, and the train was standing there. I made to cross to the steps down there in about 15 feet of me, and as I got up against the platform I seen the car coming. I didn't advance any further up towards the steps. I seen the distance was too great, and I just closed

[1] Injuries to persons at railroad stations, see note to Railroad Co. v. Hyde, 41 C. C. A. 550.

myself up against the platform. Had been to Gadsden twice before,—once by private conveyance, and once by the cars. Got my ticket there at that place. I got off there this time. Q. Were you standing or walking when you first saw the train? A. Standing, sir. My back was towards this freight train. Q. What was the first notice you had of it? A. It was in about 15 or 20 feet of me,—the car was,—when I first noticed it. Q. How did you happen to see it, or know it was coming? A. As I just stated, when I intended to go to those steps, when I got across to the side of the platform, I saw that the car was advancing, and that I couldn't make it any further. Q. You hadn't seen the car until then? A. No, sir. Q. Were you on the track or off of it when you first saw it? A. I was off of the track. Q. On the side towards the platform, or how, when you first saw the train? A. No, sir; I was crossing over to the platform. Q. Where were you when you first saw the train? A. I was against the platform when I first saw the train that hit me. I was crossing,—done across the track,—and was on the ground."

On page 20, cross-examination, Alexander says:

"Q. How were you standing, in relation to those steps,—how far from them were you? A. I was about 15 or 20 feet from them. Q. Was this track that you were hurt by between you and the steps or not? A. Yes, sir. * * * Q. Then, after you came down there and stopped, as you described before, where was it you stopped,—down here the station? A. Well, I stopped in 15 or 20 feet of the steps, just across the track. Q. What did you do there when you stopped? A. Well, I was talking to a gentleman standing there. I don't think it was more than a minute, sir. I look up towards the hotel, and seen the train (the passenger train). Q. Then what did you do? A. I walked right across towards the steps to get my ticket. Q. Where were you, or what looking did you do? A. Well, sir, I taken a general glance as I generally do. I have always been accustomed to trains, more or less, ever since I was a boy. I used to be a butcher (on W. Pt. R. R.). Q. Well, after you had taken that glance, what did you do? A. I walked right across to the steps. Q. Did you see your train? How close to you was it when you first saw it? A. The train was in 15 or 20 feet of me—the car was—before I seen it. Q. What direction were you, as to the car that hit you, just when you saw it, and just before? A. I was sidewise to it, going across, and the car was coming up. Q. Were you on the track, or where were you, when you saw that train? A. I was near the track, just stepped off against the platform, when I seen the train. Q. Was there a good space between the platform and the track there for a man to walk? A. Yes, sir; there is 3 or 3½ feet; may be more; I couldn't say."

Examination of Newt Adams:

Describes walking leisurely down Second street. Was so familiar with the locality that he says it was an unusual time for that train to be there. Did not stop at shanty, slowed up a little. "There was some shade trees, and we made it as long as possible staying in the shade until the train come in." Walked in the triangle. Never saw any ticket sold at Printup House. Office he worked for near the ticket office in Printup House. If any engines or cars had gone along pipe works track could have seen them. Did not see any. Never crossed the cut-off track. Alexander got on it. Went on, did not stop. "When he turned to go across I was on Alexander's left. We didn't make more than a step,—hadn't more than got started back, and started across,—before we discovered this train on us. Q. How far had you gotten into that pipe works track when you saw it? A. When we first saw it, we were just about stepping over into it. I think Mr. Alexander saw it first. He just spoke to me, and says, 'Newt, we are gone,' and we both made a run to the platform. We were going along down here, 'near the frog,' when he was ringing the bell down there getting ready to come out [passenger train]."

W. B. Armstrong, conductor of train that hurt plaintiff, says they made two trips on the pipe works track. On the first trip he saw Alexander and Adams. They were hurt 12 or 15 feet from the steps.

Mrs. C. W. Parr says:

"The men were coming down the sidewalk on Second street. They came on down to the crossing, and got on the track, and walked up the track. The men had the opportunity of seeing the train coming if they had looked back. Don't know whether the bell rung or not."

The auditor says:

"The preponderance of the testimony is that the locomotive bell was ringing as the train which caught the plaintiff was coming 'across Second street.' The plaintiff says he did not hear the bell ring. Adams does not say whether it was ringing or not, but does say he heard the bell on the passenger train. McMullen, the fireman, says he was ringing the bell. Porterfield, the fireman, says the fireman was ringing the bell. The witness Howe says he heard the bell ringing. Carroll, the engineer, says the bell was ringing. There is no positive testimony that the bell did not ring. Some of the witnesses did not hear or did not notice it, while some were not asked about it. No witness denies the switching of the train, and the testimony is convincing that two trips were made to the pipe works, and each time it was necessary for it to cross Second street, making a crossing of that street four times, even if it did not run up and down the house track. It would seem impossible to conclude that the plaintiff did not know of the presence of this train, and that it had crossed Second street, and was in towards the pipe works, at the time he and Adams were approaching the tracks across Second street."

There can be no question that this evidence abundantly supports the finding. If it was the verdict of a jury in favor of the defendant, and a motion for a new trial, on the ground that the verdict was not supported by the evidence, no court would hesitate to overrule the motion. The same rule should apply where, by consent of the parties, the case is referred to an auditor.

The exceptions will all be overruled on the ground that there is sufficient evidence to support the finding of the auditor that the plaintiff endeavored to cross in front of a moving train, and was injured thereby, and was guilty of such contributory negligence as to bar a recovery for the injuries received. The report of the auditor will be confirmed.

In re O'CONNOR.

In re GLOBE REFINERY CO. et al.

(Circuit Court, N. D. Georgia. March 15, 1902.)

No. 670.

BANKRUPTCY—RIGHT OF SELLER TO RECLAIM GOODS—FRAUD.

Evidence *held* to sustain the claims of sellers to reclaim goods from the estate of the buyer in bankruptcy, on the ground that by reason of fraud the title did not pass.

In Bankruptcy. In the matter of claims of the Globe Refinery Company and Fulton Bag & Cotton Mills. On exceptions to findings of referee.

Culberson, Willingham & Johnson, for the Globe Refinery Co.
Slaton & Phillips, for the Fulton Bag & Cotton Mills.
Tompkins & Alston, for bankrupt.

NEWMAN, District Judge. In the former opinion in this case (rendered November 27, 1901) 112 Fed. 666, the claims of Globe Re-

finery Company, Fulton Bag & Cotton Mills, and Bushway Britt & Co. were referred back to the referee for further investigation and report as to the right of the claimants to reclaim goods in the bankrupt's stock, on the ground that by reason of fraud no title passed to these goods. In the referee's report thereon he finds against all three claims. No exception was taken to his finding on the claim of Bushway Britt & Co., and the case is now before the court on exceptions to the finding of the referee in the claims of Globe Refinery Company and Fulton Bag & Cotton Mills. I am compelled to differ with the referee as to the conclusion he reached. In both of these cases the petitioners are entitled to have the proceeds of their goods allowed to them. As I have frequently held, I will not interfere with the action of the referee as to his finding of facts, unless there is manifest error. In this case, however, the facts require a different conclusion from that which he has reached.

An order may be taken disapproving the action of the referee, and directing the payment to the Globe Refinery Company of the proceeds of the sale of its goods, and to the Fulton Bag & Cotton Mills the proceeds of the sale of their goods. The matter of the taxation of costs as against these two claimants is left to the discretion of the referee.

HOGUE v. NORTHWESTERN MUT. LIFE INS. CO.

(Circuit Court, N. D. Georgia. January 23, 1902.)

No. 1,562.

LIFE INSURANCE—CONSTRUCTION OF CONTRACT—RIGHT OF POLICY TO SHARE IN DIVIDENDS.

Defendant, a mutual life insurance company, by whose charter all policy holders if in good standing were members, and entitled to share in profits, issued a policy for $10,000, payable on the death of the insured, the entire premium on which was to be paid in 10 annual installments, a part in cash and a part in notes bearing interest, upon which notes all dividends accruing to the policy were to be applied. The policy contained a provision "that said company further promises and agrees that, if default should be made in the payment of any premium, they will pay, as above agreed, as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the date of such default." It also further provided that, "if the said premiums or interest upon any note given for premiums shall not be paid on or before the dates above mentioned, * * * the company shall not be liable for the payment of the whole sum insured, but for such part only as is expressly stipulated above." The notes required the interest thereon to be paid annually. The insured paid eight complete annual premiums in cash and notes, together with the interest accruing on the notes previously given up to the time of the last premium payment, after which he made no further payments of premium or interest. *Held*, that by the payments made the policy, by its terms, became a legal and complete policy for the sum of $8,000, carrying all the benefits which would have accrued to it if the remaining two payments had been made, except as to the amount insured, including the right to share in further dividends, which must be applied to the payment of the interest and principal of the outstanding premium notes; and that, such application not having been made, on the death of the insured the beneficiary was entitled to have it made, and to recover the sum of $8,000, less the amount remaining due on the notes.

At Law. Action on life insurance policy, tried by the court without a jury.

Anderson, Anderson & Thomas, for plaintiff.
B. H. Hill, for defendant.

NEWMAN, District Judge. This suit was brought by the plaintiff against the defendant company on a policy of life insurance. The plaintiff was the beneficiary, and her husband, David Scott Hogue, the insured. The case was submitted to the court on the law and facts, without the intervention of a jury.

The parties have agreed on the following statement of facts:

"That the defendant issued on the 15th day of January, 1867, to the plaintiff the policy of insurance sued on, upon the life of the plaintiff's husband, David Scott Hogue, and that the copy of said policy, which is attached to the declaration in said suit, is a correct copy thereof. That eight complete annual payments by cash and notes were paid by the plaintiff and her husband on said policy of insurance, in accordance with the terms thereof, to wit, for the premiums which under the terms of said contract were due on the 15th day of January in the years 1867 to 1874, both inclusive. That the plaintiff's husband died on the 22d day of June, 1899, and proofs of death in the form required by the company were made and filed with said company. That the part of the annual premiums required to be paid in notes each year, to wit, two hundred and fifty-two dollars and ten cents, was so paid, and notes for that amount were each year given to the defendant during the years 1867 to 1874, both inclusive. Two of said notes, to wit, the two notes made January 15, 1867, and January 15, 1868, respectively, were paid off, and returned to the plaintiff by the defendant, out of the dividends earned during the years 1871, 1872, 1873, and 1874; said dividends so earned being as follows: 1871, $160.90; 1872, $92.10; 1873, $117.10; 1874, $150.70; or a total amount of five hundred and twenty dollars and eighty cents ($520.80); which, being applied to the payment of said notes, paid off the first two thereof, as above stated, and entitled the third to a credit of sixteen dollars and sixty cents ($16.60), which was credited thereon, leaving the balance due upon that note two hundred and thirty-five dollars and fifty cents ($235.50). True and correct copies of notes Nos. 3 to 8, inclusive, are hereto attached and made a part of this agreement; and it is agreed that the form and substance of notes Nos. 1 and 2 were exactly like those hereto attached, differing only in the dates. That on January 15, 1875, a note was given by the plaintiff's husband to the defendant for three hundred and ninety-eight dollars and seventeen cents ($398.17) as an extra note for cash premium and interest then due, a true and correct copy of which is hereto attached and made a part of this agreement. And on January 15, 1874, a note was given by the plaintiff's husband to defendant for four hundred and forty-seven dollars and forty-three cents ($447.43), being an extra note for cash premium and interest then due, a true and correct copy of which is hereto attached and made a part of this agreement. That receipts were given by said defendant to the plaintiff for the said eight annual premium payments, acknowledging the payment thereof in each instance; all of which were in form and substance, differing only in date and in the amount of accrued interest, exactly like that dated the 15th day of January, 1870, the original of which is hereto attached and made a part of this agreement. That neither the said defendant nor her husband, David Scott Hogue, paid any other premiums, either in notes or cash, after the 15th day of January, 1874, but that all interest due on premium notes given prior to that date were paid either in cash or by note, up to said January 15, 1874. That, within ninety (90) days after the filing of proofs of claim by the plaintiff with the defendant, the latter tendered to her the sum of one thousand four hundred and eighty-nine dollars and seventy-seven cents ($1,489.77), claiming that that sum was the amount due to her upon said policy of insurance, and the said

plaintiff declined and refused to receive the same in full satisfaction of her said claim."

Copies of resolutions passed by the directors of the defendant company from 1875 to 1898, inclusive, are agreed upon and are attached. The resolution passed on July 30, 1875, is as follows:

"Resolved, that a dividend shall be paid in the usual manner to such policy holders only as shall duly meet whatever cash payments may fall due on the anniversaries of their respective policies in 1876, according to their several contributions to the company's surplus, and that the actuary be, and is hereby, instructed to compute such dividend on the business of 1874 on such scale as to make the sum disbursed on that account in the year 1876 amount, as near as may be, to eight hundred and forty thousand ($840,000) dollars."

There was no substantial difference in the resolutions for the subsequent years on the point which is claimed to be material here. A somewhat different resolution, however, passed on July 20, 1886, it is agreed is as follows:

"Resolved, that after December 31, 1886, the surplus arising in the fifth and succeeding policy years of any participating policy be allowed as dividend, on the usual conditions, at the close of such years, respectively, but that surplus arising in either of the first four years be held a year, as heretofore; it being the object of this change to retain the existing conservative system up to the end of five years from the date of each policy, and thereafter to make returns of surplus as speedily as possible to the members from whose payments it may be found to arise."

Counsel also agreed to use the act of incorporation of the Northwestern Mutual Life Insurance Company and the amendments thereto, including those of April, 1887; also the by-laws of the company, so far as they are pertinent to the issues in the case. It was also agreed that either party could use the original policy of insurance as they might desire. It was further agreed that the court might consider any and all admissions made by either the plaintiff or defendant contained in any of the pleadings in the case. There were certain agreements as to dividends earned by the company which are not material for the present purpose.

The policy of insurance issued to the plaintiff on the life of her husband was for $10,000. The entire premiums were to be paid in 10 annual installments. The policy contained, however, this provision:

"And the said company further promises and agrees that, if default should be made in the payment of any premium, they will pay, as above agreed, as many tenth parts of the original sum insured as there shall have been complete annual premiums paid at the date of such default."

It is conceded that in cash and notes the premiums were paid for eight full years, which under the terms of the policy made it a good policy, payable at the death of the insured, for $8,000. What other rights it had is the question for determination.

The premium notes outstanding against the plaintiff bear interest at the rate of 7 per cent. per annum. The notes contain language forfeiting the policy if the interest is not paid annually, which provision is not insisted upon. They also contain this language: "The dividends on the policy are to be applied to the payment of the notes."

The company claims that it had the right, at the death of the insured, in 1899, to compute the interest on the notes, compounding

it each year, and then adding interest to principal, and deduct the aggregate from the $8,000 called for by the policy. The plaintiff insists that, as against the principal and interest so computed, she has the right to offset the dividends which an $8,000 policy earned from January, 1875, until the death of the insured. By the charter of the defendant company all persons insured therein are members and entitled to participate in profits, subject to certain restrictions as to default on the part of the holder of the policy.

Counsel for defendant in this case relies largely on a provision in the policy on which the present suit is brought, which is as follows:

"If the said premiums, or interest upon any note given for premiums, shall not be paid on or before the dates above mentioned for the payment thereof, at the office of the company, or to agents, when they produce receipts signed by the president and secretary, then in every such case the company shall not be liable for the payment of the whole sum insured, but for such part only as is expressly stipulated above."

He says, taking this in connection with what has been already stated of the terms of the policy, viz., that they will pay as many tenths of the original sum insured as there shall have been complete annual premiums paid at the time of such default, that, therefore, when the premium due January 15, 1875, was not paid the policy by its terms lapsed, except as to that portion already secured by the payment of premiums, and the company was liable for such part only as was then secured. Counsel for the company in his brief makes this further statement:

"Besides, no interest was paid on any outstanding premium note after January 15, 1874, and by the terms of the premium notes this interest was to be paid annually or the policy forfeited. The condition in the notes that the failure to pay interest would forfeit the whole amount of the policy has been frequently decided; but the company in this case construes the forfeiture clause in the notes in connection with the forfeiture clause in the policy as applicable to that portion of the amount which was not secured by complete annual payments of premium. In other words, it concedes that the eight complete annual premiums mentioned by cash and note secures absolutely eight-tenths of the policy which was nonforfeitable, less outstanding premium notes, with interest thereon. The defendant insists—First, a failure to pay the cash part of any premium, or to give a note for the note part, when the same became due, forfeits, not the entire policy, but all of the policy and future benefits thereunder, except so many tenths as there have have been made annual payments of premiums by cash and notes; second, the failure to pay in cash the interest on premium notes at the time when the interest became due forfeits the whole policy, except as above stated."

The contention of counsel for defendant, briefly stated, therefore is that the failure to pay premiums for the full period of 10 years, although premiums for several years have been paid, works such default as to deprive the insured or the beneficiary of all future benefits under the policy. It can hardly be doubted that, if the premiums had been paid in cash and notes for the entire period of 10 years, the beneficiary would have been entitled to dividends on the policy from the time of the expiration of the period until the death of the insured. If the company issues an ordinary life policy, the premium to be paid every year from the time the policy is issued until death, it is conceded that the person so insured would be entitled to the full dividends. In a policy of the character now under consideration, such additional

amount of premium is fixed and collected as will justify the company in agreeing that if the stipulated amount is paid for 10 years, or for any less number of years, it will entitle the beneficiary to the amount provided for, payable at the death of the insured. The fact is, of course, that a calculation made as to a large number of lives would show the same result in favor of the company in both classes of policies. Why should there be any distinction, then, between members holding the two classes of policies, as to the right to share in the profits of the company? There is none in reason or under the terms of the contract of insurance.

So that the matter to be determined here is, does the failure to pay for the full period of 10 years work such default as to deprive the holder of the policy of rights or benefits that would accrue in case the 10-years payments were made? It is true that the term "default" is used in the clause of the policy providing for the payment by the company, at death, of as many tenths as there shall have been complete annual payments, but this expression is as to succeeding payments. The right to what has been acquired by payments already made is as complete as if payments for the full period were made. No qualification is put on the right of the holder of the policy paying for less than the full period, except as to the amount, and that is fixed by the number of annual payments. The company, having issued a policy of this kind, certainly cannot be heard to say that the holder of such a policy is in "default" because such holder avails herself of a right granted by the policy. There is nothing whatever in the contract of the parties which makes the rights of the holder of this policy less than they would have been had payments been made for the full period of 10 years, except as to the amount, and she must be held to be entitled to the same benefits.

It is unnecessary to review the interesting cases cited on the briefs of the counsel for the respective parties. The greater number of these cases are upon the question of forfeiture for nonpayment of interest, and this, as has been stated, is not insisted upon by counsel representing the defendant company. The case which comes more nearly to deciding the precise question for determination here is Dutcher v. Insurance Co., 3 Dill. 87, Fed. Cas. No. 4,202. That case was decided by Judges Dillon and Treat in the circuit court for the Eastern district of Missouri, and, while other reasons appear to have controlled the decision there made, the right of the policy holder to have dividends under conditions such as exist in the case at bar appears to have been determined. This case was taken to the supreme court of the United States (Insurance Co. v. Dutcher, 95 U. S. 269, 24 L. Ed. 410); and, while the decision there was not upon the question here involved, there was no dissent whatever from the views upon this question expressed by the judges in the court below.

The conclusion reached in this case is that this policy is entitled to dividends from January 15, 1875, to the death of the insured, and that the plaintiff has the right to set off such dividends against the interest on these premium notes which accrued from year to year, and, if such dividends were more than sufficient to pay such interest, then against the principal to the extent that such dividends should go.

CLARK et al. v. GUY.

In re COE'S ESTATE.

(Circuit Court, D. Connecticut. March 7, 1902.)

No. 976.

1. REMOVAL OF CAUSES—BOND.
A circuit court of the United States cannot entertain a cause on removal from a state court unless the removal bond required by statute has been duly executed by the principal and surety.

2. JURISDICTION OF FEDERAL COURTS—ADMINISTRATION OF ESTATE.
A federal court is without jurisdiction of proceedings for the administration of the estate of a deceased person, either original or by removal.[1]

On Petition for Order Removing Cause from State Court.

Judson S. Hall, for petitioners.
Clarence E. Bacon, for executrix.

TOWNSEND, District Judge. The petitioners herein allege that they are heirs at law of Sanford Coe, late of Middletown, in the district of Connecticut; that the said Coe was an aged and decrepit person, and that, through undue influence of one Amy Ann Guy, and without the knowledge of the petitioners, the said Coe was induced to make a certain will in favor of the persons who exercised such undue influence; that the beneficiaries under said will have sold certain of the property formerly belonging to said testator, and threaten to dispossess one of the petitioners of her homestead; and that the beneficiary Mary J. Hollister has unsuccessfully applied for relief to the probate court for the district of Middletown. The petitioners therefore petition for removal to the circuit court of the United States for the district of Connecticut, for the purpose of having their property rights protected and adjusted. The petitioners allege that the suit in which the above relief is sought is pending in the probate court, and they petition for removal thereof, under section 639, Rev. St. U. S., because they believe that, from prejudice or local influence, they will be unable to obtain justice in such state court. Counsel for the petitioners alleges that, acting under the advice of the United States circuit court, and of the clerk of said court, he filed an application for a trial of said case. Thereafter the case was set down for hearing on the 11th day of October, 1898, before me, and the petitioner was heard thereon. Thereafter, upon examination of the papers, the petition was denied. Counsel for the petitioners, however, having alleged that I had agreed to defer the decision until further notice to him and an opportunity for further hearing, the order was set aside, and the case has again been heard upon argument of counsel and a brief submitted by counsel for the petitioners. The petitioners allege that they are aggrieved because:

"First. Said probate court did not have power to hear and determine whether the residue of said estate was testate or intestate estate. nor was said question properly before said court. Second. That if said question was

[1] See Courts, vol. 13, Cent. Dig. § 792 [c, v, x, zz], § 1325 [a–e], § 1410 [a, b].

properly before said court for determination, it should have held that said residue was intestate estate, and as such intestate estate said court should have ordered its distribution to the heirs of said Sanford Coe, of whom said Fred. C. Clark was one. Third. Because said court did not have power to construe said will. Fourth. That if said court has power to construe said will, such power could be exercised only for the purpose of determining whether the claim of the heirs was reasonable, and made in good faith, and in a proceeding had for that purpose. Fifth. Because the heirs and distributees of said Sanford Coe were persons other than Maria J. Hull, executrix of the will of Andrew R. Hull, deceased, and the person to whom the court ordered the intestate estate distributed. Sixth. Because the estate of Sanford Coe, deceased, was not pending for settlement in the orderly and prescribed way for the settlement of estates. Seventh. Because Sanford Coe died leaving real and personal property, intestate, and more than one heir to said real and personal property undisposed of by a will of which he had disposed of certain of his property, and the said court, in proceeding to distribute the same to persons other than the heirs and distributees of the said Sanford Coe, in the proper and prescribed way, acted beyond its jurisdiction. Eighth. Because said will did not leave the testate estate indefinite, and necessary to be defined, so far as the heirs and distributees therein mentioned were concerned in the action of said court in proceedings to ascertain the heirs and distributees of the intestate estate, and in ascertaining the heirs and distributees of the aforesaid, and in ordering the distribution of all said estate, was acting beyond the power of said court. Ninth. Because the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars."

Therefore the petitioner appeals from the judgment of the probate court, and asks that the orders of said court be set aside, and that this court should order a decree distributing the estate to such heirs as may be found to be entitled to receive the same.

It is unnecessary to consider the various contentions of counsel herein, because an inspection of the record shows that a bond for removal was not signed either by the principal or the surety therein. The only signature of either of these persons is that of the surety, appended to his affidavit that he is worth the sum of $500 over and above his debts and liabilities. In view of the insufficiency of said bond, and in view of the statutory requirements therein, I do not see how it is possible for me to entertain this case upon the merits.

There is, however, a further objection to this petition. The courts of this state have repeatedly decided that the settlement of the estates of deceased persons is within the sole jurisdiction of the probate courts. Pitkin v. Pitkin, 7 Conn. 315; Beach v. Norton, 9 Conn. 182; Prindle v. Holcomb, 45 Conn. 111, 122; Clement v. Brainard, 46 Conn. 174; Clement's Appeal, 49 Conn. 519; Guthrie v. Wheeler, 51 Conn. 207, 211. This conclusion is supported by the case of Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, where the supreme court formulated the doctrine laid down in the Connecticut cases cited above:

"If original jurisdiction of the administration of the estates of deceased persons were in the federal court, it might, by instituting such an administration and taking possession of the estate, through an administrator appointed by it, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person."

The petition is denied.

SIMMONS v. MUTUAL RESERVE FUND LIFE ASS'N.

(Circuit Court, N. D. Georgia. March 4, 1902.)

No. 1,649.

1. REMOVAL OF CAUSES—JURISDICTIONAL AMOUNT—CONSTRUCTION OF PLEADINGS
Where, in an action against a life insurance company to recover the present value of a policy, such value is alleged in the declaration, the amount recoverable under such declaration, unless it should be amended, is limited to the value so stated; and where that is less than $2,000 the cause is not removable into a federal court, even though the present value of the policy, if correctly computed, would be greater than that sum.

2. SAME.
In a suit to recover excessive premiums alleged to have been exacted by, and paid to, a life insurance company, interest on the several amounts sued for, from the dates of their payment to the date of the suit, cannot be added, and treated as principal, to determine the amount in controversy for the purposes of federal jurisdiction.

On Motion to Remand to State Court.

Hoke Smith and H. C. Peeples, for plaintiff.
Anderson, Anderson & Thomas, for defendant.

NEWMAN, District Judge. This is a motion to remand a case removed from the state court. The ground of the motion is that the necessary jurisdictional amount is not involved. The plaintiff's declaration, as it appears in the record brought from the state court, is as follows:

"The petition of Thomas J. Simmons respectfully shows: (1) The Mutual Reserve Fund Life Association, hereinafter styled the 'defendant,' is a corporation of the state of New York, now and at the times hereinafter mentioned engaged in the business of life insurance; and it had at the time it contracted with petitioner, as hereinafter stated, and has now, an agency, place of doing business, and an agent in said county of Fulton. (2) Said defendant is indebted to your petitioner in the sum of two thousand ($2,000) dollars, with interest upon the sums and from the dates as shown by the following: (3) On May 13, 1890, defendant issued to your petitioner a policy of life insurance, in the sum of $5,000, upon the terms and conditions shown by a copy thereof, hereto attached as an exhibit, and made a part hereof, to which leave of reference is prayed as often as may be necessary. Your petitioner's wife is named in said policy as beneficiary thereof. (4) By said policy, defendant promised that upon payment by petitioner of certain dues and mortuary calls mentioned therein, and for so long as such payments should be made by him, said contract should be and continue of force. (5) Petitioner charges that, under said contract, defendant was and is only entitled to charge him for mortuary calls at the bimonthly rate of $20.80, which was and is its rate of bimonthly mortuary calls at the age of fifty-three (53) years,—the age of your petitioner at the time said contract was made. (6) Defendant did charge him $20.80 for bimonthly mortuary calls from the time of issuing said policy until its call No. 96, of February, 1898. (7) Commencing with said call No. 96, and continuing to and including its call No. 104 (that is to say, for nine mortuary calls), defendant called upon petitioner, as a basis of keeping said contract of force, for the sum, bimonthly, of $33.90. (8) Thereafter defendant again increased its rate of mortuary call of and upon your petitioner, and, continuing to and including mortuary call No. 110 (that is to say, for six mortuary calls), called upon your petitioner, as a basis of keeping said contract of force, for the sum, bi-

monthly, of $41.40. (9) Thereafter again defendant increased its rate of mortuary call of and upon your petitioner, and, continuing to and including mortuary call No. 116 (that is to say, for six mortuary calls), called upon your petitioner, as a basis of keeping said contract of force, for the sum, bimonthly, of $45.15. Call No. 116 was made June 1, 1901. (10) Each and all of said increased calls was and is in violation of said contract, and without authority of law. (11) Petitioner has paid all entrance fees, medical examination fees, and dues required of him under said contract. (12) He has paid up all the mortuary calls made upon him by defendant up to, but not including, said call No. 116. (13) Petitioner paid said increased calls under protest, desiring to maintain the policy, if possible, without dispute or disagreement with defendant. (14) Tiring of the repeated demands made upon him in violation of his contract for such increased sums, petitioner refused to pay said call No. 116, and thereupon defendant has notified him that said policy of insurance is forfeited, null, and void. (15) Defendant has further broken and violated said contract, in that, contrary to the terms thereof, and without authority of law, it has on June 15, 1901, notified him that it called upon him for $1,365.25, payable within thirty days from said date, for the alleged purpose of providing a reserve. It has also in said notice stated that it would lend him said sum, as a lien against his insurance, and bearing interest. Copy of said notice is hereto attached as Exhibit B, made part hereof, and leave of reference thereto as often as may be necessary is prayed. (16) Petitioner has refused to pay said call, has so notified defendant, and has also notified it that he would not accept such loan, or consent to any such lien upon the policy. (17) Defendant claims the right to make such call, and, if the same be not paid, to charge the amount thereof, with interest, as a lien upon the policy, under an alleged amendment of its constitution or by-laws made at the annual meeting of its members in January, 1901. (18) Petitioner was not present or represented at said meeting. He has never consented to such amendment. He charges that the same is directly violative of his said contract with defendant, and impairs his vested rights thereunder. (19) He charges that said amendment is unreasonable, retroactive, and otherwise illegal. (20) Now, so it is, defendant has exacted from him unlawfully said increased calls, has unlawfully made upon him said call of June 15, 1901, and in each and both has violated and broken said contract. (21) Petitioner thereupon elects, as is his right, to sue now for the damages sustained by reason of said breach, and shows: (22) He has now grown older, and is unable, because of his physical condition, to procure new insurance in lieu of said policy, though he has tried repeatedly to do so. (23) He is entitled to recover from defendant the present value of $5,000, estimated upon the basis of his expectancy of life, which is 12.30 years, diminished by the present value of the insurance defendant would have the right to charge him under said policy, to wit, $20.80 bimonthly mortuary calls, and $15 annual dues, estimated upon the basis of said expectancy. (24) He charges that the present value of $5,000, so estimated, is at least $2,500, and that the present value of $20.80 bimonthly mortuary calls and $15 annual dues, so estimated, is $950, and prays judgment for the excess. (25) Petitioner is entitled to further recover the amounts on the payments made by him, as above stated, in excess of $20.80 bimonthly mortuary calls which defendant had the right to make, with interest on each of said amounts from the time of each, and of said payments. Said excessive payments amount to the principal sum of $363.25, and he prays judgment therefor. (26) He prays judgment against defendant in the sum hereinabove first stated, and that process may issue requiring the defendant to be and appear at the next term of said court to answer your petitioner's complaint."

It will be seen that this suit is for $2,000 and interest. This, of course, would be insufficient to give the court jurisdiction, but the claim for the defendant is that, under the further allegations as to the damages sustained by reason of the breach of the contract set up by the plaintiff, there could be a recovery of more than $2,000. The

argument for the defendant is that, conceding plaintiff's right to recover at all, the present value of his policy would be considerably more than is set out in the declaration, namely, $1,550, and that, notwithstanding this statement of an amount, if the present value should be more, he could recover it, because of his general allegations of his right to recover the present value of the policy. Whatever such present value may be, it is urged, the plaintiff could recover, even if its value was in excess of the amount stated. It is also claimed that, to the amount of excess premiums claimed to have been paid before the alleged breach of the contract, the interest should be added, and become a part of the principal at the date of the suit, for the purpose of determining jurisdiction. I am unable to agree with either contention. Under this declaration, without amending it, the plaintiff could not recover exceeding $1,550 for the present value of the policy. It may be true that his allegations as to his right to recover the present value of the policy would justify an amendment changing and enlarging the amount claimed, but what might be claimed by amendment can be no test of jurisdiction as to the amount involved. Neither do I think that the interest claimed on excess of premiums paid is that character of interest which becomes principal, and which may be so treated for the purpose of determining the jurisdictional amount. Even if interest be added to the amounts of excess of premiums claimed to have been paid, it would not, with the $1,550, make the jurisdictional amount. It is claimed for the defendant that, by a calculation made in the manner provided in the Code of Georgia (section 2049), it would make the present value of this policy more than is claimed by the plaintiff. The section of the Code referred to is a part of the act of the legislature of Georgia of 1887 for "regulating the business of insurance in this state," and this particular section states the manner in which the insurance commissioner of the state shall arrive at the value of life insurance policies for the purpose of determining the condition of the companies doing business in Georgia. It is not at all clear that this law is applicable to the question involved here, but, even if it is, the jurisdictional test as to the amount involved is the plaintiff's claim; and that, as has been stated, is less than $2,000.

I am clear, therefore, that there could not be a recovery, under this declaration for $2,000, exclusive of interest and costs; and for that reason the case will be remanded to the city court of Atlanta, from which it was removed. An order may be taken accordingly.

POSTAL TEL. CABLE CO. OF MONTANA v. OREGON SHORT LINE R. CO.

(Circuit Court, D. Montana. March 22, 1902.)

1. EMINENT DOMAIN—POWERS OF TELEGRAPH COMPANY — CORPORATION DE FACTO.

Where the proper formal steps have been taken to organize a telegraph corporation under the laws of a state, it becomes such a corporation de facto; and its right to exercise the power of eminent domain, conferred on such companies by the statutes of the state, cannot be denied by the defendant in a suit instituted for the condemnation of

right of way on the ground that it is only a pretended, and not a real, corporation, that being a question which can only be raised by the state.[1]

2. SAME—USE OF RAILROAD RIGHT OF WAY.
A telegraph company which has accepted the conditions imposed by Rev. St. §§ 5263–5269 is entitled to construct its line over the right of way of a railroad which by section 3964 is declared to be a post road of the United States and to have the damages assessed in any court of competent jurisdiction, where such line may be so constructed as not to interfere with the operation of the railroad.

3. SAME—MONTANA STATUTE.
Under the statute of Montana (Code Civ. Proc. p. 3, tit. 7) which confers on certain corporations, among which are telegraph companies, power to exercise the right of eminent domain, subject to the limitation that the court must find that the use sought to be made of the property condemned is a public use, and, if the property has already been appropriated to a public use, that the second is a more necessary public use, it must be held that the use of land for a telegraph line is a public use, and that the appropriation for telegraph purposes of a portion of the right of way of a railroad not occupied for railroad purposes is for a more necessary public use than that of the railroad company.

4. SAME—CONPENSATION—MEASURE OF DAMAGES.
Where the construction of a telegraph line over the right of way of a railroad will not appreciably diminish the value of the use of such right of way for railroad purposes, the telegraph company is required to pay only nominal damages on condemnation of a right of way for its line.

Proceeding to Condemn Right of Way.

J. R. McIntosh and Orlando W. Powers, for plaintiff.
P. L. Williams and J. G. Willis, for defendant.

KNOWLES, District Judge. The plaintiff in this suit desires to have condemnation, for the purpose of a telegraph line, over and along certain portions of the right of way of the Oregon Short Line Railroad Company in Montana. Originally three suits were instituted for this purpose,—one in Beaverhead county, one in Madison county, and another in Silver Bow county. These suits were all consolidated in pursuance of a stipulation between the parties, and removed to this court upon the application of the defendant. It appears from the pleadings that the plaintiff is a corporation organized under the laws of Montana, and the defendant a corporation organized under the laws of Utah.

There is an objection made that the plaintiff is not entitled to be classed as a corporation de jure. It appears, however, that certain parties who were residents and citizens of the state of Montana, complied with the laws of said state in filing the proper certificate and in making the proper records to create a corporation under the laws of said state. Prima facie, this would create the corporation named as the plaintiff herein. There were certain meetings of the officers of the plaintiff corporation, and, among other proceedings, a resolution was offered and passed looking to the acquirement of a right of way over and along the defendant's railroad right of way in Montana, for the purpose of establishing a telegraph line. It would appear that

[1] See Eminent Domain, vol. 18, Cent. Dig. § 469; 1901B Dig. § 44 [d]; Corporations, vol. 12, Cent. Dig. § 78 [gg, uu]; 1899B Dig. § 8 [b].

under these conditions the defendant could not raise the question as to whether the plaintiff is in fact a corporation, or only a pretended or "fake" corporation. That would be the prerogative of the state of Montana, in a proper suit instituted for that purpose by and through its proper officers. In Oregon Short Line R. Co. v. Postal Tel. Cable Co. of Idaho, 49 C. C. A. 663, 111 Fed. 842, it was held by the circuit court of appeals of this circuit, while considering a similar statute of Idaho, and in passing upon an objection identical with the one raised in this case, that such a corporation was a corporation de facto, and, as such, entitled to all the rights and privileges of a corporation, including the exercise of the power of eminent domain.

Plaintiff, on the argument before this court, claimed a grant of the right of way over and along the defendant's railroad right of way under and by virtue of the provisions of sections 5263 to 5269 of the Revised Statutes of the United States. Evidence was introduced to show that plaintiff had accepted the conditions named in the aforesaid statutes. Section 5263 of the statutes supra reads as follows:

"Sec. 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any state, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads."

It will be seen, by this statute, that the right is given to any telegraph corporation organized under the laws of any state to construct and maintain its telegraph line over and along any of the military or post roads of the United States which have been, or may hereafter be, declared such by law. Such lines must not interfere with the ordinary travel on such military or post roads. By section 3964 of the Revised Statutes of the United States, all railroads such as that operated by the defendant in this state have been and are declared to be post roads. If this statute is applicable to this case, then the act of congress itself determines whether the power of eminent domain should be put in motion for the purposes named, and whether the exigencies of the occasion and the public welfare required or justified its exercise. In the case of Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206, the supreme court, speaking by Mr. Justice Field, said:

"* * * When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. * * *"

Although congress had put its right of eminent domain in motion by granting to the telegraph companies who complied with the foregoing provisions of the statute the right of way over and along post roads, and determined the necessity for using said ways for telegraph purposes, it at the same time imposed the condition that such use should not interfere with the ordinary travel thereon; but there was a further

constitutional limitation that, before such right of way could be so utilized, just compensation should be awarded therefore to the owners or proprietors thereof. There would not appear to be any doubt, from the evidence presented in this case, but that the telegraph line as proposed by the plaintiff may be constructed over and along defendant's said right of way, so as not to interfere with the ordinary travel thereon. In this grant to the telegraph companies, congress, however, made no provision for the assessment of the damages arising out of the taking. In the case of Kohl v. U. S., 91 U. S. 367, 23 L. Ed. 449, the supreme court held that an action could be maintained as a civil action at law to fix the damages arising from the taking of any property for a public use. The court there said:

"* * * It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right. * * *"

In that case, after adverting to the fact that congress had made no provision for the assessing of damages for property taken under the power of eminent domain, the court said:

"* * * But there is no special provision for ascertaining the just compensation to be made for land taken. That is left to the ordinary processes of the law. * * *"

The views expressed in this opinion were affirmed in the above case of Boom Co. v. Patterson.

It would seem, then, that the plaintiff company had the right to proceed either in the state court or in the federal court to ascertain the just compensation to which the defendant would be entitled for the amount of its railroad right of way taken for the plaintiff's telegraph line; and I might stop here, and proceed to determine the just compensation to which the defendant is entitled, were it not that it would seem in the suit brought here that plaintiff appeals for its right, not to the power of eminent domain vested in the national government, but to that power inherent in the state government. The state government, by a general law, has granted the power to exercise its eminent domain to certain corporations,—among them, to telegraph companies. In this general law it is left to the courts to determine whether the use to which the property is sought to be condemned is a public use, and, if it sought to condemn property that has already been appropriated to a public use, then to determine whether such further condemnation and appropriation is for a more necessary public use than the one to which it is devoted, and for which it was first condemned.

It is alleged in the complaint in this case that the right of condemnation is asked in virtue of the provisions of the statutes of Montana. Paragraph 4 of the complaint, inter alia, contains the following:

"That said plaintiff claims and asserts the power to exercise the right of eminent domain by this proceeding under and by virtue and authority of part 3, tit. 7, of the Code of Civil Procedure of Montana (page 917)."

The right of eminent domain exercised by the national government must be for national purposes. The right of the state government to exercise such power must be for state purposes. It is evident that

both governments seek to foster the building of telegraph lines,—one for national purposes, and the other for local purposes. Under section 2211 of the Code of Civil Procedure of Montana, it is provided that the power of eminent domain may be exercised in behalf of the government of the United States for any public use it authorizes. It would appear, however, from the whole scope of the proceedings in this case, that only the state power is invoked. It becomes necessary, therefore, for this court to determine whether the construction of the telegraph line, and whether the use to which the plaintiff would appropriate the railroad right of way of the defendant, is a more necessary public use than that to which the defendant has devoted and is devoting it. In considering the evidence presented in the case, the conclusion is reached that it is desirable that the plaintiff should have the right to construct its line of telegraph over and along the right of way of the defendant's railway. In determining the question as to whether this use is a more necessary public use than that to which the defendant has devoted the right of way under consideration, we may consider the opinions of others. We find, in a case where a corporation bearing the same name as the plaintiff brought a similar suit against this same defendant in the state of Idaho, having for its object the condemnation of a portion of the defendant's railroad right of way, Judge Beatty, before whom the case was tried, held that the appropriation for telegraph purposes of the portion of the defendant's right of way not occupied by its railway tracks is a more necessary public use than its use for a right of way by the railroad company. Postal Tel. Cable Co. v. Oregon Short Line R. Co. (C. C.) 104 Fed. 623. In this opinion Judge Beatty says:

"* * * It cannot for a moment be doubted that the use to which plaintiff proposes to put that portion of the defendant's right of way would be of greater public utility than that for which it is now used. * * *"

This case was taken to the circuit court of appeals for this circuit on a writ of error, and the above ruling by Judge Beatty was there considered. 49 C. C. A. 663, 111 Fed. 843. The statute in Idaho is the same as the Montana statute, and provides for the taking of property already devoted to a public use for a more necessary public use. In construing this statute, the circuit court of appeals says:

"* * * 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 will 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. * * * 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 this conclusion. * * *"

The supreme court of Utah, in the case of Postal Tel. Cable Co. of Utah v. Oregon Short Line R. Co. (Utah) 65 Pac. 735, said:

"* * * The appropriation of the right of way of a railroad, not essential to the enjoyment of its franchise and property, to the construction of a telegraph line, is to and for a more necessary public use. * * *"

And in pursuance of this view it was held that it was proper for the telegraph company to appropriate a portion of the right of way of the Oregon Short Line Railroad Company in the state of Utah.

In considering the act of congress before quoted, it is evident that congress was of the opinion that it would be right to appropriate portions of any post road for a telegraph line, when such appropriation did not interfere with the ordinary travel thereon. Guided by these opinions, I find in this case that the portions of the railroad right of way of the Oregon Short Line Railroad Company, in Montana, sought to be appropriated by the plaintiff to the uses named, is a proper appropriation, and a more necessary public use than that to which the defendant is devoting the same. This appropriation by the telegraph company of the right of way of the defendant must be confined, however, to that portion of the same not now actually used and required for railway purposes, and along a line which will not interfere with the ordinary use thereof for railway purposes.

As to the question of damages, I find, from a careful examination and consideration of the decisions, that what may be considered as nominal damages only should be awarded defendant. St. Louis & C. R. Co. v. Postal Tel. Cable Co., 173 Ill. 508, 51 N. E. 382; Chicago, B. & Q. R. Co. v. City of Chicago, 149 Ill. 457, 37 N. E. 78; Id., 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 978; Railway Co. v. Catholic Bishop, 119 Ill. 529, 10 N. E. 372; Allen v. City of Boston, 137 Mass. 319; Mobile & O. R. Co. v. Postal Tel. Cable Co. (Miss.) 26 South. 370. The evidence in this case does not establish clearly that the defendant would suffer any peculiar or special damage by the taking, and hence what is considered a nominal damage, merely, can be awarded. The damages to the defendant are hereby fixed in the sum of $1 per mile, amounting in the aggregate to $127.

It is substantially agreed that the right of way of the defendant varies in width; that at some points on the line it is 200 feet in width, at other portions 100 feet, and at other portions only 66 feet in width. I hold that, upon such portions of the aforesaid right of way where it is 200 feet wide, the poles and wires of the plaintiff should not be placed nearer than 75 feet to the outer line of the track or rail; at such portions thereof where it is 100 feet wide, the line of telegraph should not be nearer to the outer edge of the defendant's track than 40 feet; and at all such portions where it is only 66 feet in width, the telegraph poles of the plaintiff should not be nearer than 30 feet to the track.

Let a decree be prepared in consonance with these views.

OIL SEEDS PRESSING CO. v. UNITED STATES.

(Circuit Court, S. D. New York. March 1, 1902.)

OLIVE OIL—CUSTOMS DUTY.

Where witnesses called for the government were Italians, who testified that the olive oil imported was fit for food, but was of a poor quality, and that it burned the throat, and that it was bought by the poorer class of Italians, and it had a strong, offensive, and rancid odor, and a witness for the importer testified that it was a nonedible oil, unsafe for human consumption, and that it was not manufactured, imported, or adapted for food consumption, it was free, under Act 1897, par. 626, as olive oil for manufacturing or mechanical purposes, "fit only for such use," and not dutiable as olive oil not specially provided for, under paragraph 40 of the act.

D. Frank Lloyd, Asst. U. S. Atty.
Hatch & Wickes, for the importers.

TOWNSEND, District Judge. The merchandise in question is olive oil assessed for duty as "olive oil, not specially provided for," at 40 cents per gallon, under the provisions of paragraph 40 of the act of 1897, and claimed to be free, under paragraph 626 of said act, as "olive oil for manufacturing or mechanical purposes, fit only for such use and valued at not more than sixty cents per gallon." The board of general appraisers, in overruling the protest of the importer, found that:

"The oil is worth less than sixty cents per gallon, and that it was actually used for manufacturing purposes; but we are satisfied from the evidence that it can be used for food consumption, and it is fit for such use. While it is true that this oil contains a small percentage of free fatty acid, it is nevertheless fit for food consumption."

The dealers called as witnesses to support the contention of the government that the oil was fit for food were Italians, who admitted that the oil was of poor quality, and that either they did not import or deal in such inferior oil, or had succeeded in selling very little of it; that it burned the throat; and that it was bought by the poorer class of Italians. This oil contains a great excess of free fatty acid and albuminous sediment. It has a strong, offensive, and rancid odor, and an acrid taste. Dr. Cyrus Edson testifies that it is a nonedible oil, "unsafe for human consumption, * * * because of the process of fermentation, which leaves certain germs free in the oil," and he adds, "I shouldn't permit it to be used for food." The fermentation referred to by the witness is explained by him to refer to the method by which the oil is made, which "oil itself is a product of fermentation." The word "fit" seems to be equivalent to "suitable," —the actual, practical, and commercial suitableness of the article for the purpose designated. The article in question is not manufactured, imported, or adapted for food consumption, and its perverted use for frying or for salads by a class of foreigners presumably ignorant of its deleterious qualities and injurious effects does not show that it is fit for use as food.

The decision of the board of general appraisers is reversed.

In re HOLSTEIN.

(District Court, D. Connecticut. April 11, 1902.)

No. 707.

BANKRUPTCY—REFUSING DISCHARGE—FRAUD.

An insolvent retail merchant, who, immediately on receipt of goods, sells them at wholesale, and turns the larger part of the proceeds over to a friend, whom he says he owed, but of which there is no documentary evidence, and fails to enter the check on his check book, should be refused a discharge in bankruptcy for concealment of assets.

In Bankruptcy.

The following is the report of the referee upon petition for discharge:

I, Henry G. Newton, referee in bankruptcy for the New Haven county district of the district of Connecticut, to whom the above-entitled case was referred under the act of congress relating to bankruptcy, do hereby certify: That the above-named Harry Holstein, of New Haven, Connecticut, was duly adjudicated a bankrupt herein on August 12, 1901. That the petition of the bankrupt for a discharge in bankruptcy from all his debts was duly filed with the clerk of said court on September 16, 1901, and was duly referred to me by said court for further proceedings. That on September 18th I fixed the 2d day of October, 1901, at 12 m., at my office, room 7, No. 818 Chapel street, New Haven, Connecticut, as the time and place for a hearing on said petition for a discharge, for examining the bankrupt, and for showing cause, if any, why such discharge should not be granted; and on September 20, 1901, I gave due notice thereof to all creditors whose names appear upon the schedules of the bankrupt, to all attorneys who appear in the case, and to all persons interested, by mailing and publishing, as appears by my certificate, with copy of notice, hereto annexed. That William H. Ely appeared at the hearing on the discharge to oppose on the part of S. D. Veits & Co., of Springfield, Massachusetts; his written specifications of the grounds of objection to the granting of the discharge being filed on October 11 and argued on October 28, 1901. The objections to the discharge were, in substance: (1) Concealing and failing to keep books of account; (2) paying $350 to Charles Rosenstein in trust for the bankrupt, and failing to enter the transaction on his books; (3) disposing of a driving horse and vehicle immediately before the filing of his petition in bankruptcy, without any legal transfer, and without entering the transaction upon the books. The total indebtedness of the bankrupt, as appears by his schedules, is $2,064.90. It was agreed upon the hearing that the case should be heard and decided upon evidence taken upon a former examination and hearing. The schedules in bankruptcy were dated August 10, 1901, and filed August 12, 1901. Mr. Holstein, the bankrupt, has been engaged in the business of dealing in feed, hay, and oats at retail. On July 27, 1901, he ordered of S. D. Veits & Co., the creditor objecting to his discharge, a cargo of oats, the price being $594.38. These oats were received on or about August 6th, and the cargo was immediately sold at wholesale by the bankrupt for a price slightly less than the price paid by him; but, as stated by him, at a price slightly in advance of the ruling market rate. Of the money received for the sale of the cargo of oats he deposited in bank on August 6th, $500; and on August 7th he made a further deposit of $96.69,—$596.69. He paid checks as follows: On August 6th, to the N. Y., N. H. & H. R. R. Co., $75.19, for freight on the cargo mentioned. The First National Bank, where he kept his account, charged against his account a draft of $176.17, which had been accepted by him 30 days previously. A check of August 5th to R. Sanford, for $80, was paid by the bank on August 7th. On August 7th he paid Charles Rosenstein the $350, and on August 8th to Abner Hendee, a bona fide creditor, $74.54, which exhausted his bank account within 35 cents. On his check book the stubs are not filled out for a payment of $72.19, a part of the $75.19 paid to the railroad company, or for the ones to Rosenstein and Hendee. The bankrupt did not, at any other time during the course of his business,

sell at wholesale a cargo of oats. His journal shows various charges and receipts on August 5th and August 6th and August 7th. No entry of his purchases or indebtedness appears anywhere upon his books. His testimony was that he simply made charges upon his books of goods sold, and trusted to the bills to know his indebtedness for goods purchased. Bankrupt testified that the $350 paid to Charles Rosenstein was on account of a debt which he owed him for borrowed money. Charles Rosenstein was not called by either side. No written entry of any kind was offered in corroboration of this indebtedness, and there is no written entry in regard to the Rosenstein matter upon the books of the bankrupt, nor concerning the horse and wagon. The principal question in this case is the good faith of the payment to Rosenstein, and whether the failure to note the check to him upon the book was for the purpose of concealing the payment. There is no claim as to any other payment proved to have been made, that it was fraudulent. Bankrupt testified that he sold the horse and wagon about two weeks before making the assignment in bankruptcy for $110, of which $10 was paid in cash and the balance paid by check, which was deposited in bank. No specific deposit of $100 appears upon the books, although, within two weeks there is a deposit of $120.50, which might possibly contain the $100 check. I find this objection as to horse and wagon not sustained. The question here largely turns upon the credit which ought to be given the testimony of the bankrupt. In my opinion, a sale in bulk by an insolvent retail merchant of a cargo of oats for somewhere about $600, the deposit of $500 of the money in bank, and the using of the larger part of it, other than that needed to pay the freight, for the payment of a personal debt to a friend, is not a transaction which should be looked upon with favor, and does not entitle the doer of it to credit. Except for the payment to Abner Hendee and Mr. Sanford about that time, I should not hesitate to say that the testimony ought to be discredited. It has before been reported by me, and affirmed by this court, that the obtaining of money by the sale of goods and paying it out, not in the ordinary course of business, but to a personal friend, throws the burden of proof that the transaction was fair strongly against the bankrupt. In the absence of any documentary evidence of the debt, or of any corroborative evidence whatever, in my judgment it ought to be found that the $350 was paid to Rosenstein on a concealed trust, and that the failure to enter the check upon the stub of the check book was for the purpose of concealing the true state of his affairs from his creditors in bankruptcy; and, solely from the evidence above stated, I find and report, unless the court shall be of the opinion that the facts in evidence do not sustain the finding, that the bankrupt has concealed $350, and has failed to enter the check upon his check book, with the intent to conceal from his creditors the true condition of his affairs. It may be proper to add that the failure to enter checks, and the failure to correctly state transactions on the schedules, have been repeatedly found, in other cases, not to militate against the granting of a discharge, no fraudulent intent being found. In my judgment, it would be a reproach upon the law if an insolvent retail merchant could obtain money by the sale of goods at wholesale immediately upon their receipt, and turn the bulk of it over to one who is not a business creditor, and, by his simple statement that he owed the recipient, exonerate himself from blame, and obtain a discharge from the debt. While the debt to Veits & Co. may not have been incurred by false pretenses, so as to render a discharge invalid against that particular creditor, it is a debt which ought not to be discharged in bankruptcy unless the court is absolutely forced to grant such a discharge. I therefore find from the facts and evidence, and for the reasons stated above recommend, that the discharge be refused.

Simon H. Kugel, for bankrupt.
Wm. H. Ely, for opposing creditor.

PLATT, District Judge. I am entirely in accord with the referee in his opinion upon the facts presented. His report is accepted, and the discharge is refused.

THE EL MONTE.

THE RAPPAHANNOCK.

(District Court, S. D. New York. March 4, 1902.)

1. COLLISION—NAVIGATION IN FOG—CONSTRUCTION OF RULES.
   Under the second clause of article 16 of the international navigation rules, which requires a steam vessel, "hearing apparently forward of her beam the fog signal of a vessel the position of which is not ascertained," to stop her engines, and then navigate with caution until danger of collision is over, it is the duty of a vessel to stop under such circumstances, in all doubtful cases, until both the position and course of the other is known.[1]

2. SAME—STEAM VESSELS CROSSING—EXCESSIVE SPEED AND FAILURE TO STOP IN FOG.
   In a suit for collision between two ocean steamships in a dense fog, while on crossing courses, it appeared that after entering the fog both continued at more than half speed, in violation of the first provision of rule 16, and that, after hearing each other's fog signals, both proceeded without stopping for some time, in violation of the second clause of such rule; the vessels when they saw each other being within 500 feet, and unable to check their momentum in time to avoid collision. *Held*, that both must be held in fault, and the damages divided.

In Admiralty. Suit for collision.

Convers & Kirlin, for the Rappahannock.
Maxwell Evarts, for the El Monte.

ADAMS, District Judge. These actions arose out of a collision between the steamship Rappahannock and the steamship El Monte, which occurred in a dense fog in the early morning of the 5th day of October, 1900, about 50 miles in a northeasterly direction from Cape Charles. The Rappahannock was bound into Newport News from Liverpool. She was practically in ballast, having very little cargo on board. The El Monte was proceeding up the coast, fully laden with general cargo, on a voyage from New Orleans to New York.

The contentions of the respective parties as to the main facts are as follows:

On the part of the Rappahannock, that in the early morning of the day in question the weather was fine, but became foggy about 6:30 a. m. The chief officer was in charge of the navigation of the Rappahannock at the time. He at once put the telegraph to the engine room at "stand by," to give the engineer on watch notice to be ready for maneuvers. This order was received and noted by the second engineer, who was on duty below. The captain had noticed that it was coming in thick, and was dressing when the chief officer called him, at this time, to tell him the state of the weather, and he came out on the bridge in less than a minute afterwards. At 6:40 a. m. the weather became thicker, and the telegraph was put to "half speed," which order was immediately executed. Meanwhile, from the time the weather first began to get thick, the fog

[1] Collision rules, see notes to The Niagara, 28 C. C. A. 532; The Mount Hope, 29 C. C. A. 368.

whistle had been continually sounded at intervals of about a minute, and the speed of the steamer had been reduced to about 6 knots, when at 7:10 a. m. one single long blast, the ordinary fog signal, was heard by her watch. It came from broad off the port bow, and was judged to be about four or five points before the beam. This afterwards turned out to be a signal from the El Monte. The chief officer looked at the clock at that moment, and noticed that it was 7:10. Instantly the engine room telegraph was rung to slow, and a prolonged single blast was given on the whistle. Both acts were done by the chief officer, and just as he finished blowing the whistle the master, before any further signals were heard from the El Monte, rung the telegraph to stop. Very shortly thereafter, a two-whistle signal was heard from the El Monte. The Rappahannock continued to blow single blasts at about 45 seconds intervals up to the collision, blowing four in all from the time of first hearing the El Monte. Three sets of two-whistle signals were heard from the El Monte after the first fog whistle was heard from her and before the collision. These signals seemed to be coming more abeam all the time. As the El Monte swung into sight, she was bearing about a point before the beam, and her masts were slightly open to starboard, so that her starboard side could be made out. She was coming in at about a right angle, heading forward of the bridge, and turning her bow towards the Rappahannock's stern, as though under a port helm, and apparently trying to clear the latter. Her distance from the Rappahannock, when first sighted, was probably not over 1½ ship's length. Upon seeing her, the order "full speed ahead" was immediately given, and the helm put hard aport to throw her bow around to starboard, as it seemed that the El Monte would strike forward of the beam. But it was immediately seen from the way the El Monte was swinging that she would strike abaft the beam, so that, before the Rappahannock felt the influence of her port helm, the helm was put hard to starboard to throw her quarter off, and give the El Monte a better chance of clearing. As the Rappahannock was practically stopped when the full speed ahead order was given, there was not sufficient time for her to gain headway to escape the blow from the El Monte, although perhaps a half a minute elapsed between the order and the collision. At the time of the collision, the Rappahannock's heading was W. S. W. She had changed a point and a half to starboard from her previous course, S. W. half W., after hearing the El Monte. This was chiefly due to the influence of the right-hand propeller, which tended to make the ship swing to starboard while the engines were stopped. The engines were stopped the second time immediately after the collision. The engine room record shows that the order "slow" was received at 7:10 a. m., the order "stop" at 7:11, the order "full speed ahead" at 7:12, and the final order "stop" at 7:13. Fractional portions of the minutes were not taken into account in marking down the time of the orders,—the minute to which the hand of the clock appeared to be nearest, being put down, so that, if an order came 20 seconds before the minute, it would be put down as of the minute, and if it came 20 seconds after the minute it would also be put down as of

the same minute. The engine room and deck clocks were in accord.

On the part of the El Monte, that at about 4:20 a. m., while off the Virginia Capes, the ship ran into a heavy fog. Her engines were put at slow, and the fog whistle was blown every two minutes. The ship was in charge of the captain and first officer in the pilot house. The quartermaster was at the wheel and a man on lookout. The El Monte proceeded under this speed, blowing her fog whistle, according to the regulations, every two minutes, until about 6:10, when the fog lifted in the immediate vicinity of the steamship. The engines were then put at full speed until the fog again thickened, at about 6:40, when a slow bell was given, and the speed of the ship reduced to half speed, which was somewhere between six and seven knots an hour. About 10 minutes after that, according to the ship's log, at 6:50 a. m., a whistle was heard on the starboard bow from the vessel, which afterwards turned out to be the Rappahannock. This whistle was a considerable distance away, and seemed to be a point or two forward of the starboard beam. The El Monte, which was on a course N. 10½ deg. E., at once blew a fog signal in reply. The next signal from the Rappahannock was two short, sharp blasts, which were answered by two short, sharp blasts from the El Monte, and the El Monte's helm was put to starboard. The Rappahannock then replied with one sharp blast, crossing the signal theretofore given. The El Monte at once stopped her engines, and blew two prolonged blasts, with a second interval between to indicate to the Rappahannock, that she had stopped. The order to stop her engines was given at 6:56. A minute or so after, the Rappahannock was seen from the El Monte's deck on the starboard bow, heading directly across the course of the El Monte. An order was given to reverse the engines at full speed at 6:57, and about two minutes after that the collision took place. The Rappahannock had ported her helm for the purpose of enabling her bow to clear the El Monte, and by such maneuver threw her stern on the El Monte's bow. The El Monte's stem came in contact with the Rappahannock's port quarter, near the stern.

The vessels charge each other, inter alia, with fault in not proceeding at a moderate speed in fog, and in not stopping at once upon hearing the first signal. In these particulars, the situation is governed by the sixteenth international rule, providing as follows,—the new part of the rule, which went into effect July 1, 1897, being in italics:

"Art. 16. Every *vessel* shall, in a fog, mist, falling snow, *heavy rainstorms*, go at a moderate speed, *having careful regard to the existing circumstances and conditions.*

"*A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.*"

The clocks of the vessels did not agree, those of the Rappahannock being from 12 to 15 minutes faster than the El Monte's.

The testimony shows that the Rappahannock's normal full speed was 10 or 11 knots an hour, under about 67 revolutions per minute

of her engine. She had been proceeding at this speed up to 6:30 a. m., according to her time, when it became somewhat foggy. The steamer was not slowed at this time. Ten minutes later, at 6:40, the fog became thicker, and speed was reduced from 67 to 40 or 45 revolutions per minute, by which, the Rappahannock contended, the speed was reduced to about six knots. This speed was continued in a thick fog until 7:10 a. m., when the El Monte's first signal was heard broad off the port bow. The signal was then rung to slow, which speed was continued until the master came out of his room shortly after, and assumed direct command, when a signal was given at 7:11 to stop. The collision occurred between 7:12 and 7:13.

The El Monte's testimony shows that her normal full speed was from 12 to 12½ knots an hour, under about 65 revolutions per minute of her engine. Entries in her log show that she slowed down at 6:40, according to her time, because it set in thick, and stopped at 6:56. Testimony from her officers is to the effect that she first heard the Rappahannock's signals at 6:50. (The master at one place apparently says 6:10, but that is probably a typographical error for 6:50.) The slowing down was from 65 revolutions to about 50, under which she claimed a speed of about six or seven knots. The collision occurred at 6:59 a. m.

Thus, according to her own account, each vessel continued at a speed of more than half her usual full speed up to within two or three minutes of the collision, in a frequented part of the ocean, and in a fog of such density that they could not discern each other until they were within a distance of about 500 feet. This was a violation of the first paragraph of the sixteenth rule (The Niagara, 28 C. C. A. 528, 84 Fed. 902; The Martello, 153 U. S. 64, 14 Sup. Ct. 723, 38 L. Ed. 637); but it is possible that a collision might then have been avoided had not the second paragraph been also clearly violated in the failure to stop the engines and navigate with caution until danger of collision was over. The Rappahannock seeks to avoid the effect of the rule by asserting that she did practically stop at the moment of hearing the El Monte's first signal, as the slowing and stopping were almost simultaneous, the records of the movements of the engine not showing fractional parts of a minute, and the orders instead of being a minute apart might have been only twenty seconds, as twenty seconds either way would, by the record, be included in the minute mark. I do not see, however, why there might not have been, upon the same theory, an interval of a minute and forty seconds between the orders, and the presumption here would be, in the absence of contrary proof, in view of the violation of a statutory duty, rather in favor of a lapse of the greater time. She has certainly not relieved herself of the statutory burden. The El Monte, in effect, concedes the proper application of the rule to her navigation, unless it appears to be inapplicable because the position of the Rappahannock was ascertained by means of the signals exchanged. That is, having received, as a second signal, a two-whistle signal from the Rappahannock from some distance away, she was justified in concluding that the Rappahannock was proceeding down the coast on a course that would carry the vessels safely past each

other starboard to starboard, and that, therefore, no necessity existed for stopping. An ingenious argument is advanced in support of this theory to the effect that, when a fog signal is clearly on the starboard or on the port bow, the position of the vessel whose signal is heard is ascertained so far as the position of a vessel in a fog can ever be ascertained, and is ascertained within the meaning of the words in the sixteenth article, and under such circumstances it was never intended that the vessel hearing the fog signal should stop her engines and remain stationary, thus stopping navigation in fogs. The difficulty with the contention is that the El Monte did not hear such a signal, because none such was given, but, assuming that she was justified in believing that there was a signal of the kind, she was not at liberty to conclude that the vessel was on a course to pass her in safety, or that the signal was given as a course signal to her. The object of this section of the article, providing an additional precaution against collision, was obviously to prevent vessels from approaching each other closely in a fog,—not, perhaps, requiring vessels to stop when so far away from each other that no danger actually existed, or could exist, until the situation changed, but in all doubtful cases requiring an immediate stoppage of the vessel for the purpose of a better hearing, to get the vessel's headway fully under command, and to cause all on board to be on the alert to provide for contingencies. An instructive discussion of the reasons for this amendment occurred when it was being considered in the International Maritime Conference of 1889, showing that the duty of stopping should be made imperative in order to avoid the danger of leaving too much to the navigator's judgment. Protocol of Proceedings, vol. 1, pp. 453–461. I consider this case directly within the spirit and letter of the rule. Here was a vessel, going ahead in a dense fog at the rate of at least six knots, receiving the signal of another, whose position and course were only conjectural, and yet kept on, with the result of bringing the vessels together, when an observance of the rule would undoubtedly have avoided danger. The violation cannot be overlooked. The St. Louis, 39 C. C. A. 201, 98 Fed. 750; The Rondane, 9 Mart. Law Cas. 106. As I conclude that both vessels were in fault under the sixteenth article, it is not necessary to discuss the other questions.

A decree will be entered dividing the damages.

HENDRYX et al. v. PERKINS.

(Circuit Court of Appeals, First Circuit. February 13, 1902.)

No. 378.

1. EQUITY—DECREE—CONFORMITY TO BILL
   A bill for the vacation of a prior decree of the same court, which charges fraud as the ground for the relief asked, will not sustain a decree granting such relief on the ground of mistake of fact, even though such mistake related to the state of the pleadings at the time of the hearing, and was shared by the court, and prevented a determination of the cause on the merits.
2. APPEAL—APPEALABLE DECREE—BILL TO IMPEACH DECREE FOR FRAUD.
   A bill to impeach a prior decree for fraud is an original bill, although, when filed in the court which rendered the decree attacked, one in the nature of a bill of review; and a decree entered on such bill, vacating the prior decree and restoring the parties to their former situation in that cause, terminates the litigation on the second bill, and is therefore final and appealable, whether it leaves further proceedings to be taken in the original suit or not.
3. SAME—DISCRETION OF TRIAL COURT.
   A bill to vacate a decree for fraud, which, although filed in the same court, and in the nature of a bill of review, may be filed, as a matter of right, without leave of court, is not addressed to the absolute discretion of the court of primary jurisdiction, but to its judicial discretion, and a decree granting or denying the relief prayed for is reviewable on appeal.
4. DECREE—BILL TO VACATE FOR FRAUD—LACHES.
   Neither a bill to vacate a decree for fraud nor a bill of review can be maintained after a lapse of nine years, during all of which time the complainant had knowledge of the decree, when no sufficient facts in excuse of the delay are alleged.

   Aldrich, District Judge, dissenting.

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

The following is the opinion of the court below:

COLT, Circuit Judge (orally). In this case I thought it would be better to send for counsel and state to them certain conclusions which I have reached, rather than to file a written opinion in the first instance. This suit was brought in the state court December 8, 1883. It is a suit upon a license contract dated October 4, 1876. Under the license the fees were paid to January 1, 1883. The complainant seeks an account from that date. The subject-matter of the license was bird-cage springs. The suit was removed to the circuit court in May, 1884. In November, 1884, the defendants demurred to the bill. One of the grounds of demurrer was that the plaintiff had an adequate remedy at law. On April 9, 1885, the court sustained the demurrer without prejudice to the complainant to amend and replead in this court. On April 14, 1885, the complainant divided his action, and filed a bill for discovery merely on the equity side of the court, and a declaration at law on the law side thereof. On April 28, 1885, the defendants filed a demurrer to the bill of discovery, which was overruled May 11, 1885. On the same day the defendants filed an answer to the bill of discovery. On May 22, 1885, a motion of the complainant to file additional interrogatories was granted, and the defendants ordered to answer on or before June 1st. On May 27th the time to answer interrogatories was extended to June 4th. On June 3d the amendments to the answer were filed. On June 12th the complainant filed a supplemental bill, changing the bill for discovery to one for discovery and relief. On June 23d leave to file the supplemental bill was granted. On the same day the court ordered the defendants to bring their account under the bill of discovery down to May 22, 1885, the date of filing the additional

interrogatories; the additional account to be filed on or before June 29th. In obedience to the order of court, the defendants filed an amended answer June 29th, bringing their account down to May 22, 1885. In their answer and amended answer to the bill of discovery, the defendants had set up, among other things, that there was a revocation of the license on January 1, 1883, and consequently that they could not be called on to disclose any account beyond that date.

On June 29, 1885, the situation was this: The defendants to the bill for discovery had brought their account down to May 22, 1885; and at the same time in their answers had stated why they did not think they should be called upon for this discovery. Further, the complainant on June 23d had been allowed to file a supplemental bill, changing the bill for discovery into a bill for discovery and relief. On June 29th the complainant moved for a final decree, or to set the case down for hearing on the bill and answer. This was irregular, and should not have been entertained. There was no hearing to be had, and no decree to be entered on the bill for discovery, as the complainant was only entitled to use the answer of the defendants as evidence in his action at law. That is what a bill of discovery is brought for. There is no such thing as setting down a bill of discovery for hearing upon bill and answer. I am aware that the complainant takes the position that there was another answer, which was filed on June 29th, which was an answer to the bill for discovery and relief, or the supplemental bill. There is no proof that any such answer was ever filed until July 21st following. The amended answer which was filed June 29th was the answer to the bill of discovery, and brought the account down to May 22d of that year. In that amended answer the defendants stated the reasons why they thought they should not be called on for that accounting. There is no proof of any nature or description that there was any other answer filed at that time. On the contrary, the facts and circumstances conclusively negative any such contention. The supplemental bill was not allowed until June 22d, and under the rule the defendants had until the August rules to file their answer. That bill covered the whole case, and required the defendants to make full answer. Rule 57 is perfectly clear when you look at its terms. It contemplates that a supplemental bill shall be filed upon a rule day. That rule day would have been in July, and the defendants would have until the next succeeding rule day to answer. "Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown and due notice to the other party; and, if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court." The complainant maintains that the paper which was filed upon June 29th was an answer to the supplemental bill. I must conclude that he is mistaken. We are not entirely in the dark as to what that paper was. The complainant did not desire to have anything filed in answer to his bill for discovery except the bare account. He thought other matters were irregular, and therefore we find that on July 14th following he made a motion to strike out part of the answer. The inference from this might be that the answer was upon the files at that time, or at least that the complainant knew the contents of that answer. He moved to strike out the portions of that answer which did not relate to the account but were a defense to any accounting. We have, further, the letter-press copy of Mr. Roberts, counsel for the defendants, of this amended answer; and that shows conclusively that it is the amended answer to the order of the court which was made upon June 23d. Nor is it reasonable to suppose that the defendants would come in and answer the supplemental bill five or six days after it was filed. I am therefore satisfied that the copy of the amended answer which was allowed to be filed by the court at a later date in 1887 is a copy of the original answer which was filed on June 29, 1885, and which was lost from the files.

On July 21st, the defendants filed an answer to the supplemental bill for discovery and relief, and the court proceeded to a hearing on this bill and answer. This is most material. The complainant objected to any hearing upon this bill and answer, and the court had no right to set the case down for hearing, unless upon motion of the complainant or with his assent. That hearing took place under a mistake of all parties.—the counsel for the complainant, because he supposed that the case had been set down for hearing upon the bill and answer as they stood on June 29th, when it could not have been so set down under the facts as I find them; and under a mistake of the court and of the counsel for the defendants in setting the case down for hearing upon the bill and answer of July 21st. The result is that the complainant has not been allowed to make out his case. There has been no hearing upon the merits. There was a mistake of fact for which I think the parties, the counsel, and the court were all to a certain extent responsible. The court undertook to render a decision and enter a decree upon the bill and answer filed on July 21st, which was a wrong proceeding on its part. To be sure, the complainant contended for a position which was untenable, and which helped to mislead the court; but that affords no justification of the course which was pursued.

The serious objection to granting the complainant any relief in this case is laches. It appears, however, that the position of the parties is substantially the same as it was when the final decree was entered. Under these circumstances, there having been a clear error, which was not discovered until the present time, I believe that the court should endeavor, if possible, to correct it. We need not say who is liable for it,—the complainant, the defendants, or the court. That fundamental error was in setting this case down for hearing on July 21st, against the protest of the complainant, upon an answer to the merits of the supplemental bill. There are some things in the petition and in the bill for review which the court deems entirely irrelevant, and which ought, perhaps, to be stricken from the records of the court. There is not a particle of evidence to my mind in this record that anybody connected with this case has been in the least degree guilty of any fraudulent practice of any nature whatsoever. It is true that it does not appear that the then clerk of the circuit court entered upon his minutes the answer which was filed on June 29th; but this was no more than a casual omission. There is no proof of any intention to injure the complainant. It does appear that the answer could not be found later. It would rather seem that it was on the files of this court on July 14th, when the complainant filed his motion to strike out a portion of the amended answer. It may have been among the papers when the case was heard in Providence, and it may have been mislaid by me, and therefore not returned to the clerk's office with the papers.

Under all the circumstances, I have decided to take the responsibility of allowing this case to be reheard, leaving my action to be reviewed by the appellate court. I propose, therefore, to enter an order that the final decree entered on March 31, 1888, be vacated; that the copy of the amended answer filed on the 31st day of March be treated in all respects as the amended answer to the bill for discovery, ordered by the court on June 29, 1885, and which has been lost from the files of the court; that all other opinions, motions, and orders made or entered subsequent to March 31, 1888, be vacated; and that the cause stand upon the pleadings as they appear on the 21st day of July, 1885.

Lauriston L. Scaife (William L. Bennett and Charles M. Reed, on the brief), for appellants.

John M. Perkins, in pro. per.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This case arises by an appeal from a decree on a bill, sometimes styled in the record a "bill of review," filed pursuant to leave granted by the circuit court. Although, as

Mr. Perkins, the appellee, justly says, the bill is one of the class which may be filed without leave first obtained, we also may, for convenience, at various points, name it a bill of review. Perkins commenced a proceeding of some nature against the appellants in the courts of Massachusetts. The appellants removed this litigation to the circuit court, where the docket entries commence: "May term, 1884, May 15th, entered by defendants. Removed from state court." The next entry to which we need call attention is that of April 14, 1885: "Bill for discovery filed. Defendants to answer within two weeks. Declaration at law filed, and transferred to law docket." On June 12, 1885, what was styled a "supplemental bill" was "presented to the court," and, on June 23d, "leave to file supplemental bill" was granted. On July 21, 1885, appears the following entry: "Answer to bill, amended so as to become a bill for relief, filed." From this we draw the conclusion that what was styled the "supplemental bill" was, in effect, an amendment to convert the bill of discovery into a bill for relief. The next docket entry is, "Heard on bill and answer." This occurred at Providence, in the absence of the clerk, so no date is given; but it was between July 21, 1885, and January 13, 1886, and, probably, on July 28th. This was followed by an opinion, on January 13, 1886, to the effect that the bill must be dismissed. The subsequent proceedings will be referred to hereafter so far as necessary. On June 29, 1885, it is alleged that an answer of some kind was filed by the present appellants, the then respondents, the true nature of which will be given hereafter.

No replication had been filed, and the record before us does not show that the complainant moved to have the case set down for hearing. Therefore in that particular the record is, on its face, defective; and unless, either expressly or by inference, this was waived by the complainant, he was entitled as a matter of right to a bill of review for error of law. But, ordinarily, the right to file a bill of review of this nature expires with the time limited by statute for an appeal. Thomas v. Brockenbrough, 10 Wheat. 146, 6 L. Ed. 287; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 10 Sup. Ct. 736, 34 L. Ed. 97; Reed v. Stanley, 38 C. C. A. 331, 97 Fed. 521; Id., 179 U. S. 682, 21 Sup. Ct. 915, 45 L. Ed. 384; Blythe Co. v. Hinckley (C. C. A.) 111 Fed. 827, 837; Story, Eq. Pl. (10th Ed.) § 410. The decisions with reference to this rule happen to have been applied to cases where, by the statute, there was an existing right of appeal. In the present case there is nothing in the record to show whether the amount involved permitted an appeal to the supreme court; but, assuming that it did not, there is, as we will see further on, nothing justiciable in the present proceedings with reference to any such error of law.

The final decree in the original cause was entered on March 31, 1888, and, on October 13, 1897, after a lapse of more than nine years, the appellee presented his petition for leave to file the bill the proceedings on which are now before us. The bill, in some particulars, departs from the petition, and also it may be defective in some of its details. The appellants made a motion to strike it from the files by reason of these irregularities, and the motion was refused. We do

not, however, perceive any proper assignment of error on this point. The assignments to which our attention is called are of a too general character to raise technical questions of this nature. However, this will all disappear as we go on.

The gravamen of the present bill is that in the original cause the respondents filed an answer on June 29, 1885; that the complainant did, in fact, consent to a hearing on bill and answer, although the docket entries do not show it, but that it was his understanding that the hearing was to be on the bill and the answer of June 29th; that subsequently, and before the hearing, the respondents fraudulently withdrew that answer, and fraudulently interposed in its place the answer of July 21st; that the court, as well as the complainant, was unaware of the fraudulent substitution of one answer for the other; that the court understood that the complainant's consent to a hearing applied to the answer filed on July 21st; and that it proceeded to hear and dispose of the case on the bill and that answer. The bill alleges that the court, as well as the complainant, was deceived, to use its language, by "the fraud and trickery which were practiced upon him and upon the court." What has been said constitutes the pith of this bill, although it contains enlargements of allegations which put the matter in somewhat different forms. These are confused, as will appear from the following extracts:

"Your complainant did not know of this fraud and trickery which was practiced upon him and upon the court until January, 1886, when the court ordered complainant's bill to be dismissed. The false and unlawful answer filed on July 21, 1885, denied every right claimed by complainant, and the true and correct amended answer to the bill for discovery and relief was never seen by the court. On July 28, 1885, complainant protested against any consideration being given to the so-called amended answer, filed on July 21, 1885, it being a second answer to the same matter, and was unlawfully interpolated among the papers in this suit after the cause was submitted to the court on bill and answer, and was not filed with the consent of the court, as it could only have been lawfully filed and considered." "As the case now stands, defendants have, as a practical fact, been allowed to put in new testimony in their behalf, and destroy the old and correct testimony after the cause has once been submitted to the court; and this without the knowledge and consent of the court, and against the protest of complainant."

These allegations do not weaken our statement that the gravamen of this bill is fraud. Although the complainant alleges that he protested against a hearing on the answer of July 21st, yet nothing of that character is made the basis of a specific and independent proposition; and everything rests on the background of the claim that the interposition of that answer was fraudulent.

The decree on the bill of review was entered on December 13, 1900, in the following language:

"This cause came on to be heard at the October term, A. D. 1899, upon the pleadings and proofs, and was argued by counsel for the respective parties, and now, upon consideration thereof, to wit, December 13, 1900, it is ordered, adjudged, and decreed as follows:

"First. That the final decree entered on the 31st day of March, A. D. 1888, in the cause in equity No. 2,023, be, and the same is hereby, set aside and vacated.

"Second. That the copy of the amended answer filed on the 31st day of March, A. D. 1888, in cause No. 2.023, stand, and be treated in all respects as the amended answer to the bill for discovery, ordered by the court on

June 23, 1885, and directed to be filed on or before June 29, 1885, and which has been lost from the files of the court.

"Third. That all other papers, motions, and orders made or entered subsequent to the 21st day of July, A. D. 1885, the date of the filing of the answer to the supplemental bill in No. 2,023, be, and the same are hereby, stricken from the files and vacated, and that said cause stand upon the pleadings as they appear upon said 21st day of July, A. D. 1885."

This decree, as is permitted by the rules of the supreme court, contains no special finding, and therefore it, in form, adjudges the allegations of the bill in favor of the complainant, and, consequently, it, in form, adjudges that the respondents have been guilty of fraud as charged. We are advised by the opinion of the learned judge who sat in the circuit court that he found no fraud proven; that the complainant objected to any hearing on the bill and the answer filed on July 21st; that the court had no right to set the case down for a hearing unless on motion of the complainant, or with his assent; that the hearing took place under a mistake of all the parties; and that, therefore, under the circumstances, he decided to take the responsibility of allowing the case to be reheard, leaving his action to be reviewed by the appellate court. If this had appeared of record in the final decree or otherwise, it would have shown only that the court granted relief on the ground of a common mistake, and not on that of fraud.

The complainant (now the appellee) has filed in this court his brief furnished the circuit court on the hearing of the bill of review. This raised no point of the character found in the opinion referred to. The brief, after two preliminary sentences, opens thus: "The ground for this bill of review is based on alleged fraud practiced on the complainant, and also on errors of law apparent on the face of the case." No other propositions were submitted. On the other hand, at the hearing before us, the appellants assured us that in the circuit court no suggestion was made that relief was asked on the ground of mistake, and that that subject-matter was not in any way discussed or considered. Nothing in the record, or in any matter submitted to us on either side, indicates anything on the part of the respondents (now the appellants) waiving their right to have a determination based on the allegations of the bill. This right was, under the circumstances, of a substantial character; and could not have been held to have been waived except by some clear line of action leading to that result. Putnam v. Day, 22 Wall. 60, 66, 22 L. Ed. 764, says: "A decree has to be founded on the allegata, as well as probata, of the cause." This, as is well known, and for the best of reasons, is especially applicable to bills in equity charging fraud; and the rule is most strictly enforced under such circumstances. Daniell, Ch. Prac. (6th Am. Ed.) *382. A party who charges fraud assumes a grave responsibility by reason of making injurious allegations, which he cannot escape by substituting another issue in lieu thereof. The only exceptions have been in some instances where the bill had a double aspect, so that, therefore, it might be sustained according to its other allegations, even if those charging fraud were not proven. In such cases the proper practice is to expressly dismiss the bill so far as fraud is concerned. This is fully explained in Archbold v. Commissioners, 2 H. L. Cas. 440, 460. It is clear, for the reasons which we have stated, that there is nothing

in the record which would justify us in looking at any questions except those raised by the complainant in the circuit court; namely, that the bill of review is "based on alleged fraud practiced on the complainant, and also on errors of law apparent on the face of the case."

We may well add that this view of the pleadings and proofs relieves us from the necessity of carefully considering what powers courts can exercise for relief against mistakes, either by summary petitions or by formal bills of review.

The substantial questions presented to us are threefold, namely:

First. Whether the decree of December 13, 1900, now appealed from, is final, so as to be appealable;

Second. Whether that decree involves a matter of discretion of such a character that it is not appealable; and

Third. Whether, if we have jurisdiction, the merits of the case are with the appellants.

Coming to the first question, the bill now before us is one to file which, as already said, no leave of court was required. It is in fact a bill to impeach a prior decree for fraud, and therefore it is an original bill, although in the nature of a bill of review. Story, Eq. Pl. (10th Ed.) § 426; Adams, Eq. *419; Daniell, Ch. Prac. (6th Am. Ed.) *1584. Of course, a bill to impeach a decree, when brought against the party who committed the fraud, by a person who has no interest in maintaining any affirmative adjudication, may merely annul the decree if it succeeds, because one who has imposed on the court by fraud may have no further right in the same proceeding with reference to the same subject-matter. But, when the fraud has been practiced by a respondent, and the complainant has an interest to secure an affirmative decree, a different rule prevails; otherwise the complainant might be left in no better condition than if the decree stood. It is therefore said in Story, Eq. Pl. (10th Ed.) § 426, and Adams, Eq. *419, referring to this class of bills, that, where a decree has been obtained by fraud, the court will restore the parties to their former situation, whatever their rights may be. That is precisely the nature and effect of the decree now appealed from. The decree in the original cause was not merely set aside by it, but the parties were restored to their former situation in that cause. Therefore the frame of the decree appealed from, by necessity, terminated the litigation before us, so it was final in form, and in those respects it was correct. We have, then, an original bill, and a decree which terminates the litigation on that bill. It is difficult to see why, on principle, it is not appealable.

The supreme court has several times said that a bill of this nature will lie in a federal court to set aside a judgment or a decree fraudulently obtained in a state court, and vice versa. Marshall v. Holmes, 141 U. S. 589, 596, 12 Sup. Ct. 62, 35 L. Ed. 870; Robb v. Vos, 155 U. S. 13, 38, 15 Sup. Ct. 4, 39 L. Ed. 52; Bank v. Stevens, 169 U. S. 432, 463, 18 Sup. Ct. 403, 42 L. Ed. 807. A statement of the rule is found in Arrowsmith v. Gleason, 129 U. S. 86, 100, 9 Sup. Ct. 237, 32 L. Ed. 630, being there repeated from a prior opinion, as follows:

"The court of chancery is always open to hear complaints against it [that is, alleged fraud], whether committed in pais or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor

does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and, if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it."

The fact that proceedings of this nature are of such a character that they may be maintained in the federal court in which the original bill was decreed on, without reference to the citizenship of the parties or other jurisdictional questions, does not contravene our propositions. This is fully explained in Carey v. Railroad Co., 161 U. S. 115, 128, 131, 16 Sup. Ct. 537, 40 L. Ed. 638. The citations there made show that, although this proceeding may be ancillary for jurisdictional purposes, it is original and independent in the chancery sense.

Even if the bill in the proceeding appealed from had not been strictly original, and were only a bill of review, the decree, nevertheless, is, as we have shown, of such a character as to make it final. It leaves nothing further to be done in this cause. It reinstates the original suit on the pleadings as they appeared at the time of the hearing on bill and answer, and all other proceedings must be in that case.

Our attention has not been called to any decision of the supreme court directly in point on this question under the precise circumstances of this case. So far as we have found any, they have been with reference to appeals from decrees which were necessarily final by their inherent nature, either because they refused relief, or because they directed a reversal of the decree on the original bill, with such further directions as left no opportunity for further proceedings in the original cause. Bank v. Ritchie, 8 Pet. 128, 142, 8 L. Ed. 890; Whiting v. Bank, 13 Pet. 6, 16, 10 L. Ed. 33; Craig v. Smith, 100 U. S. 226, 230, 234, 25 L. Ed. 577; Clark v. Killian, 103 U. S. 766, 768, 26 L. Ed. 607; Ensminger v. Powers, 108 U. S. 292, 305, 2 Sup. Ct. 643, 27 L. Ed. 732; Osborne v. Town Co., 178 U. S. 22, 32, 20 Sup. Ct. 860, 44 L. Ed. 961. Others related to bills impeaching judgments at law. Nevertheless, in view of all the considerations which have come to our attention, we hold that the decree in the present case was final for the purpose of an appeal.

Coming to the second question, it is said that review lies in the discretion of the court of primary jurisdiction, and that, therefore, this decree is not appealable. There are two kinds of discretion,—one absolute, as in granting or refusing continuances, from which there is no appeal; and one of a judicial character, which properly affords the basis of revision by an appellate tribunal. With reference to bills of review which are filed, not as of right, but only on application to the court of primary jurisdiction, granted or not, according to its sound discretion, an appeal does not lie from the granting or refusal of the application; but when, afterwards, a bill of review has been filed, and proceedings in regular course have followed the bill, such proceedings become a matter of strict right. They are analogous to proceedings after a new trial has been granted. No authoritative statement can be found to the contrary. There are some occasional inapt expressions, but they arise from not clearly stating the circumstances, or the distinction between a petition for leave to

file a bill and the proceedings thereafter. Adams, Eq. *417, merely states that, "Where a bill of review is founded on the occurrence or discovery of new matter, the leave of the court must be first obtained." This refers only to what precedes the filing of the bill. What Story, Eq. Pl. (10th Ed.) says on this topic in section 417, is, of course, limited by section 412, to the effect that leave of the court must be obtained before a bill of review can be filed on the ground of newly discovered matter. The court, in Rubber Co. v. Goodyear, 9 Wall. 805, 806. 19 L. Ed. 828, was speaking of an application made to itself for leave to file a bill of review below. This concerned that class of cases in which it has been held that, after a mandate has gone down, the court below cannot entertain a bill of review without the consent of the appellate tribunal,—a rule which was fully expounded by us in Re Gamewell Fire Alarm Tel. Co., 20 C. C. A. 111, 73 Fed. 908. Therefore, even if the present case were one of a bill of review, properly speaking, of the class to which the leave of the court must be obtained before one can be filed, the exercise of unappealable discretionary powers would end with the granting of the application therefor. But we have here, as we have shown, an independent and original bill, asking independent and original relief, which might have been filed as a matter of right, and as to which no mere discretion is exercised at any stage.

While neither Bronson v. Schulten, 104 U. S. 410, 26 L. Ed. 797, nor Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901, 29 L. Ed. 1013, relates to the setting aside of a decree in equity, yet they are so closely analogous to the case at bar on the question of finality, and also on the question whether the action of the circuit court was so far within its mere discretion as to be unappealable, that the principles which they recognize seem quite conclusive in favor of the results which we have reached. In Bronson v. Schulten the action of the circuit court vacating a judgment entered at a former term was reversed, and that court was directed to restore it. Phillips v. Negley, however, is so much fuller on both propositions involved that it does not seem necessary to dwell on Bronson v. Schulten, except to say that it pointedly called attention to the fact that any peculiar practice of state courts is not to be considered. Phillips v. Negley will be better understood by examining the facts as stated in the same case, 2 Mackey, 236, and the opinion of the court there reported. The special term of the supreme court of the District of Columbia, after a vacation following the entry of a judgment against the defendant Negley, set it aside, as appears in 117 U. S. 668, 6 Sup. Ct. 902, 29 L. Ed. 1013, "because of irregularity, surprise, fraud, and deceit." The record also shows that Negley had had no hearing on the merits. At the general term, according to the opinion in 2 Mackey, 236, an appeal was dismissed on the ground that the opening of the judgment was not a finality, and was a matter of mere discretion, thus involving the two principal questions we have already considered, although at law, instead of in equity. These facts are well stated by Mr. Justice Matthews in 117 U. S. 671, 6 Sup. Ct. 901, 29 L. Ed. 1013. The United States supreme court, however, held that the action of the special term was appealable, and that what it did in

setting aside the judgment was void, suggesting, however, at pages 678, 679, 117 U. S., and page 907, 6 Sup. Ct., 29 L. Ed. 1013, that Negley had, perhaps, a remedy by a bill of the class now before us. The result was that it reversed the proceedings of the supreme court of the District of Columbia, and remanded the cause, with directions to dismiss the motion of the defendant to reopen the judgment.

Coming now to the third question,—that is, the merits of the case,—we have already shown that the gravamen of the present bill is alleged fraud on the part of the present appellants. As we have also already shown, the only grounds of relief which were set up in the circuit court, and which can be within the four corners of the bill of review, are fraud and errors in law arising on the face of the record in the original cause. It is impossible to combine both matters in one bill, because a bill to set aside a decree for fraud is, as we have shown, an independent, original suit, and may be brought in some other court than that in which the decree was entered, while a bill of review for errors in law can lie only in the same court. Moreover, inasmuch as the bill now before us does not show that the complainant made any movement towards rectifying the decree for more than nine years, and sets up no excuse for the delay, it is plain that, independently of the rule that a bill of review for errors of law on the face of the record must be brought within the time within which an appeal will lie, the general doctrine of laches offers a perfect defense. It is plain, moreover, that, notwithstanding there were some allegations which might, under other circumstances, be appropriate for a bill of review for errors of law, they are here only incidental to the gravamen of the bill, which, we have already shown, is limited to alleged fraud.

It is not necessary for us to advert in detail to the well-settled rule that allegations of fraud in a bill in equity, positively denied in the answer, as is the record here, cannot be sustained on the uncorroborated testimony of a single witness,—which, at the most, is all we have here,—nor to bear on the fact that here that single witness is the complainant, and that his testimony lacks the details essential in proofs of that class. Moreover, we find, under date of June 23, 1885, the following: "Ordered that the defendants bring their account down to May 22, 1885, the date of the filing of additional interrogatories, the additional account to be filed on or before Monday, the 29th instant." This clearly related to the bill in its aspect as a bill of discovery, although the same day the "supplemental" or amended bill was filed. As already said, the docket entries show that on July 21st, the respondents filed an answer to the amended bill. The answer which the complainant claims was fraudulently withdrawn he alleges was filed on June 29th. There is enough in the docket entries to make it plain that that answer, if it was ever filed, had no relation to the amended bill. It appears that while the original bill remained simply a bill of discovery, on May 11, 1885, the respondents filed an answer thereto. Afterwards, on June 3d, the complainant moved for attachment for contempt against some of the respondents for not answering fully. Then, on June 23d, we find the order already cited. This merely directed an additional account to be filed on or

before the 29th. At that time no answer was due to the bill amended to become a bill of relief, and the presumption is inevitable that whatever was filed on the 29th, if anything, was simply the account ordered by the court to be filed on or before that date. On March 24, 1887, the respondents in the original cause produced therein a copy of the paper of June 29th, and accompanied the same with a motion for leave to file it, and an affidavit of their counsel in reference thereto. On March 31, 1888, the court made an order allowing the motion. The court, in granting leave to file this copy, authenticated it as true; and no action has been taken on the part of the complainant to qualify that authentication. Therefore the first step for the complainant in sustaining his bill of review, in that it alleges that the answer of July 21st was fraudulently interposed for the alleged answer of June 29th, was to have brought before the court the copy of the latter, so that the court could perceive its nature, or else to have challenged its authenticity. As the record stands, we are forced to the conclusion that the alleged answer of June 29th was of the character which we have stated, and that it could not have been of any consequence on the hearing which occurred in the original cause, or with reference to the final decree entered thereon. There was no motive whatever to induce its suppression as alleged in the present bill.

While thus the very foundation on which a superstructure of fraud could be erected is taken away, nevertheless, without referring to the record further than we have already done so, we ought to repeat that there is an entire failure to prove by suitable evidence any charge of fraud, connivance, or misconduct of any kind on the part of the appellants, or of any one else, and that no proper basis for any suspicion of that character is left.

It is not uncommon for the supreme court, where the record indicates merits, but the court below has departed from the pleadings or proofs, to reverse the decree, and remand it, with leave to amend the pleadings, or supplement the proofs, as the circumstances may be. There is no necessary difficulty, arising from the mere matter of form, to prevent a bill from being regarded as a summary petition, provided the substantial allegations are present. The parties having been fully heard on the merits, we treated a cross bill as an intervening petition in Gregory v. Pike, 15 C. C. A. 33, 67 Fed. 837, 846. But, in any view, whether relating to the bill now before us as framed, or whether to it as made by the circuit court, no case can be found emanating from the federal courts which can overcome the defense of laches. Whatever may have been the condition of the complainant's knowledge before the copy of the answer of June 29th was ordered to be filed on March 31, 1888, he then knew every detail which he knows at the present time. The bill alleges no excuse whatever for his delay, except the pretense of an attempt to reopen the case by a paper filed on March 25, 1887, to which we will refer further hereafter. Under these circumstances laches is an absolute bar. The principle is so well settled that it seems hardly necessary to refer to authorities, but we will cite Hardt v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548, both as to what lapse of time, when not excused, operates in equity absolutely as laches, and what

allegations the bill or petition must contain to lay the basis of excuse. The decision also shows that the defense of laches is so absolute that it may be taken on demurrer; and, indeed, it is well known that, even without a demurrer, or without any matters appearing in the answer, the court sometimes raises the defense of its own motion. The various expressions found in the decisions of the supreme court with reference to the sound discretion of the court, or special circumstances, refer to the sound discretion of the court in which the case is pending, whether the court of the first instance or the appellate tribunal, and to peculiar circumstances which may either abbreviate or extend the delay in consequence of which the defense of laches becomes operative. A collection of various instances will be found in Galliher v. Cadwell, 145 U. S. 368, 372, 373, 12 Sup. Ct. 873, 36 L. Ed. 738, where, according to the circumstances, delays for so short periods as twenty months, two years, four years, and, the longest there named, five years, operated as a bar. It will be impossible for us to sustain a decree on the bill before us on any theory whatever without violating the law with reference to laches as laid down by the supreme court on many occasions and as supported by well-established equitable rules.

The appellee has called the attention of the court to the fact that on March 25, 1887,—which was the day after the motion for leave to file the copy of the alleged answer of June 29th was made,—he, as complainant in the original cause, filed a petition for leave to file a supplemental bill, which was never considered by the court, and which, as he alleges, was never entered on the docket. He brings to our attention a copy of that petition, which states that its object was to obtain the discovery ordered on June 22, 1885, and also to obtain the answer which he alleges was filed on June 29th. If this effort had been diligently followed up, and had been brought to a close within a reasonable period before the bill now before us was filed, even though it had resulted adversely to the complainant, it might, in accordance with many precedents, have bridged the long intervening period, and avoided any defense of laches; but now answers are numerous. It does not appear that the petition was ever brought to the attention of the court. The substance of all which could possibly have been obtained by it was obtained by the order allowing the filing of the copy of the answer of June 29th; and, if there had been any loss of any right so far as the petitioner was concerned, or any irregularity through the alleged omission to docket the petition or to act on it, the lapse of time gives to all this the same conclusive answer which it gives to all the other propositions which we have considered.

Some other minor matters have been called to our attention, but they are not of sufficient importance, in any view of them, to weigh against the great preponderance of the case as we have explained it, and any reference to them would merely prolong this discussion without avail.

The appellants did not obtain a supersedeas of proceedings in the circuit court subsequent to the decree now appealed from and pursuant thereto. Also it is apparent from what we have already stated

that neither party can be properly charged with all the conditions which required this appeal. Therefore it is plain that neither party should bear the entire costs, and it seems impracticable to apportion them correctly on any satisfactory theory, or even to determine satisfactorily that they should be apportioned.

The decree of the circuit court is reversed, and the case is remanded to that court, with directions to dismiss the bill, with the costs of the circuit court for the respondents therein, and to take such further proceedings as may be necessary to restore the final decree entered in the original cause on the 31st day of March, 1888, without any costs for either party in said original cause except as provided by said decree of said 31st day of March, and neither party will recover any costs of appeal.

ALDRICH, District Judge (dissenting). I am under a strong conviction that the decree of the circuit court vacating its own earlier decree upon the ground of mistake should be affirmed, and the gravity of the question and the importance of the principle involved require that the reasons for my dissent should be stated at considerable length. The question is whether a party shall lose his right of trial and his day in court upon the merits through a mistake of the court in considering and dismissing his bill upon a paper not submitted, and one upon which the party has never been heard either as to its form or substance. I can conceive of no more important question than this. It at once goes to the fundamental right of trial. No truth is more essential to the usefulness and the security of the judicial system than that all parties shall have a full, regular, and fair trial. It is hardly less essential that judicial proceedings shall be so ordered that all parties shall feel that they have had their day in court, and that they have had a fair trial.

The court below has found that the decree dismissing the bill resulted from a mistake of fact,—that of considering an answer filed after submission upon bill and answer,—and that the mistake was one for which the court was, to a certain extent, responsible. This finding, with the same parties before him, relates to an earlier decree of the same judge in the same court, with the position of the parties substantially the same as when the earlier decree was entered. It is also found that the mistake was not discovered until the hearing in which the finding was made, and that the mistake is one which the court should endeavor, if possible, to correct.

At the outset I venture to say that no case can be found in this country or in England where the discretion of a chancellor, exercised to relieve the parties and his own conscience from the consequences of his own mistake in dismissing a bill upon misapprehension as to the state of the pleading, has been overruled by an appellate tribunal, and the chancellor compelled to execute a decree which, upon a subsequent hearing, with the parties all before him, and with the situation unchanged, and no third-party interests intervening, he has found as a matter of fact was based upon a mistake of fact, preliminary to the merits, which deprived the party of his day in court. If it is done in this case, it will be the first instance in the history of equity jurisprudence.

It is not seriously contended in argument or in the majority opinion that the mistake was not made substantially as found by the circuit court; and the majority opinion proceeds upon the idea,—First, that relief cannot be granted, because the petitioner proceeded in his application for relief upon allegations of fraud, rather than mistake; and, second, that his right to relief was lost through laches or lapse of time. I cannot but feel, therefore, that the reasoning resorted to to uphold the mistaken and wrong decree is extremely technical as applied to a situation like the one in question; and this is so because a course of reasoning, which has been the outgrowth of public policy and the necessity of upholding decrees and orders based upon hearings upon the merits, is invoked by the majority opinion to fortify and hold fast to a decree not based upon the merits, but upon a mistake, which side-tracked the merits, and deprived the plaintiff of a hearing.

I maintain that the order of the circuit court setting aside the mistaken and unwitting decree of dismissal was required—First, upon general grounds of equity; and, second, because, as a result of the mistake, the plaintiff was denied the due process of law guarantied to suitors by amendment 5 of the federal constitution.

While it is somewhat unusual to vacate decrees after enrollment, it is not by any means unheard of, and the power to do so upon proper proceedings in respect to unauthorized decrees and those based upon mistakes not relating to the merits, but preliminary thereto, when justice requires it, is unquestioned. Phillips v. Negley, 117 U. S. 665, 674, 6 Sup. Ct. 901, 29 L. Ed. 1013; Freem. Judgm. § 100, and cases in note 1; Black, Judgm. § 301; Seton, Decrees Ch. 787; 2 Daniell, Ch. Pl. & Prac. (6th Ed.) §§ 1026, 1027, and cases. See, also, cases in 17 Am. & Eng. Enc. Law (2d Ed.) p. 837, note 5, subd. "o."

It is undoubtedly a general rule that no deliberate decision should be reversed by the same court where reversal would do injustice, or unduly disturb rights of property; and it is equally axiomatic that, if a decision is clearly incorrect, and no injurious results will be likely to follow from a reversal, and especially if the decision is injurious and unjust in its operation, it is the imperative duty of the court to reverse it. In a case like this an arbitrary rule which would deny to courts the power, or absolve them from the duty, of relieving from their own mistakes in deciding cases upon wrong papers or the wrong record, would be discreditable to the administration of justice. Such a hard and fast rule would be contrary to the spirit of the law and contrary to equity. It would at once violate the plain teachings of simple justice. It would compel a chancellor to hold fast to a right which he had established upon a clear mistake. Of course, a court should and would stand to its decree based upon an adjudication of the facts and of the law; and probably no one would contend that, after the end of the term or the lapse of the statutory time for appeal, it would enter upon a review of the merits, and upon ground of error disturb its rulings of law or findings of fact; but neither conceding nor maintaining this rule of stare decisis touches the question of a decree which is wholly based upon a mistake as to

jurisdiction, or upon a mistake preliminary to the merits, like the one presented here. The first would be the review of the judgment of the chancellor; the second would be the correction of a pure mistake. Every regularly constituted court has and must have inherent power to do all things that are reasonable and necessary for the administration of justice within the scope of its jurisdiction. Holding fast to a decree based upon a mistake of the court preliminary to the merits is not administering justice. On the contrary, it is administering a mistake,—administering a wrong; still worse, administering the mistake and the unwitting wrong of the court.

The general rule that relief from decrees and judgments will not be granted upon motion after the term has no application here. This is a proceeding whereby all the parties are again brought before the court, and under circumstances in which jurisdiction both over the parties and the subject-matter again obtains. The court therefore has full and complete power to do what ought to be done.

There is no general rule that should govern this case. The petitioner has never had a trial, and he is entitled to one. He never submitted the case upon the answer. He has never been heard upon any question as to its form, substance, or effect. That he has not had a hearing is due in part, as found, to a mistake of the court, and the nature of that mistake was never discovered until the hearing in which the finding was made. But, without regard to when it was discovered, I should maintain that the court, in the presence of the parties, had the inherent power of correcting the mistake. The right of a court to correct a mistake of this character must be an inherent right. I cannot devest myself of the opinion that there is a wide difference between the idea of disestablishing a right settled by a decree upon hearing and the disestablishment of a decretal right created by the court through dismissing a bill before hearing upon mistake. In the first instance the right is established upon a regular proceeding, and in accordance with the constitution and the laws; while in the other the right is established upon a mistake,—an irregularity,—and a consequent denial of the right of a hearing.

The relief sought herein is not a review of the case upon the merits as to either law or fact, for the reason that the merits of the plaintiff's case, as presented by his original bill, have never had a first-instance consideration or decision as to either law or fact. The vacated decree was not based upon a decision upon evidence or upon the merits of the bill, but upon the allegations of a distinct and different answer, filed after submission upon bill and answer, and by reason of the rule of law that in a case submitted upon bill and answer the allegations of the answer are, for purposes of decision, to be accepted as the facts of the case, and the relief sought is, in effect, only a review of the order of dismissal; and the ground of relief is that the court, by mistake, dismissed the bill upon the merits of an answer not submitted, and not before it. So this proceeding, although somewhat in the form of a bill of review, is, in substance, not one in the sense in which such a bill is understood to be maintained,—as, for instance, to correct mistakes of law apparent on the record, or for a review of the merits upon the ground of mistake

or newly discovered evidence,—but is, in effect and substance, and should be treated upon the situation presented by the findings of the circuit court simply as, a petition or summary proceeding for relief from an inadvertence or mistake in dismissing a bill upon the facts stated in an answer supposed to be before the court, when in fact the allegations of the answer were neither admitted nor before the court for consideration under the submission.

The questions presented by this record should be approached with the idea that it is contrary to principles of natural justice that one party should be benefited or that another party should suffer by a decree based upon inadvertence, accident, or mistake; for, as said by Chief Justice Marshall in an early case, "It is against conscience that one should enjoy such a benefit or that another should suffer such a wrong." If we sustain the circuit court, we establish no property right, but we give to the complainant what he has never had,—a trial and a consideration of his case upon the merits, or a hearing upon the bill and answer as they stood when the case was submitted on bill and answer, where both parties can be heard. But, on the contrary, as a record showing a dismissal of a bill, upon bill and answer, operates as a bar to subsequent suits in respect to the same subject-matter, if we reverse the circuit court we establish a property right, and do an injustice by compelling that court, against its conscience, to hold to a decision dismissing a bill which that court finds, as a matter of fact, was ordered under a mistake of fact, not as to the merits of the case as to either law or fact, but as to the state of the pleadings before it.

In my view, we may disregard the question whether the complainant is entitled to relief upon a strict bill of review as such, and we may and ought to treat his bill as within that class of rare occurrence which is referred to by Lube, by Mitford, by Story, and by other authors on equity procedure, as embracing petitions, supplemental bills, and bills in the nature of a bill of review, and which are not subject to all the limitations as to scope and time incident to a bill of review proper, and which may be invoked in the same cause between the same parties for the purpose of suspending or avoiding a former decree, and because, a case having been concluded by such a decree, it is necessary to bring the parties again before the court upon an original petition or bill; and I am under a strong conviction that the relief sought ought to be afforded, not upon the ground of fraud, for that is not shown, but upon the ground of accident or mistake, which is found as a fact, and stated by the learned circuit judge in the court below as a reason for his action in vacating the original decree; and, if necessary for such relief, that leave should be granted to reframe the petition to the end that relief may be afforded upon the ground of mistake in accordance with the view of the circuit court as shown by the findings and the opinion therein. But I shall refer to this feature of the case at the conclusion of my dissent.

The difficulties of the situation presented here should not be magnified by confounding this case with authorities based upon situations where there was a hearing upon the merits and a final decree,

and where the parties had departed from the court with their rights established and unchallenged, and where, through lapse of time, public interests and the interests of third parties had intervened. This decree, at the most, was a decree precipitated by a technical rule as to the effect of a submission upon bill and answer, and it now turns out that the application of the rule was under a mistake and misapprehension of fact in respect to the submission; neither the court nor the parties understanding correctly under what answer the cause was submitted. In other words, the court and the parties were laboring under a mistake of fact as to the state of the pleadings.

The cause remained upon the docket from October, 1885, when the order that the bill be dismissed was entered, until October, 1887, when the decree thereon now under consideration was entered. The docket entries show that the complainant resorted to a petition for rehearing within 12 days from the order dismissing the bill, and that he constantly sought relief by motions and petitions from that time forward to 1887, from what he alleged was an unjust and mistaken result.

While, as a general rule, the law as administered by courts is careful to protect rights which vest in reliance upon judicial decrees, if there is no change in the situation, and no actual vesting of rights of third parties, the law naturally inclines to the idea of relieving from mistake and accident and to the idea of correcting that which is wrong. In this case the technical final decree—technical in the sense of not being based upon a hearing on the merits—beyond question had its foundation in mistake and misapprehension; and I cannot bring myself to a concurrence in the view that, in a case where no third party rights are in question, where no question of public justice is involved, where the same parties, with no change in the situation, are before the same court and the same judge, that the court is without the power to correct a decree to which it was led through an error or mistake of fact as to the state of the pleadings, and a mistake which it distinctly finds produced an unauthorized, mistaken, and inadvertent result. Such power must exist as an inherent, necessary, and wholesome function of a tribunal established to administer law, not upon the basis of mistakes and accidents, but upon principles of equity and justice.

The learned judge, in vacating the decree, finds that the hearing took place under a mistake of all parties,—the counsel for the complainant, because he supposed the case had been set down for hearing upon the bill and answer as they stood on June 29th, and under a mistake of the court and of the counsel for the defendant in setting the case down for hearing upon the bill and answer of July 21st,—with the result, as the learned judge proceeds to say, "that the complainant has not been allowed to make out his case," and that "there has been no hearing upon the merits." The circuit court frankly says:

"There was a mistake of fact, for which I think the parties, the counsel, and the court were all to a certain extent responsible. The court undertook to render a decision and enter a decree on the bill and answer filed on July 21st, which was a wrong proceeding on its part. * * * The complainant

objected to any hearing upon this bill and answer, and the court had no right to set the case down for hearing unless upon motion of the complainant, or with his assent."

Notwithstanding the term was passed, and notwithstanding the fact that time had elapsed, I maintain that it is plain that, the circuit court having the same parties before it, with the position of the parties substantially the same as when the final decree was entered, as is found by the learned judge below, and there being, as said by the circuit court, clear error (meaning the mistake) which was not discovered until that time (the time of vacating the decree), the court had power, in the exercise of its discretion, to relieve from the unjust and wrong decree resulting from a mistake which the court had the courage to declare it was in part responsible for, and which, as he says, "the court should endeavor, if possible, to correct."

I do not question the general proposition that, where the situation of the parties has materially changed, or where third party interests have intervened, considerations of public policy may compel a wrong and mistaken decree to stand; but such views are wholly excluded from the present situation, because here the parties and their conditions are the same. And thus the question presented is whether, under such circumstances, a decree based upon accident and mistake, which the judge making it says resulted from accident and mistake, and which the record demonstrates was the result of mistake, shall stand as an impregnable barrier, or whether it shall yield to plain and palpable considerations of justice.

It is not necessary to maintain that the order vacating the decree is altogether one resting in discretion in the sense that it was not appealable; but I do maintain that in respect to the merits, and in respect to the time in which relief was sought, the order so far rests in discretion that it should not be disturbed, if, as said in the Michigan case,—Stockley v. Stockley, 93 Mich. 307, 53 N. W. 523 (see, also, 3 Enc. Pl. & Prac. p. 585, par. 2, note 2, and Id., p. 588, and cases cited in note),—it effectuates substantial justice, and protects the legal and equitable rights of the parties. The supreme court has repeatedly and expressly refrained from deciding such questions in respect to orders as to judgments appealable, and from disturbing action of the circuit courts in the exercise of discretion. See cases collected 3 Enc. Pl. & Prac. 589, in note on appeals.

While the weight of authorities seems to hold that a bill of review, strictly speaking, which does not constitute a part of the original cause, should be brought within the time in which the case could be appealed, or in which a writ of error would lie, there is no absolute time rule in respect to bills which are incident to and a part of the original cause and of the class of which I have spoken, and it is for the reason that they are incident to and become a part of the original cause. Such proceedings are, in nature and substance, like a petition in the same cause between the same parties, to right that which is wrong.

I think the facts stated in Judge Colt's opinion should be treated as conclusive, because he says, "under the facts as I find them," etc. But, entirely independent of this, the record shows clearly enough

what the mistake was. There was an answer filed on June 29th, and on that answer the cause was set down for hearing on bill and answer. Later, on July 21st, another answer was filed, but, as the court now finds, the case was not set down for hearing thereon; yet the court, under misapprehension, dismissed the bill upon the answer upon which the case had not been submitted. So it follows, in fact, that the bill was dismissed upon a record which was not before the court through mistake of fact in considering a record not before it, rather than the record which the previous submission called for. There is some confusion upon the record as to what the lost answer of June 29th contained, but that is really of no consequence, except as showing how the mistake happened. It was not what the answer of June 29th did or did not contain that wrought the injury to the petitioner. It is quite sufficient to say that his bill was overthrown and his case dismissed by reason of the allegations of fact contained in the answer of July 21st. The case had not been submitted on such answer, and the harm resulted from its being considered against his protest, and without his knowledge.

I do not propose to enter upon any elaborate discussion of the numerous authorities, which are somewhat confused as to the scope of the strict writ of review. I do not enter upon such discussion for the reason, as it seems to me, that under a bill in the nature of a petition, which is sometimes designated as a supplemental bill, sometimes as a bill in the nature of a bill of review, and sometimes as a petition, but which is in fact an incident of the original cause, though issuing as an independent or original proceeding for the purpose of getting the parties before the court, a court not only has unquestionable power, but is under the imperative duty, not by arbitrary methods, not ex parte, and not in violation of vested rights or principles of justice, but when face to face with the parties interested in the controversy, with the conditions unchanged, to correct its orders and decrees which are founded either in accident, mistake, or fraud.

The right of the party holding this decree was not an inherent or natural right. The right was founded upon the action of the court, and, with the parties before it, the court subsequently discovered that its action was under misapprehension and mistake; that its action was taken and its decree made upon a record not submitted. Vacating this decree, therefore, did not involve the destruction of an inherent and absolute right. The vacating order only means that one shall not hold by virtue of a decree of a court that which has been accorded to him through accident and mistake; and, as already said, the effect is only to send the parties to a hearing upon the merits, where justice can be done, and, if the defendants have a case, their rights will be accorded to them.

It would be a startling proposition that a judge, who, in handing down memorandums in two cases, misplaces them by inadvertence or mishap, thereby, contrary to his purpose, dismissing a cause which he intended to hold, and holding one which he intended to dismiss, has no power, after the end of the term or at any time, upon proper proceedings, with all the parties before him, and no third party interests intervening, to undo the wrong resulting from such a mistake,

and thereby to prevent a miscarriage of justice. I think the case of U. S. v. Williams (in the Eighth circuit) 14 C. C. A. 440, 67 Fed. 384, entirely correct in principle, and entirely consistent with the English and American authorities, so far as it deals with the inherent and necessary power of the court to correct its own mistakes. Whether, in view of the supreme court authorities to the effect that the enrollment of the decree is presumed to have been made at the close of the term, it should be done on summary motion, rather than by resorting to an original bill in the nature of a bill of review or a summary petition, it is unnecessary to say, because the case before us is not upon motion, but upon petition for relief; and, although proceeding upon the idea of fraud, we may treat it as a case for relief, as the circuit court wisely did, upon the ground of mishap, mistake, or irregularity. To me it seems perfectly plain that this complainant should have relief from the decree dismissing his bill, which, though final in name, is technical in substance, in the sense that there never was a hearing upon the merits.

Setting a case down for hearing upon bill and answer is an admission of the facts set out therein, and, as has been said, by inadvertence or mishap, under this entry, the case was made to turn upon an answer filed subsequent to the submission. The court therefore turned the case against the complainant upon an admission which he never made. The circuit judge so finds, and the record sustains the finding. At all events, there is nothing in the record to justify this court in interfering with the discretion involved in the finding of such fact by the judge who made the finding and vacated the decree.

This case simply presents a mistake in dismissing a bill preliminary to the merits. That this party should either have a decision of his case upon the record as it stood when the cause was submitted upon bill and answer, or an opportunity to try his case upon the merits, is the plain demand of simple justice. He has never had either, and, if he fails to get one or the other, he is denied a plain and sacred fundamental right. That the mistake of a judge in dismissing a bill upon a wrong record becomes so impregnable and unalterable as to work such a dire result, I cannot agree. To me it is inconceivable that a judge with all the parties before him is unalterably bound by an order dismissing a case which is made under misapprehension and upon a wrong record,—by an order made through mistake of considering facts as admitted which were not even submitted. That the complainant did not get a hearing upon the record actually submitted was the result of accident or mistake, as the circuit court has found, and the defendant therefore manifestly got what he was not entitled to,—an order of dismissal upon an answer filed subsequent to the entry of hearing on bill and answer.

Courts should never strain a technical rule for the purpose of sustaining a technical advantage at the expense of substance and to the exclusion of the merits of a case. As a general rule, a final decree is conclusive, and establishes the right; but within reasonable rules, and with the parties before the court, the right is subject to being disestablished upon grounds of mistake, accident, or fraud. The right is not fixed and unalterable in the sense that it shall stand though

based upon accident or fraud. The right to hold the decree was at once challenged, and the complainant contended for relief time and again, and finally yielded to the second (or, rather, the third) decision of the circuit court against him; and, failing to get what it has subsequently been found he was entitled to, he yielded for a time; and the mistake being the mistake of the court, and the injustice resulting from such a mishap, and the decree having been challenged over and over again without relief, his inaction between the decision on rehearing and the final application in this proceeding should be treated as involuntary, like yielding to process regular upon its face, or to an unconstitutional law.

The Lord Bacon act has never been accepted in this country or in England as taking from the courts the inherent power of correcting mistakes in accordance with the plain demands of justice. As has been said, the bill was dismissed, as the circuit court finds, upon facts and upon a record not submitted. The character of the mistake is found as a matter of fact by the circuit court, and that court says the decree is based upon a wrong decision, and one from which relief should be given. I agree with this view entirely, and think it is quite plain that it is so.

There is a wide difference and a marked distinction between a case like this, where there never has been a hearing on the merits, and cases where the decree is based upon a full hearing. As pointed out by Mr. Black, in his work on Judgments and the Doctrine of Res Judicata, at section 301 (and see note 42):

"The rule that a decree once enrolled cannot be opened except by a bill of review or by an original bill for fraud is subject to well-founded exceptions arising in cases not heard upon the merits, and in which it is alleged that the decree was entered by mistake or surprise, or under such circumstances as shall satisfy the court, in the exercise of a sound discretion, that the decree ought to be set aside."

Mr. Freeman, in his treatise on Judgments (section 100, and see cases in note 1), recognizes the same doctrine as one necessary to the administration of justice, and says:

"Accordingly it is laid down by the most eminent elementary writers, and fully sustained by the adjudged cases, that when a case has not been heard on the merits the court will, good cause being shown, exercise a discretionary power of vacating an enrollment and giving the party an opportunity of having his case discussed. The fact that the merits of the case were never before the court seems to be the controlling one in all applications for the exercise of this discretionary power. Therefore, where the decree is perfectly regular, so far as regards the appearance of the parties, and is in conformity with the general practice, it may be vacated, at the discretion of the court, upon a showing of mistake, accident, or surprise, or of negligence of the solicitor, by which a decision on the merits was prevented."

The same idea is forcibly expressed by Mr. Whitehouse in his work on Equity Practice, at section 259, and see note.

I do not propose to go over the numerous English and American authorities which agree as to the power of the court to relieve from its decrees based upon accident or fraud. The point of departure between the state authorities and the decisions of the supreme court only relates to the time and mode of the application for relief. In

many of the states the time and manner are regulated by statute, but in the federal courts, in the absence of statutory provisions, each case must be governed by its own circumstances; and the supreme court, while adopting the rule that motions to vacate must be made within the term, and the general rule that a bill of review strictly as such must be made within the time in which a writ of error or an appeal could be taken, has repeatedly recognized the broader view, which permits of relief at a later period upon petitions, supplemental bills, and bills in the nature of bills of review, and that each case must be governed by its own circumstances.

The recent case of Blythe Co. v. Hinckley (C. C. A.) 111 Fed. 827, enunciates no new rule. It is merely a reiteration of the old and familiar rule that bills of review ordinarily must be filed within the time limited by statute for taking an appeal, where the review is not sought on matter discovered since the decree. The case at bar is even stronger than a case founded on evidence discovered since the decree, for here the discovery is of a mistake which led the court unwittingly to disregard all evidence and forego all decision except such as related to an answer not before it.

The strong expressions of the supreme court in support of the doctrine of stare decisis and of the idea of the inviolability of final decrees have almost always been qualified, as in Phillips v. Negley, 117 U. S. 665, 674, 6 Sup. Ct. 901, 29 L. Ed. 1013, by an exception or saving clause in respect to the power of the court to correct clerical mistakes, to reinstate a cause dismissed by mistake, and that class of cases where relief is granted upon principles of equity, and such as are covered by writs of error coram vobis at law.

In U. S. v. McKnight, 1 Cranch, C. C. 84, Fed. Cas. No. 15,695, the court at a subsequent term set aside a judgment entered by mistake. In The Palmyra, 12 Wheat. 1, 10, 6 L. Ed. 531, Mr. Justice Story observed that:

"Every court must be presumed to exercise those powers belonging to it which are necessary for the promotion of public justice; and we do not doubt that this court possesses the power to reinstate any cause dismissed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases."

In Sibbald v. U. S., 12 Pet. 488, 492, 9 L. Ed. 1167, the court, in stating the general rule that courts cannot reverse final decrees for errors of fact or law after the term in which they have been rendered, expressly qualify it by saying, "Unless for clerical mistakes, or to reinstate a cause dismissed by mistake." So in City of Elizabeth v. Nicholson Pavement Co., 24 L. Ed. 1059, the supreme court, through Mr. Justice Bradley, said, "We have no doubt of our power at any time to amend a decree which has, by inadvertence or mistake, been entered in a different form from that in which we intended it." In Insurance Co. v. Boon, 95 U. S. 117, 125, 24 L. Ed. 395, the supreme court observed that, "whatever may have been the rule announced in some of the old cases, the modern doctrine is that some orders and amendments may be made at a subsequent term, and directed to be entered and become of record as of a former term," and quotes

approvingly from a Pennsylvania case that "the old notion that the record remains in the breast of the court only till the end of the term has yielded to necessity, convenience, and common sense."

It must be distinctly borne in mind that we are not dealing here with the power of the court to review its mistakes as to a decision of facts relating to the merits, or in respect to mistakes of law relating to the merits, but only with the inadvertence or mistake of a judge in dismissing a case upon the probative force of an answer not submitted to it; in other words, inadvertently dismissing a bill upon the wrong answer. It is inconceivable that the court may relieve from the mistake of a clerk in filing a wrong paper or wrong order, and still be without power to relieve from its own mistake in taking up, considering and dismissing a case upon a wrong paper, or a record not submitted.

If the power of the court, upon process, to recall the parties, and correct its mistakes, exists,—as I maintain it does,—the question of the time in which it may be done becomes a matter of discretion, and should be decided like questions of kindred character; and a finding of the court of first instance should not be disturbed unless it clearly appears that injustice is being done.

Control of the court of first instance over its judgments and decrees in respect to questions of fraud, accident, and mistake, and relief therefrom on such grounds, was considered as so entirely a matter of discretion, to be determined by that court upon the circumstances of the particular case, that it was distinctly held by the supreme court in Brockett v. Brockett, 2 How. 238, 240, 11 L. Ed. 251, as well as in Connor v. Peugh's Lessee, 18 How. 394, 15 L. Ed. 432, that, a motion to set aside a judgment being directed to the sound discretion of the court, no appeal lies from its decision. In the later case of Ricker v. Powell, 100 U. S. 104, 107, 25 L. Ed. 527, it is said: "Without intending to decide that an appeal will lie to this court from an order of the circuit court refusing leave to file a bill of review." Again: "For a bill of review on the ground of newly discovered matter can only be filed on special leave, which depends on the sound discretion of the court to which the application is made." Again, in Nickle v. Stuart, 111 U. S. 776, 4 Sup. Ct. 700, 28 L. Ed. 599: "Without intending to decide that an appeal lies to this court from an order of the circuit court refusing leave to file a bill," etc. So in Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 226, 10 Sup. Ct. 736, 742, 34 L. Ed. 97: "The action of the circuit court * * * was taken in the exercise of a discretion with which we are not justified in interfering." So, in Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381: "The decision of the court upon the issues of fact, so far as they depend upon the proofs, are conclusive on a bill of review." Again, page 100, 95 U. S., 24 L. Ed. 381: "The granting of a rehearing is always in the sound discretion of the court, and therefore granting or refusing it furnishes no ground of appeal." See, also, Steines v. Franklin Co., 14 Wall. 15, 20 L. Ed. 846. Transportation Co. v. Pearsall, 33 C. C. A. 161, 90 Fed. 435, is a case where a default was stricken off and the parties in the case restored to their rights. This was held

to be in the exercise of a power within the discretion of the court, and not reviewable on appeal; and at page 437 there is a useful collection of authorities (which need not be enumerated) in respect to the discretionary control which the court of first instance may exercise over its orders and judgments, including that of reopening the case and granting or refusing new trials. See, also, Dexter v. Arnold, 5 Mason, 303, 315, Fed. Cas. No. 3,856; Wood v. Mann, 2 Sumn. 316, 334, Fed. Cas. No. 17,953; Nichols v. Nichols' Heirs, 8 W. Va. 174, 186.

While we might reasonably enough follow the precedents established by the supreme court, and affirm, as was done in Ricker v. Powell, 100 U. S. 104, 107, 25 L. Ed. 527, and other cases, to which I have referred supra, without deciding the precise question whether an appeal lies as a matter of right from an order like the one made below, it would quite likely be found, upon exhaustive examination of the question, that logic and principle would make the right of appeal depend upon whether the alleged error related to a matter of law apparent upon the record, or to questions of fact relating to newly discovered evidence, fraud, or mistake; and that while, in the first instance, the right of appeal would exist, the other class of questions would be treated as within the discretion of the court whose business it is to find the facts.

Now, quite aside from the question of the administration of justice under general rules of equity, and upon a distinct and different ground,—that of the constitutional right of a hearing,—is a decree based upon facts not submitted, and upon wrong papers through mistake, based upon the due process of law guarantied by the constitution?

The complainant's property rights have been concluded against him upon the allegations of an answer not submitted, and upon which he has not been afforded an opportunity to be heard. This, it seems to me, is in contravention of the constitutional provision which guaranties to all parties due process of law. Amendment 5 of the constitution does not relate alone to forms of procedure, but to substance, and to the intermediate steps involved in the course of the proceedings and trial. It may be stated as a general rule that the term "due process of law" means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. Again, law in its regular course is due process. Again, decision after full and fair trial is "due process of law." Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Kennard v. Louisiana, 92 U. S. 480, 23 L. Ed. 478; Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569; Leeper v. Texas, 139 U. S. 462, 11 Sup. Ct. 577, 35 L. Ed. 225; Marchant v. Railroad Co., 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751. Again: "It is certain that these words, 'due process of law,' imply a conformity with natural and inherent principles of justice, and forbid that one man's property or right to property shall be taken, * * * and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense." Holden v. Hardy, 169 U. S. 366, 390,

18 Sup. Ct. 383, 387, 42 L. Ed. 780. Again: "'Due process of law' undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights." Cooley, Const. Lim. 433.

I do not propose to enlarge upon this view as applied to the situation in question. It seems to me plain that a party whose rights have been determined upon facts neither proven, assented to, nor before the court, and in respect to which he has not been heard, has not enjoyed the due process of law guarantied by the constitution. The importance of guarding carefully the sacred right of trial, and of providing a full and fair hearing upon the merits, was strongly set forth by Mr. Justice White in the recent case of Hovey v. Elliott, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, and I propose to leave this phase of the subject upon the vigorous and wholesome reasoning of that case, only calling attention to the discussion beginning on page 413, 167 U. S., and page 843, 17 Sup. Ct., 42 L. Ed. 215, where it is said: "The mere statement of this proposition would seem in reason and conscience to render imperative a negative answer. A fundamental conception of a court of justice is condemnation only after hearing." Again, at page 418, 167 U. S., and page 844, 17 Sup. Ct., 42 L. Ed. 215: "No one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination. It is judicial usurpation and oppression, and can never be upheld where justice is justly administered." Again, referring to Webster's definition of "the law of the land," which is held to be synonymous with "due process of law," Mr. Justice White adopts Judge Cooley's remark that the definition is apt and suitable as applied to judicial proceedings, which cannot be valid unless they proceed upon inquiry and render judgment only after trial.

In Hovey v. Elliott the answer was removed on grounds of contempt, and the bill taken pro confesso; and it was held that this was unwarrantable, and a denial of the rights of the defendant, and that the subsequent proceedings were not based upon due process of law. It is difficult to perceive any difference in principle between such a situation and the one involved in the case at bar. In one case the facts of the bill were taken as established by reason of a rule of court in respect to the circumstances under which a bill shall be taken pro confesso; in the other case the facts set out in an answer not before the court, and in respect to which the complainant had never been heard, were adopted for purposes of decision, through mistake, and taken as established by the rule in respect to cases submitted on bill and answer. What is the difference in principle, and what is the difference, pray, in oppressive consequences, between removing an answer by an unauthorized order and deciding against the defendant without hearing upon the allegations of the bill, and an unauthorized decision against the plaintiff without a hearing and through mistake upon the allegations of an answer not before the court? One is a wrong order based upon an unauthorized ruling,

while the other is a wrong order based upon an unauthorized assumption of facts. Neither decision is based upon due process of law, and the consequences are equally dire in both cases.

Quite aside from technical reasoning, does not the question answer itself, can due process of law be based upon a mistake of the court as to the state of the pleadings, which concludes a party's rights without affording him an opportunity to be heard?

Now, as between these parties, with no third-party interests intervening, why should the doctrine of laches be invoked to uphold a decree based upon a mistake, and a mistake which denied one party the right to be heard, and concluded his rights upon facts not submitted, and gave to the other something which he was not entitled to?

The question of laches is one which has generally been treated as involving matter to be resolved by the sound discretion of the court below. In Brown v. Buena Vista Co., 95 U. S. 157, 24 L. Ed. 422, the court, in speaking of the power of equity to relieve against a judgment upon the ground of fraud in a proceeding directly for that purpose, which it says is well settled, and that the power extends to cases of accident and mistake, said, at page 160, 95 U. S., 24 L. Ed. 422, upon the question of laches: "A court of equity applies the rule of laches according to its own ideas of right and justice. Every case is governed chiefly by its own circumstances. Whether the time the negligence has subsisted is sufficient to make it effectual is a question to be resolved by the sound discretion of the court." In Thomas v. Brockenbrough, 10 Wheat. 146, 151, 6 L. Ed. 287, where the question was whether a bill of review upon new matter was barred by a statutory limitation of five years, the court said that "is a question which need not be decided in the present case, since we are all of opinion that it is in the discretion of the court to grant leave to file a bill of review for that cause."

Laches is an equitable defense, not one of absolute right. It interposes as a defense when general and third-party interests would be disturbed, and when inequity would be done, by granting relief after lapse of time. Here there are no general rights or third-party interests to be disturbed. No inequity would result from granting the relief sought in this case. It is simply proposed in a proceeding between the original parties to right a mistake.

Irrespective of statutes, whether delay will amount to laches sufficient to bar relief is a question largely, if not wholly, within the sound discretion of the court, to be determined by the particular circumstances of each case; and the cases all seem to proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the equity or inequity of permitting the claim to go forward. Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738, is a useful case on this point. There it is said, at page 372, 145 U. S., and page 874, 12 Sup. Ct., 36 L. Ed. 738, in speaking of the cases on the subject, that "they proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been

abandoned; and that, because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him now to assert them." Again, at page 373, 145 U. S., and page 875, 12 Sup. Ct., 36 L. Ed. 738: "But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced,—an inequity founded upon some change in the condition or relations of the property or the parties." See, also, Townsend v. Vanderwerker, 160 U. S. 171, 186, 16 Sup. Ct. 258, 40 L. Ed. 383, where the same principles are reiterated, and where it is said that the death of one of the parties to the agreement and the loss of her testimony does not necessarily operate as an obstacle to the maintenance of the bill, but is a circumstance to be considered by the court in weighing the evidence. See, also, Gunton v. Carroll, 101 U. S. 426, 428, 25 L. Ed. 985.

In Cawley v. Leonard, 28 N. J. Eq. 467, 471, it is said that a mere lapse of time is not sufficient to take away the right of a party to be heard in a court of equity where there has been no laches and there are no intervening rights of others which may be unjustly disturbed. In the same case it is observed, at page 470, upon the question whether a decree should be opened, that "these applications are always addressed to the sound discretion of the court"; and in Kemp v. Squire, 1 Ves. Sr. 205, Lord Hardwicke said, on application to set aside the enrollment of a decree on circumstances, "Any court of justice will incline, as far as in its power, to open what is concluded, that the merits may come before the court." See, also, Story, Eq. Pl. § 417; Beames' Orders Ch. 1; Massie v. Graham, 3 McLean, 41, 52, Fed. Cas. No. 9,263.

It is not necessary in this case to maintain the extreme view, although sustained by high authority, that laches is altogether a matter of discretion for the court of first instance, for it is quite sufficient for the purposes of the case at bar to say that it is so far a question of fact, and so far a matter within the discretion of the judge to whom it is presented, that a finding will not be disturbed by an appellate court unless it clearly appears to be contrary to evidence and contrary to equity. Such is not the condition in this case.

Every consideration of equity requires this court to look with favor upon this proceeding, and to reach a result which shall give this man a trial of his cause upon the merits, or at least a hearing upon the bill and answer as they stood when his case was submitted. With the situation of the parties unchanged, the doctrine of laches, administered under wholesome rules of equity, will be slow to deprive this party of his constitutional right of trial. He at once challenged the dismissal of the bill, and in various ways brought the matter to the attention of the court and to the adverse party, and, as appears at page 13 of the record, as early as March 27, 1887, filed a petition for a supplemental bill to restore his rights under the lost answer of June 29th, on which the case was submitted. The petition is still undecided, and has been pending since 1887. He several times moved for a rehearing, and, not succeeding in pointing out to the satisfac-

tion of the court the ground of the mishap, he was repeatedly met with adverse result, and finally succumbed to the moral and legal force involved in repeated adverse decision. His submission under such circumstances should be treated as involuntary. A man need not resort to revolution, or be constantly before the court, in order to relieve himself from the charge of laches as between himself and a party who holds against him a wrong and unauthorized decree.

Quite likely this party did not resort to the most effective means of relieving himself from the consequences of the mistake which deprived him of his rights. It is probable that he never clearly saw what the mistake was, or rather how the mistake happened, until it was pointed out by the court in the opinion and the findings on which the decree vacating the early decree was based. He proceeded until that time upon the idea that he was the victim of fraud, rather than mistake. It is apparent, from reading the various opinions and rescripts of the circuit court, that the court never discovered the mistake, or how it happened, until final hearing under this petition, and the examination of the record de novo. So the mistake is a newly discovered one, and the relief to which the petitioner is entitled is grounded upon something disclosed in a hearing, where all the parties were present with their interests represented.

It is true that the petitioner proceeded upon allegations of fraud, but upon a full hearing in respect to the question as to how the decree dismissing his bill originated, and upon general prayer for relief, the court has found that it resulted from mistake, rather than fraud. Mistake is an equitable ground for relief, and, the merits respecting the ground of relief having been fully heard, he should be permitted to reframe his allegations, to the end that he shall receive what in equity he is entitled to.

Courts are disposed to be liberal in respect to matters where the parties have not been heard upon the merits. In Gregory v. Pike, 15 C. C. A. 33, 67 Fed. 837, 846, the court of appeals treated a cross bill as an intervening petition. In Sherman v. Association (recently decided in this circuit) 113 Fed. 609, it is said, in effect, that, were the question one of substance, it could probably be met by reframing the bill, for which leave would, of course, be granted. So, in this case, for purposes of relief, there being a general prayer, we should treat it, though somewhat in the form of a bill of review, as a summary proceeding in the nature of a petition or supplemental bill, or a bill in the nature of a bill of review. It has been frequently said that it is quite unimportant how such a bill is denominated, or what it is called. Courts have indulgently applied elastic rules of practice to such proceedings, treating a bill of review as a petition for carrying a decree into execution (Thompson v. Maxwell, 95 U. S. 391, 24 L. Ed. 481), or as a petition for rehearing (Martin v. Smith, 25 W. Va. 579; Heermans v. Montague [Va.] 20 S. E. 899, 902), or one not sustainable upon its allegations may be entertained for fraud (Sayre v. Lewis, 5 B. Mon. 90; Harris v. Hanie, 37 Ark. 354; Williams v. Murphy, 1 Port. [Ala.] 44), and a defective bill of review has been treated as a cross bill (2 Bro. Parl. Rep. by Tomlins, 88; Story, Eq. Pl. [10th Ed.] § 401, note 2a). The object of such bills

or petitions is to bring the party again before the court to have something reviewed which it is claimed ought not to stand; and, although the relief is prayed for on the ground of fraud, it may be accorded on the ground of inadvertence, accident, or mistake. See 1 Daniell, Ch. Pl. & Prac. 378, note 2.

The plaintiff's bill has a double aspect. It alleges fraud against the defendants, and also alleges, in effect, that the court, against whom no fraud is charged, was led into a mistake by the course taken by the defendants; so the relief, in one aspect of the bill, was sought on the ground of mistake, and the relief may be granted on that ground. Williams v U. S., 138 U. S. 514, 517, 11 Sup. Ct. 457, 34 L. Ed. 1026.

The power to undo, in a summary manner, what has been done by a court with no authority or jurisdiction, is unquestioned. The jurisdiction exercised by the circuit court in this case with respect to the order of dismissal was only to undo, by its own order, that which, according to its own findings, it had no authority or jurisdiction to do in the first instance; and, as said in Fuel Co. v. Brock, 139 U. S. 216, 219, 11 Sup. Ct. 523, 524, 35 L. Ed. 151, "the power is inherent in every court, whilst the subject of controversy is in its custody and the parties are before it, to undo what it had no authority to do originally." And, further, "Jurisdiction to correct what has been wrongfully done must remain in the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal." True, there it was a writ of error, where, upon remand, the relief could be had by motion, and it was a case where there was no authority or jurisdiction except to undo the wrong which the courts had done; but the reasoning of the supreme court, at page 220, 139 U. S., and page 525, 11 Sup. Ct., 35 L. Ed. 151, with respect to contemplated subsequent proceedings below, illustrates the summary manner in which an unauthorized act of the court is righted, the essential and "only requisite being that the opposite party shall be heard." And, at page 220, 139 U. S., and page 525, 11 Sup. Ct., 35 L. Ed. 151, it is said: "The mode of proceeding to effect this object must be regulated according to circumstances, * * * and that all needed inquiry can be had to guide its judgment in a summary proceeding."

The petitioner's right to relief in a case like this should not be denied him, either because he failed to invoke the most effective remedy or because he misconceived the ground for relief. The learned judge, in the majority opinion, at page 13, in discussing the merits of the question, says: "We are forced to the conclusion that the alleged answer of June 29th was of the character which we have stated, and that it could not have been of any consequence on the hearing which occurred in the original cause." As I have undertaken to point out, the harm did not result from the consequence or inconsequence of the answer of June 29th. The harm resulted from accepting as conclusive the probative force of the allegations of the answer of July 21st, which was never submitted, and which the circuit court finds never was submitted, and the unauthorized consideration of which deprived the petitioner of a hearing and his day in court.

It was not the absence or the unimportance of the answer of June 29th, but the unauthorized presence of the answer of July 21st, that dethroned the plaintiff and overthrew his rights.

I take the ground that, regardless of the general rules, to which attention has been called in the majority opinion, and regardless of general expressions in the books which could have had no reference to a situation like this, the court should find a way to right a wrong for which it is responsible, like the one found by the circuit court to exist in this case. I maintain that there is no controlling authority applicable to this situation, because such a situation was never before presented; and, if there are general expressions which would seem to hold that a technical final decree like this should stand, though based upon mistake, such expressions should be disregarded. A fact necessary to jurisdiction over the subject-matter, namely, that the answer was before the court, was inadvertently assumed by the circuit court through mistake. Upon such unauthorized assumption the order was based. The court had no power to make the order, because the facts which were supposed to be before the court were not before it. It should, therefore, be treated as void. While not precisely so as to the entire proceeding, the act was surely coram non judice as to the finding in question, because the court had no jurisdiction over either the person, the cause, or the process, so far as this answer was concerned. While not precisely the same, the order stands in principle somewhat like an award of arbitrators which goes beyond the submission, and more like a decision of a court based upon lack of jurisdiction of the subject-matter and of the parties, which would be treated as void, and would be vacated, without much, if any, regard to the question of time, rather than like a right which cannot be disestablished. It is contrary to the idea of law, and it is contrary to the plain and simple rules of natural justice, that a decree based upon a mistake of fact in respect to the state of the pleadings preliminary to the merits, which operated to dismiss the petitioner's bill, and to foreclose his rights without hearing, should stand as a solemn and conclusive adjudication and bar.

It is difficult to see upon what line of reasoning such a decree can be justified or upheld. The order of dismissal was absolutely without authority, and therefore contrary to equity and contrary to law. It was the plain duty of the circuit court, upon discovery of the mistake, to do what it did do,—vacate the order at once. There is no principle of law or consideration of equity which calls for a reversal of that court. On the contrary, every principle of law and every consideration of equity and conscience requires that the circuit court should be affirmed. It is quite plain that such a decree is against justice and against conscience, and, viewed aside from the reasoning in the books in respect to decrees based upon hearings upon the merits, and in the simple light of a decree based upon an order of dismissal through mistake before hearing upon the merits, it is clear that there is no reason why it should stand; and, in the absence of controlling authorities in support of such a proposition, it is impossible for me to accept a line of reasoning which upholds or justifies a decree like the one in question in the face of the express finding

of the judge who dismissed the bill that the decree of dismissal was founded upon a mistake which deprived the party of a hearing upon the merits, and one which, for that reason, ought not, in justice or equity, to stand. It is an absolute and inalienable right of a plaintiff that his case shall not be decided against him by mistake upon the strength of a distinct and different answer, filed after he has submitted his case, and one upon which he has not been heard. It is a fundamental right, which cannot be wrested from a party by a pure mistake of the court in dismissing his bill upon a wrong paper preliminary to the merits. It is a right which cannot be withheld from a party through a mistake of the court which denies to him the right of a hearing and due process of law. The general rule of stare decisis, or the general rule in respect to the inviolability of decrees, enforced by an appellate tribunal upon a court of equity of first instance, to compel that court, against its own findings, to blindly hold itself and an aggrieved and injured party to a mistake like the one in question, —a mistake so destructive to fundamental right,—would not long stand the test of critical and discriminating legal opinion.

I think the decree of the circuit court vacating the order of dismissal should be affirmed; but if, because the allegations of fraud are not sustained by the evidence, as found by the court below, the decree should not be affirmed for that reason, then the case should be remanded, with directions to grant leave to the petitioner to reframe his allegations and prayer, to the end that the relief shall stand upon the ground of mistake, where the circuit court, after fully hearing the parties, intended it should stand.

UNION SAVINGS & LOAN ASS'N v. BYRNE et ux.

(Circuit Court of Appeals, Ninth Circuit. March 17, 1902.)

No 722.

QUIETING TITLE—SUIT TO REMOVE CLOUD—RES ADJUDICATA.

The owner of land bordering on tide land mortgaged it, including improvements extending over on the tide land, to a loan association, with warranties of seisin, right to convey, quiet possession, against incumbrances, and to defend the title, and thereafter the mortgagor, claiming a statutory preferred right to purchase from the state the tide land in question, filed her application for purchase. In the meantime the loan association foreclosed its mortgage, and purchased the mortgaged property, and then took a deficiency judgment against the mortgagor, on which execution was issued and levied on the mortgagor's interest in the tide land. Subsequently the mortgagor assigned her purchase right to a third party, who procured a conveyance in fee from the state, and sued the loan association under 2 Ballinger's Ann. Codes & St. § 5500, to remove the cloud created by the execution, and to restrain the collection of the deficiency judgment out of the tide land. *Held*, that a decree in such suit quieting title to the tide land in the mortgagor's assignee, and restraining the loan association from the collection of its deficiency judgment out of such land, was conclusive upon such association, and a bar to a suit by it against such assignee to have his title declared invalid, regardless of whether the grounds relied on by the association in the second suit were presented in the former.

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

James Kiefer, for appellant.
I. D. McCutcheon, for appellees.

Before McKENNA, Circuit Justice, and GILBERT and ROSS, Circuit Judges.

ROSS, Circuit Judge. It appears from the record that on the 19th day of December, 1896, J. Marshal Morse and Anna M. Morse, his wife, mortgaged to the appellant, who was complainant in the court below, the following described property situated in Island county, state of Washington, to wit:

"Beginning at the point where the line between the claims of Edward Barrington and Lizzie Hill intersects the Co. road running in front of the donation claims of Sumner and Taftzon, on the S. side of said road; running thence one hundred and forty (140) feet on the S. side of said road in an easterly direction; thence south to half tide; thence west one hundred and forty (140) feet; thence north to place of beginning. Also all the wharf extending from the above piece of land to deep water. Also all of lot numbered thirty-six (36), block seventeen (17), of Latona, King county, Washington, as the same appears upon the duly recorded plat thereof, and now of record in said King Co., Wash."

The mortgage contained the following covenants on the part of the mortgagors:

"First, that they are lawfully seised of said premises; second, that they have good right to convey the same; third, that the same are free from all encumbrances; fourth, that the said party of the second part, its successors and assigns, shall quietly enjoy and possess the same, and that the said parties of the first part will warrant and defend the title to the same against all lawful claims."

On December 30, 1896, Mary Morse, claiming a preferred right to purchase from the state of Washington, by virtue of one of its statutes, the piece of tide land over which the improvements mentioned in the mortgage extended, made application to buy the same from the state, which application gave rise to numerous protests and to much litigation. During the time of that contest the appellant foreclosed its mortgage, those proceedings having been begun in the year 1898. In January, 1899, a decree of foreclosure and sale having been entered, the mortgaged property was sold by the sheriff of the county, and bought in by the mortgagee, for a sum less than the amount decreed to be due, and a judgment for the deficiency entered against Mary Morse as well as the other judgment debtors. Subsequently the appellant received the sheriff's deed for the premises described in its mortgage, and purchased by it. On the 6th day of March, 1900, the appellant caused an execution, issued upon the deficiency judgment, to be levied by the sheriff upon the interest of Mary Morse in the tide land she had applied to purchase, which interest was only the preference right to purchase given by the Washington statute, the title to the property then being in the state. That preference right Mary Morse, on April 7, 1900, assigned to Laurence P. Byrne, one of the defendants to the present suit. April 24, 1900, Byrne exercised the right to purchase so assigned to him, and paid to the state $42.84 for

the land, and received from the state a conveyance of the title thereto in fee, and thereupon instituted in the superior court of Island county a suit against the appellant and the sheriff of the county to quiet his title, pursuant to the provisions of section 5500 of the statutes of Washington, which reads:

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title." 2 Ballinger's Ann. Codes & St. Wash.

The complaint in that action set forth, among other things, the application of Mary Morse to purchase the land in question, the contests that arose in respect thereto, the final adjudication thereof in her favor, the assignment of her preference right to purchase the land to Laurence P. Byrne, his payment therefor to the state and its conveyance to him of the title thereto, the issuance of execution upon the appellant's deficiency judgment, and its levy by the sheriff on the interest of Mary Morse in the land, and the advertisement of the same for sale to satisfy the execution; and further alleged that Mary Morse never acquired legal title to this tide land, and that the appellant's judgment never became a lien upon any part thereof; that the levy of the execution thereon by the sheriff for the purpose of satisfying the appellant's judgment and the sale advertised to be made thereunder "constitute a cloud upon the title of these plaintiffs (Byrne and wife) to said property; and, if said sheriff be allowed to make said sale, to issue said certificate of purchase and a deed in pursuance of said sale, the plaintiffs herein will be irreparably injured and damaged, and their title to said property will be permanently clouded." Among the prayers of the plaintiffs was one "that said sheriff and said defendant Savings and Loan Association be perpetually restrained and enjoined from taking any steps whatever to satisfy said execution and said judgment out of said described premises, and from doing any acts whatsoever tending to cloud the title of the plaintiffs to the lands in controversy, or any part thereof." The defendants to that suit answered the complaint, and, a motion on behalf of the plaintiffs thereto for judgment on the pleadings coming on to be heard, the court entered judgment for the plaintiffs, by which it was adjudged, among other things:

"(6) That the defendants, and each of them, be, and they are hereby, perpetually restrained and enjoined from taking any steps whatsoever to satisfy said judgment and execution out of the tide land hereinabove described, and from doing any act or acts whatever constituting or tending to constitute a cloud upon the title of the plaintiff to said tide land, or any part thereof, and from doing any act or acts in any manner interfering with said tide land or any part thereof. (7) That defendants, and neither of them, have any right, title, or interest in said tide land, or any part thereof, by virtue of said judgment, execution, and levy, or either of them, or otherwise."

That judgment was pleaded by the defendants to the present suit in bar thereof, and the plea sustained by the court below. Its ruling in that respect constitutes the only question on this appeal. We think the ruling clearly right. The second amended bill of the appellant sets out the facts above stated, and alleges that Laurence P. Byrne

took the assignment from Mary Morse and the deed from the state of Washington with full knowledge of appellant's mortgage and of its rights growing out of its foreclosure proceedings, and prays for a decree adjudging that Byrne and wife "have no title whatever to or interest in the said premises described in said deed from the state of Washington, and that it may be decreed that the said Laurence P. Byrne and Catherine Byrne, his wife, hold the title to said tide lands as trustee for your orator, and for the use and benefit of your orator; and that they may be required, upon repayment to them of the amount paid to the state of Washington, to convey said tide lands"; and that "the title of your orator to the said premises may be forever ratified, approved, and confirmed and quieted as against all and every claim of the said defendants Laurence P. Byrne and Catherine Byrne, his wife, and each of them." It is thus seen that the appellant, by its bill in this suit, is seeking to accomplish what the judgment of the state court in the suit of Byrne and wife against the appellant and the sheriff of Island county enjoined them from doing, namely, from taking any steps whatsoever to satisfy the deficiency judgment, and "from doing any act or acts whatever constituting or tending to constitute a cloud upon the title of the plaintiff (Byrne) to said tide land, or any part thereof, and from doing any act or acts in any manner interfering with said tide land, or any part thereof." The jurisdiction of the state court over the parties and subject-matter is not questioned. Its decree, therefore, in respect to the conflicting claims of the parties to the land in controversy, is, so long as it stands, conclusive, not only as to every ground of recovery or defense actually presented in the cause, but also as to every ground which might have been presented. Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463; McAleer v. Lewis (C. C.) 75 Fed. 734. If the precise ground here relied on was not presented in the suit brought in the state court to settle the question of title, no good reason existed why it should not have been; for the appellant was there called upon to set up and assert whatever interest it had in the property in question.

The judgment is affirmed.

DAY v. BECK & GREGG HARDWARE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 29, 1902.)

No. 1,107.

1. BANKRUPTS—ACTS OF BANKRUPTCY—ASSIGNMENTS FOR CREDITORS.
   A debtor who makes a general assignment for the benefit of creditors may be declared an involuntary bankrupt,—that being specified as an act of bankruptcy by Bankr. Act, § 3 (30 Stat. 544),—and his actual solvency is no defense.

2. SAME—TIME FOR ADJUDICATION.
   30 Stat. 544, § 18b, gives the bankrupt or any creditor 10 days after the return day in which to appear and plead to the petition in involuntary bankruptcy. Section 18e provides that if, on the last day within which pleadings may be filed, none are filed, the judge shall on the next day, or as soon as practicable, make the adjudication or dismiss the pe-

tition. Section 31 provides that time shall be computed by excluding the first day and including the last. The subpœna in involuntary bankruptcy fixed August 28th as the return day, and on September 7th the bankrupt filed an answer, which was stricken out because not verified, and on the same day the adjudication of bankruptcy was made. *Held*, that the bankrupt or any creditor had until the expiration of September 7th in which to file a sufficient answer, and the adjudication was premature.

3. SAME—JURY TRIAL.

Under 30 Stat. 544, § 19, providing that a person against whom a petition in involuntary bankruptcy has been filed is entitled to have a trial by jury as to any act of bankruptcy alleged to have been committed, on filing a written application therefor at or before the time in which an answer may be filed, a bankrupt is entitled to demand a trial by jury of the question whether he has made a general assignment for creditors, on proper demand.

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

J. A. Estes, for appellant.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. The Beck & Gregg Hardware Company, a corporation, and other creditors of J. R. Day, on August 10, 1901, filed a petition in involuntary bankruptcy against him. The petition averred the requisite amount of debts, and was in the usual form, but did not allege that the debtor was insolvent. The act of bankruptcy alleged was that J. R. Day, within four months next preceding the date of the petition, "made a general assignment for the benefit of his creditors to H. W. Sweet." A subpœna was issued on the petition on August 12, 1901, which fixed August 28, 1901, on which the defendant, J. R. Day, was to appear and answer. This was served on the defendant on the day it issued. On September 7, 1901, the defendant, J. R. Day, filed an answer in which he denied "each and every allegation of the petition filed against him in said entitled cause." He also alleged that he was solvent. He filed with his answer the following demand, signed by his counsel: "And for the trial of this case upon the issues tendered by the foregoing pleas, the said J. R. Day, respondent, demands a trial by jury." On the same day that this answer and demand were filed, the petitioners moved to strike them from the files. The court granted the motion, and on September 7, 1901, made an order adjudging J. R. Day to be a bankrupt. From this order Day has appealed to this court (30 Stat. 544, § 25), and it is assigned that the court erred in striking the answer and demand from the files, and in adjudging the appellant to be a bankrupt.

1. Among the acts of bankruptcy specified in the statute is that the debtor has "made a general assignment for the benefit of his creditors." 30 Stat. 544, § 3. Where the petitioners rely on this ground, it is not necessary to allege or prove that the defendant is insolvent. In such case the solvency of the defendant is no defense. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098.

2. The subpœna fixed August 28, 1901, as the return day. The bankrupt or any creditor may appear and plead to the petition within 10 days after the return day, or within such further time as the court

may allow. 30 Stat. 544, § 18b. If on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition. Id. § 18e. In computing the time allowed the defendant to plead, the first day is excluded, and the last included. Id. § 31. Applying this rule, the respondent had until the expiration of September 7th in which to plead. If it be conceded that the answer of the defendant was properly stricken from the files because not verified, he or any creditor of the defendant was entitled to file a sufficient answer at any time before the expiration of the 7th day of September. If no answer at all had been filed within the time allowed, on the next day after the time for answer expired, or as soon thereafter as practicable, the judge could make the adjudication or dismiss the petition. It is premature to adjudge the defendant a bankrupt before the time for filing an answer has expired.

3. A person against whom an involuntary petition has been filed is entitled to have a trial by jury as to any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. Id. § 19. In this case the defendant was entitled to demand a trial by jury of the question whether he had made a general assignment for the benefit of his creditors. He was entitled to make such demand at any time within which he could file an answer. Id. § 19. The answer filed by the defendant on the 7th of September contained a denial of all the averments of the petition, including the allegation that he made a general assignment. He filed with his answer a demand for jury trial. The statute gives him this right.

Questions were raised as to the verification of the petition and the answer, which we need not consider. The parties would be allowed to amend their pleadings, if necessary, by having them duly verified as they may be advised.

The judgment of the court of bankruptcy is reversed. Reversed.

THE PRISCILLA.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 110.

1. MARITIME LIENS—LOSS OF PASSENGER'S BAGGAGE—DELIVERY TO VESSEL.
As regards liens upon a vessel for breach of a contract of affreightment, there is no distinction in principle between a contract for the transportation of a passenger with his baggage and one for the transportation of merchandise, and, by analogy with the rule in the latter case, no lien arises for loss of baggage unless at the time of such loss either the passenger had been received on board, or his baggage had been put into the custody or control of the vessel.

2. SAME—ADMIRALTY JURISDICTION.
By the custom of a steamship company, it received at its pier baggage sent there by passengers intending to take passage on its vessels, and kept the same until claimed by the passengers. By the rules of the company, the passenger was required to present a ticket, and have

his baggage checked, before it was received on board a vessel. Libelant sent baggage to the pier, where it was received; and he subsequently purchased a ticket for one of the company's vessels, which he presented to the baggage master, but his baggage could not be found. Prior to such time the company had no notice to whom the baggage belonged, or when or by what vessel it was to be shipped. *Held*, that whatever the liability of the company, as carrier or warehouseman, libelant had no lien for the loss of the baggage on the particular vessel for transportation upon which he afterward contracted, but which at the time of the loss had not entered on performance of the contract, which would support an action in rem in a court of admiralty.

Appeal from the District Court of the United States for the Southern District of New York.

Wm. Greenough, Jr., for appellant.
Washington E. Page, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The court below decided that a maritime lien was created against the Priscilla for the value of the libelant's baggage, lost while in the custody of the vessel's owner. 106 Fed. 739. Unless this conclusion was correct, the court had no jurisdiction of the action in rem. The Priscilla was one of a line of steamships operated by the New York, New Haven & Hartford Railroad Company, known as the "Fall River & Providence Line." The company was accustomed to receive at its pier in New York City the baggage sent there by passengers intending to take passage on its vessels, and keep such baggage until claimed by the passengers. Before the baggage is shipped, the rules of the company require the passenger to show a ticket, and have his baggage checked. Storage is charged on baggage after it has remained uncalled for for more than 24 hours. Until the owner comes to the pier and claims his baggage, it is held by the baggage master; and, until it has been checked, no baggage is received by the company on board a vessel.

On the afternoon of July 3, 1899, a trunk and a dress-suit case belonging to libelant were delivered by an expressman to the agent of the steamship company at its pier. Subsequently, on the same afternoon, the libelant came to the pier and purchased a ticket for Boston. He then went to the baggage agent, claimed his baggage, and presented the receipt of the express company, together with his ticket. The agent found the trunk, but the dress-suit case was missing. Before the Priscilla sailed, the baggage agent told the libelant that, if it was found, it would be forwarded on the next boat. The libelant had his trunk checked, and took passage by the Priscilla. The dress-suit case was never found.

A contract for the transportation of passengers by sea, like one for the transportation of merchandise, is a maritime contract, and there is no distinction in principle between them. The same liability attaches both to the owner and to the vessel for breach of performance. The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397.

When a vessel enters upon the performance of a contract of affreightment, she becomes pledged to its complete execution, and may be proceeded against in rem for any breach; but, when the

contract is purely executory, no lien attaches for the breach. The Freeman, 18 How. 182, 15 L. Ed. 341; The Yankee Blade, 19 How. 82, 15 L. Ed. 554. The question was carefully considered, and the authorities fully collated, in Scott v. The Ira Chaffee (D. C.) 2 Fed. 401. Later adjudications to the same effect are The Prince Leopold (C. C.) 9 Fed. 333; The J. F. Warner (D. C.) 22 Fed. 342; The Vigilancia (D. C.) 58 Fed. 698. In The City of London, 1 W. Rob. Adm. 88, Dr. Lushington inclined to the opinion that "if a seaman is engaged on board a vessel, and the owners think fit to abandon the voyage for which the seaman has been engaged, he would not be entitled to sue in admiralty for redress, but must seek his remedy by an action on the case." In The Bella (D. C.) 91 Fed. 540, it was decided that there is no lien on the ship for the enforcement of a contract for the carriage of a passenger who has not rendered himself on board for the purpose of being carried. In The Eugene, 31 C. C. A. 345, 87 Fed. 1001, the same proposition was decided by the circuit court of appeals. Following the analogy in the case of a contract of affreightment, we have no doubt that the lien does not arise until either the passenger has been received on board, or his baggage has been put into the custody or under the control of the vessel.

In the present case the baggage was lost before the company had notice that it belonged to the libelant, and apparently before the libelant had entered into any contract of carriage. It was in the custody of the company, in contemplation that he would become a passenger; but the relation of carrier and passenger was inchoate, and the custody was a matter preliminary, although accessory to a contract of carriage. When baggage is delivered, as it was in this case, without any directions as to its destination or time of shipment, the carrier cannot be expected to know to whom it belongs, or whether it is to be carried by any particular vessel of the line, or even whether it is to be carried at all. Under such circumstances, it is in no sense within the custody or control of any particular vessel or its officers.

It is unnecessary to consider whether the company assumed the liability of a carrier, or only that of a warehouseman, towards the libelant. It suffices that the breach of its obligation took place before it had entered upon the performance of any contract of carriage, and consequently did not create any lien upon the vessel.

The decree is reversed, with costs, and with instructions to the court below to dismiss the libel.

In re MILLER.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1902.)

No. 1,140.

ARMY—ENLISTMENT OF MINOR—PARENTS SECURING RELEASE.

Under Rev. St. U. S. §§ 1116–1118, providing that army recruits must be between 16 and 35 years old; no one under 21 years shall be enlisted without the consent of his parents or guardians; and that no one under 16 years old shall be enlisted,—one between 16 and 21 years

old, enlisting without consent of parents, on representation that he is of age, becomes a soldier, amenable to military jurisdiction for military offenses, and subject to release from service only on application of his parents, who cannot prevent his court-martial for past military offenses.[1]

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

Wm. H. Atwell, U. S. Atty., and Col. E. H. Crowder, Judge Advocate U. S. Army, for appellant.

R. M. Vaughan (F. P. Works and J. E. Clarke, on the brief), for appellees.

Before McCORMICK and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. Daniel Marshall Miller enlisted in the United States army on July 26, 1901, as a private soldier, at Austin, Tex. He represented himself to be 21 years of age, when in fact he was only about 17. His parents were both living, and were citizens of Texas, residing in Hill county, in that state. They did not consent to his enlistment. He was transferred from Austin, Tex., and attached to the 105th company, coast artillery. He received from the government $15.02 pay as a private soldier, and drew clothing from the government of the value of $35.36. He deserted on September 14, 1901, in California, and went to Hill county, Tex., where, on the 8th day of February, 1902, he was arrested as a deserter by the sheriff, and delivered into the custody of Capt. J. A. Dapray, the recruiting officer for the United States, stationed at Dallas, Tex. On the 15th of February, 1902, Col. Forbush, by special order, appointed a general court-martial to meet at Ft. Sam Houston, Tex., February 19, 1902, for the trial of such prisoners as may be properly brought before it, and a detail was made for the court. Charges, with proper specifications, were preferred against Miller: (1) Desertion, in violation of the forty-seventh article of war; and (2) for fraudulent enlistment, to the prejudice of good order and military discipline, in violation of the sixty-second article of war.

It is specified under the first charge that he deserted on or about the 14th of September, 1901, and remained absent in desertion until apprehended on or about February 12, 1902. It is specified by the second charge that he, being a minor, did fraudulently enlist as a soldier in the service of the United States by falsely representing himself to be 21 years of age, and that since his enlistment he received pay and allowance thereunder. On the 17th of February, 1902, Michael M. Miller and Lucy A. Miller, the parents of the prisoner, filed a petition in the district court of the United States for the Northern district of Texas, praying for the writ of habeas corpus, and seeking the discharge of Daniel Marshall Miller from further detention by the recruiting officer of the United States, and praying that he be restored to the custody and control of the petitioners. The enlistment of the prisoner, his desertion, arrest, and detention, are stated in the petition; and it is therein alleged "that the said Daniel Marshall Miller is now detained in the custody of the said recruiting officer on the charge of having de-

[1] See Army and Navy, vol. 4, Cent. Dig. § 92.

serted the military service of the United States." The court ordered that the writ issue, directed to Capt. J. A. Dapray, recruiting officer for the United States, stationed at Dallas. The return to the writ recited the fact of Miller's enlistment, desertion, and arrest, and that charges had been preferred against him as herein stated, and that respondent held the prisoner, by authority of the United States, as a soldier in the United States army, charges having been preferred against him, and that he would be brought to trial as soon as practicable before a court-martial convened by the commanding officer of the department of Texas. It is also averred in the return that these offenses were committed by the prisoner, and the prosecution thereon begun, before the suing out of the writ of habeas corpus in this case, and that the jurisdiction of the military authorities had attached before the institution of this proceeding in the district court. The learned district court was of opinion that the parents of the prisoner had never lost, by reason of the enlistment of their son, the right to his custody and control, and that they were now entitled to exercise that control and custody. An order was made that the prisoner be released and restored to the custody and possession of his parents. An appeal was taken to this court, where the order discharging the prisoner is assigned as error.

The question to be decided is whether the court-martial has jurisdiction to try the prisoner on the charges preferred against him. If it has jurisdiction, the civil courts have no right to interfere. If it is without jurisdiction, it is the duty of the civil courts to discharge the prisoner. The contention in behalf of the petitioners is that, being under 21 years of age, the prisoner could not become a soldier without their consent, and that he cannot, therefore, be held for trial by the court-martial. This contention must be examined in the light of the statutes. "Recruits enlisting in the army must be effective and able bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment." Rev. St. U. S. § 1116. "No person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: provided, that such minor has such parents or guardians entitled to his custody and control." Rev. St. U. S. § 1117. "No minor under the age of sixteen years, no insane or intoxicated person, no deserter from the military service of the United States, and no person who has been convicted of (any criminal offense) (a felony) shall be enlisted or mustered into the military service." Rev. St. U. S. § 1118. It will be observed that recruits may enlist who are between the ages of 16 and 35, but, if under 16, they shall not enlist at all, but, if over 16 and under 21, and they have parents or guardians entitled to their custody, they shall not be enlisted without the written consent of such parents or guardian. The prisoner belonged to a class that could enlist. He was between the ages of 16 and 35. The only infirmity in his enlistment was that he was over 16, but under the age of 21, and enlisted without the written consent of his parents. If an officer had enlisted him without such consent of his parents, knowing them to be entitled to his custody, and knowing him to be a minor, he would, on conviction, be dismissed from the

service, or suffer such other punishment as a court-martial may direct. Rev. St. U. S. § 1342, art. 3. But the prisoner was enlisted on his assertion that he was 21 years of age. By section 3 of an act of congress approved July 27, 1892, fraudulent enlistment, and the receipt of any pay or allowance thereunder, "is declared a military offense and made punishable by court martial under the 62nd article of war." 27 Stat. 278. By the sixty-second article certain offenses to the prejudice of good order and military discipline, though not specially mentioned in the articles of war, are punishable according to the nature and degree of the offense, at the discretion of the court; and it provides that they are "to be taken cognizance of by a general or a regimental, garrison, or field-officers' court martial." Rev. St. U. S. § 1342. By article of war 47, any soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same in time of peace, may receive any punishment, excepting death, the court-martial may inflict. Rev. St. U. S. § 1342, art. 47. It is for a violation of these laws and articles of war that the prisoner is held for trial. The petitioners cite and rely on In re Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. The point decided in that case was that enlistment is a contract between the soldier and the government, which involves a change in his status that cannot be thrown off by him at his will, and that, therefore, an enlisted soldier cannot avoid a charge of desertion by showing that at the time he voluntarily enlisted he had passed the age at which the law allows enlistment. After referring to these contractual relations, and saying that the soldier could not, of his own volition, throw them off, and renounce his relations, and destroy his status on the plea that, if he had disclosed truthfully the facts, the state would not have entered into the new relations with him, the court said:

"Of course, these considerations may not apply where there is insanity, idiocy, infancy, or any other disability, which, in its nature, disables a party from changing his status or entering into new relations. But where a party is sui juris, without any disability to enter into the new relations, the rule generally applies as stated."

This language is urged on our attention as being conclusive of the prisoner's right to be discharged. The case before the supreme court was one in which the circuit court had held that the contract of enlistment of a man over 35 years of age was absolutely void. In re Grimley (C. C.) 38 Fed. 84. The supreme court was combating this conclusion, and holding that the enlistment could not be avoided, after the commission of a military offense, so as to prevent trial and punishment for such offense. No other question was before the court. In using the word "infancy" in connection with the words, "insanity" and "idiocy," the court evidently had in view Rev. St. § 1118, which provides that no minor under the age of 16 years, and no insane person or intoxicated person, shall be enlisted or mustered into the military service. That section peremptorily forbids a minor under the age of 16 from being enlisted. Where the minor is over the age of 16, the preceding section authorizes his enlistment, providing, however, for the written consent of his parents or guardian, if he have such, that are entitled to his custody and con-

trol. The statutes make a difference between the position of the minor under 16 and the minor over 16 years of age. That the court did not intend to hold that a minor over 16 could not, without his parents' consent, make a contract of enlistment that would change his status from citizen to soldier becomes clear on reading In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644, an opinion immediately following the one just cited. That case settles the important question of the status of a minor over 16 years of age who enlists without the consent of his parents. He is held to be "not only de facto, but de jure, a soldier, amenable to military jurisdiction." The soldier himself, and not his parents, applied for the writ. But we find nothing in the case to indicate that the parents could obtain the release of the minor soldier (over 16 years of age) after he had committed a military offense, and pending a prosecution against him for it. The statement of the minor's status that he is a soldier de facto and de jure, "amenable to military jurisdiction," seems to us in conflict with the contention of the petitioners in the case at bar. It cannot be, we think, that the court meant that he was, after committing a military offense, amenable to military jurisdiction only with the consent of his parents; that they could defeat the jurisdiction of the court martial by opposing his prosecution. That he could not, but that the parents could, secure his release from the contract of enlistment, seems clear from this and other authorities; but that is very different from obtaining release and immunity from a prosecution for an offense committed against law. In McConologue's Case, 107 Mass. 154, 170, Gray, J., speaking for the court, said that "a minor's contract of enlistment is, indeed, voidable only, and not void; and if, before a writ of habeas corpus is sued out to avoid it, he is arrested on charges for desertion, he should not be released by the court while proceedings for his trial by the military authorities are pending." This view is sustained by many authorities. A few only will be cited: Solomon v. Davenport, 30 C. C. A. 664, 87 Fed. 318; In re Cosenow (C. C.) 37 Fed. 668; In re Kaufman (C. C.) 41 Fed. 876; In re Spencer (D. C.) 40 Fed. 149; Church, Hab. Corp. (2d Ed.) 72, note "c." A court-martial proceeding, within its jurisdiction, will not be interfered with, nor its judgment avoided, by the civil courts. Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538. The common law, unaided by statute, fully recognizes the parents' right to the custody and services of their minor child; but it has never been held that they could, by the writ of habeas corpus or otherwise, obtain his custody and his immunity when he was held by an officer of a civil court of competent jurisdiction to answer a charge of crime. His enlistment having made the prisoner a soldier notwithstanding his minority, he is amenable to the military law just as the citizen who is a minor is amenable to the civil law. The parents cannot prevent the law's enforcement in either case. It is not reasonable that a minor, of age to enlist, who secures the honorable and responsible position of a soldier in the United States army, could abandon his colors in the face of the enemy and on the eve of battle, and avoid trial and punishment for

desertion by the intervention of his parents, who had not consented to his enlistment, but who had taken no step to avoid it before the soldier's arrest for desertion; or that he could endanger the army by betraying its secrets to the enemy, and not be amenable to military jurisdiction, his parents objecting. We cannot approve a view that leads to such results. When an enlisted soldier is imprisoned by military authority upon a charge of desertion or other military crime, a civil court will not interfere on habeas corpus when such military authorities have jurisdiction; and if a minor, over the age of 16 years, enlisted in the service, is so charged and detained, a civil court will not, either on his own application or that of his parents or guardian, discharge him until he has been released from the prosecution pending against him.

The decision of this case will be without prejudice to the petitioners to renew their application after the prisoner has been released from the prosecution before the court-martial.

The judgment of the district court is reversed, with instructions to remand the prisoner to the custody of the United States military authorities. Reversed.

HEMINGWAY v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,103.

1. CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—RULE IN FEDERAL COURTS.
Where, in an action to recover for negligence resulting in death, the defendant claims contributory negligence, it is the rule of the United States courts, irrespective of the decisions in the courts of the state where the federal courts are held, that the burden is on defendant to show that the deceased was negligent and that his negligence contributed to the injury which resulted in his death.

2. SAME—WHEN QUESTION OF LAW.
Where, in an action to recover for personal injury, all the material facts touching the negligence of the person injured are undisputed, and admit of no rational inference but that of his negligence, the question of contributory negligence becomes matter of law only, and the court should direct a verdict.

3. SAME—WHEN QUESTION FOR THE JURY.
Where, in an action to recover for personal injury, the negligence of defendant is shown, and there is conflict in the material evidence as to whether the person injured observed ordinary care, or, where there is no such conflict, the facts are such that reasonable men might fairly draw different conclusions from them, the question of contributory negligence is for the jury.

4. RAILROADS—NEGLIGENCE—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.
Plaintiff sued to recover for the death of his minor son, caused by the negligence of a railroad company. The accident occurred about dark at a street crossing in a village. The street approaching the crossing was for 100 yards in a cut 4 or 5 feet deep, and the railroad for 300 yards was on a curve, and in a cut 8 or 10 feet deep, with shrubs, a fence, and house between the street and track. The train was running 35 or 40 miles an hour, in violation of Laws Miss. 1896, p. 76, which prohibited a greater speed than 6 miles an hour through a city,

town or village. The evidence was conflicting as to whether the whistle was blown or bell rung continuously for 300 yards before reaching the crossing, as required by Ann. Code Miss. § 3547. Deceased, who was driving a team attached to a loaded wagon, in which were two other men, slowed to a walk as he approached the track. One of those men testified that he looked and listened all the way along for a train, and was facing the direction from which it came; that he was the first to see it, and as soon as he saw it he called out, and jumped from the wagon, and just as he struck the ground the engine struck the wagon. There was testimony that one approaching the track could not see a locomotive headlight coming from that direction until he was within 6 feet of the track and the engine was within 150 yards. The negligence of defendant was conceded, but the court directed a verdict for defendant on the ground of contributory negligence of deceased. *Held*, that the question should have been submitted to the jury.

Pardee, Circuit Judge, dissenting.

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

Wm. C. McLean, for plaintiff in error.

Edward Mayes (J. B. Harris and J. M. Dickenson, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action for $11,100 damages, brought by Prince Hemingway, a citizen of the state of Mississippi, against the Illinois Central Railroad Company, a corporation chartered under the laws of the state of Illinois. The action is based on the alleged wrongful and negligent act of the defendant in causing the death of Frank Hemingway, the infant son of the plaintiff. Such right of action is given to parents for the death of the minor child, caused by the wrongful or negligent act of another, by the law of the state of Mississippi, where it is alleged that the wrong was committed. Laws Miss. 1898, p. 82, c. 65. By a law of that state approved March 18, 1896, all railroad companies having the right of way are allowed to run locomotives and cars through cities, towns, and villages at the rate of six miles an hour, and no more; and it is provided that "the company shall be liable for any damages or injury which may be sustained by any one from such locomotive or cars whilst they are running at a greater speed than six miles an hour through any city, town or village." Laws Miss. 1896, p. 76. By another statute each locomotive engine is required to be provided with a bell and a steam whistle, which can be heard distinctly at a distance of 300 yards; and it is provided that the company "shall cause the bell to be rung or the whistle to be blown at the distance of at least three hundred yards from the place where the railroad crosses over any highway or street; and the bell shall be kept ringing, or the whistle shall be kept blowing, until the engine have (has) stopped or crosses the highway or street." Ann. Code Miss. § 3547. The declaration charges that the defendant was running the engine and train in violation of these statutes, and that Frank Hemingway was killed by its train at a public crossing in the town of Como, Miss. The defendant pleaded: (1) That it was not guilty of the supposed wrongs and injuries charged; and (2) that

Frank Hemingway was guilty of contributory negligence, in that he failed to exercise ordinary care and prudence in going upon the railroad track without stopping the wagon, and without looking or listening for the approaching train, which he could have seen and heard, and that he thereby contributed to his own injury and death. Issue was joined, and the case tried on these pleas. After evidence had been offered by both the plaintiff and defendant, counsel for the defendant moved the court to instruct the jury to find a verdict for the defendant. The trial court granted this motion, instructing the jury to return a verdict for the defendant, to which action of the court the plaintiff duly excepted. A verdict was returned for the defendant, and a judgment entered thereon, and the case is brought to this court by the plaintiff on a writ of error. It is assigned here that the circuit court erred in directing a verdict for the defendant.

The facts may be briefly stated: On the 31st of March, 1900, Frank Hemingway, 18 years of age, while attempting to cross defendant's railway track, was run over and killed by a train controlled by defendant's servants. The accident occurred about dark, at a public crossing in the corporate limits of the town of Como, Miss. The highway or street on which the deceased was driving a wagon runs east and west, and crosses the railway which runs north and south. The train which killed deceased came from the south. Beginning south of the crossing, the railway curves eastwardly. For about 300 yards south of the crossing the track runs through a cut 8 or 10 feet deep. The street east of the crossing, for about 100 yards, is in a cut four or five feet deep. A traveler on the highway from the east, as he approached the crossing, would have between him and a train coming from the south some shrubs, a fence, and a house, and the train would be in the cut on the track when within 300 feet of the crossing, and the traveler in the cut in the highway. Such were the natural features of the place where the accident occurred. Frank Hemingway was standing up in the wagon, and driving. Heywood Robinson and John Davis were sitting in the wagon, one facing the rear of the wagon and one facing south. The wagon approached the crossing, the mules going in a trot. It had in it two "iron-toothed harrows, two baskets of clothes, a barrel of flour, and some meat, sugar, and coffee." As the wagon neared the crossing, "it slowed up to a walk," but did not stop. One of the occupants of the wagon, before nearing the crossing, said, "I reckon it is about train time," and deceased said "he didn't reckon it was, but didn't know exactly what time the train came." John Davis, who was sitting with his face towards the south, testified that his face was in the direction the train was coming from; that, as the wagon approached the crossing, he looked and listened for the train "all the way along," and also "just before he got there." The train approached the crossing through the cut at the rate of "35 or 40 miles an hour." As to whether the whistle was blown and the bell rung as the crossing was approached there is conflict in the evidence. Travis Taylor, who examined the crossing before testifying, said that a traveler must get within "about 6 feet" of the railroad before he could see an approaching train; that, after getting within 6 feet of the track, he could see

the headlight of an approaching engine "about 150 yards." John Davis was the first to see the train. "I was the first to see it. I said, 'Lord, there comes the train!' and about the time I said that I jumped out. * * * About the time I hit the ground the train struck the wagon." Heywood Robinson also jumped out, and was not hurt. The wagon was smashed, the mules killed, and Frank Hemingway so injured that he died in a few hours. It is conceded that the defendant was guilty of negligence in running its trains through an incorporated town at a speed forbidden by the statute. Railroad Co. v. Toulme, 59 Miss. 284; Nelson v. Railroad Co., 40 C. C. A. 673, 100 Fed. 731.

The controlling question in the case is: Does the evidence show such contributory negligence on the part of the deceased as left nothing to be passed on by the jury, but required the court to instruct them as matter of law that the plaintiff could not recover? The burden of proof is on the defendant to show that the deceased was negligent, and that his negligence contributed to the injury which resulted in his death. Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Railroad Co. v. Volk, 151 U. S. 73, 77, 14 Sup. Ct. 239, 38 L. Ed. 78; Hough v. Railroad Co., 100 U. S. 213, 225, 25 L. Ed. 612; Railroad Co. v. Harmon's Adm'r, 147 U. S. 581, 13 Sup. Ct. 557, 37 L. Ed. 284. This rule governs in the United States courts, irrespective of the decisions in courts of the state where the federal courts are held. 2 Fost. Fed. Prac. (3d Ed.) p. 880, § 375. In the absence of all evidence on the subject, it would not be presumed that the deceased did not exercise proper care, for he had the greatest incentive to caution to protect his own life. Improvement Co. v. Stead, 95 U. S. 161 (4), 24 L. Ed. 403. But the defendant can, of course, avail itself of the evidence offered by the plaintiff as tending to show the contributory negligence of the deceased. Railroad Co. v. Horst, 93 U. S. 291 (9), 23 L. Ed. 898. But on all the evidence the rule of the federal courts is that the burden of proof is on the defendant to sustain by a preponderance of evidence its defensive plea of contributory negligence. Railroad Co. v. Mares, 123 U. S. 710, 8 Sup. Ct. 321, 31 L. Ed. 296; Beach, Contrib. Neg. § 426. In judging the deceased's conduct and considering whether it was prudent or negligent, it must be estimated in the light of all the circumstances surrounding him, and in view of what he had the right to expect of others. He is not blamable if the injury has resulted from the act of another, which he could not reasonably have anticipated. Railroad Co. v. Van Steinburg, 17 Mich. 99, 119. It would not be negligence in the deceased to act on the assumption that the defendant would not run its trains in violation of the state law. Hasie v. Railway Co., 78 Miss. 413, 414, 28 South. 941. A railroad crossing a highway or street on the same level imposes duties both on the railroad company and the traveler on the highway. The train necessarily has the preference and right of way. It is required to give reasonable notice or warning of its approach, so that a wagon in the road near the crossing may wait for it to pass. What is reasonable and timely notice, if not fixed by statute, may depend on the speed of

the train and other circumstances of the particular case. One who is crossing the track must exercise diligence and ordinary care to ascertain whether a train is approaching and to avoid a collision. The track itself is a notice and warning to exercise such care. He is not required to exercise the greatest diligence or care, but only such as a prudent man would exercise under the circumstances of the case. He is not required, as matter of law, to stop before crossing the track, but his omission to do so is a fact to be submitted with the other facts to the jury. He is required to exercise such diligence and care as an ordinarily prudent man would exercise under the circumstances. Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403; Judson v. Railroad Co., 158 N. Y. 597, 53 N. E. 514. In Railroad Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014, the court held that the peremptory instruction for the defendant should have been given. There the train that caused the injury was going at a rate not exceeding 20 miles an hour. At a distance of 40 feet from the crossing the approaching train could be seen 300 feet away. The deceased drove onto the railroad track in a slow trot, without changing gait. His eyesight and hearing were good, and there was nothing to impede his sight. He drove onto the track looking straight ahead. As he approached the crossing "the train was in full view." The court was of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor. But the court referred to a class of cases readily distinguishable "either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions, or other peculiar circumstances tending to mislead the injured party as to the existence of danger in crossing the track." In Railroad Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274, the court held that the question of the plaintiff's contributory negligence was properly left to the jury. An important fact leading to that decision was that the highway on which she was driving proceeding towards the crossing passed into "a cut, and then there was no view of the railroad whatever to the south on account of the highway being cut down and the growing corn on that side." In Nelson v. Railroad Co., 40 C. C. A. 673, 100 Fed. 731, Nelson was killed while crossing the track to carry mortar to a depot that was building. The court held that the question of Nelson's negligence was for the jury, it having been proved that a car on the side track obstructed the view of the approaching train, and that there was noise of escaping steam from a nearby engine, so that the sound of the train probably could not be heard. In that case the court laid stress on the fact that Nelson could not see the train because of a curve in the track, till it was within 330 feet of him; saying that, "if it was going at the rate of 40 miles an hour, it would go 330 feet in less than 6 seconds." In Jones v. Railroad Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, the plaintiff walked out of the depot by the usual way, and was struck by a passing train be-

tween the wall of the depot and the platform. The circuit court directed a verdict for the defendant. The case was reversed on error, because the evidence tended to show that a car on the side track obstructed the plaintiff's view of the approaching train, and, although he had listened, there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished.

To review the many cases on this subject would serve no useful purpose. They make it clear that, if all the material facts touching the alleged negligence of the person injured be undisputed, and admit of no rational inference but that of negligence, the question of contributory negligence becomes matter of law only, and the court should direct the verdict. Such is the case when one possessed of hearing and sight walks or rides on a railroad track before a rapidly approaching train, when there is nothing to impede his sight or hearing. In such case it may be assumed that he did not look, or, if he looked, he did not heed the warning, but recklessly took his chance of crossing before the train could reach him. Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Railroad Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014. But when there is conflict in the material evidence relating to the alleged negligence of the person injured, or when there is no conflict, but the facts are such that reasonable men might fairly draw different conclusions from them, the question is one for the jury. Such is the case when one walks or drives along the highway and across a railroad and is injured, and, the negligence of the railroad company being shown, there is conflict in the material evidence as to whether the person injured observed ordinary care in crossing; or, where there is no conflict in the evidence, the facts are such that different conclusions might be fairly drawn from them as to whether the person injured showed a want of ordinary care, or did what a reasonably prudent man ought to have done under the circumstances. Railroad Co. v. Griffith, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; Railroad Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. The difficulty in cases of negligent injuries is that it seldom happens the injuries are inflicted under the same circumstances, and therefore no common standard of conduct by prudent men under all circumstances can become fixed and known. And no rule of law can be formulated to apply to all cases. Said Mr. Justice Lamar, speaking for the court, in Railroad Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679, 682, 36 L. Ed. 485:

"There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under the different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such

that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."

When a judge decides as a matter of law that a plaintiff has been guilty of contributory negligence, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon what is his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. If the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the question of ordinary care, he might find them differing with him as to the ordinary standard. The question of negligence is usually one of fact for the jury, but, unquestionably, cases do occur in which it is the duty of the judge to direct the verdict. It is not possible to lay down a rule that will designate all such cases. While the principles are well settled, the application of them to particular cases causes much difference of judicial opinion.

There is evidence in the record which tends to show that the accident occurred after dark, and at a public crossing; that there were obstructions between the deceased and the approaching train; that the train was running at from 35 to 40 miles an hour in a town where the statute forbade it to be run faster than 6 miles an hour; that the whistle was not blown nor the bell rung as required by statute; and that the occupants of the wagon looked and listened, not stopping, but that they approached the crossing slowly. On this state of facts we must hold that the court erred in directing a verdict for the defendant.

Other questions were discussed at the bar and in the briefs, upon which we express no opinion, as they may not arise on the next trial on the same or similar pleadings and evidence.

The judgment of the circuit court is reversed and the cause remanded for a new trial. Judgment reversed.

PARDEE, Circuit Judge, dissents.

THE SCHOONER ROBERT LEWERS CO. v. KEKAUOHA.

(Circuit Court of Appeals, Ninth Circuit. March 17, 1902.)

No. 705.

1. WRONGFUL DEATH—RIGHT OF ACTION—LAWS OF HAWAII.

Act April 30, 1900, to provide a government for the territory of Hawaii (section 1), provides that the phrase "laws of Hawaii," as used in the act, shall mean the constitution and laws of the republic of Hawaii in force at the time of annexation. Section 6 provides that "the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal," etc. The statutes of the republic of Hawaii (Civ. Laws Hawaii 1897, § 1109) provide that "the common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except

as otherwise expressly provided by the Hawaiian constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage." In 1860 the supreme court of Hawaii, authorized thereto by the laws of the kingdom, expressly rejected as a part of the common law of the islands the rule of the English common law that a civil action could not be maintained to recover damages for wrongfully causing the death of a person, and sustained the right of a widow to sue for the wrongful death of her husband; and the rule so adopted has never since been changed by statute or decision. *Held* that, by virtue of the above statutory provisions, such rule is still in force as a part of the common law of the territory, and that the right of action given thereby may be enforced in a court of admiralty as well as a court of law.

2. SAME—NEGLIGENCE—BREAKING OF SHIP'S TACKLE.
The breaking of a chain furnished and used by the officers of a ship in unloading a heavy article, of which removal they had sole charge, if unexplained, is prima facie evidence of negligence, which authorizes a judgment against the owners of the ship for damages for the death of a person caused thereby, in the absence of proof of contributory negligence.

3. SAME—CONTRIBUTORY NEGLIGENCE.
Libelant's husband, a drayman, was killed while assisting to unload from a ship a heavy bedplate, weighing several tons. While the bedplate was suspended by the ship's tackle, a part of the tackle broke, and deceased attempted to avoid the danger by climbing onto the deck of the ship, but was caught and crushed between the bedplate and the ship's side. *Held*, that he was entitled to rely on the safety of the tackle, and was not chargeable with contributory negligence because, in the presence of imminent and unexpected danger, he did not act with deliberation.

Appeal from the District Court of the United States for the Territory of Hawaii.

William O. Smith and Abraham Lewis, Jr., for appellant.
T. McCants Stewart, for appellee.

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

ROSS, Circuit Judge. This is an appeal by the owner of the schooner Robert Lewers from a decree rendered by the United States district court for the territory of Hawaii awarding damages to the appellee for the accidental death of her husband, Enoka Kekauoha. The deceased was one of four draymen employed by Hustace & Co., of Honolulu, who had come on the wharf at that city, to which the schooner was tied, for the purpose of loading and hauling away a bedplate weighing 12½ tons, which had been taken to Honolulu from San Francisco by the schooner, and was then on board. The captain and officers of the schooner were engaged in removing the bedplate from the schooner onto trucks placed on the wharf by the draymen. The bedplate had been lifted from the schooner, and hung suspended by ropes and blocks attached to the main and mizzen masts of the schooner. A guy line or outhaul was fastened to an opening in the center of the bedplate, and carried to a large boiler lying on the wharf. By pulling on the outhaul the bedplate was drawn over the vessel's side, remaining suspended in the tackles, which were connected by falls to the main and mizzen masts. The lashings, lines, and fastenings were all of rope, with the exception of one chain around the

bedplate, and to which one end of the outhaul was fastened, and one chain around the boiler on the wharf, to which the other end of the outhaul was fastened. The tackle, lines, chains, and fastenings were the property of the schooner. Because of the position in which the truck had been placed by the draymen, the plate was not coming squarely down over the truck, and the drayman suggested that it be hauled out a trifle further. While it was in this position, one of the chains, about 15 feet in length, attached to the outhaul, broke, causing the bedplate to swing back to the vessel. At the time the chain broke, the deceased, in order to avoid the danger, ran to the vessel's side, and endeavored to get on the deck, but was caught by the plate and held up against the side of the schooner, thereby receiving injuries from which his death resulted. His widow thereupon filed in the court below a libel in personam against the owner of the schooner for damages resulting from the death of her husband, which she therein alleged was caused by the negligence of the officers of the ship. An answer was filed by the owner of the schooner, setting up that no cause of action lay in the court of admiralty for such damages, inasmuch as there was no act of congress or territorial statute giving any cause of action by reason of the decedent's death, and also denying any negligence on the part of the officers of the schooner, and averring contributory negligence on the part of the deceased. The court below held against the defendant on each point, and gave the libelant judgment for the sum of $1,577.12, with costs.

It is insisted on the part of the appellant that no cause of action for damages will lie in a court of admiralty within the territory of Hawaii for the death of a human being. That by the common law no civil action lies for an injury which results in death is well settled, and is now not denied. And since the decision of the supreme court in the case of The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358, in which the theretofore conflicting decisions are referred to, and the question considered and determined on principle, it does not remain open to question that such an action will not lie in the courts of the United States under the general maritime law. In many jurisdictions, however, the rule has been changed by statute; and where by statute a right of action is given, whether arising on the land or on the sea, it is uniformly held that courts of admiralty, as well as courts of law, will entertain and enforce it. The Harrisburg, supra, and cases there cited; The Corsair, 145 U. S. 335, 12 Sup. Ct. 949, 36 L. Ed. 727; The Willamette, 18 C. C. A. 366, 70 Fed. 874, 31 L. R. A. 715; Laidlaw v. Navigation Co., 26 C. C. A. 665, 81 Fed. 876; Association v. Christopherson, 19 C. C. A. 481, 73 Fed. 239, 46 L. R. A. 264. The death here complained of occurred within one of the territories of the United States,—that of Hawaii,—over which the court below confessedly had admiralty jurisdiction, including the suit of the appellee, if there was any right of action in her. That depends upon the law prevailing in that territory at the time of the death in question.

The first, fifth, and sixth sections of the act of congress of April 30, 1900, to provide a government for the territory of Hawaii, are as follows:

"Section 1. That the phrase 'laws of Hawaii,' as used in this act without qualifying words, shall mean the constitution and laws of the republic of Hawaii, in force on the twelfth day of August, eighteen hundred and ninety-eight, at the time of the transfer of the sovereignty of the Hawaiian Islands to the United States of America. The constitution and statute laws of the republic of Hawaii then in force, set forth in a compilation made by Sydney M. Ballou under the authority of the legislature, and published in two volumes entitled 'Civil Laws' and 'Penal Laws,' respectively, and in the Session Laws of the legislature for the session of eighteen hundred and ninety-eight, are referred to in this act as 'Civil Laws,' 'Penal Laws,' and 'Session Laws.'"

"Sec. 5. That the constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States: provided, that sections eighteen hundred and fifty and eighteen hundred and ninety of the Revised Statutes of the United States shall not apply to the territory of Hawaii.

"Sec. 6. That the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the congress of the United States." 31 Stat. 141.

Among the statute laws of the republic of Hawaii set forth in the compilation by Mr. Ballou is the following:

"Sec. 1109. The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided, however, that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." Civ. Laws Hawaii 1897, p. 447.

Turning to the decisions of the supreme court of Hawaii, we find that the precise right asserted and sustained in the present case was there asserted and sustained as early as 1860,—nearly 40 years prior to the passage of the act of congress of April 30, 1900. Kake v. Horton, 2 Hawaii, 209. The reasons for the decision are thus stated by the court in its opinion:

"By the common law of England, the action would not lie. In the case of Baker v. Bolton, 1 Camp. 493, which was an action against the defendants as proprietors of a stagecoach on the top of which the plaintiff and his late wife were traveling from Portsmouth to London, when it was overturned, whereby the plaintiff himself was much bruised, and his wife was so severely hurt that she died about a month after, Lord Ellenborough, C. J., held that the jury could only take into consideration the bruises which the plaintiff had himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account from the time of the accident until the moment of her dissolution, for that in a civil court the death of a human being could not be complained of as an injury, and the damages as to the plaintiff's wife must stop with the period of her existence. It is argued by counsel for the defendant that the common law of England is in force in this kingdom, and that therefore the action cannot be maintained in this court. In our opinion, this argument is not sound. We do not regard the common law of England as being in force here eo nomine, and as a whole. Its principles and provisions are in force so far as they have been expressly or by necessary implication incorporated into our laws by enactment of the legislature, or have been adopted by the rulings of the courts of record, or have become a part of the common law of this kingdom by universal usage, but no farther. The analogy sought to be set up between the Hawaiian Islands and the British colonies in North America (now a part of the United States) with reference to the common law of England is not, in our opinion, well sustained. We think the circum-

stances of the two countries are widely different. Whether or not the present action can be maintained in this court depends upon the construction to be given to certain provisions of the Hawaiian statutes. The provision contained in the 1116th section of the Civil Code touching the institution of suits to recover damages for injuries, direct or consequential, is very general in its terms, as, indeed, such a provision must be; it being impossible for the legislature to define and enumerate all the various causes for which an action of trespass or an action on the case will lie. Such causes are illimitable in their variety. And as has been repeatedly remarked, it is by no means a conclusive objection to an action on the case to say that an action never was maintained for the same cause before. When an action is brought under the general provision referred to, the question whether or not that particular action will lie is a matter for judicial determination,—not, certainly, according to the mere whim or fancy of the court or judge, but in accordance with legal principles. It is provided in the fourteenth section of the Civil Code, which forms a part of the chapter on the 'Construction of Laws,' that, in all civil matters where there is no express law, the judges are bound to proceed and decide according to equity; applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. And to decide equitably, an appeal is to be made to natural law and reason or to received usage, and resort may also be had to the laws and usages of other countries. We think reason and natural justice are clearly in favor of permitting an action to be maintained upon the grounds relied upon in this case; and upon a resort, for light, to the laws of those countries to whose authority and opinion we yield the highest veneration, we find that the old, harsh rule, which had its origin in feudal times, has been superseded by liberal statutory provisions, more in accordance with the sentiments and circumstances of an enlightened age. As we are not fettered by the English common-law rule on the subject, no legislative enactment is required to remove that obstacle to the maintenance of an action like the present in a Hawaiian court; and we think it ought to be permitted, as being consonant with natural law and reason, as well as with the laws of civilized countries. In the case of Carey v. Railroad Co., 1 Cush. 480, 48 Am. Dec. 616, Metcalfe, J., intimated an opinion that by the civil law, and by the law of France and Scotland, whose jurisprudence is mainly based upon the civil law, actions like the present could be maintained. We regret that we have not had time to verify, by reference to the books, the opinion of so respectable an authority, because this would of itself afford a distinct and sufficient foundation for our decision. The several courts of record having the power, under the 823d section of the Civil Code, which is not a new provision in our statutes, but one which has been repeatedly acted upon by this court, to cite and adopt, at their discretion, the reasoning and principles of the common law, or of the civil law, so far as the same may appear to the court to be founded in justice, and not in conflict with the laws and customs of this kingdom, if, as is intimated in the case just referred to, the principles of the civil law would permit the institution of such an action as the present, we have no hesitation in preferring the doctrine of the civil law to that of the English common law upon this point, for we conceive the former to be pre-eminently 'founded in justice.' The principle which we now recognize will become, by judicial adoption, a valuable part of the common law of this kingdom. With regard to the objection that this action must be brought by the executor or administrator of the decedent, we think such an objection applies merely to the form of enforcing the remedy, and not to the merits of the claim, or the principle upon which it stands. We have some doubt whether, under our statute of practice, as it reads at present, an administrator could maintain the action, as such. The provision of the English statute referred to (9 & 10 Vict.), requiring the suit to be brought by the executor or administrator, is evidently intended for convenience, and to prevent a multiplicity of actions. But the damages recovered in such actions are not general assets in the hands of the administrator, being for the individual benefit of the widow, or other party entitled thereto, and it does not appear by any means indispensable that the suit should be brought

by the administrator. We think the suit in this case is well brought by the widow."

As will have been observed, the supreme court there expressly declared, "The principle which we now recognize will become, by judicial adoption, a valuable part of the common law of this kingdom." Such judicial modification of the common law the legislature of Hawaii expressly sanctioned and ratified by section 1109 of Ballou's compilation of the laws of that country, which, as has been seen, was, in turn, sanctioned and ratified by section 1 of the act of congress of April 30, 1900, above set out. There was therefore statutory authority for the right asserted, and sustained by the court below.

It is a mistake to say, as do the counsel for the appellant, that the case of Kake v. Horton was overruled by the later case of Bishop v. Lokana, 6 Hawaii, 556. That was an action of trespass quare clausum fregit, brought by the owner of the land trespassed upon, who subsequently died, and whose executors thereafter appeared in court and filed a suggestion of her death, and prayed that the suit might proceed to final judgment. The court granted a motion to set aside the appearance of the executors, saying, "Actions for injury to real estate do not survive to the executor or administrator, for the real estate passed to the heir or devisee, and not to the personal representatives." At the end of the opinion the judge delivering it said, "I notice in Kake v. Horton, 2 Hawaii, 213, that this court doubted whether an administrator could maintain an action for damage on the death of a person, but allowed the widow to maintain the suit." So far from the case of Bishop v. Lokana overruling the doctrine announced in the case of Kake v. Horton, the clause last quoted from Bishop v. Lokana indicates, rather, an approval of that ruling.

The only other questions presented by the record relate to the alleged negligence on the part of the defendant, and the alleged contributory negligence of the deceased. We think there is sufficient evidence to establish the alleged negligence on the part of the defendant. The officers of the ship were engaged in delivering the bedplate to the draymen, and had exclusive control in the premises. The ropes, chains, and other appliances were the ship's, for the sufficiency and good order of which its owner was responsible. That the accident occurred by reason of the breaking of one of the chains is not denied. The fact that the chain broke, resulting in the damage complained of, unexplained, is prima facie evidence of negligence. A portion of the chain in question was produced in court by the defendant, but not the link or part that broke. The part exhibited is characterized in the opinion of the trial court as "an old five-eighths of an inch chain," and the court added that it "certainly did not look strong enough for the purpose" for which it was used. J. F. Haglund, a sea captain, and witness on behalf of the defendant, testified that iron becomes brittle after it gets old, and that sea captains prefer ropes, "because," said the witness, "we can't always rely on a chain." We are of the opinion that the record contains sufficient evidence to justify the finding of the court

below of negligence on the part of the owner of the schooner. And we are further of opinion that the court below was quite right in holding that no contributory negligence on the part of the deceased was shown. He was not bound to anticipate that the chain would break. On the contrary, he was legally entitled to rely upon the supposition that it would not. And when the imminent danger unexpectedly arose, the fact that he did not run some other way than he did, in his effort to get out of harm's way, is wholly insufficient to show contributory negligence; for, as was well said by the court below, "in the presence of great and unforeseen danger no man is expected to act with deliberation."

The judgment is affirmed.

KING et al. v. ILLINOIS CENT. R. CO.

(Circuit Court of Appeals, Fifth Circuit. May 6, 1902.)

No. 1,129.

1. RAILROADS—BACKING TRAIN—STATUTORY REQUIREMENTS—PASSENGER DEPOT.
   Under Code Miss. 1892, § 3549, providing that it shall be unlawful to back a train of cars into or along a passenger depot at a greater rate of speed than three miles an hour, and a train backed along such depot within 50 feet thereof shall, for 300 feet before it comes opposite such depot, be preceded by a servant of the railroad company on foot, not exceeding 40 or under 20 feet in advance, to give warning, and that, for every injury inflicted by a railroad company while violating such section, full damages may be recovered, without regard to contributory negligence, the 300-feet limit does not exceed 300 feet from the building, some part of which is used as a passenger depot, notwithstanding there may be a graveled walk extending along the track beyond the building, on which passengers alight from long trains.
2. SAME—NEGLIGENCE—PLEA OF CONTRIBUTORY NEGLIGENCE—WHEN AVAILABLE.
   Where a man, just after stepping on a railroad track in the yards, was run over by part of a freight train backing at the rate of about eight miles per hour, while the conductor, who was on the rear car, was looking in the opposite direction to see if a switch was properly turned for a passing train, and none of the trainmen saw the man on the track, there was no such wanton recklessness or gross negligence as would render unavailable a plea of contributory negligence.
3. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE.
   Where a man in vigorous bodily and mental health, with good hearing and sight, with nothing to obstruct the vision, stepped on and walked along a railroad track on which part of a freight train was backing at a rate of eight miles an hour, and was overtaken and killed, he was guilty of contributory negligence.
4. SAME—LICENSE TO WALK ON TRACKS—DUTY OF LICENSEE.
   The fact that persons were accustomed to walk along the railroad tracks at the place where an accident occurred, with the knowledge of, and without objection from, the railroad company and its servants, did not relieve such persons from the exercise of ordinary care while on the tracks.

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

C. L. Sivley and T. U. Sisson, for plaintiffs in error.

Edward Mayes and J. B. Harris, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On or about the 16th day of June, 1900, Calvin J. King was killed by a train of the defendant in error in the town of Durant, Miss. Between 11 and 12 o'clock noon, Mr. King was walking up the tracks of the railroad, approaching the depot building, and at a point 430 feet from the nearest part of the depot building was struck and killed by a part of a train of cars, consisting of a freight engine with three or four cars attached thereto, backing up a side track designated as the "passing track." Durant is an incorporated town of 2,000 inhabitants. The depot building and its connected platform run north and south. The main line of the railroad lies east of the depot, and next east of the main line lies the track called the "passing track," on which the accident occurred. This is a very long side track, extending a mile or more south of the depot building, as well as far north of it. It is perfectly straight, and located on substantially level ground, with no natural object to obstruct the view throughout its length. East of the passing track, and south of the depot, was a coal chute. East of the coal chute there was a switch line called the "loop," which connected with the passing track both north and south of the coal chute. West of the main line, and below or south of the depot building, was a switch line called the "scales track," and still west of the scales track was another switch line, called the "platform track," both located south of the freight depot building. Both of these lines of track are three or four hundred yards long, extending across Cedar street, and across another street further south. They run parallel with the main line. The east rail of the scales track is 9 feet from the west rail of the main line, and the east rail of the platform track is 23 feet from the west rail of the main line. The space between these tracks is clear throughout their whole length, and the gravel walk referred to later occupies all the space between the east rail of the scales track and the west rail of the main line to the engine room south of the coal bin, which is 90 feet south of the place where Mr. King was killed. The business part of the town of Durant, west of the railroad, extends to the north and south of the depot building, and Cedar street crosses the railroad at right angles five or six hundred feet south of the depot building. Along the line of the railroad, and on each side of its right of way, there are settlements south of Cedar street, and on the east side of the right of way is a fairly good sidewalk. The proof shows that persons settled in that locality and others were in the habit of passing up north along the railroad tracks to a public crossing just north of the depot building, and of going thence to the business portion or other part of the town lying west of the railroad. The engine which was propelling the cars described as backing northward on the passing track belonged to a freight train which had arrived at Durant a short time before 11 o'clock, and had stopped on the passing track north of the depot building, where the engine was disconnected from the train, and proceeded south on the same track to the coal chute, where it coaled, and then proceeded south to a connecting-link track between the passing track and the main line, on which it passed to the main line, and then,

in due course, backed off the main line onto a track west of the main line, and took up three or four freight cars, at least one of which was a box car, and pulled them onto the main line, and thence, by the connecting link, backed them onto the passing track, and was proceeding to back along the same to the part of the train which had been left on that track north of the depot building. There was no evidence tending to show that the engine or the cars it was pushing had been on the loop track, or on any track east of the passing track. The evidence is ample, clear, and uncontradicted that the engine and cars which ran over the deceased had not been on any of the tracks east of the passing track. Mr. King was seen by one witness approaching the railroad from the west on Cedar street at the point where it crosses the railroad. He turned to the north, walking for a few steps on the main line, then proceeding a few steps more between the main line and the passing track, then stepping onto the passing track, and proceeding north on it until he was struck and killed by the backing cars and engine. At this same time another south-bound freight train was coming down the main track, and the engine pulling it was within four or five car lengths of Mr. King, when he stepped off of the main track onto the space between it and the passing track, and stepped onto the passing track about the time the engine of this south-bound train got opposite him. A witness called by the plaintiff, named Cal Turner, testified that he lived in Durant, south of the depot; that on the day the accident occurred he had started home, and was walking slowly along the east side of the main line of the railroad, having crossed over to that side because he did not want any one to see him get on the freight train, which was then moving southward, and on which he wished to ride to his home, which was the fourth house south of Cedar street; that when the engine of the south-bound freight train was about even with him, at a point about 100 feet south of the public crossing north of the depot building, he saw Mr. King coming toward him from the south; that at the time he first saw Mr. King there was no train south of witness on the track on which Mr. King was killed; that witness did not get on the train, because before the caboose reached him the train was going too fast for him to get on with safety. He continued walking south along the track, and had, at the time of the collision, proceeded to a point about 200 feet north of where it occurred. By this time nearly all of the south-bound train had passed him. He thinks there were four cars attached to the engine which ran over Mr. King, but does not remember whether they were all box cars or not. He did not see the backing train before it struck Mr. King. His attention was attracted by hearing some one hollo, and then he saw Mr. King under the front part of the box car. When witness first saw Mr. King, he was walking north on the main line. Mr. King got in between the main line and the other track when the engine was about four or five lengths from him. This witness did not see or hear any signals given by the backing train, did not hear any bell ring or whistle blow on that train, but did hear signals from the train that was on the main line, going south. Says the backing train was moving at the rate of six or eight miles an hour. Other uncontradicted evidence shows that the backing train,

or part of the train, had on it an engineer, a fireman, a brakeman, and the conductor of the train to which the engine belonged. They all testify that the engineer, the fireman, and the conductor were keeping the customary lookout; that the required signals were being given; that the most northern one of the cars in the backing train was a coal car; that the conductor was seated on the southeastern corner of this car, looking north. The conductor testified that just at that instant he was noticing to see if the switch connecting the link track, over which they had passed from the main track, was properly thrown, so that the south-bound train could pass on safely; that he did not see Mr. King. The engineer and the fireman both testified that they did not see him; did not know that he was on the track until they had passed over him, and their attention was challenged by the holloing, which at first they could not locate; that, at the instant they did ascertain what had been done, they stopped the backing train; that it was going at a rate not exceeding four or five miles an hour, and they did not know there was any occasion for stopping until after they had passed over the man.

The plaintiffs are the surviving wife and children of the deceased. Their action is for damages, in the usual form, charging that the death was occasioned by the negligence of the defendant's servants. The defense is a general denial of liability; that the company and its servants were not negligent; and, further, the company pleads negligence on the part of the deceased, which caused him to receive the fatal injury. To meet the plea of contributory negligence, the plaintiffs rely on section 3549 of the Mississippi Code of 1892, which is as follows:

"It shall be unlawful to back a train of cars, or part of a train, or an engine into or along a passenger depot at a greater rate of speed than three miles an hour; and every such train, part of a train, or engine backed into or along a passenger depot and within fifty feet thereof, shall for at least 300 feet before it reaches or comes opposite to such depot be preceded by a servant of the railroad company on foot, not exceeding forty nor under twenty feet in advance, to give warning. For every injury inflicted by a railroad company while violating this section, the party injured may recover full damages without regard to mere contributory negligence."

When evidence on behalf of the plaintiffs and on behalf of the defendant had been fully heard, and the hearing of evidence closed, the defendant, by written motion, requested the court to instruct the jury peremptorily to find for the defendant, which the court did, and there was a verdict and judgment in accordance therewith. The only error assigned which we deem it proper to notice is stated as follows: "The court erred in granting the peremptory charge asked by the defendant below wherein the jury was instructed to return a verdict in favor of the defendant below."

Considering the case without reference to the provisions of section 3549 of the Mississippi Code of 1892, it seems to us to be too clear for controversy that, while there is proof tending to show some degree of negligence upon the part of the defendant company, there is manifestly no proof tending to show such wanton recklessness or gross negligence as would render unavailable a plea of mere contributory negligence on the part of the deceased. It seems also

to us to be beyond controversy, and manifest from the proof, that the deceased was negligent in a manner that contributed directly to the receiving of the fatal injury. Deceased was not yet 50 years of age. Had been up to that time a man in vigorous bodily and mental health. His hearing and sight were good. It was midday. The track was straight and level, with no obstruction thereon. The backing train was more than 100 feet long, and, at the most, its rate of speed did not exceed eight miles an hour. It therefore became necessary for the trial court to decide whether the statute referred to applied to the conduct of the parties at the point where this injury was inflicted. The trial court was not charged with the impossible duty of giving the term "passenger depot" an abstract definition, that would mean the same thing wherever that term would be used or sought to be applied, or the almost equally difficult duty and useless labor of giving it a relative definition adjusted to all possible hypothetical cases. It was the duty of that court to determine by its construction of this section of the statute whether at the time and place when and where King was killed the defendant was backing a train of cars, or part of a train, or an engine, into or along a passenger depot. Some other provisions of the same Mississippi Code may be profitably considered in construing the language of section 3549:

"Sec. 4302. Necessary Depots to be Maintained. Every railroad shall establish and maintain such depots as shall be reasonably necessary for the public convenience, and shall stop such of the passenger and freight trains at any depot as the business and public convenience shall require; and the commission may cause all passenger-trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public. And it shall be unlawful for any railroad to abolish or disuse any depot when once established, or to fail to keep up the same and to regularly stop the trains thereat, without the consent of the commission.

"Sec. 4303. Regulations for Passenger-Depots. The commission shall establish such rules and regulations for the arrangement and management of passenger-depots as will secure the comfort of passengers, and it shall cause a copy thereof to be posted in each passenger depot or reception-room.

"Sec. 4304. Bulletin-Boards. It is the duty of every railroad to keep conspicuously placed, as the commission shall direct, and of the form and size prescribed by it, at each reception-room or depot, a bulletin-board," etc.

"Sec. 4305. Commission to Visit Stations, etc. The commission shall from time to time, as far as practicable, visit all stations on the various lines of railroad, and investigate the manner in which bulletin-boards are posted and kept, how reception-rooms are arranged and kept," etc.

"Sec. 4309. Location of Station-Houses. The commission may designate the site or location of any new building or station-house which may be ordered erected in cases where the site selected by the railroad's officials is inconvenient or inaccessible; but every depot must be located with due regard to the interest of the railroad and the public convenience.

"Sec. 4310. Union Passenger-Depots. The commission, whenever the public convenience may require it, shall cause union passenger-depots and transfer-stations to be erected, and may designate the dimensions and sites thereof," etc.

"Sec. 4312. To Inspect Depots; Reception-Rooms. It is the duty of the commissioners to inspect the depots of all railroads from time to time, and of the commission to require comfortable and suitable reception-rooms for passengers, separate for the races, and, if it deem proper, for the sexes; and it may require such additions to or alterations in passenger-depots or station-

houses as may be necessary, in its judgment, to secure ample, comfortable, and suitable accommodations for all passengers. * * *"

The supreme court of Mississippi has decided that section 3549 was designed to afford protection to all persons within the prescribed limits. Railroad Co. v. McCalip, 76 Miss. 360, 25 South. 166. The case just cited is the only one reported in which the supreme court of Mississippi has had occasion to consider and construe section 3549; and that case did not involve the question which now engages us, because in that case the injury was received by the plaintiff while attempting to cross the railroad track on a public street at the north end of the depot building, and was manifestly within the space limitations of the statute, whether or not the words "passenger depot" should be held to relate to the building alone. We note in the reporter's statement of the case: "The depots are situated opposite each other. The freight depot is on the east side of the tracks and the passenger depot is on the west side." In that case, as in this, the passenger depot seems to have fronted on a public crossing just to the north of the depot building. Here, in the case we are considering, both of the waiting rooms of the passenger depot are at the extreme north end of the structure, and the two rooms take in the width of the building. They open to the north. There is a rock deposit all around that end of the building on the north end of it. Immediately behind or south of the sitting rooms is the agent's office, and immediately behind or south of the agent's office is the baggage room, and immediately south of the baggage room is the freight warehouse. On the east and west sides, and immediately south of the freight warehouse, is a platform. The platform immediately south of the freight warehouse is as wide as the whole building, or any part of it. Then there is a cut-off down east, and a narrow transfer platform running south some distance, with a shed over it. This is used to transfer cars. The other platform is used for depositing parcels, such as boxes, lumber, or anything. It is not used for passenger purposes, and is about 3 feet off the ground,—too high for a man to get on, except he go to the end, and come up by the steps. The part of the building used as a freight warehouse, not including its platforms, extends north and south along the main-line track for a distance of 100 feet; and the part used for sitting rooms, agent's office, and baggage room extends about 60 feet along the line; making the whole length of the depot building, excluding from consideration the platforms, 160 feet. The point at which Mr. King was struck is 425 feet from the southeast corner (its nearest part) of the freight-depot building, is 395 feet from the southeast corner of the main platform around the freight warehouse, and is 525 feet from the extreme south end of that part of the building used in connection with passengers, and is only 237 feet from Cedar street crossing. As already mentioned, between the west rail of the main-line track and the east rail of the scales track a 9-foot space, uniform in width, was covered with a good gravel walk, extending more than 600 feet south from the most southern point of that part of the depot building used for passengers, and extends 90 feet beyond the

point at which the collision occurred. A like gravel walk extends north from the depot building about 600 feet; making, including the length of the building itself, a stretch of more than 1,350 feet covered by the southern and northern extensions of this gravel walk. It was put down for the convenience of receiving and discharging passengers on or from cars, in connection with any of the long through trains while standing on the main line, and was given the length it has in order to accommodate the longest trains going north or south on the main line. At the point where the collision occurred, passengers may have been received or discharged, and certainly were often received or discharged on such cars at points not many feet north of the place where the injury was received.

The contention of the plaintiffs is that, within the meaning of the terms of section 3549, every point on this extended gravel walk, throughout its whole length, is a part of the passenger depot, and that the language of the statute required that for a distance of 300 feet further south, and of 300 feet further north, from the respective extremities of this gravel walk (that is, for a distance of 1,950 feet), the railroad company, in backing a train of cars, or part of a train, or an engine, along any of its tracks located and running within 50 feet of this gravel walk, should not run at a greater rate of speed than three miles an hour, and that it should have every such train, part of train, or engine preceded by a servant of the railroad company, on foot, not exceeding 40 or under 20 feet in advance, to give warning. On the other hand, it is contended by the railroad company that the plain meaning of the language of the section in question requires that the words "a passenger depot," as used in that section, should be construed to apply to the building used for such depot in cases where there is a building to locate the depot.

We have noticed, in section 4302, that the railroad commission of the state of Mississippi "may cause all passenger trains to permit passengers to get on and off in a city at any place other than at the depot, where it is for the convenience of the traveling public." It is not necessary to hold that there could not be a passenger depot on a railroad without having in connection with it, and as its most conspicuous feature, some character of a house or building. But it seems to be very certain, from the comprehensive provisions of the Code of Mississippi defining the powers and duties of the railroad commission of that state, that no railroad in that state would be permitted to use such a passenger depot. While, in a certain sense, the term "passenger depot" embraces more than the mere building, in undertaking to survey and fix the limits of the space reservation made by this statute it is necessary that we should look for a reasonably definite point as a place of beginning. The limits are that the line of track must run within 50 feet of the passenger depot, and that a train, or part of a train, or engine, backing on this track into or along a passenger depot, shall, for at least 300 feet before it reaches or comes opposite to such depot, be preceded by a servant of the railroad company, etc., and be run at a rate of speed not greater than three miles an hour. Counsel for the plaintiffs calls to our attention section 3551 of the Code, which

concludes with this sentence: "A failure to observe this and the four last preceding sections shall cause a railroad company to be liable to a fine of fifty dollars for each offense;" and counsel say truly that "this penalty is therefore imposed for the violation of sections 3547, 3548, 3549 [the section we are construing], 3550, and 3551." The last sentence of section 3549 is also highly penal in its character: "For every injury inflicted by a railroad company while violating this section the party injured may recover full damages without regard to mere contributory negligence." Following the recognized canons for the construction of such statutes, and keeping well in mind that the purpose of this statute is to provide for the preservation of human life, we are unable to give the words "a passenger depot," as used in the section, the construction contended for by the plaintiffs' counsel, and are fully persuaded that in this particular case the language "a passenger depot" must be limited at least so as to include, at most, only the whole of the building, a part of which is used in connection with the passenger service, and therefore that the restrictions and limitations of the section were not laid upon the defendant at the time and place when and where the collision occurred which occasioned the death of Mr. King. We think the contention of the plaintiffs' counsel that Mr. King was a licensee on the defendant's tracks at the point where he was struck in no way favorably affects the plaintiffs' case. It is only claimed that he and others were in the habit of passing north along these tracks, between the rails of the different tracks, or between the different tracks, indifferently, without confining themselves to the gravel walk, and that this was known to the defendant and its servants, who are not shown to have made any effort to prevent it. The fact that such use of the tracks was permitted, either passively or expressly, would not relieve persons availing of it from the exercise of ordinary caution, and, so far from charging the servants of the company with any additional degree of care in operating its trains at midday, would have a reasonable and natural tendency to dull their attention in taking notice of people passing about or along the tracks at such a time, on account of its being a common occurrence, and the persons usually there being those who were accustomed to the place, and having knowledge of its dangers, and trusting in their own capacity to avoid injury in such use by timely stepping off a track on which a train, or part of a train, or engine was approaching.

From the most careful consideration of the whole proof, and of the language of section 3549, and of the other parts of the statutory law of Mississippi to which we have been referred, we are satisfied that the plea of contributory negligence was well taken, and was established by uncontradicted testimony, and that the trial judge did not err in directing a verdict for the defendant.

The judgment of the circuit court is affirmed.

COLTON v. RAYMOND.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 116.

1. STATUTE OF FRAUDS—SALES—PART PAYMENT OF PRICE.
Under the statute of frauds of New York, which provides that a contract for the sale of goods, where no note or memorandum in writing is made, shall be void unless the buyer shall receive some part of the goods, or "shall at the time pay some part of the purchase money," as construed by the courts of the state, in order that the receipt by the seller of a part of the consideration for goods, after the time when a verbal contract for their sale was made, shall render the contract valid, there must be, at the time of such payment and receipt, such action taken by the parties as amounts to the making of a new contract, either by the making and acceptance of the payment for the expressed purpose of complying with the statute and making valid the contract, recognized as previously void, or by substantially restating, reaffirming, and renewing its terms; and a delivery of such part of the consideration by the buyer, with the statement that it was "in compliance and fulfillment of the trade that we made" on a day stated, and the acceptance of the same by the seller in silence, does not amount to a renewal of the prior contract, or the making of a new one, but at most is an implied recognition of the validity of the former contract, and the payment is not made "at the time" within the statutory exception.

2. SAME—SUBJECT OF SALE—OFFICE OR AGENCY.
An office involving fiduciary duties or an agency in which the delectus personæ is the essence of the relation cannot be the subject of a sale or assignment; nor is an oral agreement to resign such an office or agency as part of the consideration for a promise by the other party a contract for the sale of "goods, chattels, or things in action," within the meaning of the New York statute of frauds, so that the delivery of such resignation will amount to a part performance to bind the other party.

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

A. Walker Otis, for plaintiff in error.
Wm. B. Hornblower, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error, who was the plaintiff in the court below, upon the trial of the action excepted to the rulings of the trial judge in directing a verdict for the defendant, and the principal assignments of error are addressed to that ruling. The case has been before this court on a former occasion upon a writ of error by the defendant from a judgment for the plaintiff entered upon the verdict of a jury, when the judgment was reversed upon the ground that the contract for breach of which the action was brought was invalid by the statute of frauds. The opinion is reported in Raymond v. Colton, 43 C. C. A. 501, 104 Fed. 219. Upon the present trial the facts proved were substantially those which were recited in that opinion, but some additional evidence was introduced in

behalf of the plaintiff, which will be referred to hereafter. Briefly stated, the agreement proved was one by which the plaintiff was to dispose of his interest in the concern of Vantine & Co., and the defendant was to pay him therefor in goods of the concern.

Vantine & Co. was a joint-stock mercantile association, with a capital stock divided into 2,500 shares, of which the plaintiff was the owner of 625 shares, and the defendant the owner of the remaining shares. Its business was carried on at New York and in Japan. The plaintiff was vice president and general manager of the concern, having a salary of $10,000 per annum as vice president. His brother was the general manager of the concern in Japan, and his father was a nominal shareholder and a director. The defendant was the president. The plaintiff had pledged his 625 shares of stock to the defendant as collateral security for the payment of his promissory note to the defendant for the sum of $165,000, with interest from January 1, 1897. He was also indebted to the concern in the sum of $12,000. Although the concern was, in legal effect, a corporation, its business had been conducted by the parties as though it were a partnership in which the plaintiff had a one-fourth interest and the defendant a three-fourths interest. The agreement grew out of friction between the parties in their business relations, and was made August 3, 1898. The evidence in respect to it authorized the jury to find that the plaintiff on his part undertook to "get out," and deliver to the defendant his resignation as vice president and managing agent and the resignation of his brother; and the defendant undertook to pay him therefor the value of his interest in the concern, less the amount of his note to the defendant and his indebtedness to the concern, such interest to be ascertained as of January 1, 1898, from the books of the concern. The evidence also authorized the jury to find that it was understood by the parties that the agreement was to be regarded as final, but without prejudice to further negotiations for some other adjustment of their differences. The evidence also authorized the jury to find that such negotiations took place, but on August 15th the plaintiff terminated them by an interview, at which he handed to the defendant the resignations "in compliance and fulfillment of the trade that we have made," and stated that he wanted the defendant to give him his quarter interest in the business, as he had agreed, and that the defendant received and retained the resignations.

In our former decision, in referring to the agreement, we characterized it in the opinion in this language:

"All that the plaintiff had to sell, and all that the defendant could buy, were the plaintiff's shares in the association. The plaintiff could not sell, nor could the defendant buy, the directorships of the association. In legal effect, the agreement was one for the barter or exchange of the shares in the association for the goods, the defendant being the buyer of the shares, and the plaintiff the buyer of the goods."

The principal question considered in that opinion was whether the contract was void under the statute of frauds, or whether, though an oral contract, it was withdrawn from the operation of the statute because the plaintiff had "at the time" paid some part of the purchase

consideration. The question was not considered whether the contract was withdrawn from the operation of the statute, because the defendant had accepted and received some part of the property which was the subject of the sale.

As the statute of frauds is construed by the courts of this state, a payment made subsequent to the time of the original contract is to be deemed made at the time of the contract, if there was such a reaffirmation of the prior contract as to constitute a new contract. The majority of the court regarded the decisions of the state courts as holding that the reaffirmation is one which is made by express terms, and not one which arises from the making and the reception of the payment upon the tacit or implied understanding that the contract formerly made is in force; in other words, the majority adopted the language of the court of appeals in Jackson v. Tupper, 101 N. Y. 519, 5 N. E. 65, and held the payment ineffectual to validate the contract, because "there was no restatement of the terms of the prior oral agreement when the payment was made, and no express recognition thereof; nor was the payment made for the avowed purpose of binding the prior bargain."

To differentiate the present case from the former one, the plaintiff gave additional evidence in respect to the conversation which took place between the parties at the interview on August 15th. He testified that in speaking of the agreement at the interview he mentioned it as the agreement made August 3d. He narrated that interview as follows:

"I said: 'Mr. Raymond, I am going to give you my resignation, my father's resignation, and my brother's resignation, to take effect to-night at six o'clock, in compliance and fulfillment of the trade that we made on August 3d. I want you to give me my quarter interest in the goods, less the notes, as you promised to August 3d.' He said, 'Charlie, won't you regret it?' I said, 'No.' I think that closed the talk at that time."

He also testified that the certificate for the 625 shares had never been in his possession, but had always been in the possession of the defendant since it was issued. Further new testimony was given for the plaintiff by the witness Sproull, an attorney, who had been present when the contract of August 3d was made. This witness testified to a conversation with the defendant on August 19th, in which he stated to the defendant that the plaintiff had given up his resignation and his salary, and had made over to the defendant his stock, and asked the defendant: "Do you want anything further? Do you want an assignment of the stock?" And the defendant answered: "No, I have got them. He made them over. I can do as I please. * * * I want him to resign as trustee. When he has done that, I will give him his one-quarter interest in the concern in the shape of goods." Sproull then proposed to secure the plaintiff's resignation as trustee, and said to the defendant: "Colton, I know, will be willing to give it. I will report to him this conversation, and tell him that you will give him his interest in goods, and then he will give you his resignation as director and trustee." Sproull also testified that he communicated the request for the resignation to the plaintiff. It

was proved also that the plaintiff complied with Sproull's request by mailing to the defendant a resignation as trustee and director.

In directing a verdict for the defendant, the trial judge expressed the opinion that the contract was void by the statute of frauds, and that the evidence did not distinguish the case from the one previously considered by this court.

As the statute is a New York statute, it is the duty of this court to adopt the construction put upon it by the highest courts of this state in respect to the meaning of the words "at the time" of the contract. The statute declares any contract "for the sale of goods, chattels, or things in action" void, in the absence of a note or memorandum in writing, unless the buyer shall "accept and receive some part of the goods, or the evidences, or some part of such things in action," or "shall at the time pay some part of the purchase money." The former statute did not specify the time when either the goods were to be accepted or received, or a part of the purchase money was to be paid. The history of the legislation is given in McKnight v. Dunlop, 5 N. Y. 537, 55 Am. Dec. 370, where the court adverted to a decision of the supreme court of Massachusetts in Thompson v. Alger, 12 Metc. 435, where the meaning of the New York statute was considered. The Massachusetts case was one in which the court, speaking of the original verbal agreement, used this language:

"Had nothing further occurred, this verbal contract might have been restricted to that point of time. But such was not the case. On the contrary, these parties met again, and further declared upon the subject, and they engaged that the defendant should on that day pay to Stone $400 in part payment of the purchase money; and, if the defendant would thus pay that sum, that Stone would have the stock transferred, so that the defendant could have it the next time he should be in Hudson. Here was a new and further negotiation of the parties, a renewal of the contract, with a new agreement as to the time of the transfer of the shares. At the time of the making of this latter agreement,—which is the one that the plaintiff seeks to enforce,—the $400 was actually paid as a part of the purchase money of these shares, which, by this agreement, were to be conveyed. These facts present a case of payment, which, we think, will bring this case within the third class of exceptions from the operation of the statute of frauds."

In McKnight v. Dunlop, referring to that decision, the court said:

"If the contract is not in law deemed to be made until the part payment of the purchase money, and a previous oral agreement is merely referred to to ascertain the terms of the subsequent valid contract, the decision of the supreme judicial court of Massachusetts can be regarded as sound."

The subsequent decisions of the courts of New York follow this interpretation of the statute. In Bissell v. Balcom, 39 N. Y. 275, the parties had made a verbal agreement for the sale of cattle at a price exceeding $50, without any actual delivery or payment of any part of the purchase price, but the next day the plaintiff called upon the defendant for a payment to "bind the bargain, so that there will be no chance to back out," and for that purpose the defendant made a payment of a part of the price. After referring to the conversation which took place at the time of the payment between the parties, the court said:

"Here is a distinct intelligent reference by both parties to the negotiation of the previous day; a recognition by both of its want of binding force or validity, because no part of the stipulated price was paid; a declared intent to make the bargain valid and binding, assented to; a request for the payment of the money for that purpose, and a payment in compliance with that request."

In Hunter v. Wetsell, 57 N. Y. 375, 15 Am. Rep. 508, the contract (for the sale of hops) was made September 27th, and no portion of the purchase price was then paid. Subsequently the defendant paid the plaintiff $300 upon the purchase price,—$200 in November and $100 in December,—to apply on the hop contract. There was no proof of what was said about the hops. In deciding the case the court said:

"There is no proof of what was said about the hops or the contract when these payments were made. The evidence does not even show that the contract was mentioned or referred to. It is simply that the payments were made towards the hops."

After reviewing the authorities, the court used this language:

"The following points may, however, be regarded as established: (1) Where a contract of sale has been made, good at common law, but void under the statute of frauds, and the parties subsequently meet, and for the express purpose of then complying with the statute and making the contract valid, a payment is made by the purchaser upon the contract, at the request of the seller, such payment is made at the time of making the contract, within the meaning of the statute. (2) Where, in case of such a void contract, the parties subsequently come together, and substantially restate, reaffirm, and renew its terms, so as then and there, by the meeting of their minds, to make a contract, and then payment is made upon the contract, the statute is complied with."

This case subsequently came before the court of appeals a second time (84 N. Y. 549, 38 Am. Rep. 544), and the court said:

"In the case as now presented, the difficulty, fatal before, is claimed to have been obviated. There is proof of a restatement of the essential terms of the contract at the time of the delivery of the check for $200."

The court held the contract valid because payment was made at the time of such restatement of the terms of the contract.

These propositions have always been adhered to by the courts of New York. In Jackson v. Tupper, 101 N. Y. 515, 5 N. E. 65, where the payment was held insufficient to validate the contract, the court observed that the plaintiffs did not bring their case within these propositions, saying:

"There was no restatement of the terms of the prior oral agreement when the payment of May 1, 1880, was made, and no express recognition thereof, nor was the payment made for the avowed purpose of binding the prior bargain."

In the present case, treating the delivery of the resignations on August 15th as a payment made upon the contract of August 3d, it is not pretended that the payment was made for the purpose of validating the prior void contract. It purported to be made in execution of a valid prior contract, in the words of the plaintiff, "in compliance and fulfillment of the trade that we made on August 3d." Was there any

restatement of the substantial terms of the prior contract? The plaintiff said to the defendant: "I am going to give you the resignations in fulfillment of the trade that we made on August 3d. I want you to give me my quarter interest in the goods, less the notes, as you promised to August 3d." The defendant was silent, though, of course, by receiving the resignations he assented to the statements of the plaintiff. Nothing was said about the shares of stock, or as to the manner in which the plaintiff's interest was to be ascertained. It was understood, undoubtedly, that his interest was to be that as shown by the books of the company on the previous 1st day of January, viz., by ascertaining the inventory value of the assets and the state of the plaintiff's account with the concern on that day; but no mention was made of this substantial part of the prior contract. Nothing was said about the certificates for the plaintiff's shares then pledged to the defendant, and nothing about the cancellation or surrender of the plaintiff's note for which the shares were held as collateral. Nor was there any mention made of the vital and important conditions of the prior contract that the plaintiff was to "get out," or renounce his interest in the concern. Finally, throughout the interview there was merely a proposition or demand on the part of the plaintiff, a statement of what he proposed to do and wanted the defendant to do, and no verbal assent by the defendant. It seems preposterous to say that here was any restatement of the terms of the old contract. By implication they recognized that it was still existing, but they did not reassert its terms so as to agree upon a new one of essentially the same purport.

Did the subsequent conversation with Sproull on August 19th, and what took place pursuant to that conversation, amount to a payment at that time? If we treat the conversation as an interview between the defendant and the plaintiff himself, there are two reasons why it did not: (1) There was no restatement of the substantial terms of the contract, and (2) there was no payment of any part of the contract consideration. What was said by the defendant about the stock was merely his statement of what he conceived to be his rights in view of what had previously taken place. The resignation of the plaintiff's father as a trustee, or of the plaintiff himself as a trustee, was not a part of the consideration of the prior contract. The agreement was that the plaintiff should "get out," and hand in his brother's resignation and his own resignation as vice president and general manager If in that conversation, or the previous conversation with the plaintiff, the defendant had stated that he would henceforth regard himself as the owner of the plaintiff's shares of stock, the circumstance would not have helped the plaintiff's case. The statute requires physical acts of delivery and acceptance, and words alone are useless. In the absence of any act of the defendant indicating an assumption of ownership of the shares, or of authority over them, what was said and what took place was of no importance. Shindler v. Houston, 1 N Y. 261, 49 Am. Dec. 316; In re Hoover, 33 Hun, 555; Caulkins v. Hellman, 47 N. Y. 453, 7 Am. Rep. 461; Cooke v. Millard, 65 N. Y. 352, 22 Am. Rep. 619.

Upon principle, and logically, there can be no payment made at the time of the contract unless it is made as a part of the negotiations, or at the time when the negotiation is concluded; otherwise the statutory provision would be nugatory. If there is a new contract, in which the parties agree to reinstate a previous one for the purpose of validating it according to the statute, so that it is to take effect as a new agreement in substitution of the void one, and a payment is made at the time, the statute is satisfied. If they get together, and by words or implication say to one another, "We recognize that the bargain that we have previously made is not enforceable, but we are willing to stand by its terms upon the immediate payment of the purchase money, or a part of it," there is a new contract supported by a new consideration. But when they get together, and talk over a part of the terms of the original contract, but do not advert to some of the substantial conditions, and a payment is made, the old contract is not reinstated, but a new and different one is made, which, because of the payment, is valid within the statute. This contract may support an action for its breach, but it cannot support one for a breach of the original contract.

It has not been argued that there was an acceptance or reception by the defendant of "some part of the goods, or the evidences, or some part thereof, of such things in action," so as to bring the case within the other exception of the statute. In our former decision we pointed out that there could be no sale or purchase of the directorships or offices of the corporation, although the promise by the plaintiff to sell or deliver the resignations might be regarded as a part of the consideration of the defendant's promise. Neither could there be a sale of the agencies of the plaintiff and his brother. An office involving fiduciary duties, or an agency in which the delectus personæ is the essence of the relation, is not the subject of a sale or an assignment. Devlin v. Mayor, etc., 63 N. Y. 8; Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246; Delaware Co. v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674. Nor do they fall within the terms of the statute of frauds. They are neither "goods, chattels, nor things in action." It is the reception or acceptance of some of these things, or the "evidence thereof" to which the statute refers. The statute has no application to the contract for the sale or the purchase of an agency, and it is immaterial whether such a contract is in writing or is not. The delivery of the resignations was merely an act evidencing the plaintiff's renunciation of all further participation in the business of the concern.

We conclude that the court below ruled correctly in directing a verdict for the defendant, and the judgment is therefore affirmed.

DAWSON v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1902.)

No. 1,600.

MASTER AND SERVANT—DEATH OF BRAKEMAN—CONTRIBUTORY NEGLIGENCE.

Where a brakeman, going between two cars, which were moving quite fast, seized a grip iron on the end of a flat car, which was primarily designed to be used for making couplings, and, in attempting to step on a swinging brake beam to ride to a car which he had been directed to take up, was killed, and there were hand holds on the side of a box car next to the flat, which he might have used without any risk, if he desired to ride, he was guilty of negligence contributing to his death, and precluding a recovery.

Caldwell, J., dissenting.

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

Thomas P. Fenlon (B. F. Endres, on the brief), for plaintiff in error.

W. F. Evans (M. A. Low, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was an action for personal injuries, in which the trial court, after hearing all the testimony, directed a verdict in favor of the defendant company. Whether such direction was proper is the sole question presented by the record, and the facts on which the decision must turn are few and simple. Alberta M. Dawson, the husband of Daisy Dawson, the plaintiff in error, was a brakeman in the employ of the Chicago, Rock Island & Pacific Railway Company, the defendant in error. On November 5, 1898, the freight train on which he was employed as head brakeman arrived at Narka, Kan., between 2 and 3 o'clock p. m.; having started from Phillipsburg, Kan., that morning, and being on its way to Fairbury, Neb. Arriving at Narka, his conductor ordered him to pick up a car which was standing on the house track, and place it in the train. With this purpose in view, the engine, with two cars attached, —the one next to the engine being a box car, and the other a flat car belonging to the Lake Shore & Michigan Southern Railway Company, and loaded with piling,—were accordingly detached from the train, and run forward eastwardly some distance from the station, beyond a switch, with a view of backing in on the house track, and picking up the car, which was standing from 130 to 150 feet west of the switch. Dawson and another person, by the name of Short, who was not in the employ of the defendant company, appear to have ridden on the flat car from the station to the switch, where Dawson jumped off for the purpose of throwing the switch. While so riding they stood on the swinging brake beam of the flat car, maintaining their footing thereon by means of two hand holds (one on each side of the drawhead) at the end of the car. When the engine backed down in obedience to the signal to pass in on the house track, Dawson, who was then standing near the switch, stepped in, or swung

himself in, as one witness says, between the box car and the flat car, seizing one of the hand holds at the end of the flat car, and stepped, or attempted to step, on the swinging brake beam, either with the intention of standing thereon and riding back to where the car was to be picked up, or with a view of climbing up on the flat car. The hand hold gave way because one of the screws by which it was held in place was screwed into wood that had become rotten; the result being that he fell across the track and was run over, sustaining injuries on account of which he died the succeeding day. The flat car to which the defective hand hold was attached, as before stated, was a foreign car, and had come into the possession of the defendant company at Phillipsburg, Kan., on the night preceding the accident. It had been placed in the train on which Dawson was a brakeman early in the morning of the day the accident occurred, and had been hauled in that train from Phillipsburg to Narka. The hand hold which proved to be defective was placed there in obedience to the act of congress of March 2, 1893 (27 Stat. 531, c. 196). The purpose of requiring grip irons or hand holds to be placed at the end of cars used in interstate commerce seems to have been to afford greater security for employés when they are in the act of coupling or uncoupling cars. One of the plaintiff's witnesses, who was nearest to the train when the accident occurred, testified that the engine and cars were backing in on the switch "tolerably fast," or "pretty swift," when Dawson swung in between the cars and stepped on the brake-beam, while another witness, who was farther away, said that they were moving slowly.

It is claimed on behalf of the plaintiff that the facts above recited, concerning which there was no dispute, would have warranted the jury in finding that the defendant company, in the exercise of ordinary care, ought to have discovered the defect in the hand hold or grip iron on the end of the foreign car prior to the accident, and that it was guilty of negligence in not making such discovery. It is also claimed that the facts would have warranted a jury in finding that Dawson acted with ordinary prudence on the occasion in question, and was not guilty of contributory negligence.

Relative to the first of these contentions, we observe that as the flat car to which the hand hold was bolted had been received by the defendant company on the evening previous to the accident, and had passed only one inspection point prior thereto; and as there does not seem to have been any outward evidence that the timber was rotten where one end of the hand hold was bolted, until the screw came out and disclosed that the wood was decayed, or "doty," as one witness says, it is at least questionable whether a jury could reasonably have found that the defendant company was guilty of culpable negligence in not discovering the defect. Short, who rode with Dawson from the station to the switch, and who had held on to the identical grip iron which subsequently gave way when Dawson seized it, says that it appeared to be in a proper condition until the screw came out and disclosed the defect in the timber, and so it may have appeared to the defendant's car inspectors. But it is unnecessary, we think, to express a definite opinion upon the question whether a jury of reasonable men

might have found that the defendant was guilty of a want of ordinary care.

Dawson went in between two cars, when, as the witness who was best able to judge says, "they were moving pretty swift," or "tolerably fast," seized the grip iron on the end of the flat car, which was primarily designed to be used by a brakeman for the purpose of making a coupling, and stepped, or attempted to step, on a swinging brake beam, with a view of standing and riding thereon for a distance of about 150 feet, until the car which he had been directed to pick up was reached. It appears that there were stirrups and hand holds on the side of the box car, which he might have used without any risk of injury, if he desired to ride rather than to walk, and that he could have walked to the place where the coupling was to be made without delaying the train for a minute. From any point of view, the risk which Dawson thus took was an unnecessary risk, that might as well have been avoided, and he ought to have avoided it. He was not confronted at the time with an emergency which called for instant and decisive action, such as sometimes confronts railroad men, and compels them to incur considerable risk. He was in a situation where he could have done what he desired to do in a perfectly safe way. He thought proper, however, to place himself in a position of great peril, where a slight misadventure meant instant death or serious injury. Conceding it to be true that brakemen sometimes take such risks without any sufficient cause or excuse, yet such acts should nevertheless be pronounced negligent. Such conduct on the part of brakemen and others ought, also, to be discouraged. If a man exposes himself to great risk unnecessarily, he is guilty of negligence, although it be shown that other persons have done the same thing and escaped unhurt. The inherent quality of an act is not changed, whether it is done by one or many. In the case of Morris v. Railway Co., 47 C. C. A. 661, 664, 108 Fed. 747, 749, this court held, in substance, that where there is a comparatively safe way, known to a person, of doing an act, and there are no obstacles in the way of his employing the safe method, but he deliberately chooses a dangerous method, the perils of which are obvious, he is guilty of negligence, and thereby assumes the risks so incurred. See, also, Loranger v. Railway Co., 104 Mich. 80, 86, 62 N. W. 137; Carrier v. Railway Co., 61 Kan. 447, 451, 59 Pac. 1075; Cunningham v. Railway Co. (C. C.) 17 Fed. 882.

Our conclusion is, therefore, that, in view of the undisputed evidence in the case which this record contains, Dawson must be adjudged to have been guilty of negligence which immediately contributed to his death, and on this ground the lower court properly directed a judgment for the defendant. The judgment below is accordingly affirmed.

CALDWELL, Circuit Judge (dissenting). The act of congress provides that "it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grip irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." It will be ob-

served that the requirement of the act is that the grip iron or hand hold shall be "secure," and they are to be placed in the ends and sides of each car, for greater security to men in coupling and uncoupling cars. The act does not undertake to direct when the brakeman shall use the grip irons on the side, and when he shall use those on the end, of the car. They are placed near together. Sometimes it is more convenient to use one, and sometimes the other. They are used indifferently, except that when signals are to be given by the brakeman the end hand holds are preferred. On the subject of the use of these hand holds, experienced brakemen and other railroad men testified as follows:

"Q. Is it ever customary, or not, for a brakeman occupying the position that Dawson did, and about to perform the services which he was, to get upon a car while in motion, for the purpose of coupling it onto another car some distance from it? A. It is customary. Q. What is the usual and ordinary way of getting upon a car such as this one was, where they have a hand hold upon the end and also upon the sides of the car? A. They generally use the side when they get on the side, and use the hand hold when they get on the end, or sometimes both,—whichever is convenient."

In answer to this clear proof that the action of the deceased was in accordance with the custom and usage of brakemen under like circumstances, it is said:

"Conceding it to be true that brakemen sometimes take such risks without any sufficient cause or excuse, yet such acts should nevertheless be pronounced negligent. Such conduct on the part of brakemen and others ought also to be discouraged."

The court assumes to know more about the proper way for brakemen to discharge their duties than the brakemen themselves know, and levels its censures at them for not conforming to the court's idea of the proper mode of discharging their duties, but has no word of censure for the railroad company for carrying on its cars an insecure hand hold, certain to result in death or great bodily injury to any brakeman who attempted to use it in the discharge of his duties in the customary mode. It would seem that in such case, if the life and limb of a brakeman are esteemed of any consequence, and their protection thought to be desirable, it is the conduct of the railroad that ought to be "discouraged" by the court's decision, rather than to require the brakemen to adopt some novel and unusual mode of discharging their duties, prescribed by a court which has no more knowledge of the proper and customary mode of discharging those duties than the brakemen have of the intricacies and mysteries of special pleading. The decision in this case is, in effect, a license to the railroad company to carry a death trap on its cars for its brakemen, in defiance of the act of congress which requires them to provide their cars with "secure" hand holds. Manifestly, it were better the act of congress had never been passed, for a car without any sort of hand holds would be preferable to one with insecure hand holds,—hand holds that give way and send the brakeman to his death.

It is obvious from a consideration of the testimony that the brakeman was not guilty of contributory negligence in seeking to support

himself by taking hold of the end hand holds, instead of those on the side. In reference to the defense of contributory negligence it may be observed: First, in the courts of the United States this defense is one which the defendant must prove; second, the rule is that, to establish contributory negligence, "the evidence against the plaintiff must be so clear as to leave no room to doubt, and all the material facts must be conceded or established beyond controversy." Field, Dam. 519; Beach, Cont. Neg. § 447; Railway Co. v. Sharp, 27 U. S. App. 334, 11 C. C. A. 337, 63 Fed. 532; Railroad Co. v. Lowell, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131; Bluedorn v. Railway Co., 108 Mo. 439, 18 S. W. 1103, 32 Am. St. Rep. 615; Weller v. Railway Co., 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532.

The majority of the court seek to prescribe a rule of conduct for brakemen impracticable in practice, and contrary to the established usage and practice in such cases. The standard of care required of a brakeman is the brakeman's standard of care, and not the ideal standard of care of a judge reposing in security and comfort in an upholstered chair in his chambers. It is said the brakeman could have "walked to the place where the coupling was to be made, without delaying the train for a minute." If the hand holds are not to be used where the brakeman could walk to the place of coupling, it follows logically that he must refrain from using them when he could reach the place of coupling by running. Such a standard of care nullifies the act of congress altogether. If trains could only be operated and cars coupled and uncoupled by such ideal standards, a radical revision of railroad time-tables would be necessary. The remark of Lord Hatherly in delivering the judgment of the house of lords in Overend & Gurney Co. v. Gibb, L. R. 5 H. L. 494, is as applicable in this case as it was in that. He said:

"What I did intend to state in that case was that I could not measure—and I think it would be a very fatal error in the verdict of any court of justice to attempt to measure—the amount of prudence that ought to be exercised by the amount of prudence which the judge himself might think, under similar circumstances, he should have exercised."

But the opinion of the majority or minority of this court upon this question is quite immaterial. Whether the brakeman was guilty of contributory negligence, under the circumstances, was clearly a question of fact for the jury, and not one of law for the court. In the case of Jones v. Railroad Co., 128 U. S. 443, 9 Sup. Ct. 118, 32 L. Ed. 478, the circuit court instructed the jury to render a verdict for the defendant upon the ground that the plaintiff had been guilty of contributory negligence, but the supreme court reversed the judgment. The court, speaking by Mr. Justice Miller, said:

"But we think these questions [of negligence] are for the jury to determine. 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 this as well as others. * * * Instead of the course here pursued, a due regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

In the case of Railroad Co. v. Ives, 144 U. S. 409, 417, 12 Sup. Ct. 679, 36 L. Ed. 485, the court said:

"It is only where the facts are such that all reasonable men must draw the same conclusions from them that the question of negligence is ever considered one of law for the court."

The proof is overwhelming that the wood in which the hand holds were inserted was soft, black, and rotten. The only inspection of the hand holds, if any was made, was a mere perfunctory, visual inspection. Such an inspection does not satisfy the requirements imposed by law on a railroad company, either as to its own or foreign cars.

In Railroad Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, the supreme court said:

"That it was the duty of the railway company to use reasonable care to see that the cars employed on its road were in good order and fit for the purposes for which they were intended, and that its employés had a right to rely upon this being the case, is too well settled to require anything but mere statement. That this duty of a railroad, as regards the cars owned by it, exists also as to cars of other railroads received by it, sometimes designated as 'foreign cars,' is also settled."

In Felton v. Bullard, 37 C. C. A. 1, 94 Fed. 781, it was assigned for error that the circuit court refused to give this instruction:

"If the defect was latent,—that is, one not visible,—the defendant is not liable, if the injury occurred for reason of such latent or invisible defects."

In overruling this assignment of error, the circuit court of appeals of the Sixth circuit said:

"The refusal to instruct in the words of the request is now assigned as error. There was evidence tending to show that neither the broken and rusted condition of one of the screws by which the grip iron was held to the wood of the car, nor the decayed condition of the wood surrounding this broken screw, was visible from the surface. Indeed, the evidence strongly indicated that no mere visual inspection would have disclosed the dangerous condition of this grip iron. But would a mere visual inspection of such an attachment be due and reasonable inspection of such an instrumentality? Was there no other ready means of ascertaining whether it was properly and safely attached, than a visual inspection? If the application of some force would disclose a dangerous weakness, ought not such a force to be applied? The grab iron was about two feet in length. If the weight of a man was thrown upon the end supported by the sound screw, it might hold. But if that weight was thrown upon the other screw, was it likely to indicate any firmness? The facts were not voiceless. They speak for themselves. The condition of the screw supporting one end, and of the wood into which it was screwed, was such, as disclosed by examination after the accident, as to make it obvious that any strain thrown upon that end would disclose the weakness with which it was attached. Did the inspection made involve any strain upon the weak end of this grab iron? If so, did he use it in such way as to really afford a test of the firmness of its attachment? If the inspection made did not involve such a physical test as was feasible, and calculated to disclose just such an infirmity as existed, would not a jury be warranted in finding either that no physical test at all was made, or that, if made, it was so carelessly made as to be useless?"

And in Gutridge v. Railway Co., 105 Mo. 520, 16 S. W. 943, the supreme court of Missouri said:

"The fact that the wood is old and the screws are rusty would naturally suggest to an ordinarily prudent man the propriety of a thorough inspection.

We cannot concur in the contention that an inspector of a hand hold performs his duty, under all circumstances, by simply using his eyes to detect defects."

And after citing authorities the court continues:

"We quote these authorities to show that the master is not always, and under all circumstances, excused if he could not see a defect; and, if the conditions are such as would excite suspicion in a man of ordinary prudence, he must go further and apply other tests. We know that machinery, and the materials composing it, may be tested in various ways. What the ordinary tests, as applied to railroad appliances, are, is not disclosed by this record; but we feel satisfied that looking is not the only test. The master must use such reasonable tests to discover defects as ordinary prudence suggests. The amount of care required is measured by the circumstances of each case, depending upon the kinds of machinery used, the risks incident to its use, and the hazard of the business in which it is used. Whether the defendant could have discovered the defect in the hand hold in this case by the exercise of ordinary care was a question for the jury, and not for the court, to determine."

It is highly probable that the brakeman took hold of the end hand hold in order to be in the best position to signal the conductor. But whether this is so or not is quite immaterial. He was doing something he had an undoubted right to do, and that is customarily done by brakemen in the discharge of like duties. Moreover, it is certain his death was due solely to the insecure hand hold. There is no pretense that he would have been injured if the hand hold had not given way. The defective hand hold was the proximate cause, and the sole proximate cause, of the injury. Even if the deceased was guilty of any negligence, such negligence in no manner contributed to his injury, and the rule is well settled that "negligence which is not a proximate cause of the injury is not contributory negligence." Railroad Co. v. Mansburger, 12 C. C. A. 574, 65 Fed. 196. In Coasting Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, the supreme court say:

"Contributory negligence will not exonerate defendant if it be shown that defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence."

If the brakeman had taken hold of the side hand hold, and it had given way, and he had been killed, as he might have been, the contention of the railroad company, doubtless, would have been that he should have used the end hand hold, as that was better adapted to the discharge of all his duties as brakeman, namely, riding, coupling, and signaling. But the question of contributory negligence, as well as that of negligence, is also one for the jury; and the evidence in the record in this case leaves no room to doubt that a jury would have found the railroad company guilty of negligence, and the brakeman not guilty of contributory negligence.

I again enter my protest against depriving suitors in this class of cases of their constitutional right of trial by jury, and, without here repeating the arguments and citing the authorities in support of my views, I refer to Railroad Co. v. Ellis, 4 C. C. A. 454, 54 Fed. 481, and my opinions in Railroad Co. v. Whittle, 20 C. C. A. 196, 74 Fed. 296, and Myers v. Railway Co., 37 C. C. A. 137, 95 Fed. 406.

The judgment of the circuit court should be reversed, and the cause remanded, with instructions to grant a new trial.

PACIFIC COAST CO. v. REYNOLDS et al.

(Circuit Court of Appeals, Ninth Circuit. March 17, 1902.)

No. 696.

1. SHIPPING—LIMITATION OF LIABILITY—VALUE OF STRANDED VESSEL.
Where a ship was stranded on a reef and so injured as to terminate her voyage, in order to secure the statutory limitation of liability the owner, when the vessel is not surrendered, must pay her value as she lay upon the rocks, and the amount of her freight then pending, if any. Her value for such purpose is not affected by the result of any subsequent salvage operations, whether undertaken by the owner or others; and where at great risk, hazard, and expense the owner succeeded in releasing her and having her towed to a port where she was valued, there must be deducted from such valuation, for the purpose of fixing the measure of his liability in limitation proceedings, not only the expense incurred in her rescue, but also an allowance on account of the risk and hazard of the salvage undertaking, which clearly affected her value as she lay before such operations were commenced.[1]

2. SAME—FREIGHT PENDING.
In respect to the pending freight, which must be surrendered by a shipowner in order to secure the statutory limitation of liability, the law is that freight pending is freight earned; and when the voyage is broken up by the wrecking of the ship before reaching her destination, there is ordinarily no freight earned, for, even though prepaid, in the absence of special contract, it may be recovered back by the shipper.

3. SAME—PASSAGE MONEY RECEIVED FROM PASSENGERS.
Where a ship, at the time she was stranded and the voyage terminated, was carrying passengers, who had prepaid their passage under contracts providing that in case of the loss of the vessel the passage money should not be refunded, such passage money must be considered the same as freight earned, and surrendered by the owner in proceedings for the limitation of liability; and no deduction can be made because certain of the tickets were given to the passengers by the shipowner, nor on account of a sum paid by such owner for the transportation of the passengers from the place of the stranding to their port of destination.

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

Geo. W. Towle, Jr., for appellant.

Fred W Fry, J. D. Jones, L. H. Wheeler, and Wm. J. Tuska, for appellees.

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

ROSS, Circuit Judge. The following statement of the case by counsel for the appellant is not questioned by counsel for the appellees: On and prior to the 23d day of January, 1898, the Pacific Coast Company, a corporation, was the owner of the American registered steel steamship Corona, 230 feet long, 35 feet beam, 14 feet mean draft of water when fully loaded, and of 1,492 gross, and 996 net, registered tons measurement. That steamer, on January 23, 1898, and while on a voyage from Seattle to Juneau, and elsewhere in Alaska, with a full cargo and 250 passengers, ran upon a then unknown reef

[1] Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.

of rocks near Lewis Island, in Arthur's Passage and British Columbia waters, where she thereafter lay, stranded and helpless, until rescued by her owners. The point where the steamer was stranded is in latitude 54 degrees north, and was exposed to the severe gales which, in the winter season, prevail in that locality. The reef upon which the steamer was stranded extends out from Lewis Island for a little more than 1,200 feet, and is, at ordinary low tide, entirely submerged. At the extreme run out, that is, at the full and change of the moon, one small point of the reef, about 3 feet in diameter, projects about 6 inches above water. Where the Corona lay there was 12 feet of water above the reef at low tide. The tide, at this point, always runs in the same direction, and rises and falls about 25 feet. Where the steamer struck was about 1,200 feet from the shore of Lewis Island, which is there precipitous, and within about 15 feet of the extreme end of the reef. The reef at that point is about 40 feet wide, with an abrupt drop, on the northerly side, of 30 feet, and on the southerly side of 35 feet. The position of the Corona on the reef was such that had she shifted her position slightly she might have capsized and gone out of sight. In stranding, the steamer seriously damaged her keel, frames, and plates, breaking jagged holes in her bottom and bilges, and she lay across the reef with her stern depressed at an angle of about 30 degrees, and with a port list of about 20 degrees the tide ebbing and flowing through the steamer, which was submerged, at high tide, to within about 30 feet of her stem, and at low tide to about amidships. The keel of the steamer at the stern, the lowest point outside the reef, did not touch bottom by some 8 or 10 feet. After the steamer was stranded her passengers were landed on Lewis Island and there cared for until another steamer, the Oregon, came along, when they were placed on board of that vessel, and, at an expense of $2,500, forwarded to destination. The master of the Corona and her mate, a watchman, and four seamen remained by the Corona, living in a shack on Lewis Island,—all of the houses having been washed off the Corona in the heavy gales there prevailing,—until the arrival of Capt. C. M. Goodall, on February 15, 1898. Prior to going there Capt. Goodall, acting for the owner of the Corona, had, at an expense of $17,000, procured a wrecking outfit, consisting of a small steamer, the Maude, and divers, engines, pumps, etc., at Victoria, B. C., but could not, owing to the Alaskan mining fever then on at Dawson, get a suitable steamer for the work, and for assistance was obliged to rely upon such Indians and squaw men as could be found near the wreck. With such assistance, and under such conditions, the work of rescue was prosecuted, with the result that the Corona was, on March 3, 1898, so far pumped out as to float, but she then listed so far over onto the steamer that was secured to tow her to the beach when she should float that the master of that steamer cut his lines and left the Corona to go where she would. So left, the Corona, by the greatest of good fortune, as it then appeared, swung around and landed longitudinally on the reef, with her stern resting about where her midships section had before rested, and her bow towards the shore of Lewis Island. On March 7, 1898, the water was again pumped from the Corona so that she floated, and, by the

assistance of two steamers, she was towed to Irving, on the Skeena river, six or seven miles distant, to get her in a more sheltered position, so that her cargo could be shifted and her patchwork made sufficiently secure to justify an effort to tow the Corona to Port Townsend. Towing to Irving was, as testified by Capt. Goodall, an extremely hazardous undertaking, as the holes in the bottom were only stopped with waste stuck through the bottom, and the slipping out of one piece of waste would probably have resulted in the total loss of the Corona. The cost of getting the Corona to Irving was $19,500. At Irving the cargo was shifted, and the waste in the holes in the bottom strengthened by cement backings from the inside, and, a tugboat of sufficient power having been secured from Victoria, the Corona was towed to Port Townsend, where she arrived on March 17, 1898. At Port Townsend the Corona was still leaking so badly that the divers' services were there needed, and it was with difficulty that the steamer's pumps handled the water so as to keep her afloat. After reaching Port Townsend the Corona was placed on the dry dock, at Quartermaster Harbor, where a survey was had and such temporary repairs made as were necessary to enable the steamer, at considerable risk, to be towed to San Francisco, the only place where the needed repairs could be made. The cost of getting the Corona from her stranded position to Port Townsend was $23,500, and the time consumed was from February 2 to March 17, 1898. The Corona was afterwards towed to San Francisco, and the total cost of getting the steamer from her stranded position to San Francisco was $35,624.38. At San Francisco the hull, machinery, etc., of the Corona were thoroughly repaired, the steamer restored to her prior condition as far as possible at the Union Iron Works, at a cost for such repairs, exclusive of furnishings, of $94,403.96, or a total cost, including expenses of raising and towing and temporary repairs, of $130,028.34. There was also expended by the Pacific Coast Company, "for fittings, furniture, and supplies, to replace those lost by the stranding," the further sum of $17,983.63. The value of the Corona after she was so repaired and refurnished was $120,000. On April 6, 1899, many suits having been commenced against the Pacific Coast Steamship Company to recover damages for losses alleged to have been sustained as the result of the stranding, the last-named company and the Pacific Coast Company filed in the district court of the United States for the Northern district of California their several petitions for a limitation of their liability in the premises, and thereafter such proceedings were had, on notice, as provided by the court, to all parties interested, that on May 16, 1899, the said court, by its order, directed an appraisement of the Corona, and her freight pending, and of the several interests of the petitioners therein, to be made, and referred the matter of such appraisements to George E. Morse, Esq., as a commissioner to take testimony, make findings, and report thereon. Pursuant to that order the taking of testimony was commenced on July 10, 1899, and thereafter such proceedings were had that the said commissioner, on April 18, 1900, filed, in open court, his report and his supplemental report, in the premises, thereby finding and reporting that the cost of raising the Corona and towing

her to Port Townsend was the sum of $23,500; that the cost of raising the Corona, temporary repairs at Port Townsend, and towing to San Francisco was the sum of $35,624.38; that the total cost of raising, towing, temporary repairs, and permanent repairs made at San Francisco was the sum of $130,028.34; that there was expended "for fittings, furniture, and supplies, to replace those lost by stranding," the further sum of $17,983.63; that the value of the Corona, her engines, boilers, machinery, tackle, apparel, furniture, etc., after she was completely repaired and refurnished, was the sum of $120,000; that the value of the Corona, at the end of her voyage, to wit, as she lay stranded, was the sum of $9,500; that the value of the freight pending was the sum of $11,637.47, and that the Pacific Coast Company was the sole owner. Thereupon, and on April 21, 1900, the Pacific Coast Company served and filed its exceptions to such report, and the appraisements thereby made, upon the grounds, among others, that the several appraisements of value therein stated were excessive. After a hearing had on such exceptions, the said court, on November 30, 1900, by its order entered in such proceedings, overruled all of such exceptions, and thereafter, on January 14, 1901, entered its final decree in the premises, whereby it was adjudged and decreed that the value of said Corona, as she lay stranded, was the sum of $9,500, and that the value of her freight then pending was the sum of $11,637.47, and that the limit of liability of the Pacific Coast Company, in the premises, is the sum of $21,137.47, and thereby ordered the last-named company to give, within 30 days from the date of said decree, "a stipulation, with sufficient sureties to be approved by this court, for the payment of said sum of $21,137.47, or any part thereof, into court whenever the same shall be required." From that decree, the stipulation ordered not having been given, this appeal has been prosecuted by the Pacific Coast Company, upon an assignment of errors therein.

The assignment of errors presents the questions: (1) What was the value of the steamship at the end of her voyage, that is, as she lay stranded on the reef? and (2) what was the value of her freight then pending? The law is well settled that in such cases as the present one the owner, in order to secure the limitation of liability provided for by the statute, must pay the value of the ship at the time her voyage was ended and the amount of her then pending freight. The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134. "If," said the court in that case, "by reason of the loss or sinking of the ship the voyage is never completed, but is broken up and ended by causes over which the owners have no control, the value of the ship (if it has any value), at the time of such breaking up and ending of the voyage, must be taken as the owner's liability. In most cases of this character no freight will be earned, but if any shall have been earned it will be added to the value of the ship in estimating the amount of the owner's liability. These consequences are so obvious that no attempt at argument can make them plainer." 118 U. S. 492, 6 Sup. Ct. 1156, 30 L. Ed. 143. The court then proceeded to say:

"If this view is correct, it follows, as a matter of course, that any salvage operations, undertaken for the purpose of recovering from the bottom of the

sea any portion of the wreck, after the disastrous ending of the voyage as above supposed, can have no effect on the question of the liability of the owners. Their liability is fixed when the voyage is ended. The subsequent history of the wreck can only furnish evidence of its value at that point of time. And it makes no difference, in this regard, whether the salvage is effected by the owners or by any other persons. Having fixed the point of time at which the value is to be taken, the statute does the rest. It declares that the liability of the owner shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. If the vessel arrives in port in a damaged condition, and earns some freight, the value at that time is the measure of liability; if she goes to the bottom and earns no freight, the value at that time is the criterion. And the benefit of the statute may be obtained either by abandoning the vessel to the creditors or persons injured, or by having her appraisement made and paying the money into court, or giving a stipulation in lieu of it, and keeping the vessel. This double remedy given by our statute is a great convenience to all parties. It does not make two measures or standards of liability, for the measure is the same whichever course is adopted, but it enables the owner to lay out money in recovering and repairing the ship without increasing the burden to which he is subjected."

Turning now to the findings of the commissioner, approved and adopted by the court below, we find that the value of the ship at the time her voyage was ended was fixed by taking the lowest estimate of her value at Port Townsend, to which place she was towed from the place of her wreck, made by any of the witnesses, which estimate amounted to $33,000, and deducting therefrom the actual cost of getting the ship to Port Townsend, which was found to be $23,500, thus leaving $9,500 as the value of the ship as she lay on the reef at the end of her voyage. It is manifest that this eliminated from the problem any and all risk or hazard attending the undertaking. The evidence in the case leaves no room for doubt that the risk and hazard were great. The position of the ship on the reef was itself the strongest sort of evidence of that fact. And there was risk that, in the event the vessel could be successfully floated and repaired, the cost might exceed her value when all of that was done. And the findings here expressly show that such cost actually did exceed the value of the ship when the repairs were completed by more than $10,000. It is true that this subsequent history of the wreck is not conclusive evidence of the fact that she was of no value as she lay upon the reef, for the demand for ships at the time of the completion of her repairs and other considerations may have entered into the question of her then value. But that the subsequent history of the wreck does furnish some evidence of its value at that time was expressly decided by the supreme court in the case of The City of Norwich, supra. Added to this is the undeniable fact that the owner actually risked the $23,500 that the findings show that it cost to get the ship from the reef to Port Townsend. This amount is more than double that fixed by the findings as the value of the ship as she lay upon the reef. Such cases admit of no exact rule for fixing values, but, the record in this case considered, we are of opinion that the latter amount should be reduced two-thirds; that is to say, that the value of the ship at the time of the termination of her voyage should be fixed at $3,166.66.

In respect to the pending freight, the law is that freight pending is

freight earned. Carv. Carr. by Sea (2d Ed.) § 547; The City of Norwich, supra; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The Main v. Williams, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381; The Abbie C. Stubbs (D. C.) 28 Fed. 719; In re Meyer (D. C.) 74 Fed. 881. And freight is not earned until the goods are carried to and delivered at the place of destination. Authorities supra. And, further, freight paid in advance may, in the absence of a special agreement to the contrary, be recovered back if the voyage be broken up and the goods be not carried for any cause not imputable to the shipper. In re Liverpool & G. W. Steam Co. (D. C.) 3 Fed. 168; Brown v. Harris, 2 Gray, 359, cited with approval by the supreme court in The Main v. Williams, 152 U. S. 122, 14 Sup. Ct. 486, 38 L. Ed. 381. It results that the item of $3,867.47 for prepaid freight, wharfage, and advance charges must be deducted from the amount the petitioner should be required to pay in order to secure the benefit of the statute limiting its liability, even if all of the items entering into that charge can be properly regarded as freight.

Included, also, within freight pending, as found and decreed by the court below, is the item of $7,770 prepaid passage money. It is insisted on the part of the appellant that passage money and freight are governed by the same rules, and that the passage money was no more earned by the Corona than was the freight. There is in this case, however, this important distinction between the two items: In the contract between the owner and the passengers there was this express stipulation, to wit, "In the event of the loss or detention of the steamer during the voyage, the vessel, her owners or charterers, shall not * * * refund the amount of passage." This was not, as argued by counsel for the appellant, a collateral contract, such, for instance, as a contract for insurance upon the vessel or freight which, it was held in the case of The City of Norwich, supra, and in other cases, need not be surrendered by the owner in a limited liability proceeding, but the stipulation here entered into and constituted a part of the contract of carriage itself. As therefore the passage money in question was prepaid under an express agreement that the owner of the ship should not refund it, notwithstanding a failure to deliver the passengers at the place of destination, we think it clear that it must be regarded as earned. It is urged, however, on the part of the appellant, that in any event there should be deducted from the amount of the prepaid passage money the $2,500 expended by the owner in forwarding the passengers to their destination, as, also, the sum of $475 claimed to have been refunded by the owner to some of the passengers. It is said that the decision of the supreme court in the case of The Scotland, supra, requires this to be done. In respect to the $475 it appears from the evidence that the owner of the ship furnished to certain of its passengers tickets from Seattle to Skagway, aggregating that sum, taking from such passengers a receipt for the ticket declaring:

"This ticket is furnished me, not on account of any obligation of the company to me, but as a donation to assist me in returning to Alaska. I hereby accept same as above, and release said company from all liability for loss I sustained on steamer Corona."

The appeal to a court of justice of one who has made gifts, by which it is sought to make good the donations out of third parties, must always fall upon deaf ears. The judgment of the supreme court in the case of The Scotland did affirm that of the lower court in that case, wherein there was deducted from the prepaid passage money certain moneys returned to the passengers and certain money expended by the petitioner in taking care of them pending their reshipment. But in the case of The Scotland the contract of carriage contained no agreement, as does the contract in the present case, expressly stipulating that the passage money should not be refunded in the event of the loss or detention of the steamer during the voyage. The passage money in The Scotland case was therefore just as much subject to recovery by the passengers for failure to carry them to the place of destination as was the money prepaid for the carriage of property, since each are governed by the same rules, and in neither was the amount prepaid earned. In the present case the amount prepaid for passage was, by the express stipulation of the parties, made absolute and unconditional, and should, in our opinion, be regarded as earned.

For the reasons stated the findings and judgment of the court below must be so modified as to reduce the value of the ship at the time of the termination of her voyage to $3,166.66, and the value of her then pending freight to $7,770, making the full limit of the petitioner's liability $10,936.66, and, as so modified, the judgment is affirmed.

UNITED STATES v. TISDALE, U. S. Marshal.

(Circuit Court of Appeals, Fifth Circuit. April 29, 1902.)

No. 1,098.

1. UNITED STATES MARSHALS—FEES—ACTIONS—FINDINGS OF FACTS.
In an action by a United States marshal against the United States to recover fees disallowed by the auditing department, a finding of facts by the trial judge, merely reciting the service, and that the marshal was entitled to recover therefor, but not sufficiently specific to enable the appellate court to determine the government's liability, is not a sufficient compliance with Act Cong. March 3, 1887, requiring the court in such cases to file a written opinion setting forth the specific findings of facts and its conclusions of law.

2. SAME—TRAVEL FEES—SINGLE TRIP.
Where a marshal makes a trip to arrest an offender, and also to subpœna witnesses, and serves both warrant and subpœnas, it constitutes one trip, for which he may charge either mileage to the furthest point traveled or his actual expenses, but he may not charge both, nor can he charge mileage for part of the trip and actual expenses for the other part.

3. SAME—TRAVEL IN ADJOINING DISTRICT.
A marshal traveling into a district adjoining his own to make an arrest may recover for mileage actually traveled in his own district, or for the distance traveled in the adjoining district, if he travel there with a warrant, and is deputized by the marshal of such adjoining district, who disclaims his fees in the case.

4. SAME—ENDEAVORING TO MAKE ARREST.
Where a marshal endeavors to make an arrest, or actually makes a trip with a warrant to arrest an offender, but fails, because the de-

fendant has fled, the marshal may recover his actual expenses, not exceeding $2 per day for each day actually spent.

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

This suit was instituted under the act of congress entitled "An act to provide for the bringing of suits against the government of the United States, approved March 3, 1887," by William H. Tisdale, United States marshal for the Middle district of Alabama, to recover from the United States certain fees and expenses alleged to have been earned by the marshal and his deputies, which said fees and expenses had been disallowed by the proper auditing department of the United States. The petition is admitted to be in proper form, and is accompanied by a bill of particulars, more or less definite, showing the amounts claimed, and for what services. The answer of the United States denies each and every statement, charge, averment, and allegation in said petition contained, except certain formal averments not necessary to mention. On these pleadings, the court in due course entered the following findings of fact and law, to wit:

"(1) William H. Tisdale was the marshal of the United States for the Middle district of Alabama from the 12th day of June, in the year 1893, until the 24th day of September, in the year 1897, and during all of the time during which the services hereinafter mentioned were performed. Harry Adams, W. F. Adams, G. W. Black, G. L. Bender, Young Blake, ——— Cartwright, W. B. Clark, J. H. Draper, J. L. Domingus, J. A. Dudley, M. C. Gannt, H. R. Gay, Hiram Gibson, G. W. Haden, B. H. Hill, J. W. Harmon, F. N. Holly, O. M. Hill, J. M. Johnson, John W. Powell, A. J. Phillips, G. W. Phillips, W. L. Pool, W. C. Stribling, W. C. Starke, C. C. Shields, G. W. Stevens, C. E. Taylor, and J. A. Treadwell were deputy marshals, duly appointed, qualified, and acting under the said William H. Tisdale, marshal as aforesaid, and while acting as such deputy marshals performed the services and incurred the expenses hereinafter shown at the instance and request of the United States, for the said William H. Tisdale, marshal as aforesaid, as follows, to wit: In twenty-one different cases, the defendant was released on temporary bond pending an investigation. At the termination of said investigation in each of said cases, the defendant was required to give another bond for his appearance to answer the charge. The court finds that in each of said twenty-one cases a fee for taking the last bond mentioned, at fifty (50c.) cents for each bond, is allowable,—total, $10.50. In fifty-one different cases, the deputy traveled with a warrant for defendant and subpœnas for witnesses to the place of arrest. After arresting the prisoner, he served the subpœnas beyond the place of arrest. He charged mileage on the warrant from point where warrant was received to place of arrest, and from the place of arrest he charged actual expenses in lieu of mileage in summoning the witnesses. The deputy actually expended money in serving subpœnas for the United States, for which no mileage has been allowed, and the amounts expended were, respectively, as follows: $1, $2.50, $2, $10.42, $3.28, $2.40, $13.45, $10.25, $2. $3.75, $3, $3.25, $3, $3.75, $3.75, $10.25, $4.50, $14.46. $4.25, $8.75, $1, $2. 60c., $13.45, $10.25, 75c., $2.25, $3, $8, $3.75, $2, $1.52, $1.80, $2.82, $2.39. $1.40, 60c., $2.20, $1.60, $1.50, 30c., $1.66, $8.17, $1.98, $3.10, $1.50, $2.15,—making a total of $195.10. In thirty-six different cases, warrants were issued in the Middle district of Alabama for defendants, who were arrested on said warrants by one of the above-mentioned deputies in another district, and brought before a commissioner in said Middle district, without a warrant of removal, the prisoners being willing to come without said warrant of removal. The marshal of said other district in each case deputized the deputy of Marshal Tisdale to make the arrest, and disclaimed all fees in each case. The mileage earned in each of said cases was, respectively, as follows: $7.50, $33.75. $10.86, $16.56, $15.78, $15.90, $16.56, $16.20, $15.78, $15.66, $3.06, $17.45, $9.84, $10.92, $9, $40.35, $37.78, $37.62, $53.52, $66.12, $54.54, $14.10, $5.71, 78c., $20.47, $7.64, $26.96, $40.02, $36.35, $11.33, $7.80, $11.10, $4, $22.20, $31.98, $12.06,—making a total of $757.25. In twenty-

two different cases, a deputy was engaged a number of days in endeavoring to make an arrest, and was in each case allowed for one day less than the court finds the deputy was actually engaged. The court finds that there were twenty-two days in which the deputies were engaged not allowed for by the treasury department, and the court allows the same at $2 per day, making a total of $44.00. In twenty-four different cases, the treasury department disallowed mileage in going to arrest and in returning with the prisoner, upon the ground that the route traveled was not the nearest practicable route. The court finds in each of said cases that the route traveled was the usual and nearest practicable route, and allows the mileage disallowed by the treasury department in said cases, respectively, as follows: 96c., $6.76, $6.24, $6.76, $6.76, $3, $1, $2.43, $3.96, $2.92, $2, $2.08, $2.34, $3.73, $4.48, $5.98, $5.20, $3.87, $3.01, $5.82, $3.48, $5.10, $9.50, $2.13,—making a total of $96.11. In twenty-seven different cases, the mileage was disallowed by the treasury department because of the belief that the prisoner, when arrested, was not carried before the nearest commissioner. The court finds in each case that the prisoner was carried to the nearest commissioner, and that the mileage in said cases, respectively, was: $12, $15, $21.80, $18.80, $18, $18.80, $6.60, $14.60, $17, $14.60, $14.80, $9.80, $14.80, $12.20, $8, $9.60, $10.20, $10.20, $10.40, $6, $14, $14.80, $13.40, $9.20, $9.20, $13.40, $13.60,—making a total of $350.60. The court finds that it ordered the marshal, in order to preserve order, to employ an additional bailiff, making four in all, and that this bailiff was employed and served 15 days, $2 per day allowed,—$30.00. In four different cases, the deputy actually made a trip with a warrant to arrest the defendant, but did not arrest because the defendant had flown. The defendant was afterwards arrested, and mileage for the number of miles traveled when the arrest was made was paid, but mileage when the deputy failed to arrest was disallowed. The court finds that mileage was earned on the trips made when the arrest was not made, viz., $5.52, $8.88, $9.90, $1.08, making a total of $25.38. The court finds that a bench warrant, together with certified copy of indictment, was issued from the Southern district of Georgia, and sent to the marshal of the United States for the Middle district of Alabama to arrest a defendant at Lafayette, in said Middle district of Alabama. The deputy arrested the defendant at Lafayette, and carried him before a commissioner, at Opelika, Alabama, and thence, on order of removal issued by this court, to Georgia. The treasury department refused to allow mileage. The court finds that the mileage is allowable, viz., $21.76. The court finds that for lodging and feeding prisoner there was actually expended on different occasions, respectively, 75c., 75c., $1, $1, 25c., 25c., 25c., 25c., 50c., 25c., $3, 50c., $2.25, making a total of $11.00. The court finds that Deputy Powell was forced to place his prisoner in a calaboose of a town over night, and that the fees actually paid to the town authorities amounted to $4. The amount allowed by the treasury department was $1. The court rules that the actual expense should be reimbursed, and allows the balance, viz., $3.00. The court finds that Deputy Black went from Montgomery with revenue officers for the purpose of raiding a distillery. The defendant was found actually running the distillery, and arrested by the deputy, and carried to Montgomery, where a warrant was issued. Mileage for the deputy and prisoner from the place of arrest to Montgomery is allowed, viz., $14.40. The court finds that deputies attended on hearings before commissioners five separate days, for which nothing has been paid, and allowance at $2 per day is made, $10.00,—making a grand total of one thousand five hundred and fifty-eight dollars and sixty cents ($1,558.60). The court further finds that not one of the items hereinabove mentioned and allowed has ever been allowed or paid in any manner, and that all of said items herein allowed and found to be due have been presented by said William H. Tisdale, as marshal as aforesaid, in his account, were regularly approved and allowed by the court and by the district attorney of the United States, but were disallowed by the accounting officers of the treasury of the United States. The court further finds that each and all of said services herein mentioned and allowed for were actually performed, and that each and all of the expenses herein mentioned and allowed were actually incurred, and the mileage actually earned, and that no part of the

same has ever been paid, and therefore the court files the following as its findings of law:

"(2) The court decrees and holds that under the provisions of the statutes of the United States regulating the fees to be paid and the expenses to be allowed to marshals of the United States in existence and in force at the time said services were rendered and said expenses incurred, the services and expenses hereinbefore mentioned and allowed for are, each and all, proper charges against the United States. It is therefore ordered, adjudged, and decreed by the court that the following judgment and this finding of facts and law be entered upon the minutes of this court as the decree of the court in this cause, viz.: It is ordered, adjudged, and decreed that William H. Tisdale, the petitioner, have and recover of and from the defendants, the United States of America, the full sum of fifteen hundred and fifty-eight dollars and sixty cents ($1,558.60), together with the costs in this behalf expended.

"Rendered in term time, this 23rd day of May, A. D. 1901.

"John Bruce,
"Judge of the District Court of the United States for the Middle District of Alabama."

On the same day a bill of exceptions was allowed and filed, containing exceptions to the finding of facts as incomplete and obscure, and not a substantial compliance with the law, and also specifically excepting to every fact found on the same ground and to all the findings of law. The United States sued out this writ of error, assigning as errors substantially the same matters set forth in the bill of exceptions.

W. S. Reese and J. Sternfeld, for the United States.

Thos. H. Watt, Alexander Troy and F. G. Caffey, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The statute on which this suit is brought provides that "it shall be the duty of the court to cause a written opinion to be filed in the cause setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment therein." The first and second assignments of error are as follows:

"(1) The court erred in making the finding of facts of May 23, 1901, because it is incomplete, obscure, is not a substantial compliance with the law, and because it does not comply with the act of March 3, 1887.

"(2) The court erred in making up each and every finding of fact set out in the finding of facts made herein on May 23, 1901, because each item thereof is incomplete, obscure, is not a substantial compliance with the law, and because it does not comply with the act of March 3, 1887."

The finding of facts in this case is not sufficiently full and specific, in regard to many of the items allowed, to enable this court to determine, even by reference to the bill of particulars attached to the petition, whether any liability to the United States results therefrom; and the finding of facts as a whole is incomplete and obscure, and not, in our opinion, a substantial compliance with the law. Therefore the first and second assignments of error are well taken, and this renders it necessary to reverse the judgment of the circuit court and remand the cause for a new trial.

On a new trial many of the questions argued in this hearing may not arise, but, at the same time, we deem it proper to partially dis-

cuss some of the items allowed on the former trial; thus indicating certain facts necessary to be specifically found in order to determine the government's liability. The court found that in 51 cases the deputy traveled with a warrant and subpœnas for witnesses, and an allowance of $195.10 is made, in addition to mileage, for expenses; but there is no specific finding as to the distance traveled, the mileage charged, nor the actual expense incurred,—these matters being covered by finding that "the deputy actually expended money in serving subpœnas for the United States for which no mileage has been allowed." Where the marshal or his deputy travels with a warrant for the arrest of an accused person, and also with subpœnas for witnesses, and on the same trip serves both warrant and subpœnas, it constitutes one trip, for which the marshal may charge, at his option, either mileage to the furthest point traveled or his actual expenses, but he may not charge both; nor may he divide the trip and charge mileage for part and his actual expenses for the other part.

The court allowed $757.25 for mileage in making arrests in adjoining districts on warrants issued in the Middle district of Alabama, without finding the travel in the adjoining district was on a warrant issued therein. The finding is not specific as to how much of the travel was within the Middle district of Alabama or how much was in the adjoining district. Where the marshal or his deputy, armed with a warrant for the arrest of an accused person, travels out of his district into an adjoining district, and there makes the arrest, he may recover his mileage for the distance actually traveled within his own district, and, further, for such distance as he may have traveled in the adjoining district, provided he there travels with a warrant and is deputized by the marshal of the adjoining district, who disclaims his fees in such case.

Two items are allowed for "endeavoring,"—one on the basis of mileage, and one as per diem, without finding actual expenses and number of days engaged in regard to either. Where the marshal or his deputy is engaged in endeavoring to make an arrest, or actually makes a trip with a warrant to arrest an offender, but does not arrest, because the defendant has fled, he may be allowed, for so "endeavoring," his actual expenses, not to exceed $2 per day each day actually engaged.

The judgment of the circuit court is reversed, and the case is remanded.

GRIFFIN v. AMERICAN GOLD MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1902.)

No. 712.

1. VENDOR AND PURCHASER—ACTION FOR PURCHASE MONEY—DEFENSES.

Plaintiff contracted to sell to defendant's assignor a mining claim, which he had located and to which he had made application for a patent, described in accordance with the survey thereof made by the government surveyor. He deposited a deed in escrow, and agreed to prosecute his application and obtain a final receipt before the purchase money became payable. A portion of the claim as so surveyed overlapped a placer claim owned by the purchaser, and to which it after-

ward received a patent. Thereafter it filed a protest against the issuance of a patent for such portion of plaintiff's entry, on the ground that there was no known lode or vein thereon at the time it was patented under the placer location. This issue was tried and decided by the land department in favor of the protestant, and plaintiff's entry was held for cancellation as to such portion of his claim, which included about one-half its surface area. *Held*, that such determination was conclusive, and, since his contract was entire, and he could not give title to the land sold and described in his deed, he could not maintain an action for the purchase money.

2. MINING CLAIM—CONTEST—ESTOPPEL.
The fact that defendant had contracted to purchase a mining claim from plaintiff, conditioned upon the obtaining of a patent therefor, did not deprive him of the right to contest the allowance of such patent as to a portion of the claim which overlapped a prior claim owned by himself.

In Error to the District Court of the United States for the District of Alaska.

R. F. Lewis, John G. Heid, and Alfred Sutro, for plaintiff in error.
Lorenzo S. B. Sawyer, for defendant in error.

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

ROSS, Circuit Judge. This action was commenced November 20, 1893, in the district court for the district of Alaska, by Martin W. Murray against the Nowell Gold Mining Company, to recover $25,000, with interest, under and by virtue of a written contract entered into August 21, 1891, by and between Murray and a corporation styled "Silver Bow Basin Mining Company." By that contract Murray agreed and covenanted, for the considerations therein stated, to sell to the Silver Bow Company a certain mining lode claim, situated in the Harris mining district of Alaska, called the "Morris G," which the contract declared to be fully described "in the deed of the party of the first part [Murray] to the party of the second part [the Silver Bow Company] of even date herewith, conveying said premises, and also the field notes of the United States deputy surveyor as set forth in the application of the party of the first part for a United States patent to said location known as the 'Morris G,' which application bears date the 13th day of August, 1891." The contract contained a further covenant on the part of Murray "to prosecute said application for a patent in the land office to a final destination [determination], and upon the issuance of a receiver's receipt for said ground on said application for a patent, and upon the payment of the sum of twenty-five thousand dollars as hereinafter set forth, the party of the first part [Murray] hereby covenants and agrees that the deed heretofore mentioned and set forth, which by agreement of the parties is placed in escrow in the hands of A. K. Delaney, shall be forwarded, together with such receiver's receipt, to the commissioner of the general land office at Washington, with any necessary instructions of the party of the first part, to the end that the patent for said Morris G lode may be issued to the party of the second part [the Silver Bow Company]." The agreement on

the part of the Silver Bow Company to pay for the claim thereby agreed to be purchased was as follows:

"Five thousand dollars on the 1st day of June, 1892, and twenty thousand dollars on the 1st day of August, 1892, provided, that on the 1st day of June, 1892, the said party of the first part shall have successfully prosecuted in the land office his application for a patent for said premises, and shall have come into possession under and by virtue of such proceedings in the land office of a receiver's receipt, equivalent to a patent for said claim; but in case the party of the first part shall not have received said receiver's receipt for the 1st of June, 1892, then the whole sum of twenty-five thousand dollars shall be payable on the 1st day of August, 1892, provided, as before, that the party of the first part shall have successfully prosecuted his application for a patent for said premises and obtained said receiver's receipt. And it is further agreed that in case the proceedings upon said application for a patent shall not have been perfected, and the said receiver's receipt issued, by the 1st day of August, 1892, the party of the second part hereby agrees, at any time within one year from said date, to pay the said party of the first part the sum of twenty-five thousand dollars, the full consideration price of the said premises, whenever within that time the said party of the first part shall deliver to the party of the second part such receiver's receipt, together with the deed above mentioned and the said necessary instructions to the general land office, whereby the patent to the said premises may be issued by the general land office to the party of the second part."

And the contract concluded with this clause:

"This agreement is drawn in triplicate, and collateral thereto a deed of the party of the first part, conveying the said premises to the party of the second part, describing said premises by field notes of the United States surveyor, as set forth in said application for patent, and containing the usual covenants of warranty, and which said deed, together with one triplicate of this agreement, is placed in the hands of A. K. Delaney, in escrow, to be disposed of in accordance with the terms of this agreement, or returned to the said party of the first part in case such agreement is not finally perfected and carried out, and one triplicate of this agreement is delivered to each of the parties hereto, respectively."

The complaint alleged, among other things, that on the 14th day of December, 1891, the Silver Bow Company, in consideration of the sum of $5, and of the assumption in writing by the defendant Nowell Gold Mining Company of all the contracts, debts, and obligations of the Silver Bow Company, the latter sold and conveyed to the Nowell Company all of its property, rights, and assets within the district of Alaska, in consideration of which the Nowell Company did, in and by a written agreement, annexed to and made a part of the complaint, assume, among other obligations, the contract of the Silver Bow Company with the plaintiff. Pending the action Frank W. Griffin was substituted as plaintiff, as successor in interest of Murray, and the American Gold Mining Company was likewise substituted as defendant, as successor in interest of the Nowell Gold Mining Company, and the case continued as between these parties, standing in the shoes, respectively, of the original parties to the action. Prior to the substitution of Griffin as plaintiff, an amended complaint was filed by Murray, in which it was alleged, among other things, that:

"Although said defendant has refused and still refuses to pay said sum of twenty-five thousand dollars, or any part thereof, nevertheless during the mining season of 1894 said defendant went upon said Morris G lode claim and took possession of the same, and worked and mined said Morris G lode

claim, and removed therefrom large quantities of earth and gravel containing gold and other precious metals, and still retains undisputed possession of said claim."

The averments last quoted were put in issue by the answer of the American Gold Mining Company to the amended complaint, as well as the allegations in respect to the assumption by the Nowell Gold Mining Company of the obligations imposed on the Silver Bow Company by reason of its agreement to purchase and pay for the Morris G lode claim. The only other defense interposed by the defendant American Gold Mining Company was that on the 30th day of June, 1894, Murray conveyed the Morris G lode claim to the present plaintiff, Griffin, who has ever since remained the owner thereof, and that—

"If it was ever bound, or could be held liable, on the contract between the plaintiff and the Silver Bow Basin Mining Company, yet it says that plaintiff ought not to have and maintain this suit against it, for that it is not true, as alleged by plaintiff, that he complied with all the terms and conditions of said contract, and defendant especially denies said allegation or performance by plaintiff; that in truth and in fact, while under the terms of said contract plaintiff was to obtain a receiver's receipt, and give such instructions and perform such acts as were necessary to enable the Silver Bow Basin Mining Company to obtain a patent, to about thirteen (13) acres of ground embraced within the exterior limits of the said Morris G lode as described in said contract, yet the receiver's receipt finally given and entry allowed only embraced about six (6) acres of said ground; that the said ground embraced in the exterior boundaries of said Morris G lode claim as described in said contract conflicted with prior valid mineral locations, to wit, with discovery claim, embraced in U. S. surveys Nos. 77, 78, 79, and 80, to the extent of about seven acres, which said prior locations were adjudged by the land department to have the prior and better right to said land so in conflict. The precise extent and nature of said conflict is shown in the plat hereto attached and made a part hereof."

The case was tried with a jury, and a verdict returned for the defendant by direction of the court. The assignments of error present the questions hereinafter considered, which are the only ones we deem it necessary to mention.

On the trial the plaintiff offered in evidence the written agreement of the Nowell Gold Mining Company, by which for valuable considerations it undertook to assume the obligations of the Silver Bow Basin Mining Company in respect to the purchase of the Morris G lode claim, which agreement was excluded by the court below on objections thereto interposed by the defendant. In that there was manifest error, not only because the alleged making of that agreement was one of the important issues in the case, but also for the reason that it was contemporaneous with, explanatory of, and, indeed, by express reference, was made a part of, the deed from Murray to the Silver Bow Company, which the court did admit in evidence. Whether or not the error so committed demands a reversal of the judgment depends upon the view taken of other questions in the case.

It appeared from the evidence that on the 4th day of October, 1880, the Discovery placer claim was located, by whom does not appear, and that an application for a patent therefor was filed in the local land office October 19, 1888. Meanwhile, to wit, June 4, 1881,

the Morris G lode claim was located by Murray, and so located as to include a portion of the surface of the prior placer location. Notice of the application for a patent for the placer claim was duly posted and published, and, no adverse claim being made, the claimant was on March 14, 1891, permitted to make mineral entry No. 32, embracing lots Nos. 77, 78, 79, and 80 of the government surveys, upon which entry a patent was issued September 18, 1891. Notwithstanding the fact that the Discovery placer claim included about 6.33 acres of what Murray located as the Morris G lode claim and contracted to sell to the Silver Bow Company, he interposed no adverse claim or protest against the application of the placer claimant for a patent therefor. August 13, 1891, Murray filed his application for a patent for the Morris G lode claim, notice of which was published from August 20 to November 12, 1891, during which time the claimant of the Discovery placer claim filed no adverse claim or protest, notwithstanding the fact that the Morris G lode claim, as surveyed, covered 6.33 acres of the ground embraced by lots 77, 78, 79, and 80 of the placer claimant. The result was that Murray was allowed to make mineral entry No. 39 for the Morris G lode claim. But on the 16th day of December, 1891, the Silver Bow Basin Mining Company, patentee of the Discovery placer claim, filed its protest against issuing a patent upon the mineral entry 39 for the Morris G lode claim; the ground alleged being that:

"There is no lode or vein or rock in place bearing the precious metals within the exterior boundaries of said part of said Morris G lode claim which overlaps said lots numbered 77, 78, 79, and 80, as above described, known to protestant, and no vein, lode, or rock in place bearing the precious metals was known at the time the said company, by its grantors, made application for patent for said placer claim."

That question of fact, the evidence showed, was determined in favor of the protestant by the land department, and accordingly Murray's mineral entry 39 was held for cancellation in so far as it conflicted with the prior Discovery placer location, and the subsequent entry and patent of the Morris G lode claim allowed only for about 7 of the 13 acres Murray bound himself to convey. That the determination of such questions of fact by the land department of the government is conclusive upon the courts has been so often decided as to render a citation of the cases unnecessary. There was, therefore, no error on the part of the court below in refusing to submit to the jury, at the request of the plaintiff, the questions:

"(1) Was the Morris G lode or vein in existence at the date of the application for patent for the Discovery placer claims, situated in Silver Bow basin, Alaska? (2) If so, was the Morris G lode or vein known to exist within the boundaries of said Discovery placer mining claims at the date of the application for a United States patent for said Discovery placer claims?"

The contention on the part of the plaintiff in error that he and his predecessors in interest were prevented by the wrongful act of the predecessor in interest of the present defendant from performance of the plaintiff's agreement cannot be sustained. The Silver Bow Company, in contesting the application of the Morris G lode claimant, was put protecting its own prior placer location, and

was under no obligation of any character to stand by and permit the claimant of the subsequent lode location to include therein a part of its ground. The case, in truth, was one in which the plaintiff below contracted to sell what he did not own and could not convey, and, as the contract was entire, there was nothing left for the trial court to do, as the case was presented, but to instruct the jury to return a verdict for the defendant. The error first pointed out became immaterial, and the evidence in support of the alleged taking by the defendant of earth and gravel from the lode claim was too indefinite and uncertain, even if material to the action brought.

The judgment is affirmed.

MEXICAN CENT. RY. CO., Limited, v. HENDERSON.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,118.

MASTER AND SERVANT—INJURY TO ENGINEER—INSPECTION OF ENGINE—DUTY OF ENGINEER—INSTRUCTIONS—WITHDRAWING CASE FROM JURY.

An engineer, prior to reaching repair shops, discovered a defect, which he indicated at the shop by entry in a work book kept for the purpose. Before starting out, according to the practice in the shops, he inspected the work book, to ascertain if the defects had been repaired, and discovered that the marks had been erased, which indicated that the needed repairs had been made. He assumed charge of his engine without an examination to determine if the repairs had been in fact made, though he stated it was an engineer's duty to see if his engine was in proper condition. The defect had not been repaired, and the engineer was injured thereby. *Held*, that it was error to refuse, as practically withdrawing the case from the jury, an instruction to find for defendant if the jury believed it was the engineer's duty to inspect his engine before starting out, and he did not make such inspection; that, had he made such inspection, as it was his duty to do, he could have discovered the defect, and avoided it; and that, by failure to make the inspection and discover the defect, he was injured.

Shelby, Circuit Judge, dissenting.

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

This action was brought by S. H. Anderson, the defendant in error (plaintiff below), to recover damages of the Mexican Central Railway Company, Limited, the plaintiff in error (defendant below), for personal injuries alleged to have been received by the plaintiff while in the service of the defendant, and to have been caused by the defendant's negligence in the manner as stated in the petition. The accident which it is alleged resulted in the plaintiff's injuries occurred in the republic of Mexico on August 20, 1899, at which time the plaintiff was an engineer in the employment of the defendant. Briefly stated, his petition claims that one side of the stirrup on the tender was broken, and that on arriving at Cardenas with his engine, in the daytime of August 19, 1899, he did, as was his duty to do, enter a memorandum on the work book, calling attention to the fact that the stirrup was out of repair; that he entered that memorandum on the work book for the purpose of notifying the defendant that the stirrup was out of repair, that it might be repaired before the engine was required again to be used; that at some time during the night of the same day, or early in the morning of the next day, while it was still night, he was called to go out on the same engine; that he went to the work book, and found that his memorandum had been erased, and he knew from that fact that the stirrup

had been repaired; that some time during that day, while out upon the road with his engine, he attempted to use the stirrup, and in making the attempt, by reason of one side being broken, it gave way, and he was injured.

The evidence on the trial which bears on the questions discussed in the opinion is the testimony given by the plaintiff, which the bill of exceptions shows substantially as follows: "Plaintiff, S. H. Henderson, after being duly sworn, testified in his own behalf as follows, to wit: Direct Examination by Buckler: "* * * I was employed by the Mexican Central Railway Company, Limited, in the capacity of locomotive engineer, about the 20th day of August, 1899, at which time my leg was injured. This took place at Canon water tank. We were going towards a place called Cardenas, in Mexico. I got off the tank on the left side of the engine. I then stepped around on the right side of the engine. The two front engines gave a lurch for the first engine to take water, and I went to jump on the tank. I noticed in the morning that the work I had reported on the work book had been marked off. I stepped on this stirrup, and it broke, and I went against the edge of the tank, and it took the flesh clean off the bone. I noticed that this stirrup had been broken before. I made a report of it on the work book. This work book is a book provided by the company for any work to be done on the engines. We write out our report on the work book, and then, when we come back to go to work, we generally always look and see what work is done. This had all been scratched out of the work book, and I supposed that this work had been done on this step, together with the other work I had reported. This work book was kept on the desk in the roundhouse at Cardenas. Cardenas is an inspection station. They have an inspector and master mechanic there, whose duty it is to see that these repairs are made before the engine goes out on the road again. This is the foreman's duty. He is appointed by the master mechanic. It is his duty to do this work. It is to be done by certain men, and it is his duty to see that the work is done. This is the duty of the master mechanic or those appointed by him. When I arrived there with my engine I discovered that one side of this step was broken, and I entered that fact upon the work book. I entered other memoranda at the time, to wit, that other work was to be done. The work book at that time was at the workshop, on the desk, in Cardenas, in the republic of Mexico. * * * Any work that was to be done on the engine was to be reported in this work book. When the work was done, they would erase the memorandum, so that any one examining the work book afterwards would know from the fact of the erasure of the memorandum that the work had been done. This was the custom established by defendant, and the way in which I always did my work. Whenever I got ready to go out, I consulted the work book, and the object of the erasure was to inform me that the step had been fixed. In this instance I saw the memorandum erased, and supposed from that that the work had been done, and, acting upon that supposition, I did not examine the step. Mr. Fulton was the master mechanic at that time. * * * I was employed by the Mexican Central Railway Company as an engineer. This was one of their Boggy engines. When I attempted to use this step of the Boggy engine I knew that the work had been erased off the book, and supposed it had been fixed. I did not know it had not been fixed. I made no examination myself. The engine was brought out to me in the night on the 19th of August at Cardenas. When I went to get on my engine at Canon water tank the train was moving back. I stepped on the stirrup, for the purpose of getting on the engine in the usual way, and when the train first jarred back I caught the handholds, and jumped it, as I usually would. I did this in the usual way of jumping on the train." Cross-examination by Davis: "* * * I could not tell you the exact time I left my engine at the roundhouse before I was injured, but it was on the 19th of August that I made out this report. I could not say as to the time of the day, but it was in the daytime. I went down the road on the night of the 19th, and came up on the morning of the 20th. I do not know when I left the roundhouse with my engine. The reason I did not look at the engine and the step, instead of the book, was that it had been fixed from an examination of the work book. I went to see where I was assigned. I went into the shop, and looked over the board

to see how many engines were going down. I first noted the book to see what work had been done. I looked on the book, and saw that this work had been erased, first by a pencil and then scratched. I don't mean that it was rubbed out by an eraser. The reason why I didn't look at it to see if the repair had been made was because I supposed the repair had been made. I didn't look to see whether it had been done. I could have seen whether or not the repair had been made had I made an examination of it. * * * Q. Isn't it the duty of the engineer to look over his engine before going out on his run? A. The duty of the engineer is to look at his engine, oil her up, and get ready for the trip. It is his duty to look over it, and see that it is in proper condition, and to see that everything is all right. Q. Had you looked over your engine at that time, would you have seen whether or not the engine had been repaired? A. I didn't look over it this morning when I went down the hill. Q. If you had looked for it, could you have seen whether or not the work had been repaired? A. Yes, sir; but I saw that the work that was on the book had been scratched out of the book. I couldn't tell who did scratch it out. I could not tell you who ran the scratch through that, and whether it was done by mistake or accident." Redirect examination by Buckler: "The object of erasing the memoranda was to show that the work was done to the engine. When I went to the memoranda I found that the same had been erased, the object of which was to inform me that the step had been fixed. This is the way the business was carried on there, and the way I always did my work. If anything occurred to any of the machinery on the road, I made a memorandum when I got to Cardenas, and it was my duty to enter it in the work book." Plaintiff, upon being recalled, testified as follows: Direct examination by Buckler: "* * * The repairs on the step that I reported should be done were such as were usually done at the shop in Cardenas. I entered there with my engine on the 19th. The engine was put in the shop. When I got ready to go out, the engine was brought out to me by the hostler, on the night of the 19th, and placed where I could go and get on it." Plaintiff again took the stand, and testified as follows: "When the engine was brought out upon the track by the hostler at Cardenas for me to take her out, it was fired up, watered, and so on, ready for the trip."

The bill of exceptions further shows: "All the evidence being in, and both parties having rested, the defendant then and there, before the jury had retired to consider of their verdict, requested the court to give the following charge: 'Defendant asks the court to charge the jury to find a verdict for the defendant herein,' which charge was refused by the court, and the defendant * * * duly excepted; * * * and the defendant then and there, and before the jury had retired to consider of their verdict, prepared and requested the court to give the following charge: 'The defendant asks the court to charge the jury as follows, to wit: Gentlemen of the jury, you are charged that if you believe from the evidence that it was the duty of the plaintiff to inspect his engine before starting out on the road; that he did not make such inspection; that, had he made such inspection, as it was his duty to do, he could and would have discovered the defect in the step, and have avoided the injury; and that by reason of plaintiff's failure to make such inspection and discover said defect he was injured by said defective step,—you will find for defendant,'—which charge was refused with the following explanation: 'The foregoing charge is refused. In refusing it the court desires to make this explanation: While being satisfied that, as a general proposition, and under proper facts, the charge embodies the law, yet plaintiff's counsel having produced several authorities, among them Railroad Co. v. Nordell (Tex. Civ. App.) 50 S. W. 601, and Railroad Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 506, which appear to hold that under somewhat similar circumstances the question was one for the jury, I concluded to submit it, although inclining to the view that a peremptory instruction should have been given for the defendant. See, also, Railroad Co. v. Babcock, 154 U. S. 199, 14 Sup. Ct. 978, 38 L. Ed. 958. [Signed] T. S. Maxey, Judge.'"

There was a verdict and judgment for the plaintiff, and the defendant brought this writ of error.

T. A. Falvey and Waters Davis, for plaintiff in error.
Millard Patterson and C. N. Buckler, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

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

The plaintiff in error assigns seven grounds on which it asks a reversal of the judgment of the circuit court. We deem it necessary to notice only two,—the third and fourth, as numbered in the assignment. The first of these submits that the court erred in refusing the first requested charge, namely, "The defendant asks the court to charge the jury to find a verdict for the defendant herein." The other is, "The court erred in refusing the second requested charge." It is shown in the statement of the case. The distinguished and able counsel who have submitted a brief on behalf of the plaintiff in error have argued these assignments together, and treated them as practically equivalent to each other; that is to say, in their argument they consider their second request for instructions as, in substance, a request to withdraw the case from the consideration of the jury, and to direct, peremptorily, a verdict for the defendant. The explanation given by the trial judge of his action in refusing the second of the requested charges seems to indicate that he was of opinion that this charge would practically withdraw the case from the jury. We have very carefully examined the cases to which the trial judge refers, namely, Railroad Co. v. Nordell (Tex. Civ. App.) 50 S. W. 601, Railroad Co. v. Amato, 144 U. S. 465, 12 Sup. Ct. 740, 36 L. Ed. 596, Railroad Co. v. Babcock, 154 U. S. 199, 14 Sup. Ct. 978, 38 L. Ed. 958, and agree with him that these cases hold, under similar circumstances to those presented by the instant case, that the case was one for the jury. But we cannot concur in the suggestions of counsel for the plaintiff in error, or in the view which appears, by implication at least, to have been taken by the trial judge as to the character and effect of the second request. It does not seem to us to withdraw from the jury the question that was vital on the trial, but, in our opinion, expressly and correctly submits it to the jury. Let us examine it. Its language is:

"You are charged that if you believe from the evidence that it was the duty of the plaintiff to inspect his engine before starting out on the road; that he did not make such inspection; that, had he made such inspection, as it was his duty to do, he could and would have discovered the defect in the step, and have avoided the injury; and that by reason of plaintiff's failure to make such inspection and discover said defect he was injured by said defective step,—you will find for defendant."

The insistence of counsel for the plaintiff in error is that the testimony of the defendant in error shut the jury up to the one conclusion,—that, under the circumstances in this case, the defendant in error owed the duty to himself and to his employer to make a different inspection from the one which his proof shows him to have made, and that it concludes him, as an admission made as a witness on the stand, that he did not make such an inspection as was his duty, under the circumstances, to make before taking out the en-

gine. If the matter had been submitted to them under this requested charge, the jury might have so considered the plaintiff's testimony. But it can hardly be claimed that, on a consideration of the whole testimony given by the defendant in error, no reasonable mind could reach a different conclusion, or that the evidence is such that the trial judge must have thought it to be his duty to award a new trial in case the jury had reached a different conclusion, and returned a verdict for the plaintiff. The only defect in the engine involved in this inquiry was the broken step. The plaintiff's testimony shows that he, while operating this engine, prior to reaching Cardenas on August 19th, had discovered this defect; that Cardenas was the place where such defects were to be repaired; that in the due and regular discharge of his duty he gave notice thereof, in the manner required by the rules and practice of the company, to the agent of the company, whose duty it was to have the defect corrected and the step properly repaired; that, in the regular discharge of his duty, and according to the ordinary and well-known practice in the shops of the plaintiff in error at Cardenas, he did, before starting out on the trip on which he was injured, look at the work book, to see if the defects which his inspection had discovered, and which he had reported, had been repaired, and that he thereby discovered, from the marks designed to show the fact to him, that the work had been done and the needed repairs made. In answer to a categorical question the plaintiff did, indeed, say: "The duty of the engineer is to look at his engine, oil her up, and get ready for the trip. It is his duty to look over it, and see that it is in proper condition, and to see that everything is all right." But this does not at all indicate that the plaintiff, as engineer, was under any rule of duty not applicable in railroad operation to other locomotive engineers, or other than was binding on Nordell and on Munro, the engineers, respectively, in the Nordell and in the Babcock Cases, supra. The jury had the witness before them. His testimony was expressed to them, not alone in the arbitrary characters which constitute the words he used, but also by his manner in their use. Whatever may be the fact, it does not unquestionably appear on the surface of the language in which his testimony is reported to us that he thought, or that he intended to admit, or believed that he was admitting, that he had not done, on the morning he started out with his engine, all that his duty as an engineer and the rules and practice of the company required him to do to satisfy himself that the step in question was in condition for use. We think the requested charge submits to the jury what the authority of the cases cited by the learned trial judge requires should have been submitted to them; that its tenor and effect was not to withdraw the case from them, and to direct a verdict for the defendant; and that it correctly states the law to be that, if they find from the proof that the plaintiff did not make such inspection of his engine as it was his duty to do, they must find a verdict for the defendant.

It follows that for the error in refusing the second requested charge the judgment of the circuit court must be reversed. As we have already said, we do not deem it necessary to consider now the

other matters suggested in the assignment of errors, as the questions presented may not arise on another trial.

The judgment of the circuit court is reversed, and the cause is remanded to that court with direction to award the defendant a new trial.

SHELBY, Circuit Judge (dissenting). I am constrained to dissent from the opinion in this case. The trial court refused to give the following charge:

"You are charged that if you believe from the evidence that it was the duty of the plaintiff to inspect his engine before starting out on the road; that he did not make such inspection; that, had he made such inspection, as it was his duty to do, he could and would have discovered the defect in the step, and have avoided the injury; and that by reason of plaintiff's failure to make such inspection and discover said defect he was injured by said defective step,—you will find for the defendant."

In view of the evidence given by the plaintiff as a witness, the court below construed the charge to be a peremptory instruction to find for the defendant, and therefore refused to give it. In the opinion of this court the charge does not take the case from the jury. This difference of opinion as to its proper construction tends to show that it was not a proper instruction to give to the jury. Construed in the light of the evidence to which it relates, it is obscure and ambiguous. A trial court should not be reversed for the refusal to give a charge that is susceptible of two constructions, one of which is a correct and the other an erroneous statement of the law. I think the charge is contradictory and repugnant. In the first paragraph it leaves the question of the plaintiff's duty to the jury,—"if you believe from the evidence that it was the duty of the plaintiff to inspect his engine," etc.; in the second paragraph it is stated that it was the plaintiff's duty to inspect the engine,—"that had he made such inspection as it was his duty to do," etc. The trial court should not be reversed for a refusal to give a charge which is either contradictory or ambiguous. The refusal of such instructions is always proper. In U. S. v. Jones, 8 Pet. 399, 414, 8 L. Ed. 988, in declining to reverse the trial court for refusing to give requested instructions, Mr. Justice Story said:

"The language used is equivocal, and admits of various interpretations; and it is certainly the duty of a party asking an instruction to express it with such certainty as may not mislead either the court or the jury."

The cases from the state courts of last resort are to the same effect. Proff. Jury, 338, 345, 346; 11 Enc. Pl. & Prac. 140, 141; Strohn v. Railroad Co., 99 Am. Dec. 127.

The charge in question here is construed by counsel and the trial court to be a peremptory instruction to find for the defendant. It may be conceded that this court is right in placing a different construction on it. But a charge that is so contradictory and ambiguous that it may fairly be susceptible of such different and conflicting constructions ought not to be given. When an instruction is so written that learned counsel and courts may fairly differ as to its meaning, it would probably be misleading, and confusing to the

jury. It is incumbent on a party seeking an instruction to put it in such clear, precise, and intelligible form as to leave no reasonable ground for misapprehension by the jury as to its correct meaning. Unless the charge is so written, I do not think it is error for the trial court to refuse to give it.

I therefore respectfully dissent from the opinion of the court.

ST. LOUIS & S. F. R. CO. v. FURRY.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1902.)

No. 1,577.

RAILROADS — NEGLIGENCE — FELLOW SERVANTS — FIREMEN — TELEGRAPH OPERATOR — CONSTRUCTION OF STATUTE.

Under Sand. & H. Dig. Ark. § 6248, declaring that the employés of a railway corporation shall not be considered fellow servants unless working together to a common purpose of the same grade and in the same department or service, a fireman, who was injured by a collision of trains caused by the failure of a telegraph operator to deliver orders received by him from the train dispatcher, was not a fellow servant with such telegraph operator.[1]

Sanborn, Circuit Judge, dissenting.

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

This was an action by Warren G. Furry, a railroad fireman, who sued his employer, the St. Louis & San Francisco Railroad Company, the plaintiff in error, for injuries sustained in a collision between two freight trains on October 17, 1897. The circumstances which occasioned the collision were these: Train known as second 38, on which the plaintiff below was a fireman, arrived at Springdale, Ark., at 8:35 a. m. on October 17, 1897, and took the side track at that station to await the passage of a south-bound passenger train. The freight train (second 38) was running north, and was under orders to meet a south-bound freight train at Rogers, a station some 10 miles north of Springdale. When it took the siding at Springdale, it ran to the north end thereof, so as to be in a position to run out on the main track as soon as the passenger train went by, at which point the engine of the freight train was about one half a mile north of the station. While the freight train was standing on the siding, the telegraph operator at the station received an order directing the two freight trains to meet at Springdale instead of at Rogers, but the operator failed to notify either the conductor or the engineer of second 38 of this order, or to put up the customary red signal that orders were in his hands, as it was his duty to do. In consequence of such neglect on the part of the operator, second 38 proceeded north on the main track, as soon as the passenger train had passed by, and, about two miles north of Springdale, came into collision with the south-bound freight, which had received the order to meet at Springdale instead of Rogers. As a result of the collision Furry was horribly burned and otherwise injured, so as to cripple him for life. In consequence of these facts the jury awarded him damages in the sum of $16,000. To reverse that judgment, the railroad company brought a writ of error.

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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.

L. F. Parker and B. R. Davidson, for plaintiff in error.

Samuel R. Chew and Joseph M. Hill (Henry Fitzhugh, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

On February 28, 1893, the legislature of the state of Arkansas passed an act, the material parts of which, as now contained in Sand. & H. Dig. St. Ark., are as follows:

"Sec. 6248. All persons engaged in the service of any railway corporations, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employé, in the performance of any duty of such employé, are vice-principals of such corporation, and are not fellow-servants with such employé.

"Sec. 6249. All persons who are engaged in the common service of such railway corporations, and who, while so engaged, are working together to a common purpose, of same grade, neither of such persons being entrusted by such corporations with any superintendence or control over their fellow employés, are fellow servants with each other; provided, nothing herein contained shall be so construed as to make employés of such corporation in the service of such corporation fellow servants with other employés of such corporation engaged in any other department or service of such corporation. Employés who do not come within the provisions of this section shall not be considered fellow servants."

This statute is the same, in substance, as one which was enacted by the legislature of the state of Texas on March 10, 1891, and it has since been adopted, in substance, by the legislature of the state of Utah (Rev. St. Utah, 1898, §§ 1342, 1343), and possibly in some other states. On the trial of the case it was admitted by both parties that the plaintiff and the engineer of his train were free from any fault or negligence contributing to the collision; that the defendant company's train dispatcher for the division of the road on which the collision occurred was likewise without blame; and that the disaster was occasioned solely by the neglect of the defendant's telegraph operator at Springdale to communicate to the conductor and engineer of freight train second 38 the fact that an order had been received directing that train to meet the south-bound freight train at Springdale instead of meeting it at Rogers. The question to be decided, therefore, lies within a narrow compass, the question being whether, under the aforesaid statute, Furry, the fireman, and the telegraph operator at Springdale, were fellow servants, as the defendant company contends, or whether, by reason of the statute, they cannot be regarded as occupying that relation; this latter being the view which was entertained by the trial court. In the decision of this question, which turns entirely upon the construction of the local statute and a consideration of the purpose which underlies it, it will not aid materially to consider what would be the relation of the two employés in the absence of the statute. We accordingly pretermit any discussion of that question, being willing to concede, as counsel for the defendant in error concede, that but for the statute they would

be fellow servants, within the federal adjudications on that subject and according to the doctrine which formerly prevailed in the state of Arkansas. The question now is, what rule did the legislature which enacted this statute intend to prescribe? What was the purpose of the enactment? When that purpose is discovered our duty is to give the statute the effect which it was intended to have, instead of nullifying it by construction.

It is well known to the profession that the fellow-servant doctrine, so termed, which was first enunciated in Priestly v. Fowler, 3 Mees. & W. 1, and in this country in Farwell v. Railway Corp., 4 Metc. (Mass.) 49, 38 Am. Dec. 339, and in Murray v. Railway Co., 1 McMul. 385, 36 Am. Dec. 268, although generally followed in the United States, has been applied, in some states, with important qualifications not recognized in other states. For example, it was early held in some states, and the rule is still adhered to, that persons in the employ of the same master are not fellow servants, although the labor that they respectively perform tends to the accomplishment of the same general object or enterprise which the employer has in view, provided they work in different departments of the service and do a different kind or class of work, which does not bring them into habitual association with each other. This qualification had become ingrafted, in several states, on the fellow-servant doctrine, as it was first enunciated, prior to the adoption of either the Arkansas or Texas statute. Railroad Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Stafford v. Railroad Co., 114 Ill. 244, 2 N. E. 185; Railroad Co. v. Snyder, 117 Ill. 376, 7 N. E. 604; Cooper v. Mullins, 30 Ga. 150, 76 Am. Dec. 638; Railroad Co. v. Collins, 2 Duv. 114, 87 Am. Dec. 486; Madden's Adm'r v. Railway Co., 28 W. Va. 610, 621, 57 Am. Rep. 695; Railroad Co. v. De Armond, 86 Tenn. 73, 78, 5 S. W. 600, 6 Am. St. Rep. 816. The fellow-servant doctrine had also undergone a further modification in several states, prior to 1893, by the adoption in those states of what is known as the superior servant rule, in virtue of which two employés of the same master are not regarded as fellow servants if one is placed in a position of subordination under the other and is subject to his orders and control in such a way that the one exercising the power of control may reasonably be regarded as exercising the functions of the master. This doctrine once met with the approval of the supreme court of the United States (Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787), and is upheld in many judicial opinions, as will appear by a reference to the cases cited under section 43 of McKinney, Fel. Serv. In view of the great contrariety of opinion prior to 1893, and the strong disposition manifested at that time, in some quarters, to modify the fellow-servant doctrine as at first enunciated, and in view of the fact that it had been modified in some states in the respects above mentioned, we have no doubt that it was the intention of the legislature of the state of Arkansas, when it enacted the statute above quoted, to adopt the departmental limitation of the fellow-servant doctrine, as well as the superior servant rule, to the full extent that these doctrines were then recognized in other states. No other reasonable view of the purpose of the lawmaker, in our judgment, can well be taken. Arkan-

sas was one of the states whose courts, up to the time that this statute was enacted, had declined to adopt the departmental limitation or the superior servant doctrine. Railway Co. v. Triplett, 54 Ark. 289, 298, 15 S. W. 831, 16 S. W. 266; Fones v. Phillips, 39 Ark. 17, 43 Am. Rep. 264; Railway Co. v. Shackelford, 42 Ark. 417, 420. The legislature evidently proposed to effect some change in the law as it had been previously declared and enforced by the courts of that state, as otherwise there was no need of further legislation; and our conclusion, based upon the aforesaid considerations, as well as upon the language of the statute itself, is that it intended to adopt the superior servant rule, also to approve and adopt the departmental limitation of the fellow-servant doctrine.

It follows from what has been said that, in determining whether Furry and the telegraph operator at Springdale were fellow servants within the meaning and intent of the Arkansas statute, we must perforce give special weight to the adjudications in those states that have adopted both of the modifications of the fellow-servant doctrine above mentioned. Our attention has only been directed to one case (Railroad Co. v. Becker, 67 Ark. 1, 53 S. W. 406, 409, 46 L. R. A. 814, 77 Am. St. Rep. 78), where the local statute has been referred to at length and construed by the supreme court of the state of Arkansas, whose construction of the statute, as a matter of course, is binding upon this court. In that case the question arose whether a fireman on an engine and an inspector and repairer of engines at a divisional point were fellow servants within the terms of the statute. It appeared that when the engine on which the fireman worked was at the roundhouse, where the inspector was stationed, he and the inspector were under the orders of the roundhouse foreman in the mechanical department, and that both had certain duties to perform with respect to the engine; but while the fireman was on the road, he was in the operating department, although even then he was subject to be discharged by the roundhouse foreman. With reference to their relation the court said:

"When Becker [the fireman] was at Thayer [the divisional point], his and Johnson's duties were different, and were not such as to associate and bring them together in their work, except casually, when they might work on Becker's engine at the same time, Becker cleaning and Johnson inspecting or repairing. They could not be said to have been working together, except when and so long as they were so casually engaged. Their working together was not sufficient to constitute them associates in labor any longer than it continued, no more than the casual meeting of individuals for short periods of time could constitute them associates. As they were not working together in the same department at the time the accident occurred, it follows that they were not fellow servants at the time when Becker was injured."

This extract from the opinion is important, in that it clearly indicates that, as the statute is understood and interpreted by the court which delivered the opinion, persons employed by a railroad corporation in the state of Arkansas are not fellow servants unless they habitually work together, that is, in juxtaposition, to a common purpose, nor unless they are employed in the same department. The language of the statute undoubtedly warrants this construction, because in one paragraph it declares that those are fellow servants "who are engaged

in the common service * * * and * * * are working together to a common purpose," while the proviso to the same section declares that "nothing herein contained * * * shall be so construed as to make employés * * * fellow servants with other employés * * * engaged in any other department or service." Better language than this could hardly have been chosen to formulate the doctrine which prevails in Illinois, sometimes termed the "doctrine of consociation"; namely, that two persons in the service of the same master are not to be esteemed fellow servants unless their duties are such as to bring them into habitual association with each other, so that they will exercise a mutual influence upon each other, tending to inspire caution and insure each other's safety. Steel Co. v. Shields, 134 Ill. 209, 213, 25 N. E. 569; Railway Co. v. Moranda, 93 Ill. 302, 315, 34 Am. Rep. 168.

Turning to decisions in the state of Texas, which was the first to adopt the Arkansas statute, and whose decisions upon the act must, for that reason, be regarded as very persuasive, we find it to be held (Railway Co. v. Whitlock [Tex. Civ. App.] 41 S. W. 407) that an engineer on a road engine who ran his engine into a yard that was under the control of a yardmaster, for the purpose of taking out a train which had been made up, and who was injured by reason of the negligence of those employés in the yard whose duty it was to make up trains, might recover against his company, because the persons working in the yard, under the direction of the yardmaster, were not fellow servants of the engineer, although, when the latter came into the yard with his engine, he passed, for the time being, under the jurisdiction of the yardmaster. This decision was based on the ground that the engineer and the persons employed in the yard were not "working together to a common purpose" in the statutory sense. In another case (Railway Co. v. Harding [Tex. Civ. App.] 33 S. W. 373), it was held that an engineer on a road locomotive, who was under the control of the yardmaster, and who ran into a railroad yard and was there injured, was not a fellow servant of employés in the yard, who were under the supervision of the yardmaster, because they did not work in the same department, and for the further reason that the engineer of the road engine and the yard men were not working together to a common purpose. It has also been held in that state that a member of a day crew, who were employed to unload ties which the members of a night crew removed, and who was injured by the falling of certain ties which the night crew had negligently left standing, was not a fellow servant of the members of the night crew, because they were not working together at the same time and place and to a common purpose. Railroad Co. v. Echols (Tex. Civ. App.) 41 S. W. 488, 491. See also Railroad Co. v. Talley (Tex. Civ. App.) 39 S. W. 206; Masterson v. Railway Co. (Tex. Civ. App.) 42 S. W. 1001; Railway Co. v. Warner (Tex. Sup.) 35 S. W. 364.

Our attention has been directed to the fact that the words "working together," as employed in the Arkansas statute, are supplemented in the Texas statute (vide Laws Tex. 1893, p. 120), by the further words "at the same time and place"; but we are not able to regard

this change of phraseology as warranting a different interpretation of the two statutes. It is most likely that the words "working together to a common purpose" were regarded as expressing the same rule intended to be expressed by the Texas statute, in a more concise form.

It is a circumstance worthy of notice that before the Arkansas statute was adopted it had been held in those states like Illinois, which accepted the fellow-servant doctrine only in a modified form, that a section man working on a railroad was not in the same department as a fireman or engineer, and hence that the two were not fellow servants (Railroad Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Railroad Co. v. Erickson, 41 Neb. 1, 59 N. W. 347, 29 L. R. A. 137); that a station agent is not in the same department as a conductor (Railroad Co. v. Snyder, 117 Ill. 376, 7 N. E. 604); and that a telegraph operator and an engineer are not in the same department, and hence are not fellow servants (Madden's Adm'r v. Railroad Co., 28 W. Va. 610, 621, 57 Am. Rep. 695; Railroad Co. v. De Armond, 86 Tenn. 73, 78, 5 S. W. 600, 6 Am. St. Rep. 816). In a recent case decided by the supreme court of the state of Tennessee, it is held that a conductor of a freight train, who assists in switching cars at a station, is not a fellow servant of the station agent, because they are employed in different departments of the service. Railroad Co. v. Jackson (Tenn.) 61 S. W. 771. Moreover, it has been decided in Ohio, which has adopted a statute somewhat like the Arkansas statute, defining who are fellow servants, that, when the act speaks of "departments or branches of service," the term "department" should not be limited so as to include only those large divisions of work which may be created by a railroad company for its own convenience, but that the terms should be understood to refer to those more minute subdivisions of the work "which concern the daily duties of the employés"; and in accordance with that view it was held by the supreme court of Ohio that an engineer of one train was in a separate branch or department of the company's service from a brakeman of another train belonging to the same company. Railroad Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11, 14. See also Railroad Co. v. Warner (Tex. Sup.) 35 S. W. 364, 366, wherein it was said by the supreme court of Texas, "The words 'department' or 'service' [as used in the statute of that state] merely mean a subdivision of business, as running a train, clearing away a wreck, repairing a track," etc.

Without pursuing the subject at any greater length, we are forced to conclude that Furry and the defendant's telegraph operator at Springdale, by whose fault the collision was occasioned, were not fellow servants, because, within the meaning of the Arkansas statute, they were not "working together to a common purpose"; the work which they did being of an entirely different character, which only brought them together casually. We are also disposed to think that the two employés were not engaged in the same "department or service" of the corporation, within the true intent of the statute. As this was substantially the view which was entertained by the trial court, the judgment below is affirmed.

SANBORN, Circuit Judge (dissenting). I am unable to assent to the views expressed or the conclusion reached by the majority of the court, because in my opinion the local telegraph operator and the fireman were within the true meaning of the statute of Arkansas "working together to a common purpose,"—the purpose of operating the trains of the company,—and were engaged in the same "department or service," namely, the operating department or service, when the accident occurred. These are the reasons which have forced my mind to this conclusion:

1. The Arkansas statute was enacted in 1893. The terms "department" and "service" in that statute are obviously interchangeable, and have the same meaning. One who is in the same department is in the same service, and vice versa. The ordinary, usual, and accepted meaning of the term "department" in the state of Arkansas, when the statute was passed, as applied to the business of a railroad company, was one of the great natural divisions of that business, such as the operating department, the auditing department, or the legal department. It is probably not too venturesome a statement to say that, if all the people of that state had been separately requested to state the meaning of this term, more than 95 per cent. of those who answered at all, legislators and constituents alike, would have thus defined it. To the same extent the usual and accepted meaning of those employés who were "working together to a common purpose" for the same master was those who were working in the same department or service to accomplish the common end of the business of that department, to operate the railroad, to audit its accounts, or to protect the legal rights of the company.

2. This was the authoritative legal definition and meaning of these terms when this statute was enacted, a definition and a meaning which the decisions of the supreme court of the United States had expressly ascribed to them, while a decision of the supreme court of Arkansas had as clearly repudiated the theories of the courts of Illinois, Georgia, Kentucky, Tennessee, and Texas on this subject, which the majority now invoke. Railroad Co. v. Baugh, 149 U. S. 368, 384, 389, 13 Sup. Ct. 914, 37 L. Ed. 772; Railway Co. v. Triplett, 54 Ark. 289, 295, 296, 15 S. W. 831, 16 S. W. 266; Railway Co. v. Conroy, 175 U. S. 323, 337, 20 Sup. Ct. 85, 44 L. Ed. 181; Railway Co. v. Peterson, 162 U. S. 346, 355, 16 Sup. Ct. 843, 40 L. Ed. 994; Oakes v. Mase, 165 U. S. 363, 364, 17 Sup. Ct. 345, 41 L. Ed. 746; Railway Co. v. Hambly, 154 U. S. 349, 357, 14 Sup. Ct. 983, 38 L. Ed. 1009; Railway Co. v. Frost, 21 C. C. A. 186, 74 Fed. 965, 967; Railway Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952–964; McKaig v. Railway Co. (C. C.) 42 Fed. 288–291; Wright v. Railway Co. (C. C.) 80 Fed. 261. The supreme court of the United States had said:

"All enter into the service of the same master, to further his interests in the one enterprise. Each knows when entering into that service that there is some risk of injury through the negligence of other employés, and that risk, which he knows exists, he assumes in entering into the employment. * * * That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department,—the operating department;

and those employed in running them, whether as engineers or firemen, are engaged in a common employment, and are fellow servants." Railroad Co. v. Baugh, 149 U. S. 384, 389, 13 Sup. Ct. 914, 37 L. Ed. 772.

The supreme court of Arkansas had carefully considered and repudiated the theories of departments and consociation promulgated by the courts of Illinois, Georgia, Kentucky, and Tennessee, because, as that court said, "it leads to confusion and possible absurdities." Railway Co. v. Triplett, 54 Ark. 289, 295, 15 S. W. 831, 16 S. W. 266.

3. When the statute was passed there was no definite meaning to the terms in question other than that ascribed to them by the supreme court and generally accepted. The decisions in Illinois, Georgia, Kentucky, Tennessee, and Texas on this subject are inconsistent, confused, and irreconcilable. No rational definition of those "working together to a common purpose" or of the "same department or service" can be conceived that will reconcile them. Witness the decisions that an engineer of one train is not in the same department as a brakeman of another train employed by the same company (Railroad Co. v. Margrat, 51 Ohio St. 130, 37 N. E. 11); that an engineer who runs his engine into a yard where the other employés in the yard are engaged with him under the direction of the same yardmaster in making up his train was not "working together to a common purpose" with them (Railway Co. v. Whitlock [Tex. Civ. App.] 41 S. W. 407); and that the members of a day crew and the members of a night crew engaged in unloading ties were not working together at the same time and place to a common purpose (Railroad Co. v. Echols [Tex. Civ. App.] 41 S. W. 488, 491). In view of these decisions would not two men engaged under the same master in unloading cord wood by each lifting and removing a stick alternately be in different departments working to different purposes, because they would not both be engaged in unloading the same stick at the same time? It seems to me extremely improbable that the legislature of Arkansas left the authoritative legal definition and the usual and accepted meaning in that state of the two terms it used in this statute, wandered into other states, and adopted the confusing and uncertain conceptions of their meaning disclosed in these decisions in Illinois, Georgia, Kentucky, Tennessee, and Texas,—conceptions so impracticable that the courts of the states of Virginia and West Virginia, which once attempted to follow and enforce them, have reversed their rulings and repudiated them. Jackson v. Railway Co., 43 W. Va. 381, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337; Railroad Co. v. Nuckol's Adm'r, 91 Va. 193, 21 S. E. 342.

4. When this statute was enacted, then the ordinary, commonly accepted meaning in Arkansas, and the authoritative legal definition there, of the term "department," as applied to a railroad company, was: "One of the great divisions of its business; such as the operating department, the auditing department, the legal department,"—and the ordinarily accepted and the legal meaning of the term "those employed by the same master, working together to a common purpose," was: "Those working together to accomplish the common end sought to be attained in the department in which they were em-

ployed." In the absence of other definitions in the legislation of a state, the legal presumption is that the legislature used and intended to use the words and terms found in a statute in their usual sense at the time and place that the legislation was enacted. Corning v. Board, 42 C. C. A. 154, 157, 102 Fed. 57, 60. This statute gives no other definition of the words or terms in question,—no evidence of any intention of the legislature to change or modify their accustomed meaning; and the ordinary presumption of law is strengthened by the fact that the authoritative legal definition of the terms was the same as their commonly accepted meaning. These considerations persuade me to believe that the legislature intended to use, and did use, them in this sense in this statute.

5. Indulging for a moment the permissible assumption that this local telegraph operator and this fireman were working in their respective positions on the day this statute became a law, they were, just before it was enacted, "working together to a common purpose," the purpose of operating the railroad, in the same "department or service," the operating department or service, and they were fellow servants. Railroad Co. v. Camp, 13 C. C. A. 233, 65 Fed. 952, 954; Railway Co. v. Clark, 6 C. C. A. 281, 57 Fed. 125; Railway Co. v. Frost, 21 C. C. A. 186, 74 Fed. 965, 967. The statute was passed, but it did not change their relation. It nowhere asserted or intimated that they should not continue to be "working together to a common purpose." On the other hand, it expressly declared that those who were "working together to a common purpose" were fellow servants; and the operator and the fireman were so working. Is not the conclusion irresistible that they continued to be fellow servants? And as they were working in the same way and to the same purpose when the accident occurred, they were then fellow servants, by the express declaration of this statute. Continuing the indulgence of the assumption, these men were in the same department or service when the law passed, and there was nothing in it to divide their department or service, or to place them in different departments or different services. The only suggestion the statute contains on this subject is a proviso that "nothing herein contained shall be so construed as to make employés * * * fellow servants with other employés * * * engaged in any other department or service." This proviso had no application to these men, because they were in the same department or service, and were fellow servants, when it was passed. They were in the same department or service when the accident occurred, and neither the proviso nor the statute itself affected their relations to each other or to their master in this regard. For the reasons which have now been stated, this telegraph operator and this fireman were, in my opinion, fellow servants, within the true intent and meaning of the statute of Arkansas, when the fireman was injured, and the judgment below should be reversed upon that ground.

OLCOTT v. ENNIS-CALVERT COMPRESS CO.

(Circuit Court of Appeals, Fifth Circuit. April 29, 1902.)

No. 1,120.

APPEAL—REVIEW—FINDINGS OF FACT BY TRIAL COURT.

Where, in an action brought in the circuit court, a jury was waived, and the court found a judgment against the plaintiff, and at the request of the parties filed therewith findings of fact, which stated that the facts were the same as those in a certain case, and the case cited contained no specific findings of ultimate facts, but the opinion gave a statement of the issues, a ruling as to the title of property involved, a recital of the contentions of the parties as to the facts claimed as proved, and other matters of fact intermingled with conclusions of law, the circuit court of appeals will not review the decision.

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

On the 26th day of October, 1900, plaintiff in error brought this suit against the Ennis-Calvert Compress Company, a corporation organized under the laws of the state of Texas, in trespass to try title and for the possession of a certain tract of land, being town lot property situated in the city of Waco. The defendant, after demurring, filed its original answer, pleading not guilty and the statutes of limitations of three, five, and ten years. The case was tried before the court (a jury being waived in writing), and the court found a judgment against plaintiff in said cause and adjudged the title to said property to the defendant; and filed contemporaneously therewith, at the request of the parties, findings of fact and conclusions of law, as follows:

"(1) The court finds the facts in this case to be the same as those in the case of Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., decided by the court of civil appeals, and reported in 56 S. W. 367, to which reference may be made as part hereof.

"(2) I find that on the 11th day of June, 1877, the Houston & Texas Central Railway Company conveyed the property sued for to the Waco Produce Company, with the following language in said deed: 'Now, the separate and independent conditions of this quitclaim deed are as follows, to wit: In case the said Waco Produce Company shall, within six months from date hereof,—and time is declared to be the essence of the contract.—construct a cotton compress and the necessary sheds upon the said tract of land herein conveyed, then, and in that event, this instrument is to take effect, and not otherwise: provided, nevertheless, that in case said Waco Produce Company, or any person holding or claiming under it, shall at any time thereafter make use of the tract herein conveyed, or of any part thereof, for any purpose or purposes than that hereinbefore specified, or shall fail or neglect to keep and maintain its compress in good working condition, or shall in any way forfeit its charter, or shall become insolvent, that on the happening of any one of said several contingencies, or upon the failure as aforesaid of any one of them, that the title and possession of said tract herein conveyed shall in consequence and by force thereof, and without the necessity of a reconveyance, ipso facto revert to and invest in said Houston & Texas Central Railroad Company, its successors and assigns, and thereupon this instrument shall become null and void as against said railway company, but shall be in force as an estoppel of all claims to title or possession as against said grantee herein.'

"(3) I find through various links the title of said property finally passed to the defendant in this suit through those under whom it holds under the H. & T. C. Railway Co., and that the same was occupied continuously, practically, by a compress thereupon, until on or about the year 1892, when the Ennis-Calvert Compress Company abandoned said property, and from said date the grantor, or its successors or assigns, became entitled to enter or sue for said property on account of the breach of the conditions subsequent.

"(4) I find that on the 4th day of May, 1888, all of the properties of the Houston & Texas Central Railway Company, including this property, was ordered to be sold under decree of the United States circuit court sitting at Galveston, in the case of Nelson S. Easton et al. v. The Houston & Texas Central Railway Company et al., and that Charles Dillingham was appointed master commissioner to sell the property, and on the 8th day of September, 1888, he sold all of its properties to Frederic P. Olcott, who became the purchaser at said sale, which sale was duly confirmed; and on the 18th day of January, 1889, the said Charles Dillingham, master commissioner, under orders of the court, executed and delivered his deed to Frederic P. Olcott, in which deed the Houston & Texas Central Railway Company joins, and the property conveyed in said deed is described as follows, to wit: 'The property so conveyed includes the railroads of said company from Houston to Denison and from Hempstead to Austin, with the roadbeds, rights of way, buildings, and improvements of every kind and description connected with the said railroads, or any part thereof, and all their appurtenances, and also all rolling stock and equipments, materials, supplies, and personal property of every kind procured for or in any manner connected with said railroads, or used thereon, or any part thereof; also all the chartered rights, liberties, privileges, immunities and franchises of said railway company of every kind and description whatsoever appertaining to said railroads; also all the lands which have been received from the state of Texas for the construction of its said railways, not including the lands covered by the said first mortgage on the said Waco and Northwestern Division; and also all other lands, town lots, or blocks, and real estate or interests in real estate, of every kind and description to which said railway company has title, claim, or equitable ownership; and also all the tolls, earnings, freights, receipts, and moneys of every kind and description of said railway company from said railways, and all personal property, bonds, stocks, choses in action, assets, accounts, and claims of every kind of said railway company, appertaining to said railways, saving and reserving such portions of said lands as have been heretofore and prior to May 4, 1888, sold to other purchasers, but including all securities for unpaid consideration of said sales, the amount of such sales included in this deed being estimated to amount, exclusive of the lands pertaining to the railways themselves, to about four millions three hundred and forty thousand three hundred and thirty-nine acres, and including all property of whatever character, description,' etc. That on the 1st day of April, 1890, the said Frederic P. Olcott sold part of said property so purchased by him to the Houston & Texas Central Railroad Company, the present corporation, using the following language, to wit: 'The railways formerly of the Houston & Texas Central Railway Company from Houston to Denison and from Hempstead to Austin, with the roadbeds, rights of way, buildings, and improvements of every kind and description connected with the said railways, or any part thereof, and all their appurtenances; and also all rolling stock, and equipments, material, supplies, and personal property of every kind procured for or in any manner connected with said railways, or used thereon, or any part thereof; also all the chartered rights, liberties, privileges, immunities, and franchises of said railroad company of every kind and description whatsoever appertaining to said railways; and also all the tolls, earnings, freights, receipts, and moneys of every kind and description of said railway company from said railways, and all personal property, bonds, stocks, choses in action, assets, accounts, and claims of every kind of said railway company appertaining to said railways,—it being the intent and purpose of these presents that there shall be hereby granted and conveyed to the party of the second part (the railroad company) all the railways, properties, rights, privileges, and franchises purchased by and conveyed to the party of the first part (Frederic P. Olcott) under such decree of foreclosure, excepting only town lots which formerly belonged to the Houston & Texas Central Railway Company, and lands derived by said last-mentioned railway company from the state of Texas, and not forming part of the right of way, or being appurtenant to or used in connection with the operation of the railways hereinbefore described, and except the right, title, and interest at law or in equity formerly belonging to said Houston & Texas

Central Railway Company to the lands and town lots standing on the 18th day of January, 1889, or originally standing of record in the names of A. Groesbeck and others, trustees, in the counties of Bastrop, Brazos, Brown, Collin, Caldwell, Dallas, Ellis, Fayette, Freestone, Falls, Grayson, Gonzales, Johnson, Kaufman, Limestone, Lee, McLennan, Navarro, Robertson, Washington, and Wharton, all in the state of Texas.'

"Conclusions of Law.

"(1) I find, as a matter of law, that the Houston & Texas Central Railway Company, or its assignee, Frederic P. Olcott, had the right to re-enter and take possession of said property upon breach of the conditions subsequent, which said premises were abandoned for compress purposes in the year 1892.

"(2) I further find that by reason of the language in said deed from Frederic P. Olcott to the Houston & Texas Central Railroad Company, conveying all 'choses in action,' said Frederic P. Olcott conveyed to said Houston & Texas Central Railroad Company all his right, title, and interest in and to said land, and his right of re-entry on account of said conditions subsequent being broken.

"(3) I further find, by reason of the judgment in the suit of Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., supra, and affirmed by the court of civil appeals, that the defendant in this case is entitled to recover the land sued for herein.

"I therefore find for the defendant herein, and direct the judgment to be entered accordingly.

"Edward R. Meek, Judge."

On this writ the assignment of errors attacks all the conclusions of law as found by the trial judge.

T. D. Cobbs, for plaintiff in error.

L. W. Campbell, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The first finding of fact is that the facts in this case are the same as in the case of Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., decided by the court of civil appeals, and reported in 56 S. W. 367, to which reference may be made. If we turn to the said reported case, we find an opinion of the court of civil appeals reviewing a trial and judgment in the district court of McLennan county, Tex., in a suit for trespass to try title, involving the property herein in controversy. There was no specific finding of facts in the district court of McLennan county, nor is there any such finding in the report of the case as determined in the court of civil appeals; but we find in the opinion of the court a statement of the issues between the parties, the compress company's title, and a ruling as to the divestiture of title depending upon a re-entry by the original grantor, a recital of the contentions of the parties as to the facts claimed and the facts proved, and many other matters of fact more or less intermingled with conclusions of law; but nowhere in the opinion do we find, without much analysis and examination, any clear-cut finding of fact,—ultimate fact. This is not a finding of fact that we are called upon, or ought to be called upon, to consider, even if the report of the case to which we are sent to find facts had been recited in the record. On the waiver of a jury in a civil case in the circuit court the finding of facts by the court is strictly analogous to a special verdict, and should state the ultimate facts of the case. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; Coddington v.

Richardson, 10 Wall. 516, 19 L. Ed. 981; Town of Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862. To the same effect is Raimond v. Parish of Terrebonne, 132 U. S. 192, 10 Sup. Ct. 57, 33 L. Ed. 309, which seems to be a case in many respects similar to this, and the court said:

"In the present case the pleadings present issues of fact. There is no bill of exceptions. The so-called statement of facts is mainly a recapitulation of evidence introduced by the parties at the trial. The case was not submitted to the decision of the court upon that statement only, but the court made a further finding as to what took place at the trial. That finding merely states that the parties admitted that, so far as the facts were stated in a certain reported opinion of the supreme court of Louisiana, they were a correct statement of the facts of this case; but that each party claimed that there existed additional facts, as to which there is no finding. On referring to that opinion, such facts as are there stated appear to be scattered through it, intermingled with statements of conflicting evidence and with the court's conclusions of fact upon that evidence, as well as with its conclusions of law. State v. Police Jury of Terrebonne Parish, 30 La. Ann. 287. In short, there is nothing in the present case which can be called, in any legal or proper sense, either a statement of facts by the parties or a finding of facts by the court; and no question of law is presented in such a form as to authorize this court to consider it. Judgment affirmed."

In the present case there is a bill of exceptions that purports to recite a part of the evidence, to wit, the transfer, through foreclosure proceedings, from the Houston & Texas Central Railway Company to F. P. Olcott, and from F. P. Olcott to the Houston & Texas Central Railroad Company, all as recited above in the fourth finding of fact; and the bill concludes with the finding of facts and conclusions of law as above given, so that this bill of exceptions does not in any respect aid the first finding of fact. The third and last conclusion of law contains the trial judge's reason for judgment, and is based upon the judgment in the case of Houston & T. C. R. Co. v. Ennis-Calvert Compress Co., affirmed in the court of civil appeals, which is in the record only as referred to in the first finding of fact. This shows that the finding of facts, with the first eliminated, is partial and incomplete, and the case is in no condition for our review on the sole question involved; i. e., whether the facts proved and found warranted the judgment rendered.

The judgment of the circuit court is affirmed.

McNAMARA et al. v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK et al.

(Circuit Court of Appeals, Fifth Circuit. April 22, 1902.)

No. 1,113.

1. ACTIONS—INTERPLEADER—BILL—DEMURRER—EQUITY.
   Where a bill is good as in the nature of a bill of interpleader, and shows equities in favor of complainant entitling it to relief, a demurrer thereto should be overruled, even though it be not good as a pure bill of interpleader.
2. SAME—DEFAULT—INJUNCTION—COSTS.
   Where one defendant in a bill of interpleader establishes his title, and the other makes default, the court will decree payment of the fund, less

plaintiff's costs, to the former, and a perpetual injunction against the latter, and also that he pay the costs of the former, together with the costs paid plaintiff.

3. SAME—CROSS BILL—NECESSITY.
A cross bill in an interpleader suit is not necessary to sustain a decree for a successful defendant as against defendants who have defaulted.

4. SAME—DEFAULT IN DEFENDANTS—RIGHT TO QUESTION DECREE.
Defendants in an interpleader suit who have defaulted are not in a position to complain of a decree in favor of a successful defendant, as, if they are not to receive the fund or any part thereof, it is no concern of theirs how it is awarded.

5. SAME—INTEREST OF COMPLAINANT.
Where a life insurance company which issued a policy conditioned to pay a stated sum, less any indebtedness on account of the policy, on proof of death of the insured, filed a bill of interpleader against two defendants, each of whom claimed under the policy, setting forth in the bill all the facts, and that there was at the death of the insured a certain sum due for premium which was deducted from the face of the policy, and the balance, with interest, deposited in court, the existence of such indebtedness for premium, and deduction thereof in making such deposit, did not make complainant an interested party, so as to deprive the bill of its intended character as a pure bill of interpleader.

6. SAME—SOLICITOR'S FEE.
Where a life insurance company files a bill of interpleader against two adverse claimants under the policy, and deposits the amount due thereunder in court, it should be allowed a solicitor's fee, to be paid in the first instance by the prevailing defendant.

7. SAME—DECREE—HARMLESS RECITAL.
Where one defendant in a bill of interpleader demurred to the bill and declined to answer after his demurrer was overruled, a recital in the decree that "no demurrer, plea, disclaimer, or answer has been filed," except by the answering defendant, should be construed to mean that no valid demurrer, etc., had been filed, and, if such unnecessary recital was erroneous at all, it was harmless error.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This cause is one wherein the Provident Savings Life Assurance Society of New York brings a bill against Ernest M. Loeb and the widow and heirs of Robert McNamara. The bill alleges the issue of a policy whereby the company promised to pay to Moses Schwartz, his executors, administrators, or assigns, the sum of $10,000, less any indebtedness on account of the policy, within 90 days after receipt of satisfactory proof, at its office in New York, of the death of Robert McNamara; the death of McNamara; the furnishing of proofs of death by Ernest M. Loeb, assignee of Moses Schwartz, and also by Robert McNamara, claiming to be a son and a representative of the heirs of Robert McNamara, and each claiming to be entitled to the proceeds of the policy. The bill contains allegations that the complainant claims no interest in the subject-matter of the contention, viz., the amount due under the policy; has incurred no independent liability to either party; is perfectly indifferent between them, in the position merely of a stakeholder; that the amount due upon the policy is the sum of $10,000, less certain premiums amounting to $337.50, leaving due $9,662.50. The bill further alleges a deposit of this money in court, with interest at 6 per cent. per annum from March 28, 1901, up to date of deposit, and the prayer of the bill that the defendants interplead and settle and adjust between themselves their rights or claims, or that they be restrained by injunction from prosecuting any action or actions at law or in equity against the complainant for the recovery of any amount due or to become due under the policy. To this bill an answer was filed by the defendant Loeb, claiming in his own right as assignee of Moses Schwartz the

entire amount of the deposit. The McNamaras appeared, and jointly filed a general demurrer. This demurrer was overruled, and 10 days allowed in which to further plead or answer. At the expiration of the 10 days a motion was made by the McNamaras asking for an additional delay of 5 days within which to answer, which motion was granted. This order was granted June 24th, and expired June 29th, but no further pleadings were filed. On July 18th, on motion of complainant, an order was entered taking the bill pro confesso against the McNamara defendants. The cause thereupon proceeded to final hearing as between the complainant and the defendant Loeb and the McNamara heirs.

The decree was in accordance with the prayer of the bill. It fixed the fees of the solicitor for the complainant, payable out of the fund in court, at $150, perpetuated the preliminary injunction, and ordered that the residue of the fund in court, after payment of the costs of the complainant, should be paid over to the defendant Loeb, and that the other defendants should be condemned in solido to pay to the defendant Loeb his costs of court and also the costs allowed to the complainant out of the fund in court. From this decree the McNamara defendants have prosecuted an appeal.

The assignments of error may be condensed under four heads, as follows: First. Did the court err in sustaining the demurrer filed by the McNamara defendants? Second. Did the court err in rendering a final decree in favor of defendant Loeb in the absence of any cross bill filed by him or of any process in his behalf as against defendants? Third. Did the court err in allowing solicitor's fees to the complainant? Fourth. Did the court err in decreeing against the McNamara defendants as in default?

Robert J. Maloney and J. R. Beckwith, for appellants.

Solomon Wolff and E. B. Kruttschnitt, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). 1. Judge Parlange, in the circuit court, overruled the demurrer on the ground that the bill, if not good as a pure bill of interpleader, was certainly good as a bill in the nature of a bill of interpleader, and showing equities in favor of complainant entitling it to relief; citing Groves v. Sentell, 153 U. S. 485, 14 Sup. Ct. 898, 38 L. Ed. 785, and other authorities. This ruling is fully supported by the adjudged cases cited, and, so far as the demurrer to the bill is concerned, Judge Parlange's opinion, found in the record, needs neither to be amplified nor supported.

2. It is not contended in this court that the decree pro confesso against the McNamara defendants was erroneously taken, nor that said defendants were not actually in default. "If one defendant in a bill of interpleader establishes his title and the other makes default, the court will decree payment to the former, and a perpetual injunction against the latter." 2 Daniell, Ch. Pl. & Prac. (5th Ed.) 1494, note. To the same effect see 2 Beach, Mod. Eq. Prac. § 638. That this is correct practice is declared in many adjudged cases. See Richards v. Salter, 6 Johns. Ch. 445; Plaster Co. v. White, 44 Mich. 25, 5 N. W. 1086; Badeau v. Rogers, 2 Paige, 209.

Richards v. Salter was decided by Chancellor Kent on a review of the practice and authorities, and we quote, as conclusive on the subject, from his opinion, as follows:

"The defendant S. has answered, and set forward his right and title to the money, and the other defendants have not supported their claim. Upon this bill the question of right may be decided in favor of one defendant against

another. If one defendant establishes a title, and the other makes default, the court will decree payment to the former, and a perpetual injunction against the latter. This was so done in Bolton v. Williams, 4 Brown, Ch. 297; and also in Hodges v. Smith, decided by Lord Kenyon as master of the rolls (1 Cox, Ch. 357, and cited by Sir William Grant in Angell v. Hadden, 16 Ves. 203). The defendant S. is entitled to the fund, subject to the plaintiff's costs; and the other defendants, who have set up a groundless claim, and by that means compelled the plaintiff to resort to his bill of interpleader, and put the defendant S. to the necessity of defending this suit, ought to pay to the defendant S. his costs of this suit, as well as the costs of the plaintiff, which the defendant S. is, in the first instance, obliged to pay out of the fund in court."

The defendant Loeb asserted title in his answer, and established the same by full proof, and under the correct practice was entitled to a final decree, and no cross bill against the defendants in default was necessary. And this seems clear when we notice the fact that said defendants neither asserted title to the fund in court nor denied Loeb's title to said fund. We note, further, that said defendants so being in default, and necessarily so adjudged by the court, are in no position to complain of a decree in Loeb's favor. If they are not to receive the fund nor any part thereof, it is no concern of theirs as to how it is awarded.

3. In ruling on the demurrer, it was not necessary to determine whether the bill was a pure bill of interpleader or a bill showing equities in the nature of an interpleader; but, to review the allowance to the complainant of a solicitor's fee, it is necessary to go further, and consider the exact character of the bill. The bill was intended to be and it contains all the allegations necessary for a pure bill of interpleader, and if it is not such a bill it is because the complainant, notwithstanding his allegations to the contrary, has an interest in the subject-matter of the suit. No other objection has been presented. The contention is that as the complainant has not paid in the full $10,000 named in the policy, but has retained the sum of $337.50, the amount due for unpaid premiums as stipulated in the policy, the amount so retained is in contest, and to that extent the complainant is interested in the subject-matter of the suit. The policy expressly stipulates that on the death of Robert McNamara the insurance company shall pay to the legal representatives or assigns of said McNamara the sum of $10,000, less any indebtedness on account of the policy. On the death of McNamara $337.50 in unpaid premiums became due on account of the policy, and thereby the insurance company was bound by its contract to pay to the legal representatives and assigns of McNamara the sum of $10,000, less said premiums, to wit, $9,662.50; and this sum, still following the terms of the policy, became due on the 18th day of February, 1901, 90 days after proof of death was received, and it, together with 6 per cent. interest thereon from that day to the filing of the bill, was paid into court. As the contract was specific, and the amount due was certain (and that is always certain which can be made certain), there was no room for any contest as to the amount due under the policy, and any interest of the complainant in the subject-matter of the suit arising from the source indicated is too remote to be seriously considered. Just as well might we consider that the complainant

was interested in the subject-matter of the suit because the complainant only paid in 6 per cent. interest from February 18, 1901, instead of from November 19, 1900, the day proofs of death of McNamara were furnished, or even from October 23, 1900, the date of McNamara's death. The interest in the subject-matter of the suit sufficient to deny the complainant the right to bring a strict bill of interpleader must be a substantial, contested right; otherwise, no such bill, however meritorious the case, could ever be entertained. In this case, neither by the bill nor by any legitimate inference to be drawn from the evidence, does it appear that the complainant had any substantive or substantial interest in the subject-matter of the suit. Where no such interest is shown, and the complainant's acts in the premises have been free and above board, and conducive to equity, a solicitor's fee may be allowed. Groves v. Sentell, supra; Lottery Co. v. Clark (C. C.) 16 Fed. 20; Trustees v. Greenough, 105 U. S. 535, 26 L. Ed. 1157; Spring v. Insurance Co., 8 Wheat. 268, 5 L. Ed. 614; Daniel v. Fain, 5 Lea (Tenn.) 258.

4. We understand that part of the first paragraph of the decree appealed from, which declares that "no demurrer, plea, disclaimer, or answer has been filed to said bill of complaint by any of the defendants herein other than said Ernest M. Loeb, to mean that the McNamara defendants filed no valid and sufficient demurrer, plea, disclaimer, or answer to said bill. The demurrer interposed by said defendants had been properly overruled, and for the purpose of the decree to be rendered was of no more force or effect than if it had never been filed. Besides, the recital in question was wholly unnecessary, and, if erroneous at all, it was harmless error.

We find the decree appealed from was in all respects in accordance with equity rules and practice, and the same is affirmed.

GOLDSMITH v. THURINGIA INS. CO. OF ERFURT, GERMANY.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 1,645.

TRIAL—QUESTION FOR JURY—SUBSTANTIAL EVIDENCE—JUDGMENT OF REASONABLE MEN.

Where there is substantial evidence tending to establish each contention over an issue of fact, and reasonable men, in the exercise of a fair and impartial judgment, may well reach a conclusion sustaining either contention, the issue should be submitted to the jury.

(Syllabus by the Court.)

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

J. H. McCulloch (R. S. Hall and J. J. O'Connor, on the brief), for plaintiff in error.

H. C. Brome (A. H. Burnett, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The plaintiff, Joseph Goldsmith, had a policy of insurance of the Thuringia Insurance Company, of Erfurt, Germany, for one year from September 10, 1897, on his stock of goods while located and contained in the brick building at No. 1401 Douglas street, in the city of Omaha, and not elsewhere. On the 24th and 25th days of May, 1898, he moved his stock from the building at 1401 Douglas street into the building at 1407 Harney street, in the city of Omaha, and at about 6 o'clock in the afternoon of the latter day it was damaged by fire. He sued the insurance company on the policy, and it defended on the ground that the goods described in the policy had been removed before the fire from the place in which they were insured, so that when it occurred they were not covered by the contract. At the close of the evidence the court instructed the jury to return a verdict for the defendant, and this ruling is the principal error assigned.

The evidence which conditions the correctness of this ruling disclosed these facts: Brennan, Love & Co. were the agents of the insurance company in Omaha. A. J. Love, a member of that firm, was the active manager of their insurance business, and Miss Dunn was their stenographer. Edward E. Howell was the agent of the plaintiff. He procured the policy for him from Brennan, Love & Co. originally. A few days before May 25, 1898, Love saw the goods of the plaintiff moving toward Harney street, and he told Howell that he would not consent to a transfer of this insurance to the goods in their new location. On the morning of May 25th Howell sent to the office of Brennan, Love & Co. the plaintiff's policy, with a removal slip attached, ready for the signature of Brennan, Love & Co., whereby they, as agents of the defendant, consented to the transfer of the policy and the insurance to the plaintiff's stock of merchandise in its new location, and, through his messenger, requested them to sign it. Mr. Love was not in the office. Miss Dunn received and kept the policy and slip. She replied to the request that she would rather refer the matter to Mr. Love before she let it go out of her hands, but that she would sign the permit if Mr. Love approved it. Miss Dunn and Mr. Love testified that the matter was not called to his attention, and that he did not know or approve of the transfer before the fire. During the day, and before the fire, Miss Dunn, however, signed the slip with the name Brennan, Love & Co., as she was authorized and accustomed to do when such transfers were approved by Love. She left the policy, with the removal slip thus signed, upon her desk. The next morning the office boy handed it to a messenger of Mr. Howell before Mr. Love or Miss Dunn had arrived at the office. Love testified that he first learned about this removal slip on the morning of May 26, 1898, the day after the fire. On that morning he went to the plaintiff's store, had an interview with him, said nothing about the expiration or lapse of his policy, and told him he would send an adjuster to investigate the fire. On the same day he wrote and sent to the plaintiff a letter in which he notified him that his policy would be canceled at noon on that day, "subject to a loss which occurred at 6:18 p. m. yesterday."

Would all reasonable men, in the fair exercise of their impartial

judgment, be compelled to conclude from this evidence that the agent Love did not know and approve of the transfer of the insurance before the fire? A careful review of the testimony fails to convince that this question should be answered in the affirmative, and it is only when it can be so answered that an issue of fact may be properly withdrawn from the jury. Mr. Love and Miss Dunn testify that he did not approve the transfer. But the acts and interpretations of parties to contracts before controversies arise are often as cogent and persuasive evidence upon the question of their existence and meaning as their testimony. Miss Dunn told the messenger she would sign the slip if Mr. Love approved it. She did sign it. Mr. Love knew she had signed it the next morning, and he knew the stock had been moved, but he did not question the existence and validity of the policy, or the liability of the company for the loss. On the other hand, he acknowledged the liability, and made the cancellation of the policy expressly subject to the loss. It is true that, if the transfer slip was not approved before the fire, he could not create a liability of the company by acknowledging or admitting it after the fire. But the signature of Miss Dunn to the slip, and Love's interview with the plaintiff, and his cancellation of the policy, subject to the loss, after the fire, are competent and persuasive evidence on the issue whether or not Love was aware of and approved the transfer. They may persuade some reasonable men that he had knowledge of it, and approved it, although the fact had slipped from his memory when he testified. This question should have been submitted to the jury under this evidence, and the judgment below is accordingly reversed, and the case is remanded to the court below for a new trial.

In re HAWK.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1902.)

No. 21, Original.

BANKRUPT COURT—SETTING ASIDE DISCHARGE—AMENDMENT OF SCHEDULE.

A court of bankruptcy is without jurisdiction to set aside a discharge, to reinstate a case, and to permit an addition of a creditor to the bankrupt's schedule more than a year after the adjudication in bankruptcy, without notice to the creditor.

(Syllabus by the Court.)

Petition for Review.

John E. Greene (H. F. Miller, on the brief), for petitioner.

D. G. Maclay (W. F. Ball and J. S. Watson, on the brief), for respondent.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. William J. Hawk was adjudged a bankrupt on June 21, 1899. On October 5, 1899, he received his discharge in bankruptcy. His estate produced no assets that were

not exempt from execution, and there were no dividends to his creditors. He owed the Van Dusen-Harrington Company, a corporation, upon his promissory notes, $2,320.12 and interest from some date in the year 1896. He did not include this creditor or these notes in his schedule of liabilities, and this creditor was not aware of the proceedings in bankruptcy until some time in the month of August, 1900. During the month of June in that year Van Dusen, Harrington & Co. became indebted to Hawk through business transactions conducted in that month in the sum of $1,944.77. On August 11, 1900, upon the application of the bankrupt, showing that he had forgotten to include the claim of Van Dusen-Harrington Company against him in his schedule, and without any notice to that creditor, the court made an order that he be permitted to amend his schedule by inserting the name of the Van Dusen-Harrington Company as one of his creditors, with a proper description of the nature and consideration of his debt to it, and directed that the discharge in bankruptcy be set aside, and the case be referred to the referee. On October 10, 1900, after hearing the creditor and the bankrupt, a new order was made to the effect that the order of August 11, 1900, be vacated and set aside, and that the discharge in bankruptcy of October 5, 1899, be reinstated. The bankrupt presents these facts and proceedings by petition for review, and alleges that the order of October 10, 1900, was illegally issued.

The court below granted the order of October 10, 1900, on the ground that it had no jurisdiction to make the original order of August 11th, because the term of the district court at which the bankrupt was discharged had expired in the preceding May. It is unnecessary to determine in this case, and we do not decide, whether or not the terms of the United States district court are the terms of the courts of bankruptcy established by the bankruptcy law of 1898, so that the ordinary rule at law and in equity that the court has no jurisdiction to vacate or modify its judgments in matters of substance after the expiration of the term is applicable. Whether the judgment of discharge was subject to this rule or not, the order of August 11, 1900, was clearly void upon another ground. The adjudication in bankruptcy was made on June 21, 1899. Section 57n provides that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication." The year within which the claim of the Van Dusen-Harrington Company against the estate of this bankrupt could be proved had expired on June 21, 1900. It had become indebted to the bankrupt, Hawk, in the sum of $1,944.77, against which it had the legal and moral right to offset its claim upon the promissory notes of Hawk. The order of August 11th avoiding the discharge of the bankrupt, and permitting him to insert in his schedule of debts this claim of Van Dusen-Harrington Company, would, if effectual, deprive this creditor of $1,944.77 without notice or hearing. It would, in the ordinary course of proceedings, result in the discharge of the bankrupt from liability on his promissory notes held by this creditor, while it would leave the creditor liable to the bankrupt for the debt of $1,944.77 which it owed him. The court below had no jurisdiction

to make such an order without notice to the creditor, because its effect would be to deprive the creditor of a valuable right of property without due process of law (In re Rosser, 101 Fed. 562, 567, 41 C. C. A. 497, 502), and because the time within which a claim against the estate of the bankrupt could be proved had expired under section 57n of the bankrupt law.

There was no error in the order of October 10, 1900, which vacated and set aside the order of August 11, 1900, and it is approved and confirmed.

CINCINNATI, H. & D. R. CO. v. THIERAUD.

(Circuit Court of Appeals, Sixth Circuit. November 7, 1900.)

No. 661.

1. APPEAL—PRESUMPTIONS—FACTS NOT SHOWN BY RECORD.
   It is not necessary in all cases that a bill of exceptions should expressly declare that it contains all the evidence or the whole case in order to repel the presumption that other facts may have been proven or other evidence given. It is enough if, from the frame of the bill, it is clearly implied that what is therein stated constitutes the whole of what took place on the trial.

2. MASTER AND SERVANT—INJURY OF SERVANT—EMPLOYER'S LIABILITY ACT OF INDIANA.
   In the employer's liability act of Indiana (Laws 1893, pp. 294, 295), which provides that corporations shall be liable for damages for personal injury suffered by an employé through the negligence of co-employés, in certain cases, in the absence of contributory negligence, "and the person so injured obeying or conforming to the order of some superior, at the time of such injury, having authority to direct," the provision quoted, under the construction placed thereon by the supreme court of the state, does not require that the person injured should be acting at the time under any special direction of a superior, but is equivalent to a requirement that he shall be acting in the line of his duty as an employé; and a railroad engineer injured without negligence on his part while in charge of his engine, at a time and place when and where he had a right to be with his train, through the negligence of those in charge of another engine, must be presumed to have been at the time discharging the regular duties of his employment, and the case is within the statute.

3. SAME—CONSTITUTIONALITY OF ACT.
   The Indiana employer's liability act is not in contravention of the fourteenth amendment to the federal constitution, as denying to corporations the equal protection of the laws by discriminating between them and individual employers.[1]

4. JURISDICTION OF FEDERAL COURT—ACTION BY ADMINISTRATOR FOR WRONGFUL DEATH—CITIZENSHIP OF PARTIES.
   The statute of Indiana (Burns' Rev. St. 1894, § 285) gives an administrator a right of action for the wrongful death of his intestate if the deceased, had he lived, might have maintained an action for an injury for the same act or omission, and provides that the damages recovered shall inure to "the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." *Held*, that an administrator in such an action sues as trustee, and not as a merely formal party, without interest, being vested by the statute with the legal title to the cause of action, and charged in his official capacity with the care and distribution of the amount recovered,

[1] See Constitutional Law, vol. 10, Cent. Dig. § 702.

and that his citizenship, and not that of the beneficiaries, must be considered in determining whether a federal court has jurisdiction of the action.

5. ADMINISTRATOR—VALIDITY OF APPOINTMENT—DOMICILE OF DECEDENT.
Under the statute of Indiana (Burns' Rev. St. 1894, § 2381), which provides that an administrator shall be appointed in the county—"First, where, at his death, the intestate was an inhabitant; second, where, not being an inhabitant, he leaves assets," a petition for letters of administration which was not controverted, and which alleged that the decedent left an estate in the county, was sufficient to authorize the appointment whether the deceased at the time of his death was a resident of the state or not.

6. WRONGFUL DEATH—ACTION FOR DAMAGES—RIGHT OF FOREIGN ADMINISTRATOR TO SUE IN OHIO.
Under Rev. St. Ohio, § 6133, which authorizes an executor or administrator duly appointed in another state to maintain an action in the courts of Ohio in his official capacity, "in like manner and under like restrictions as a nonresident may be permitted to sue," and section 6134a, which provides that a right of action for wrongful death accruing under the laws of another state may be enforced in Ohio "in all cases where such other state, * * * allows the enforcement in its courts of the statute of this state of like character," an administrator appointed in Indiana, where his decedent was killed, and who is given by the Indiana statute a right of action for the death in his official capacity, may maintain an action thereon in Ohio.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a suit brought by Thiebaud, the defendant in error, as administrator of Sweetman, against the Cincinnati, Hamilton & Dayton Railroad Company, to recover damages arising from the death of the deceased, occasioned by the negligence of the company. The right of the administrator to bring such an action is founded upon a statute of Indiana, where the accident and death occurred, which provides that: "When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." Burns' Rev. St. 1894, § 285. Sweetman was a locomotive engineer in the employment of the railroad company, and was killed in a collision with a freight engine on the defendant's railroad in Fayette county, Ind., between Longwood switch and Saulter's switch, on September 18, 1896, under the following circumstances: The deceased on that day was running an engine drawing the pay car of the defendant going eastwardly from Indianapolis, Ind., to Hamilton, Ohio. The defendant's freight train No. 95, also going eastwardly between those points, had been stalled near Longwood switch. The conductor of the freight train thereupon ordered part of the cars placed on the Longwood switch or side track, and proceeded with the balance of the train to Saulter's switch or side track, four and a half miles distant east, intending to come back to Longwood switch for the part of the train he left there. From Saulter's switch to Connersville is eight-tenths of a mile, and at said last-mentioned point a telegraph operator was stationed. Having placed said freight cars on the switch at Saulter's switch, the conductor and engineer of No. 95 started west with the locomotive and crew to get the cars which had been left at Longwood switch, and came into said collision with the deceased's locomotive east of Longwood switch. The conductor and engineer of freight train No. 95 had not left and did not leave a flagman or signals at Longwood switch, and did not go to Connersville to receive orders before proceeding westwardly to Longwood switch on the main

track; and in failing to leave a flagman or place signals at Longwood switch, or in not going to Connersville to receive orders before proceeding westwardly on said main track, were, it is conceded, negligent, and said negligence was the cause of the accident. The bill of exceptions states that it was proven on the trial, and not disputed, that the deceased was guilty of no negligence, and had the right to be with his train at the place where and at the time when he was killed, and also that the railroad at that place consisted of a single track. The deceased left a widow and children, to whom the damages recovered would, under the Indiana statute above recited, inure. By the employer's liability act of Indiana in force when the accident happened it was enacted: "That every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injury suffered by an employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: * * * (3) Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. (4) Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, coemployé or fellow servant engaged in the same common service in any of the several departments of the service of any corporation, the said person, coemployé or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct." Laws 1893, pp. 294, 295. The plaintiff's appointment as administrator was made in Indiana by the court having probate jurisdiction there. The validity of the appointment is denied by the plaintiff in error in this court, and the rejection of an offer of proof made of certain matters in the court below mentioned in the opinion which follows is relied on to support an assignment of error. On the trial of the case the court, upon the foregoing facts appearing or being conceded, instructed the jury that the verdict should be for the plaintiff, leaving the amount of the damages to be settled by them. To this instruction counsel for the railroad company excepted. The jury returned a verdict for $3,000 in favor of the plaintiff, whereon judgment was duly entered, and the case is brought here on writ of error.

Lawrence Maxwell, Jr., for plaintiff in error.

Harlan Cleveland and Charles M. Cist, for defendant in error.

Before LURTON, DAY, and SEVERENS, Circuit Judges.

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

In support of the assignments of error, it is contended by counsel in behalf of the railroad company:

1. That the case is not within the scope of the Indiana statute fixing the liability of employés. The contention is that it applies only to persons who are "obeying or conforming to the order of some superior, at the time of such injury, having authority to direct"; and it is said (which appears to be the fact) that there was no proof that the deceased was acting at the time under any special direction, or otherwise than in the discharge of the general duty of his employment. It is insisted for the defendant in error that the bill of exceptions does not purport to contain all the evidence, and that we may presume that proof was made of such facts as would show that the deceased was under such direction. But, although the bill of exceptions does not, in

terms, state that it contains the whole case which the evidence tended to make out, yet it purports to state the facts which did appear by the evidence and the admissions of counsel, and it does this in such a way as to indicate that the whole case, so far as the parties deemed it material to the exceptions taken, is presented. It is not in all cases necessary that the bill should expressly declare that it contains all the evidence, or the whole case, in order to repel the presumption that other facts may have been proven or other evidence given. It is enough if, from the frame of the bill, it is clearly implied that that which is stated constitutes the whole of what took place upon the trial. Ironwood Store Co. v. Harrison, 75 Mich. 197, 42 N. W. 808; Everett v. Clements, 9 Ark. 480; Leggett v. Grimmett, 36 Ark. 500; Robinson v. Hartridge, 13 Fla. 505. We therefore think that the question under discussion must be considered upon the assumption of the fact that the deceased was not, at the time of the accident, in the execution of any special order or direction.

Counsel for the plaintiff in error contends that the clause in subdivision 4, requiring that the person injured shall have been acting in obedience to the order of some superior, is to be construed in immediate connection with each of the two preceding clauses which describes the classes of persons who commit the injury, and reference is made to two cases decided by the supreme court of Indiana involving the construction of the third and fourth subdivisions of section 1 of the act (Laws 1893, pp. 294, 295). Railway Co. v. Little, 149 Ind. 167, 48 N. E. 862; Railroad Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301. The classification made by the learned judge who delivered the opinion in the case of Railway Co. v. Little of the cases taken out of the operation of the fellow-servant rule by subdivisions 3 and 4 of section 1 of the act seems to require a construction different from that contended for. But the only question pertinent here actually involved and decided in that case was whether a brakeman was included in the classes of persons by whose negligence the injury is committed. It was held that he was not. In the Montgomery Case, however, it was distinctly held that the concluding clause was to be read in connection with each of the two clauses describing the persons by whose fault the injury happened. We are required to follow the construction of the act given by the supreme court of that state. But under the obligation of the same rule we are also required by the decision in the last-mentioned case to hold, as was there held, that the requirement that the injured person should be acting in conformity to the order of some superior is equivalent to a requirement that he should be acting in the line of his duty as an employé. Having regard to the well-known order of business of railroad companies, of which the court must take judicial notice, it could not be otherwise than that a subordinate, such as a locomotive engineer, when acting in the line of his duty as such, would be acting under the order of some superior. It is stated in the bill of exceptions that the deceased was guilty of no negligence and that he had the right to be with his train at the time and place when and where the accident occurred. This can have no other reasonable meaning than that he was discharging the regular duties of his employment. The negligence of the conductor and en-

gineer of the other train being conceded, it would seem that a case was made out fulfilling the conditions of the Indiana statute, and, as the accident and death happened in that state, that is the law applicable to the case. Railroad Co. v. Ihlenberg, 43 U. S. App. 726, 21 C. C. A. 546, 75 Fed. 873; Dennick v. Railroad Co., 103 U. S. 11, 26 L. Ed. 439.

2. It was contended that this statute is in contravention of the fourteenth amendment to the federal constitution, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the law," in that it discriminates between corporations and all other persons. But during the pendency of this case on writ of error this point has been distinctly ruled the other way by the supreme court in Tullis v. Railroad Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192,—a case arising under the same statute.

3. It is insisted that the circuit court of the United States in Ohio did not have jurisdiction, because, as the petition alleges, the suit is brought for the benefit of the widow and children of the deceased, who are alleged to have suffered damages by his death; and the point is that, as Thiebaud, the administrator, who brings this suit as a citizen of Indiana, is a nominal party only, having no interest in the recovery, the citizenship of the beneficiaries, who are citizens of Ohio, is to govern in determining the question of jurisdiction, and that by that test, the railroad company being also a citizen of Ohio, it does not exist. It has been held in numerous cases that where the plaintiff in the suit has no interest, legal or equitable, in the recovery, but is put forward as a formal party in conformity to some statutory appointment made for the purpose, the citizenship of the real party will furnish the test of jurisdiction so far as that party to the case is concerned. McNutt v. Bland, 2 How. 9, 11 L. Ed. 159; Huff v. Hutchinson, 14 How, 586, 14 L. Ed. 553; Maryland v. Baldwin, 112 U. S. 490, 5 Sup. Ct. 278, 28 L. Ed. 822; Indiana v. Glover, 155 U. S. 513, 15 Sup. Ct. 186, 39 L. Ed. 243; Stewart v. Railroad Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537. The case of Blacklock v. Small, 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70, is also cited in the brief of counsel for the plaintiff in error. In this class of cases the nominal plaintiff has no title or interest in the subject of the suit, immediate or remote. He cannot control the litigation, and has no authority to meddle with it. On the other hand, it is well settled that where the plaintiff sues in the character of a trustee, being vested with the title to the subject of the litigation, even though it is destined to ultimately pass in due course to designated beneficiaries, it is his citizenship which is recognized in settling the question of jurisdiction. It is he who has the control of the action, and, so long as he faithfully discharges the duties of his trust, he is the only party to represent the interest he prosecutes. Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179; Knapp v. Railroad Co., 20 Wall. 117, 22 L. Ed. 328; Morris v. Landauer, 6 U. S. App. 510, 4 C. C. A. 168, 54 Fed. 23; Popp v. Railroad Co. (C. C.) 96 Fed. 465. These citations of cases on either side are by no means exhaustive of the decisions on this subject, but they are sufficient to explain the principle of the distinction. We will refer to one or two comparatively recent decisions, which are supposed to

be not in harmony with the rules above stated. In Blacklock v. Small, 127 U. S. 96, 8 Sup. Ct. 1096, 32 L. Ed. 70, the case involved a somewhat different question. The plaintiffs were two of three beneficiaries, and brought suit against the obligor in a bond assigned to their trustee, against the trustee himself and the other beneficiary, to set aside the payment of the bond, which had been made in treasury notes of the Confederate States, of no value. The trustee was charged with a breach of trust in accepting such payment. The beneficiary who was made defendant by her answer ranged herself with the plaintiffs, and prayed the same relief. It was held that she should be classed with the plaintiffs, and, as she was a citizen of the same state as the obligor in the bond, the court had no jurisdiction. The trustee was not suing. The beneficiaries were themselves the actors seeking direct relief, and it was therefore their citizenship which was to be considered in determining the jurisdiction of the controversy as between the parties before the court. In the case of Stewart v. Railroad Co., 168 U. S. 449, 18 Sup. Ct. 105, 42 L. Ed. 537, much relied on for the plaintiff in error, the deceased was killed by the negligence of the railroad company in the state of Maryland. The statute of that state required that the action should be brought in the name of the state. The action was brought in the District of Columbia, in the name of an administrator appointed there, the law of the District requiring that such an action should be so brought. The supreme court of the United States held that the action being transitory, and under the law of both jurisdictions, the plaintiff in whose name the suit was required to be brought being a merely nominal one, the action might be maintained. It will be noticed that the statute of the district required the action to be brought "in the name of the personal representative." The short explanation of the case is that, as both statutes required the action to be brought in the name of a formal party, the action was regarded as that of the beneficiaries, and the employment of the name of the administrator was simply conforming to the law of the forum in respect to the mode of procedure. The statutes in the several states providing a remedy for the benefit of the family or next of kin of the deceased who dies from the wrongful act of another differ in the mode by which it is accomplished, and this difference greatly affects the subject we are considering. In some a remedy is given directly to the beneficiaries. Such is the law of Tennessee, which was involved in the case of Railway Co. v. Hooper, 35 C. C. A. 24, 92 Fed. 820, which came to this court from that state. There either the administrator or the beneficiaries may sue. In others the right of action is devolved upon his personal representative. It is true that the recovery is not turned over to creditors, but that is a matter which relates merely to the administration of the fund, and the legislature which creates the law is perfectly competent to direct in this, as it does with reference to the proper assets of deceased persons, who shall be the beneficiaries; and when this is done by vesting the right of action in the personal representative he takes it for administration in the general meaning of the word as much as when he takes other property to collect and distribute to those designated by law. It is included in the duties of

his appointment, and he is responsible for the fund. The Indiana statute provides that the administrator may maintain an action if the deceased, had he lived, might have maintained an action for the same cause. The damages, when collected, are distributed to the family or next of kin. It is obvious that the beneficiaries cannot bring the action. They have only the right to ultimately receive the proceeds when the administrator shall have executed his trust. And this is the interpretation which the supreme court of Indiana puts upon this statute. Packet Co. v. Pikey, 142 Ind. 304, 40 N. E. 527. It was held in that case that the administrator held the fund when collected as the trustee of an express trust for the benefit of the persons named. In Yelton v. Railroad Co., 134 Ind. 414, 33 N. E. 629, 21 L. R. A. 158, the sole beneficiary had attempted to compromise the liability of the defendant while a suit by the administrator was pending. It was held that she (the widow in that case) had not the power to do this; and the court said:

"While actions under this section of the statute are prosecuted for the benefit of, and the damages inure to the exclusive benefit of, the widow and children of the deceased, yet it contemplates the collection of the damages by the administrator, and the turning of the same over to the widow and children on final settlement."

The statute as thus interpreted creates a trust, and names the trustee. We are unable to distinguish the case in this respect from those in which it has been repeatedly held by the federal courts that the trustee is the legal representative of the beneficiaries, and that his citizenship is the only one to be considered in determining the jurisdiction in respect to that side of the controversy.

4. The authority and jurisdiction of the probate court in Indiana, from which the administrator derived his appointment, is disputed, it being contended that Sweetman was not an inhabitant of Indiana, and left no assets there. And it is further insisted in this connection that the court below erred in excluding evidence tending to show these facts. We will deal with this last objection first. It is sufficient to say that this question is not presented by the record. It appears that, on a question being put to a witness in regard to the situs of certain personal effects of the deceased by counsel for the railroad company, objection was made that the appointment of the administrator could not be thus collaterally attacked. The counsel who put the question thereupon expressly disclaimed the purpose of attacking the appointment made by the court of probate, and stated his purpose to be to show that the claim for which the suit was brought was the whole of the estate, and that his purpose in doing this was to prove that the circuit court in which the case was being tried was without jurisdiction. There is nothing whatever in the record to show that the defendant below raised any question of the validity of the appointment so far as it related to existence of assets in Indiana. Then, as to the point that Sweetman was not an inhabitant of Indiana, the question raised relates to the effect of the record of the proceedings in the court of probate. The statute of Indiana (Burns' Rev. St. 1894, § 2381) relating to the granting of letters of administration provides that "such letters shall

be granted in the county; first, where, at his death, the intestate was an inhabitant; second, where, not being an inhabitant, he leaves assets." The record of the court of probate shows that a verified petition praying for the appointment of Thiebaud as administrator was filed in that court, showing that the deceased died in Fayette county, Ind., leaving a personal estate of the probable value of $100, and that his widow and next of kin were not residents of that state. It further states that the petition was granted; that Thiebaud was appointed administrator; that he filed a proper bond as such, which was approved; that he took the oath of office, and that letters of administration were issued to him. Conceding that it inferentially appears from this and other recitals in the record that the court of probate assumed that Sweetman was an inhabitant of Fayette county, Ind., at the time of his death, and conceding also that he was not, but was an inhabitant of Ohio, still the petition, which was verified, and not disputed, showed that he left assets in the county, and that was sufficient whether he was an inhabitant of the county and state or not. If the court was in error in assuming one of the conditions to an appointment to exist, still, if other conditions existed, which, independently of the first, authorized the appointment, they would constitute a sufficient basis for the order. But there is not in the record anything which shows with positiveness that the letters were granted upon the assumption that Sweetman was such inhabitant of Indiana. All that we find upon that subject on which to base an inference that the court based the appointment upon the ground that the deceased was an inhabitant of Indiana is that he is described in the probate record as "Chris Sweetman, late of Fayette county." We perceive no sufficient reason for doubting that the appointment was valid. The question whether it was competent for the defendant in the court below to have proven that the conditions were such that the court of probate had no authority at all to appoint an administrator is, as we have said, not presented for our decision, and we therefore express no opinion upon it.

5. It is further contended that Thiebaud, having been appointed administrator in Indiana only, cannot maintain this action in Ohio. This would undoubtedly have been so at the common law. Story, Confl. Laws, 513; Johnson v. Powers, 139 U. S. 156, 11 Sup. St. 525, 35 L. Ed. 112. But the Revised Statutes of Ohio contain the following provisions:

"Sec. 6133. An executor or administrator duly appointed in any state or county may commence and prosecute any action or proceeding in any court in this state in his capacity of executor or administrator, in like manner and under like restriction as a nonresident may be permitted to sue."

"Sec. 6134a. Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state in all cases where such other state, territory or foreign country allows the enforcement in its courts of the statute of this state of a like character," etc.

The state of Indiana gives such right of action as is mentioned in section 6134a of the Ohio Statutes, as is shown by the cases of

Burns v. Railroad Co., 113 Ind. 169, 15 N. E. 230, and Railroad Co. v. McMullen, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67. This removes all objection which may have existed upon the ground of the public policy of Ohio. Section 6133 of the Ohio Statutes in very broad terms concedes to foreign administrators the right to prosecute "any action or proceeding" in the courts of the state in like manner "as any nonresident may be permitted to sue." The ground upon which it is proposed to restrict this privilege is that the intention was to accord it only to such action or proceeding as the administrator institutes for recovering the assets of the deceased. But, as we have already stated, under the Indiana statutes the plaintiff sues as administrator under a right of action vested in him as such. It seems to us that the statute of Ohio extends to all cases where the administrator is the actor, and sues for that which, in his official capacity, he is entitled to recover. It does not discriminate between the matters which, by the foreign law, may be intrusted to him by virtue of his office, provided the exercise of the privilege is not inconsistent with the interests of the public in the state of Ohio. The only restriction mentioned by the statute is that which is imposed upon any nonresident. We think there is no valid reason for excluding such an action as this upon the fact that the fund, after it comes to the hand of the administrator, is distributed to other persons than those to whom by another statute of Indiana the assets of the deceased are distributable. The case of Transfer Co v. Wilson's Adm'r, 16 U. S. App. 236, 8 C. C. A. 21, 59 Fed. 91, decided by this court, and cited for the plaintiff, is not opposed to this conclusion. It was there held that a foreign administrator could not sue in the courts of Kentucky to recover damages for a death occasioned by the fault of another under a statute of that state which authorized such administrator to "prosecute actions for the recovery of debts due to such decedents." The restriction was expressly made in the very terms of the grant of the privilege without which the foreign administrator could not sue in Kentucky. In no sense could such damages be called debts due the decedent. The dissimilarity between the Kentucky and Ohio statutes is obvious.

For the reasons stated, we are convinced that none of the assignments of error are maintainable, and that the judgment should be affirmed.

EDISON v. AMERICAN MUTOSCOPE CO.

(Circuit Court of Appeals, Second Circuit. March 10, 1902.)

No. 75.

PATENTS—INVENTION—KINETOGRAPHIC CAMERA.

In the Edison patent, No. 589,168, for a kinetographic camera, claims 1, 2, and 3, which cover any camera apparatus which includes a stationary single lens and a tapelike film, and is capable of intermittently projecting, at such rapid rate as to result in persistence of vision, images of successive positions of an object or objects in motion, and any mechanism or device for so moving the film as to cause the successive images to be received thereon separately and in single-line sequence, without speci-

fying the mechanisms to be employed, except functionally, are void, as broader than the actual invention of the patentee, which, in view of the prior art, was limited to the details of organization by which he accomplished such results, and which are not described. Claim 5, covering a tapelike photographic film having thereon equidistant photographs of successive positions of an object in motion, in straight-line sequence, is also void for lack of invention, as distinguished from nonpatentable improvement upon films previously known.

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

This was an appeal from a decree adjudging the validity and infringement of letters patent No. 589,168, granted August 31, 1897, to Thomas A. Edison, for a kinetographic camera. See 110 Fed. 660, 664.

Parker W. Page and Thos. B. Kerr, for appellant.

Richard N. Dyer and Fredk. P. Fish, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree sustaining the validity, and adjudging the infringement by the defendant, of letters patent No. 589,168, for a kinetographic camera, granted to Thomas A. Edison August 31, 1897. The patent contains six claims; the first, second, third, and fifth being the only ones in controversy. The assignments of error challenge the validity of the claims, and contest the infringement of the fifth claim.

The purpose of the patented invention is to produce pictures, "representing objects in motion throughout an extended period of time, which may be utilized to exhibit the scene including such moving objects in a perfect and natural manner by means of a suitable exhibiting apparatus," such as that described in Edison's patent No. 493,426, granted March 14, 1893. The specification states that the inventor "has found it possible to accomplish this end by means of photography." It further states that the photographic apparatus comprises means, such as a single camera, for intermittently projecting, at such rapid rate as to result in persistence of vision, images of successive positions of the object or objects in motion as observed from a fixed and single point of view, a sensitized tapelike film, and means for so moving the film as to cause the successive images to be received thereon separately and in single-line sequence. It further states that the movements of the tapelike film may be continuous or intermittent, but the latter is preferable, and that it is further preferable that the periods of rest of the film should be longer than the periods of movement. It further states that, by taking the photographs at a rate sufficiently high as to result in persistence of vision, the developed photographs will, when brought successively into view by an exhibiting apparatus, reproduce the movements faithfully and naturally. The patentee says:

"I have been able to take with a single camera and a tape film as many as forty-six photographs per second, each having a size measured lengthwise

of the tape of one inch, and I have also been able to hold the tape at rest for nine-tenths of the time; but I do not wish to limit the scope of my invention to this high rate of speed, nor to this great disproportion between the periods of rest and the periods of motion, since with some subjects a speed as low as thirty pictures per second, or even lower, is sufficient, and, while it is desirable to make the periods of rest as much longer than the periods of motion as possible, any excess of the periods of rest over the periods of motion is advantageous."

As more particularly described in the specification and shown in the drawings, the apparatus, which is inclosed in a boxlike casing, from which light will be excluded, except through the lens, embraces an ordinary adjustable camera having the lens end mounted in the side of the box. Two reels, inclosed in suitable cases, are located on opposite sides of the camera lens. The film is drawn from one of the reels onto the other across the lens. It is transparent or translucent, and tapelike in form, and is preferably of sufficient width to admit the taking of pictures one inch in diameter between the rows of holes on its edges. These holes are for engagement with the feed wheels for positively advancing the film. When the film is narrow it is not essential to use two rows of perforations and two feed wheels, one of such rows and one feed wheel being sufficient. The two feed wheels are carried by a shaft, and engage the film on one side of the camera opening. The power is supplied by an electric motor which drives a rotating shaft carrying the feed wheels through a pulley held in frictional engagement with the feed-wheel shaft. The take-up reel, or the reel which receives the tape after passing the lens, is also driven from the motor shaft through a pulley which is frictionally mounted upon the reel shaft. The shaft carrying the feed wheels is controlled by a stop or escapement movement which is driven positively by another shaft, so that, although the motor tends to drive the feed wheels continuously, they are only permitted to turn with an intermittent motion by the stop or escapement device; the pulley which drives the feed wheels slipping on the feed-wheel shaft while that shaft is held at rest by the stop or escapement device. A shutter consisting of a rotating disk having an opening in it is mounted directly upon the motor shaft, and revolves past the lens, so that the light from the lens is intermittently thrown upon and cut off from the sensitive surface of the film. The camera is shown as a single lens, and is arranged to project the image of the scene being photographed upon the film when the openings of the shutter disk are opposite the aperture between the lens and the film. In operation the apparatus is first charged with a tape film several hundred or even thousands of feet in length. The specification states that the parts are preferably proportioned so that the film is at rest for nine-tenths of the time, in order to give the sensitized film as long an exposure as practicable, and is moving forward one-tenth of the time, and that the forward movement is made to take place 30 or more times per second, and preferably at least as high as 46 times per second, although the rapidity of movement or number of times per second may be regulated as desired to give satisfactory results; and there should be at least enough so that the eye of the observer cannot distinguish, or at least cannot clearly or positively distinguish, at a glance, the difference in position occupied by the objects in the successive pictures.

The claims alleged to be infringed are as follows:

"(1) An apparatus for effecting by photography a representation, suitable for reproduction, of a scene including a moving object or objects, comprising a means for intermittently projecting, at such rapid rate as to result in persistence of vision, images of successive positions of the object or objects in motion, as observed from a fixed and single point of view, a sensitized, tapelike film, and a means for so moving the film as to cause the successive images to be received thereon separately and in a single-line sequence.

"(2) An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a single camera, and means for passing a sensitized tape film at a high rate of speed across the lens of the camera, and for exposing successive portions of the film in rapid succession, substantially as set forth.

"(3) An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a single camera, and means for passing a sensitized tape film across the lens of the camera at a high rate of speed, and with an intermittent motion, and for exposing successive portions of the film during the periods of rest, substantially as set forth."

"(5) An unbroken transparent or translucent tapelike photographic film, having thereon equidistant photographs of successive positions of an object in motion, all taken from the same point of view, such photographs being arranged in a continuous, straight-line sequence, unlimited in number, save by the length of the film, substantially as described."

According to the views of the expert for the complainant, the first claim covers every apparatus comprising—First, any means whatever capable of intermittently projecting, at such rapid rate as to result in persistence of vision, images of successive positions of the object or objects in motion, as observed from a fixed and single point of view; second, a sensitized, tapelike film; and, third, any means or mechanism or device for so moving the film, either continuously or intermittently, or both continuously and intermittently, as to cause the successive images to be received thereon separately and in a single-line sequence. According to his view, the scope of the second claim is identical with that of the first, except that it is limited to a single camera, with a single lens, as the means for projecting the images onto the sensitized surface, and the third claim differs from the second only in that it is restricted to the intermittent movement of the film, and to the exposure of the film during the periods of rest. We think this interpretation of the claims is the reasonable one, and the question of their validity is to be determined by giving to them this scope.

The photographic reproduction of moving objects, the production from the negatives of a series of pictures representing the successive stages of motion, and the presentation of them by an exhibiting apparatus to the eye of the spectator in such rapid sequence as to blend them together, and give the effect of a single picture in which the objects are moving, had been accomplished long before Mr. Edison entered the field. The patent in suit pertains merely to that branch of the art which consists of the production of suitable negatives. The introduction of instantaneous photography, by facilitating the taking of the negatives with the necessary rapidity to secure what is termed "persistence of vision," led to the devising of cameras for using sensitized plates and bringing them successively into the field of the lens, and later for using a continuously moving sensitized band or strip of

paper to receive the successive exposures. The invention of the patent in suit was made by Mr. Edison in the summer of 1889. We shall consider only those references to the prior art which show the nearest approximation to it, and are the most valuable of those which have been introduced for the purpose of negativing the novelty of its claims.

The French patent to Du Cos, of 1864, describes a camera apparatus consisting of a battery of lenses placed together in parallel rows, and focused upon a sensitive plate; the lenses being caused to act in rapid succession, by means of a suitable shutter, to depict the successive stages of movement of the object to be photographed. Between the lenses and the plate is arranged a band having a series of openings in such manner that if the band is drawn upwards or downwards the various lenses in the battery will be exposed in succession, so that a large number of small pictures will be taken upon the plate. The patent does not describe the means for moving the plate so as to cause the successive images to be received thereon separately. In a certificate of addition to this patent, he describes an apparatus in which there is a short, endless band, passing over two parallel drums, upon which, as the band is moved by the rotation of the drums, one lens after the other will pass an aperture through which light is reflected from the object to be photographed. Back of the lenses is another band of fabric, passing over drums like the other band, and carrying either a series of sensitized plates or a surface of sensitized paper. This band has projections or pins, which, as the drums are rotated, engage with corresponding projections from the band carrying the lenses. By this apparatus the lenses are made to move in accord with the movement of the band, and as they pass the aperture they project successively upon the sensitized paper, which is moving at the same speed, impressions of the object to be photographed. Practically the images are reproduced from the same point of view,—the aperture through which the lenses operate. The expert for the complainant, Prof. Morton, concedes that the Du Cos camera would be capable of taking a series of photographs on a strip of sensitized paper, such as subsequently came into commercial use, at the rate of eight or ten a second, supposing them to be two or three inches square; but he insists that the dry paper then known was not sufficiently sensitized to permit this to be done.

Prior to January, 1888, a sensitive film better adapted for instantaneous impression was in commercial use with photographers, and in that month a patent was obtained in this country by Le Prince for a method of, and apparatus for, producing animated pictures. The apparatus included a camera for producing the negatives upon an endless strip of sensitive film, "or any quick-acting paper, such as Eastman's paper film." The camera apparatus was a series of lenses arranged in two or more rows, and two or more strips of film. Each strip of film is unwound from a supply spool, and drawn across the field of its row of lenses by a take-up spool. The lenses are provided with shutters which open and allow them to operate upon the film at the proper time. By means of mutilated guides upon a shaft operated by a crank or other motor, the two take-up spools are alter-

nately revolved, and draw first one film and then the other the required distance to receive its series of impressions, while by means of other guides connected with the driving shaft the shutters of the lenses are successively opened to permit an impression to be projected upon the film while it is at rest. Thus the apparatus is equipped with means for moving two strips of film alternately and successively, and with lenses and shutters which at the proper moment open and allow the lenses to operate upon the strips of film as they are successively brought to rest. Le Prince subsequently, and in 1888, obtained an English patent for the same apparatus, a complete specification of which was published December 8, 1888. This patent contains a suggestion that only a single lens may be employed, as follows:

"When provided with only one lens, as it sometimes may be, it is so constructed that the sensitive film is intermittently operated at the rear of said lens, which is provided with a properly timed intermittently operated shutter."

The mechanism adapted to co-operate with a single-lens camera is not described.

The camera apparatus of M. Marey, described in the Scientific American of June, 1882, and used by him, mounted in a photographic gun, to produce a series of instantaneous photographs, showing the successive phases of motion of birds and animals, describes a single-lens camera, and clock mechanism which actuates the several parts. The apparatus is shown in detail by woodcuts. M. Marey conceived the idea of equipping a gun with the apparatus from the astronomical revolver invented by Mr. Janssen for observing the last passage of Venus. He describes the apparatus as follows:

"The barrel of this gun is a tube containing a photographic objective. At the back end of this, firmly affixed to the butt, there is a wide, cylindrical breech piece, in which there is contained a clockwork, whose barrel is seen externally at B. When the trigger of the gun is pulled, the wheelwork begins its movement, and gives the various parts of the instrument the motion necessary. A central axis, making twelve revolutions per second, controls all the parts of the apparatus. First, there is an opaque, metallic disk, containing a narrow slit. This forms the cut-off or shutter, and allows the light emanating from the objective to enter only twelve times per second, and every time during $1/720$th of a second. Behind this disk, and revolving freely on the same axis, there is another one which is provided with twelve openings, and behind this is placed the sensitive plate of circular or octagonal form. The disk must revolve in an intermittent manner, so as to stop twelve times per second opposite the fascicle of light that enters the instrument. This motion is obtained by means of an eccentric, E, which is placed on the axis, gives a regular to and from motion to a rod provided with a click, C, which at every oscillation engages with one of the teeth that collectively form a crown on the disk containing the apertures. A special shutter, O, cuts off all entrance of light into the instrument as soon as the twelve images have been obtained. There are other arrangements for the purpose of preventing the sensitized plate, owing to its acquired velocity, going beyond the position to which it is brought by the click, and at which it should be perfectly immovable during the duration of the luminous impression. A pressing button, b, rests firmly against the plate from the time that it is introduced into the apparatus; and it is through the influence of such pressure that the plate is made to adhere to the posterior surface of the disk containing the apertures. This surface is covered with black velvet to prevent slipping. Focusing is effected by shortening or elongating the barrel, thus moving the objective backward or forward. The focus is finally verified

by observing, through an aperture in the breech piece, the sharpness of the image received on a piece of ground glass."

He states that he has photographed with his apparatus horses, asses, dogs, and men on foot and on velocipedes, but he has not followed such experiments up, as they entered into the programme that Mr. Muybridge had carried out with so much success. He proposes especially to study by photography the mechanism of flight in different animals.

Mr. Levison, in an article published in the Brooklyn Eagle of June 14, 1888, describes a camera apparatus for taking a series of pictures of objects in motion, in which a single lens is employed to operate upon plates 3¼ by 4¼ inches in size. These plates are carried in compartments on a polygonal wheel, which is caused to move onward and rest by a peculiar screw motion, and while at rest an electromagnet, actuated by a suitable battery, operates the shutter and exposes the plate, then in proper position for the lens. He says the mechanism employed to drive the plate carrier could be employed to operate a continuous strip of paper or a film carrier, and by a simple modification of the contact switch the shutter may be operated indefinitely; and with a camera thus constructed a series of pictures, limited only by the length of the sensitive paper, may be taken. The mechanism of the apparatus is not detailed, except in the general way stated.

It is apparent from the references considered that while Mr. Edison was not the first to devise a camera apparatus for taking negatives of objects in motion, and at a rate sufficiently high to result in persistence of vision, the prior art does not disclose the specific type of apparatus which is described in his patent. His apparatus is capable of using a single sensitized and flexible film of great length with a single-lens camera, and of producing an indefinite number of negatives on such a film with a rapidity theretofore unknown. The Du Cos apparatus requires the use of a large number of lenses in succession, and both the lens and the sensitized surface are in continuous motion while the picture is being taken; whereas in the apparatus of the patent but a single lens is employed, which is always at rest, and the film is also at rest at the time when the negative is being taken. Nor is it provided with means for passing the sensitized surface across the camera lenses at the very high rate of speed, which is a feature, though not an essential feature, of the patented apparatus.

The Le Prince apparatus employs two or more rows of lenses, and two or more strips of film, which move alternately and successively, the lenses of each operating upon its appropriate strip, and the shutters of the lenses opening successively as the strips are brought to rest; and, although its devices permit the exposures for the production of successive pictures to be made in rapid succession, they require a slow movement of the film. Pictures taken in such apparatus are not taken from the "same point of view" as they are when taken from a single stationary lens. This would result in producing, when such pictures are subsequently combined for persistence of vision in their exhibition, a greater or less indefiniteness of outline and conformation as to movement. Again, the pictures are not taken in a

regular succession, as on a single strip, but a short series are taken on one strip, then a short succeeding series on another strip, and so on, with the result that to use these pictures for exhibition in any convenient way would require them to be cut up and rearranged, or apparatus would have to be employed for so moving and feeding them as to obtain the proper arrangement of their positives for the purposes of exhibition, which is indicated in the Le Prince patent. Those taken by the apparatus of the patent in suit can be reproduced by a precisely corresponding positive. The suggestion that one lens may be employed, implying, of course, the use of a single film, is quite enigmatical, and would seem to be impracticable, without altering the principle of his apparatus. The problem of dispensing with the other lenses would involve changing the mechanism so as to secure a rapid movement of the film. We are not satisfied that the apparatus is inoperative, but incline to the opinion that the alleged defects are merely in details of construction, which would be readily obviated by the skilled mechanic. The presumption arising from the grant of the United States patent must prevail in the absence of proof to overthrow it.

The Marey apparatus employs the same general combination of parts specified in the first and third claims of the patent, except the tape film, to produce the negatives; but it is not adapted to produce them upon the film of the patent, and it would require modifications to enable it to do so; but whether such as would involve invention, or merely mechanical skill, is a debatable question. It enables negatives of an animate object, showing the various phases of motion, to be produced by projecting images of the moving object, as observed from a fixed and single point of view, or from a fixed and successive point of view, upon the successively advanced portions of the sensitized surface, and in sequence thereon, and at such a rapid rate of succession that the movements can be naturally reproduced to the eye by bringing the developed photographs successively into view. It is capable of taking 12 pictures per second, each image requiring an exposure of $^1/_{720}$th part of a second. Although his revolver was designed to get successive pictures for an analysis of the movements of objects, and not for the purpose of taking negatives for reproduction and use in an exhibiting apparatus, it seems manifest that it could have been adapted by changes in the parts, obvious to the skilled mechanic, to produce negatives suitable for reproduction and use in such an apparatus.

The Levison publication would not be of value were it not that the broad claims of the patent do not call for the employment of any specific operative devices, except the single camera and the sensitized tape film.

The important question is whether the invention was in such sense a primary one as to authorize the claims based upon it. The general statements in the specification imply that Mr. Edison was the creator of the art to which the patent relates, and the descriptive parts are carefully framed to lay the foundation for generic claims which are not to be limited by importing into them any of the operative devices, except those which are indispensable to effect the functional

results enumerated. It will be observed that neither the means for moving the film across the lens of the camera, nor for exposing successive portions of it to the operation of the lens, nor for giving it a continuous or intermittent motion, nor for doing these things at a high rate of speed, are specified in the claims otherwise than functionally. Any combination of means that will do these things at a high enough rate of speed to secure the result of persistence of vision, and which includes a stationary single lens and tapelike film, is covered by the claims.

It is obvious that Mr. Edison was not a pioneer, in the large sense of the term, or in the more limited sense in which he would have been if he had also invented the film. He was not the inventor of the film. He was not the first inventor of apparatus capable of producing suitable negatives, taken from practically a single point of view, in single-line sequence, upon a film like his, and embodying the same general means of rotating drums and shutters for bringing the sensitized surface across the lens, and exposing successive portions of it in rapid succession. Du Cos anticipated him in this, notwithstanding he did not use the film. Neither was he the first inventor of apparatus capable of producing suitable negatives, and embodying means for passing a sensitized surface across a single-lens camera at a high rate of speed, and with an intermittent motion, and for exposing successive portions of the surfaces during the periods of rest. His claim for such an apparatus was rejected by the patent office, and he acquiesced in its rejection. He was anticipated in this by Marey, and Marey also anticipated him in photographing successive positions of the object in motion from the same point of view.

The predecessors of Edison invented apparatus, during a period of transition from plates to flexible paper film, and from paper film to celluloid film, which was capable of producing negatives suitable for reproduction in exhibiting machines. No new principle was to be discovered, or essentially new form of machine invented, in order to make the improved photographic material available for that purpose. The early inventors had felt the need of such material, but, in the absence of its supply, had either contented themselves with such measure of practical success as was possible, or had allowed their plans to remain upon paper as indications of the forms of mechanical and optical apparatus which might be used when suitable photographic surfaces became available. They had not perfected the details of apparatus especially adapted for the employment of the film of the patent, and to do this required but a moderate amount of mechanical ingenuity. Undoubtedly Mr. Edison, by utilizing this film and perfecting the first apparatus for using it, met all the conditions necessary for commercial success. This, however, did not entitle him, under the patent laws, to a monopoly of all camera apparatus capable of utilizing the film. Nor did it entitle him to a monopoly of all apparatus employing a single camera.

We conclude that the functional limitations which are inserted in the claims do not restrict the patent to the scope of Mr. Edison's real invention. We cannot undertake to point out the differences between the scope of the real invention and the claims. The real

invention, if it involved invention as distinguished from improvement, probably consists of details of organization, by which the capacity of the reels and the moving devices are augmented and adapted to carry the film of the patent rapidly and properly. It suffices to say that the modifications required to conform old apparatus to the use of the tape film, and which would define the real invention, cannot be imported into the first and third claims without violence to their terms; and the second claim is broader than the third.

The fifth claim of the patent is obviously an attempt by the patentee to obtain a monopoly of the product of the apparatus described in the patent, so that in the event it should turn out that his apparatus was not patentable, or the product could be made by apparatus not infringing his, he could nevertheless enjoy the exclusive right of making it. A claim for an article of manufacture is not invalid merely because the article is the product of a machine, whether the machine is patented or unpatented; but it is invalid unless the article is new in a patentable sense,—that is, unless its original conception or production involved invention, as distinguished from ordinary mechanical skill. If it is new only in the sense that it embodies and represents superior workmanship, or is an improvement upon an old article in degree and excellence, within all authorities the claim is invalid. Hatch v. Moffitt (C. C.) 15 Fed. 252; Wooster v. Calhoun, 11 Blatchf. 215, Fed. Cas. No. 18,035; Excelsior Needle Co. v. Union Needle Co. (C. C.) 32 Fed. 221; Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Locomotive Works v. Medart, 158 U. S. 79, 15 Sup. Ct. 745, 39 L. Ed. 899. By the terms of the claim the length of the film is not defined, nor is the number of photographs which it is to represent defined. It is to be an unbroken transparent or translucent, tapelike photographic film; it is to have thereon equidistant photographs of successive positions of an object in motion; these photographs are to be arranged in a continuous, straight-line sequence; and the number of them is not limited, save by the length of the film. The film was not new, and if the other characteristics of the product are not new, or are new only in the sense that they add to the article merely a superiority of finish or a greater accuracy of detail, the claim is destitute of patentable novelty.

In determining the scope and patentable subject-matter of this claim, the proceedings in reference to its allowance in the patent office should be referred to. In the original application for the patent the sensitized surface was described as "in the form of a long gelatine tape film." April 18, 1896, the application was amended as to specification and claims so that the word "gelatine" was omitted from the description of the film. The substituted specification of that application contains this statement: "The sensitized surface is preferably in the form of a long tape, although it may be a cylindrical surface on which the photographs are taken in a spiral line;" and, in referring to the drawings, states that "3 indicates the transparent or translucent tape film, which before the apparatus is put in operation is all coiled on a reel," etc. In that application, for the first time, a claim was made for the product. After the claim, as originally phrased in that application, had been rejected by the patent office, it was amended by the applicant to read as follows:

"(8) An unbroken transparent or translucent tape film, having thereon a continuous series of equidistant photographs of an object in motion, arranged in a single straight-line sequence, substantially as set forth."

This claim was again rejected upon a reference to the Le Prince patent. As finally allowed by the office, it was allowed upon the statement as follows:

"As to claims 8 and 9, while as drawn they have been properly rejected on account of the Le Prince tape film, they can be distinguished therefrom by amending the claims to indicate that the number of photographs in the series is unlimited, except by the length of the film, as distinguished from the Le Prince film, in which the number in a straight-line sequence is limited to four, whatever the length of the film."

In view of these proceedings, and the acquiescence of the patentee in the limitations imposed upon the claim by the patent office, its novelty depends mainly upon the length of the film. This feature of the claim is satisfied by any film which is long enough to carry a sufficient number of successive pictures to reproduce, when properly used, some definite cycle of movements to convey the impression of reality to the observer. A film having this characteristic was not new, in the sense that its production involved invention. The Du Cos apparatus was capable of taking the requisite number of pictures in series suitable for using in an exhibiting apparatus. Prof. Morton, the expert for the complainant, in his testimony, conceded that a series of photographs of an object in motion could have been taken upon a paper strip by the camera of the certificate of addition of the Du Cos patent, and these negatives might have been transferred to a translucent paper strip, as a series of positives, and that it would have required no invention, in view of the instructions which Du Cos gives as to doing this, to prepare such a strip of paper with a series of pictures upon it. He differentiates the film of the claim from the film which could have been thus produced in the fact that the pictures, not having been taken from a single lens, would not all be taken from the same point of view. This conclusion, however, overlooks the fact that practically the images were produced from the same point of view in the Du Cos apparatus,—the single aperture through which the lenses operate,—and that it is quite immaterial whether the same point of view is obtained by the use of a single lens, or by the use of a number of lenses, for the purpose of meeting this characteristic of the claim.

We conclude that the court below erred in sustaining the validity of the claims in controversy, and that the decree should be reversed, with costs, and with instructions to the court below to dismiss the bill.

AMERICAN ORDNANCE CO. v. DRIGGS-SEABURY GUN & AMMUNITION CO.

(Circuit Court of Appeals, Second Circuit. February 25, 1902.)

No. 36.

PATENTS—INVENTION—BREECH LOADING ORDNANCE.

The Driggs & Schroeder patent, No. 360,798, for breech-loading ordnance, was not anticipated by the Storm patent, No. 132,740, nor by the Pieri British patent, No. 3,615, and describes a breech-block mechanism

for rapid-fire guns, both novel and useful. Claim 1 also *held* infringed by a gun constructed in accordance with the Driggs-Tasker patent, No. 613,195.

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

Ernest Wilkinson, for appellant.
W. H. Singleton, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree adjudging the validity of the first claim of letters patent No. 360,798, granted April 5, 1887, to Driggs & Schroeder, for "breech-loading ordnance," and ordering an injunction against the defendant, and an accounting for infringement. 99 Fed. 996.

Error is assigned of the decision of the court below both upon the issues of the validity of the patent and its infringement.

The patent relates to the class of small cannon known as "rapid-firing, single-shot guns," which are a development of small arms; and the improvements described are designed for equipping the gun with breech-closing mechanism capable of rapid operation, and strong enough to resist the pressure caused by the discharge.

The gun of the patent is one in which the cartridge is inserted at the rear. In such guns the introduction chamber is a rearward prolongation of the powder chamber, and ordinarily is arch-shaped at the upper part, though not necessarily so. The upper part of the chamber of the patent is arch-shaped, and is provided with recesses or grooves extending downward below the center of the chamber. As shown in the drawings, there are two of these grooves, each encircling the upper half of the chamber. The breech block is provided upon its upper convex surface with projections or bands adapted to fit closely into these recesses. The breech block is actuated by mechanism which raises it upward and forward until the bands are brought near the recesses of the chamber, when it is given a further upward direction, which causes the bands to slide into the corresponding recesses. When thus interlocked, the bands and grooves form practically a mortise joint, extending over the top, and around the upper half of the chamber; and the breech block receives a solid support at the top, and as far downward as the recesses extend. The actuating mechanism consists of a horizontal rock shaft, extending through the breech below the bore of the gun, and an operating lever and cam so arranged that, when the shaft is turned in one direction, it will swing the breech block forward, then upward and forward, and upward again, into the locked position, and, when turned in the opposite direction, it will lower the breech block to an unlocked position, and then swing it backward and downward to below the introduction chamber.

The claim is as follows:

"(1) In a gun in which the breech block first moves downward in opening, and then swings backward and downward, the combination, with the gun breech provided with grooves in its upper wall, of the pivoted breech block, A, provided on its upper surface with bands or projections, a a', adapted

to fit in said grooves and hold said breech block firmly in place, and means for moving the breech block into and out of said grooves, substantially as described."

We agree with the court below that there was nothing new in the downward and backward and downward movements of the breech block, or in the construction and arrangement of the mechanism for giving these movements to the breech block, or for moving it in and out of the grooves. If there was any patentable novelty in the combination of the claim, it resided in employing with the other parts the peculiar recesses in the breech and projections upon the breech block which are described in the specification and shown in the drawings.

Of the numerous prior patents introduced in evidence for the purpose of defeating the novelty of the claim, those of one group disclose breech-closing mechanism in guns in which the cartridge is inserted at the rear of the cartridge chamber, and those of another group disclose such mechanism in guns in which the cartridge is inserted at the top of the cartridge chamber.

The most important of the anticipating references is the English patent to Pieri, of 1885. This patent belongs to the second group. If in this patent were disclosed the recesses and projections of the patent in suit, it would be a complete anticipation of the claim. The description and drawings of the patent leave some of the details of the construction of the parts to inference, but that its breech and breech block are provided with recesses and projections which measurably perform the functions of those of the patent in suit is not to be doubted. It shows on either side of the introduction chamber a short groove extending to the upper part of the chamber, but these grooves extend down the sides but a comparatively short distance. Between these recesses the chamber is not provided with an upper wall, the top being uncovered to admit the insertion of the cartridge, and necessarily the recesses do not extend across the upper part of the chamber. The breech block, instead of being rounded transversely at the top, is flat, and has no projections of any kind. It has a stud projection on each of its upper sides, conformed to fit closely into the grooves of the chamber. The studs have only a short vertical bearing, and any increase in the length of the bearing surface would necessitate a long and objectionable movement of the breech block, for locking and releasing it.

We have not referred to the other prior patents introduced by the defendant, partly because the more important of them are fully and satisfactorily considered in the opinion of the court below, and partly because the mechanism of the Pieri patent most closely approximates the construction of the claim in controversy. In none of the prior patents is shown a breech block provided with projections in the form of narrow, raised surfaces, like bands or ribs. In none of them are shown projections adapted to fill grooves extending completely around the upper surface of the chamber.

The real question, as regards the validity of the claim, is whether it involved invention to modify the form of the recesses and projections of the Pieri patent in order to reach the organization of the patent in suit. The improvements of the patent consist in an organization per-

fectly adapted for use with such a breech and breech block as are described therein. They are admirably adapted to release the breech block quickly, and hold it firmly when locked, and they are capable of indefinite multiplication if desired. That they supplied a stronger support for the breech block than the short grooves and studs of the Pieri patent is admitted by one of the experts for the defendant. It is important that the breech block be supported against the strain of discharge at other points than near the top, and so supported as to distribute the strain at all points as equally as is practicable. In order to do this, and to supplement the support given by the short grooves and studs, Pieri, as his patent shows, equipped his breech block with side cheeks at the rear, which bear opposite the bore of the gun when the breech is locked against extensions of the chamber. Although the grooves and bands of the patent in suit perform the same function of the short grooves and lugs of the Pieri patent, they do so more efficiently because the latter, lying wholly above the bore of the gun, do not furnish a sufficiently strong resistance to the discharge pressure. They can be unlocked when the breech block is lowered a distance much less than the length of its vertical supports. Their merit consists in allowing a long vertical bearing, together with a short and quick movement of the breech block in locking and unlocking. If the recesses and projections of the Pieri patent had been employed in a chamber having an upper wall, it would have been a simple, and perhaps an obvious, thing to join them by extending them across the upper wall, and to correspondingly extend the projections on the breech block; yet this would have only afforded a support for the breech block at and near the top. The question is, was there enough in the recesses and projections, as there used, to suggest the conception of the bands and grooves of the patent in suit? We think not, and conclude that these modifications of form and arrangement were new and valuable improvements, and involved sufficient inventive thought to sustain a patent.

We concur in the views expressed in the opinion of the court below upon the question of infringement, and do not deem it necessary to enlarge upon them.

The decree is affirmed, with costs.

STEARNS-ROGER MFG. CO. v. BROWN.

PORTLAND GOLD MIN. CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 21, 1902.)

Nos. 1,650, 1,651.

1. RIGHT OF APPEAL—TEMPORARY INJUNCTION—PARTY NOT RESTRAINED.
One who is not restrained from the performance of any act or from the pursuance of any course of conduct by an injunction is not legally aggrieved by the order granting it, and has no right to appeal from such order.[1]

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[1] See Appeal and Error, vol. 2, Cent. Dig. § 951 [j].

2. SAME—ORDER ISSUING DISCRETIONARY.
The right to exercise a sound judicial discretion in granting or refusing a temporary injunction is vested in the trial court, and not in the appellate court, and its orders should not be disturbed on appeal unless they are violative of the rules of equity which have been established for the guidance of the exercise of its discretion.

3. PATENTS—PRELIMINARY INJUNCTION—INFRINGEMENT—REVIEW ON APPEAL.
Where the determination of the question of infringement on the hearing of an appeal from an order granting a temporary injunction would not be final, but one of the parties to the suit would be entitled to a consideration and decision of the same issue at the final hearing, the appellate court will defer the decision of the question until after that hearing.

4. SAME—TEMPORARY INJUNCTION NOT GRANTED UNLESS INFRINGEMENT CLEAR.
It is the general rule that a temporary injunction should not be granted on ex parte affidavits in a suit for the infringement of a patent where the question of infringement is grave and difficult, and it is not clear that the defendant is guilty of infringement.

5 SAME—TEMPORARY INJUNCTION CONTINUED UNTIL FINAL HEARING ON PROPER BOND.
But in the appellate court the presumption is that the trial court rightfully found infringement, and even where that question is grave, and its decision doubtful, an order granting a temporary injunction will not necessarily be reversed, where the court below has required the complainant to give bond to protect the defendant against loss from the erroneous issue of the injunction; and a final determination of the question of infringement cannot be made until the final hearing, if no better scheme can be devised to protect both parties from loss in the interim.

6. LACHES—PATENTS—TEMPORARY INJUNCTION—REASONABLE DELAY.
Repeated willful trespasses confer no right to continue them; and mere delay, for any reasonable length of time, unaccompanied by such acts or conduct of the owner of the patent, and such facts and circumstances as amount to an equitable estoppel, will not deprive him, either on the ground of laches or of estoppel, of his right to a preliminary injunction, or to any other relief to which he would otherwise be entitled.

7. SAME—DELAY DURING LITIGATION OVER VALIDITY OF PATENT NOT LACHES.
Delay in prosecuting other infringers while the validity of the patent is in active litigation does not constitute laches.

8. PATENTS—PRELIMINARY INJUNCTION—CONTINUING INFRINGEMENT WARRANTS.
A continuing infringement on the complainant's monopoly is always a sufficient ground for a preliminary injunction in the absence of countervailing facts, because there is no other adequate remedy for the loss which constantly repeated trespasses entail.

(Syllabus by the Court.)

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

These are appeals from an order granting a motion for a preliminary injunction to restrain the Stearns-Roger Manufacturing Company, a corporation, from manufacturing or selling the Pearce turret ore-roasting furnace until the final hearing of this suit. After a spirited and protracted litigation, Horace F. Brown, the complainant, had established the validity of the first claim of letters patent No. 471,264, for improvements in ore-roasting furnaces, which had been issued to Mary C. Brown on March 22, 1892, and assigned to him. Extraction Co. v. Brown, 104 Fed. 345, 43 C. C. A. 568; Id., 110 Fed. 665, 49 C. C. A. 147. The Stearns-Roger Manufacturing Company had long been engaged in manufacturing and selling the Pearce turret ore-roasting furnaces, which were constructed in substantial conformity to the description contained in letters patent No. 488,797, issued to Richard Pearce on December 27, 1892. Brown had notified Pearce in 1893 that these furnaces were infringements of his patent, and had requested him to cease infringing, but Pearce had

denied that his furnaces constituted infringements of Brown's patent, and had continued their manufacture and sale. The Portland Gold Mining Company is a corporation engaged in mining and milling ore. It is not a manufacturer or vendor of furnaces. In July, 1900, the Stearns-Roger Manufacturing Company made a contract with the Portland Gold Mining Company to construct in a large mill for the reduction of ore which the mining company was about to build, three Pearce turret ore-roasting furnaces for the sum of $45,000. The manufacturing company was engaged in performing this contract, and the mill, which was to cost about $600,000, and the furnaces, which were indispensable to its operation, were approaching completion when the complainant, Brown, exhibited his bill in the court below, alleged that these Pearce turret furnaces infringed upon his patent, and prayed for the usual injunction and accounting. The defendants answered that the Pearce turret furnaces were not infringements upon the complainant's monopoly; that the Stearns-Roger Company was manufacturing and selling them, and that it was building three of these furnaces for the mining company, which the latter was about to use in its new mill. The mining company also pleaded that a preliminary injunction would compel it to install other furnaces in its mill; that this would delay the completion and the commencement of the operation of the mill for several months, and would entail upon it a loss of $1,200 a day during this delay. Upon these pleadings and upon affidavits a motion for a preliminary injunction was heard and decided by the circuit court, and the order of that court was that upon the filing by the complainant of a bond in the sum of $10,000 a temporary injunction should issue restraining the Stearns-Roger Company until the final hearing of this case from manufacturing or selling any Pearce turret ore-roasting furnaces except the three furnaces in process of construction for the Portland Gold Mining Company. No injunction was granted against the completion of these furnaces or against their use by the mining company.

Leonard E. Curtis and Lucius M. Cuthbert (Henry T. Rogers and Daniel B. Ellis, on the brief), for appellants.

Douglas Dyrenforth and Philip C. Dyrenforth, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The primary question on an appeal from an order granting a temporary injunction is whether or not the injunction evidences an error in the exercise of its sound judicial discretion by the court which issued it. There are established legal principles for the guidance of that discretion, and where they are violated the action of the court below should be corrected. But, unless there is a plain disregard of some of the settled rules of equity which govern the issue of injunctions, the orders of the courts below on this subject should not be disturbed. The law has placed upon these courts the duty to exercise this discretion. It has imposed upon them the responsibility of its exercise wisely, and has left them much latitude for action within the rules which should guide them; and, if there has been no violation of those rules, an appellate court ought not to interfere with the results of the exercise of their discretion. The right to exercise this discretion has been vested in the trial courts. It has not been granted to the appellate courts, and the question for them to determine is not how they would have exercised this discretion, but whether or not the courts below have exercised it so carelessly or unreasonably that they have passed beyond the

wide latitude permitted them, and violated the rules of law which should have guided their action.

The complainant applied, upon an adjudicated patent, for an injunction to restrain the Stearns-Roger Manufacturing Company and the Portland Gold Mining Company from constructing and using their Pearce turret ore-roasting furnaces which the manufacturing company was building under a contract with the mining company, and which the mining company intended to use when they were completed. He also asked for a general injunction against the manufacture, sale, or use by the defendants of any of the Pearce furnaces. The court refused to issue any injunction against the mining company. It refused to enjoin either company from constructing and using the three furnaces in process of erection. But upon the execution and filing of a bond in the sum of $10,000 to indemnify the manufacturing company for any damages it should sustain if the preliminary injunction was subsequently dissolved or modified, it enjoined the manufacturing company from making or vending any more Pearce furnaces until the final determination of this suit. This does not seem to be an unjust or an unreasonable course of action. The mining company took and has prosecuted a separate and independent appeal from the order granting the injunction against the manufacturing company. But as the injunction does not restrain the mining company from doing any act either alone or jointly with the manufacturing company, the mining company could not have been legally aggrieved by the order, and it had no right to appeal from it. Its appeal is accordingly dismissed.

The remaining question is whether or not the order enjoining the manufacturing company during the pendency of this suit from building and selling more Pearce furnaces after it installed the three that were contracted to the mining company was an unlawful exercise of the discretion of the circuit court. Counsel for the manufacturing company insist that this order was violative of the established rules of equity jurisprudence, because the Pearce furnace was not an infringement upon the patent to Brown, because the complainant had been guilty of such laches that he was not entitled to an ad interim injunction, and because there was no proof that the complainant would sustain such injury from the continued infringement as would warrant an injunction. The crucial question in this case—the question which must ultimately determine it on the merits—is whether or not the manufacture, sale, and use of the Pearce furnace is an infringement upon Brown's monopoly. There are cases in which the question of infringement may be finally determined on appeals from orders granting temporary injunctions, and where this can be done it is always competent, and often prudent, for an appellate court to consider and decide it on such an appeal. But this is not one of those cases. The complainant properly joined the manufacturing company and the mining company as defendants in this court, because they were jointly making and preparing to use the three Pearce furnaces which they were about to install in the new mill of the mining company. The mining company has answered that these furnaces do not infringe upon the patent to Brown, and it is entitled to a decision of that issue upon the evidence and testimony

which will be presented at the final hearing of this case. It had no right to appeal from the order granting the injunction, and its appeal has been dismissed. It would not be estopped by any decision of the question of infringement which this court might make on the ex parte affidavits presented on this appeal, but it would still be entitled to a later hearing and decision of the same question in this very case after the various witnesses have been subjected to examination and cross-examination in the usual course of a preparation for a final hearing. It is therefore reasonably certain that the question of infringement cannot be authoritatively decided upon this appeal, and that it must, in any event, be finally considered and determined upon other evidence which will be produced at the hearing. In view of this fact, and also because testimony taken under examination and cross-examination is much more satisfactory and far more reliable than the ex parte affidavits which this record contains, and because the affidavits might lead to one conclusion and the testimony to another, this court declines to enter upon a consideration and determination of the question of infringement upon this appeal.

Counsel for the manufacturing company invoke the conceded rule that, where it is not clear that the defendant is guilty of infringement, and that question is grave and difficult, a temporary injunction should not be granted on ex parte affidavits. Sprague Electric Ry. & Motor Co. v. Nassau Electric R. Co., 95 Fed. 821, 37 C. C. A. 286; Hatch Storage Battery Co. v. Electric Storage Battery Co., 100 Fed. 975, 976, 41 C. C. A. 133, 134. But while this rule prevails in all its force in the trial court, it is met in the appellate court by another of great cogency,—by the rule that where the court below has considered a question, and made a finding on conflicting evidence, its conclusion is presumptively correct, and it ought not to be disturbed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the facts. Kinloch Tel. Co. v. Western Electric Co., 113 Fed. 659; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 716, 45 C. C. A. 544, 567; 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; Exploration Co. v. Adams, 104 Fed. 404, 408, 45 C. C. A. 185, 188. The court below has considered this question of infringement on the conflicting evidence which the affidavits present, and has concluded that the trespass of the defendant is clear. Moreover, the rule which the defendant invokes does not apply with nearly as much force to a case like that at bar, in which the complainant furnishes ample security to indemnify the defendant against any loss which results from an erroneous issue of the injunction, as it does to one in which such a bond has not been given. It is by no means obvious that the court below was or that it was

not in error in its decision of the question of infringement on the evidence before it. Whether it was so or not can be determined only by an examination and study of the evidence and a comparison of the two furnaces,—a study and comparison which we should not hesitate to make were it not for the fact that it would be practically futile, and that it might result in contradictory and confusing decisions upon different states of facts in the same case. No opinion is expressed upon this question of infringement. But the injunction should not be dissolved on the ground that this issue is doubtful, because the order and the bond furnish as complete protection to both parties against loss as can be devised, because the presumption is that the finding of the trial court is right, and because a final determination of the question of infringement cannot be made in this case on this appeal, and a decision of it might lead to confusing and contradictory opinions upon different states of facts in the same case.

It is contended that the complainant was guilty of such laches that he was not entitled to a preliminary injunction. The patent in suit was issued on March 22, 1892. In May, 1893, the owner of the patent notified the manufacturing company or its predecessor that its Pearce furnace was an infringement, and in June that charge was denied. On January 4, 1897, Brown brought his suit against the Metallic Extraction Company, in which, after a protracted and expensive litigation, the validity of his patent was finally established on October 8, 1900. Extraction Co. v. Brown, 104 Fed. 345, 43 C. C. A. 568. The bill in this suit was exhibited on April 24, 1901. The doctrine of laches is an equitable principle, which is applied to promote, never to defeat, justice. It is a branch of the principle of equitable estoppel. Where a patentee, by deceitful acts, silence, or acquiescence, lulls an infringer into security, and induces him to incur expenses or suffer losses which he would not otherwise have sustained, courts of equity apply the doctrine of laches on the principle that one ought not to be permitted to deny the existence of facts which he has intentionally or recklessly induced another to believe to his prejudice. There is nothing of that character in this case. The manufacturing company was informed that Brown claimed its furnace was an infringement in 1893. It then had the option to retire from its manufacture and sale, or to proceed with it, and take the chances. It chose the latter alternative. Brown did not induce it to make this choice. The company made its own choice with its eyes open, and with full notice of Brown's claim, and it has ever since continued to follow it against the protest and in spite of the notice of Brown to it to desist. One who, with full knowledge of a patentee's claim of infringement, and against his protest, continues to trespass, cannot, on the ground of the estoppel or laches of the patentee, successfully defend a suit for infringement brought, or a motion for a preliminary injunction made, within any reasonable time. Repeated willful trespasses establish no right to their continuance. And mere delay by a patentee to bring his suit or to apply for his preliminary injunction for any reasonable length of time after an infringer is informed of his trespass, unaccompanied with such acts of the patentee and such facts and cir-

cumstances as amount to an equitable estoppel, will not deprive him, either on the ground of laches or of estoppel, of his right to a temporary injunction or to a recovery. Moreover, delay in prosecuting other infringers during the time while the validity of a patent is in litigation does not constitute laches. American Bell Tel. Co. v. Southern Tel. Co. (C. C.) 34 Fed. 795, 802; Edison Electric Light Co. v. Sawyer-Man Electric Light Co., 3 C. C. A. 605, 53 Fed. 592; Green v. Barney (C. C.) 19 Fed. 420; Norton v. Can Co. (C. C.) 57 Fed. 929, 933. The complainant was therefore guilty of no laches between January 4, 1897, and October 8, 1900. There was no unreasonable delay after the decision of October 8, 1900, was filed. The complainant exhibited his bill within seven months after the determination of the validity of his patent. There were no acts or conduct of the complainant, no facts or circumstances between the issue of his patent in 1892 and the commencement of his suit against the Metallic Extraction Company, on which to base an equitable estoppel in favor of the Stearns-Roger Manufacturing Company. It knowingly exercised its option to make and sell its furnaces in spite of Brown's patent and his notice to them to desist. Brown was guilty of no laches in this case that deprived him of his right to the preliminary injunction.

Finally, it is contended that the order granting the injunction should be reversed because there was no proof of such threatened irreparable injury to the plaintiff as would warrant it, while there was evidence that the manufacturing company was solvent, and that the issue of the injunction would cause it great loss. A continuing trespass is always good ground for the issue of an injunction in the absence of countervailing considerations, because a multiplicity of suits for damages is never an adequate remedy for the loss which constantly repeated trespasses entail. Upon this ground, in the absence of other considerations, the complainant was entitled to his injunction. Manufacturing Co. v. Booth, 78 Fed. 878, 24 C. C. A. 378. In a litigation like this it is impossible for either party to escape without some loss. All that the courts can do is to make such orders and to pursue such a course as will enable the parties to reach a determination of their respective rights with as little loss as possible. The affidavits in this case have been carefully considered, and the damages likely to result to the respective parties from the issue of and the refusal to issue this injunction have been thoughtfully balanced, in vain, to find a more just and equitable order for the protection of the rights of the parties to this suit than that which was made by the court below. It permitted the completion and use of the furnaces in process of construction, thus preventing any loss to the mining company. It restrained the manufacture and sale of other infringing furnaces, thus protecting the rights of the complainant. And it required the complainant to make a bond for $10,000 to indemnify the manufacturing company against possible loss from the erroneous issue of the injunction, thus securing the latter company as far as possible against damages from the chances of the litgation. It was a wise and provident exercise of the judicial discretion of the court below, and it is affirmed.

MARVEL CO. v. PEARL et al.

(Circuit Court, S. D. New York. February 20, 1902.)

1. PATENTS—ESTOPPEL.
A patentee, and likewise a corporation, which it organizes and controls, are estopped to assert the invalidity of the patent as against an assignee thereof.

2. SAME—INFRINGEMENT—PRELIMINARY INJUNCTION.
There being dispute as to the equities, preliminary injunction in suit for infringement of patent will not issue, defendants giving a bond to respond for profits or damages ultimately found, and filing statements of sales.

Motion for Preliminary Injunction on Design Patent No. 30,023, January 17, 1899, and Mechanical Patent No. 616,963, January 3, 1899.

Philip Manro, for the motion.
Henry B. Brownell, opposed.

LACOMBE, Circuit Judge. The design patent sued on in this cause is another instance of a perversion of the statute. Patents for designs are intended to apply to matters of ornament, in which the utility depends upon the pleasing effect imparted to the eye, and not upon any new function. Rowe v. Blodgett & Clapp Co. (Nov. 14, 1901) 50 C. C. A. 120, 112 Fed. 61. Syringes of this sort are not bought because of their artistic beauty, but because they are mechanically useful. However, the defendant Tullar Pearl, who is himself the patentee and assignor to the complainant, cannot be heard to assert the invalidity of his patent, nor can the defendant company, which he organized and controls. There seems, however, to be no infringement of the design shown. As patentee and assignor of the mechanical patent, defendant Tullar cannot be heard to dispute its validity; and his corporation is in the same situation. They cannot controvert the statement in the specification that the patentee was "the first to provide a syringe wherein the water is discharged by the compression of a bulb with a stationary deflector held in the end thereof, and formed of a disk having radial slits therein extending from a point near the center, and the portions between the slits bent to form wings, which are disposed at such an angle as to present inclined or spiral passages to the discharge or flow of the liquid." In the alleged infringing device inclined or spiral passages for the discharge or flow of the liquid are presented in the shape of the inclined or slanting perforations, which seem to be a fair equivalent of the slits with slanting wings.

Inasmuch as there is some dispute as to the equities, preliminary injunction will not issue if defendants, within 10 days, give a bond for $2,000 to respond for profits or damages ultimately found, and file within 20 days a full sworn statement of all of the alleged infringing devices sold down to and including February 28th and within the first week in April, and in each succeeding month file a similar sworn statement covering sales of the preceding month. In the event of failure to comply with these conditions, preliminary injunction under the mechanical patent may issue.

In re SWIFT et al.

Ex parte HARRIGAN.

(District Court, D. Massachusetts. March 21, 1902.)

No. 2,745.

1. BROKERS—BREACH OF CONTRACT TO DELIVER STOCKS—SUFFICIENCY OF DEMAND.

A broker who was carrying stocks for a customer, which he had bought on a margin, made a general assignment; and a few days afterwards the customer wrote him, asking the amount of his account, which he did not know, and stating that he would remit the amount and take up the stocks. No action was taken by the broker or assignee on such letter, the stocks having been previously pledged by the broker and sold by the pledgee; and the broker was subsequently adjudged a bankrupt. *Held*, that the letter constituted a demand, the failure to comply with which was a breach of the contract, and gave the customer an immediate right of action; it being shown that he was able and willing to pay the amount due from him to the broker.

2. SAME—MEASURE OF DAMAGES.

The measure of damages for the breach of a contract by a broker to deliver stocks on demand of a customer, for whom he had bought the same on a margin, is to be determined according to the highest intermediate value of the stocks between the default and a time after the customer has notice thereof reasonably sufficient to enable him to replace the stocks.[1]

In Bankruptcy. On review of decision of referee.

Robert K. Dickerman, for creditors.

Freedom Hutchinson, trustee, pro se.

LOWELL, District Judge. The creditor was a customer of the bankrupts in their business as stockbrokers. The bankrupts had bought, and were carrying for the customer, certain stocks, worth more than the customer's debt to the bankrupts. These stocks had been pledged by the bankrupts to other creditors. On December 27, 1899, the bankrupts made a general assignment, and the creditor had notice of it at the time it was made. On December 30th the creditor wrote to the bankrupts as follows:

"Lowell, Mass., Dec. 30th, 1899.

"E. C. Hodges & Co., Exchange Bldg., Boston—Gentlemen: I have on account with you two hundred shares Isle Royal Mining Co., one hundred shares Butte & Boston Mining Co., C. F. S., and fifty shares Tamarack Mining Co., J. S. H., and fifty shares Tamarack Mining Co., C. H. H. Will you please send me a statement of the amount I owe on these stocks, and I will send funds sufficient to cover the amount due, and will take up the certificates.

"Very truly, Geo. M. Harrigan."

The following circulars were sent by the common-law assignee, and received by the creditor:

"Boston, January 10, 1900.

"To the Creditors of E. C. Hodges & Co.—Gentlemen: E. C. Hodges, Frederick Swift, and E. F. Lowry, doing business under the firm name of E. C. Hodges & Co., did on the 27th day of December, 1899, execute

[1] See Brokers, vol. 8, Cent. Dig. §§ 27 [d], 36 [a, i, j].

to me an assignment of all their property, in trust for the benefit of their creditors, without preference or priority except as provided by law. I have accepted the trust. A general meeting of the creditors will be called at an early day, of which you will receive notice. To expedite a settlement of affairs, I ask you to send me a statement of your account, made up to this date, and also to sign and mail to me as soon as possible the inclosed assent to the assignment.

"Yours respectfully, Geo. C. Dickson,
"53 State Street, Room 823. Assignee of E. C. Hodges & Co."

"Dear Sir: On Saturday, Jan. 13, 1900, I mailed you a statement of the assignment of E. C. Hodges & Co., with the request that you assent to said assignment; and, not having received a reply, I beg to advise you as follows: More than one-half of the creditors have assented. At the same time, I do not feel justified in continuing under the assignment unless it is assented to by all parties in interest. In other words, if the creditors prefer to petition the firm into bankruptcy, it is within their power, and it would seem to be time wasted to continue under the present arrangements if this is the wish of any of the creditors; but, from the examination that I have been able to make of the affairs of E. C. Hodges & Co., I believe it to be for the best interests of the creditors to assent to the assignment, and, when the condition of the affairs of Hodges & Co. are presented before them, if it should then be the wish of the creditors to petition the firm into bankruptcy, they can do so without any loss of their rights. My position as assignee is simply to hold the property until the creditors meet and decide what is best to be done. Under this assignment no persons' rights can be prejudiced in any way, but all are alike protected. I make the above statement, believing it will be for your best interests to sign the within assent; and, not receiving a reply to this letter, I will understand that, as far as your claim is concerned, you prefer that the firm be petitioned into bankruptcy.

"Very truly, [Signed] G. C. Dickson, Assignee."

The creditor took no further action until after the adjudication, May 7, 1900, which was made on an involuntary petition filed April 6th. The stocks carried were sold by those creditors of the bankrupts to whom they were pledged on December 27 or 28, 1899. Their value was greater on April 6th than on December 27th or 28th. The question here raised concerns the amount of proof to be allowed. Of what date is the value of these stocks to be taken? In Re Swift (D. C.) 105 Fed. 493, affirmed as Hutchinson v. Dee (C. C. A.) 112 Fed. 315, it was held that the value of the stocks carried for another customer of these bankrupts was to be taken as of April 6th. The court has here to determine, therefore, if the facts of this case differ materially from those of Hutchinson v. Dee. In that case there was correspondence which, in the opinion of the court of appeals, "makes it clear that both the bankrupts and Dee, in effect, agreed to regard the assignment as not definitive, and that each held everything in abeyance until the decisive blow was struck by the proceedings in bankruptcy." "Voluntary assignments," said the court, "are frequently resorted to as expedients to tide debtors over their difficulties, and intended to be merely temporary; that the letters referred to indicate that this case falls within that observation; and that the parties waived, for the time being, insistence on the performance of the existing contracts. Therefore the rights of the parties, as fixed by the law, necessarily relate to the bankruptcy proceedings." 112 Fed. 315, 320. In its opinion this court said, "As no demand was made in this case by the customer after the general

assignment, it follows that no right of action accrued to him." 105 Fed. 500. In Weston v. Jordan, 168 Mass. 401, 405, 47 N. E. 133, 134, it was said by the supreme court of Massachusetts:

"After Wheatland had parted with the control of the shares, and after repeated demands for them by Jordan, and refusals by Wheatland to deliver them, Jordan had a valid ground of action against Wheatland either for breach of contract or for a conversion. It matters not which. If Wheatland had refused on demand to deliver the shares when they were high, and they had afterwards fallen in value, we cannot accede to the defendant's contention that Wheatland could still have compelled Jordan to take them up and pay the balance of the cost."

There is nothing in Chase v. City of Boston (Mass.) 62 N. E. 1059, to modify the earlier Massachusetts cases in their application to the case at bar.

Did the creditor in this case make upon the bankrupts a "demand," in the sense in which that word is used in the cases above cited? No formal tender was made, but none could be made, for the creditor did not know just how much he owed the bankrupts. It seems that his demand was like that made in Weston v. Jordan, and relied on by the court in deciding that case. When either broker or customer "has made a voluntary assignment for the benefit of creditors, or gone into bankruptcy, or perhaps when he has committed some other notorious act of insolvency," said the circuit court of appeals in Hutchinson v. Dee, "he has parted with the control of his assets; and the law assumes, as is the fact, that his ability to perform his contracts has terminated, and that a demand and tender would be futile, and ordinarily an action may at once be brought." 112 Fed. 320. If this be true, a fortiori demand and tender need not have that formality which is required in some other cases. It was found as a fact that the creditor was both able and willing to pay the bankrupts his debt due them on December 30, 1899, when his letter was written. I am of opinion, therefore, that in this case the creditor has not "waived, for the time being, insistence on the performance of the existing contracts," but that, on the contrary, he has demanded the delivery of the shares carried for him, and has exercised his election to treat the contract as broken. His failure to notice the assignee's letters does not indicate that he modified his position as definitely declared in his letter of December 30th. Had the shares fallen in price between December 28, 1899, and April 6, 1900, the broker could not have compelled the creditor to take their reduced price in satisfaction of his claim.

It remains to be determined if the value of the shares should be taken as of December 28, 1899, or as of some date thereafter, but prior to April 6, 1900. The rule of damages stated in Galigher v. Jones, 129 U. S. 193, 200, 9 Sup. Ct. 335, 32 L. Ed. 658, binds this court, even though it be shown that some of the text-books and cases there relied on lay down a rule quite the opposite of that which they are cited to support. Following Galigher v. Jones, this court has to determine what is a "reasonable time" for the purchase of the stocks in question. These appear to have been of the "active" sort, and doubtless could have been bought at any time. If there was a

rise in their price within a day or two after December 30th, the creditor may, perhaps, be entitled to the benefit of it, and the referee may receive evidence on that point.

The judgment of the referee is reversed and the matter of the claims of Harrigan, Sullivan, Harris, and Hansen is referred back to him, with instructions to proceed in accordance with this opinion. In the case of Lyons the correspondence was not precisely the same as that quoted above, but the difference is not material to the decision. The same order must be made in this matter as in the rest.

UNITED STATES v. WEBER et al.

(Circuit Court, W. D. Virginia. March 25, 1902.)

1. INJUNCTION ISSUED BY DISTRICT JUDGE—LIFE OF.
   Rev. St. § 719, providing that an injunction issued by a district judge as one of the judges of the circuit court shall not continue longer than to the circuit court next ensuing, unless so ordered by the circuit court, was intended to limit the life of injunctions issued by district judges acting as judges of the circuit court, only when issued in vacation.

2. LABOR UNIONS—ILLEGAL PURPOSES AND MEANS—LIABILITY OF MEMBERS AS CONSPIRATORS.
   If the object of a labor union is unlawful, or if the methods employed by it either to induce acquisitions to its ranks or to accomplish its ulterior purposes are unlawful, all persons who combine in such efforts are conspirators.

3. SAME—LEGALITY OF OBJECT—STRIKES—INTIMIDATION OF EMPLOYES.
   Though the right of persons employed by receivers of a mining corporation to voluntarily join a union having only legal purposes cannot be denied, nor the right of others to induce such action on their part by legal methods and fair moral suasion, they have no right to combine for the purpose of securing control of all mining operations, including those under the management of the receivers, with the intent of forcing compliance with their demands by means of strikes, nor have they the right, by threats and intimidation, to compel others, who do not desire to join the union, to quit work.

4. SAME—ORDERING EMPLOYES OF RECEIVERS TO QUIT WORK—EFFECT.
   Action on the part of a union composed of mining employés in ordering persons employed by receivers of a particular mining corporation to quit work is in itself a direct violation of the order of court directing the receivers to operate the plant.

5. SAME—VIOLATION OF INJUNCTION.
   An order made October 26th, specifically requiring of two named parties that they "desist from any interference with the employés of the said receivers, so as to affect the conduct of the business by the receivers," was shown to have been violated where it appeared that they addressed a number of the employés on March 2d following, and were about to address another crowd on the 12th when arrested, and that one of them then called out to the men to "continue their work" (of intimidation), and afterwards in a printed interview stated that they had advised the men to quit, and also that he had told a party that he had violated and intended to violate the order.

Contempt Proceedings.

Bullitt, Kelly & Hull and Blackford, Horsley & Blackford, for the United States.

H. M. Ford and Harrison & Long, for defendants.

Before SIMONTON, Circuit Judge, and McDOWELL, District Judge.

McDOWELL, District Judge. The defendants Weber and Haddow have been attached and brought before the court on a charge of violations of orders of this court made in the case of the Morton Trust Company against the Virginia Iron, Coal & Coke Company. The defendants Tom Braley, Cass Braley, and David Clarkson have been summoned by rule to show cause why they should not be held guilty of contempt for violations of these same orders. All the defendants have, in effect, denied the charges made against them. Both the attachment and the rule were issued upon information contained in a verified petition filed by the receivers appointed in the above-named cause.

It is well in the outset to state that the court fully recognizes the limitations on its powers as to contempts committed neither in the presence of the court nor so near thereto as to obstruct the administration of justice. Rev. St. § 725. That there must have been disobedience of, or resistance to, some order of the court is essential to constitute contempt in the case at bar.

By the first order entered in the case of the Morton Trust Company against the Virginia Iron, Coal & Coke Company the receivers thereby appointed were directed to take possession of and to operate the properties of the defendant company. By an order entered by the late Judge Paul, district judge, on February 12, 1901, certain named persons (not including any of these defendants), and "all other parties concerned whose names be hereafter ascertained," were enjoined from entering upon the property of the Virginia Iron, Coal & Coke Company, from trespassing thereon, and from intimidating or coercing, or attempting to intimidate or coerce, or in any manner interfering with the employés of said receivers with intent to induce them to quit the service of said receivers, and from entering into any conspiracy or combination for the purpose of hindering or obstructing the said receivers in the operation of their business at the "Looney Creek Lease." The Looney Creek Lease is the same operation that is now alleged to have been obstructed and crippled by the acts of these defendants.

As to the last-mentioned order, the point is made by counsel for the defendants that, as the order was made by a district judge, it ceased to be operative long before the acts here complained of are alleged to have been committed, because of section 719, Rev. St. The statute referred to was intended to limit the life of injunctions issued by district judges, acting as judges of the circuit courts, only when issued in vacation. 1 Bates, Fed. Eq. Proc. § 528; Vulcanite Co. v. Folsom (C. C.) 3 Fed. 509. But upon inquiry of the clerk at Abingdon, where this cause is docketed, it appears that the October term, 1900, of the circuit court was adjourned sine die on October 13, 1900. The next regular term there commenced by law in May, 1901. It follows, therefore, that said order ceased to be effective before the commission of the acts here complained of, and consequently the said order is not of moment in this discussion, except in so far as it served as a warning that the plant at Inman was under the charge of the court, and that

interference with the employés with intent to induce them to quit the service, or intimidating them to that end, had been regarded by the court as a violation of its orders.

With the petition for the attachment is filed, as Exhibit A, a printed poster giving, in effect, the terms of the above order. It appears that many copies of this poster had been conspicuously displayed, and that the defendants Weber and Haddow knew its contents. In fact Haddow testified that he knew the terms of the poster so thoroughly that he could repeat it almost verbatim. On October 26, 1901, one of the circuit judges of this circuit issued an order by which the defendants Weber and Haddow, by name, were ordered to show cause why they should not be attached for contempt in attempting to interfere with the conduct of the business of the receivers in the management of the properties intrusted to their hands by former orders of this court. And, further ordering, "that the employés of said receivers be enjoined from conspiring and agreeing with any person or persons whomsoever in attempting to interfere with the conduct of the business of the receivers. In the meantime, and until the further order of this court, that the said Haddow and Weber desist from any interference with the employés of said receivers, so as to affect the conduct of the business of the receivers." A writ of injunction, issued in pursuance of said order, was served on the defendant Weber, and knowledge of the contents of the writ appears to have been brought home to the defendant Haddow. But it does not appear that further action was then taken by the court. This was in November, 1901. It appears that all the defendants knew that the plant at Inman—the "Looney Creek Lease"—was being operated by the receivers of this court; that Weber and Haddow knew the purport of the injunction orders above mentioned; and it is entirely improbable that the other defendants were ignorant of the purport of the injunction order issued by Judge Paul.

Having thus set out the orders of this court, some or all of which are alleged to have been disobeyed or resisted by the defendants, it may further tend to clearness of thought to briefly consider some questions of law involved in this matter. It is admitted by defendants Weber and Haddow that they are officers of the organization known as the "United Mine Workers of America"; that their duties consist in part in organizing mine workers into local lodges of said order; that they came to Virginia both in October, 1901, and March, 1902, for the purpose of organizing such lodges among the miners working for the receivers at Inman and at Tom's Creek, as well as among miners working at other nearby plants. It appears from the evidence that in Western Pennsylvania, Ohio, Indiana, and Illinois the coal miners are so nearly all members of the organization that said regions may be considered as "union" territory. Further, that in West Virginia and Virginia a great many—perhaps a majority—of the miners are not members of the union. It also appears that when, on a former occasion or occasions, a general strike was ordered, the hopes of the organization were in some measure, at least, defeated because of the fact that the miners in West Virginia continued at work, and the coal thus produced went into the markets that would otherwise have been largely dependent upon the output of the union territory. Hence, it

seems, that the object in organizing lodges in the Virginias is to bring the Virginia mines under the control of the organization.

The right of the employés of the receivers to voluntarily join a union that has only legal purposes in view cannot be denied. Moreover, the right to induce, by legal methods and fair moral suasion, the employés of the receivers to join such an organization is not denied. But if the object of the union is illegal, or if the methods employed by it, either to induce acquisitions to its ranks or to accomplish its ulterior purposes, are illegal, it appears to be well settled that the persons who combine in such efforts are conspirators. In Bish. Cr. Law (7th Ed.) § 171, it is said:

"Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end."

In 24 Am. & Eng. Enc. Law (1st Ed.) p. 131, under the head of "Strikes," is a quotation from Com. v. Shelton, 11 Va. Law J. 324, in which the court of appeals of Virginia said:

"The authorities seem to agree that the gist of the offense is the conspiracy, and that a conspiracy is a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual or the public. But by 'unlawful' it is not intended to mean that the acts agreed to be done must be criminal; it is enough if they be wrongful and with improper or evil intent. Thus, it has been held that threats, intimidation, or any forcible means, other than lawful competition, are unlawful. To threaten another in order to deter him from doing some lawful act * * * has always been considered a misdemeanor at common law."

See, also, Crump's Case, 84 Va. 927, 6 S. E. 620, 10 Am. St. Rep. 895, which contains much valuable learning on the subject of conspiracy, and is indirectly authority for the proposition that a combination for the purpose of effecting a legitimate object by illegitimate means is a criminal conspiracy.

It is an equally well-settled doctrine that each of the confederates is liable for all such illegal acts of the others as may be reasonably anticipated as incidental to the intended act. An excellent discussion of this question is appended to the report of In re Doolittle (C. C.) 23 Fed. 549. See, also, U. S. v. Kane, Id. 748; Mitchell's Case, 33 Grat. 845; 1 Bish. Cr. Law (7th Ed.) § 636.

In the first place, it is hardly open to serious question that the ultimate purpose of the union is not legal. This purpose is to secure control of mining operations, including those under the management of the receivers of this court. Confessedly, control is desired for this purpose: If the union miners in some other state make complaint of grievance,—the justness of the complaint to be judged solely by the union,—the union will be in a position to enforce compliance with their demands by ordering and carrying into effect a general strike.

Can this court rightfully surrender control of the works under its charge to the United Mine Workers? On authority it is clear that it cannot. See In re Higgins (C. C.) 27 Fed. 445; In re Wabash R. Co. (C. C.) 24 Fed. 217; In re Doolittle (C. C.) 23 Fed. 544; Thomas v. Railroad Co. (C. C.) 62 Fed. 803. On reason, also, it is equally clear. But a discussion of the reason for this rule, involving sociological questions of much interest, cannot now be entered into.

To go further, it appears from the evidence that, in order to perfect the control desired by the union, it is necessary that practically all mine workers be members of the organization and subject to its directions. In other words, it is necessary that nonunion men—men who do not desire to join the union—be compelled to quit work. This is one of the avowed means to the desired end. That this is illegal and not to be tolerated needs no argument. Hence, even if it were conceded that the ultimate purpose is legal, yet, as a means intended to be used to effect the ultimate purpose is illegal, it follows that a combination to effect the purposes of the union is a conspiracy.

It is proven here beyond all reasonable doubt that until very recently there were between 600 and 700 employés at work at the Inman plant, and that at the time the witnesses left there to attend court the number of men at work had fallen off to about one-third of that number; thus restricting the output of the plant, and materially reducing the income derived from its operation.

It was further proven that on the night of Sunday, March 9, 1902, sundry notices, each bearing the impress of the seal of the local lodge or union of the United Mine Workers, were conspicuously posted about the works. Two of the notices produced here read:

"Local No. 1,763: I hereby notify you coke pullers and loaders to stop work. U. M. W. of A."

The other read:

"Notice.

"Inman. No. 1,763.

"U. M. W. of A. March 9, 1902.

"To All Miners and Mine Workers: You are notified that your works are suspended, and we ask that all of you come out and assist us in this struggle for freedom. To one and all.

"Yours for success, U. M. W. of A."

It is also a fact that many, if not all, of the Hungarians employed at the plant had been intimidated and prevented from work because of threats that if they worked they would be shot. That others of the employés had been intimidated was also proved. Some of the witnesses introduced by the government gave visible evidence while on the witness stand that they stood in great fear of the union. In fact, no one hearing the testimony and observing the demeanor of many of the witnesses could well doubt that at least some of the employés had been intimidated and induced to quit work because of fear, and that others had been forced to join the union by the same method. That the seal impressed upon the notices above mentioned is the seal of the local lodge at Inman was admitted. Two of the defendants—Cass Braley and David Clark or Clarkson—are proved to have been members of the union, and to have posted some of said notices.

It is earnestly contended that the defendants Weber and Haddow never participated in, sanctioned, or advised any of the illegal acts traced to some members of the union. But the act of the union in ordering the coke pullers and loaders to stop work is in itself in direct contravention of the order of this court directing the receivers to operate the plant. In other words, such acts are illegal. Coupled with the known intimidation of some of the employés, the above no-

tices can hardly be considered otherwise than an order, not to be disobeyed with impunity, to stop work. Again, the notices containing the statement that the "works are suspended" is itself in contravention of the orders of this court.

There is no necessity to consider these notices in so far as they may be treated as a mere request or invitation to the nonunion men to quit work. The announcement that the works are suspended carries with it by implication something sinister, and something altogether different from a mere invitation to quit work.

It therefore seems, to say the least, probable that the union, in order to carry out its ultimate purpose, resorted in the case at bar to threats and intimidation of the nonunion laborers. But, even if not, certainly the union, by some member or members having control of its seal, did resort to direct violations of the orders of this court in order to carry out its purposes. The union has never disavowed the responsibility for the issuance of the notices above mentioned. In their bearing on the statement that the union intended to use unlawful means to secure its end, the addresses made by the defendants Weber and Haddow at the meeting on Sunday, March 2, 1902, are of importance. At that meeting much that was said by these organizers was proper and unobjectionable. But, even from the testimony of these defendants themselves, it appears that intimations were thrown out that if the nonunion men did not join, and if the plant did not become subject to the union, the product of the mines might be boycotted, as such a thing had been done and might be done again. According to the witness George Kilgore, who seemed to be disinterested, what was said was that in the event mentioned the product of the mines would be boycotted, and all nonunion miners would be blacklisted and denied work at any unionized mines.

There is another fact developed in the evidence that has its bearing just here. It appears that there is another mining operation, "Stonega," located near the Inman plant, which is operated by the Virginia Coal & Iron Company. Extraordinary efforts seem to have been made by this company to keep organizers of the Mine Workers from coming on the property, notwithstanding which they went on the property. However, mere visits by one or a few organizers did not produce the desired result. Hence a plan was formed by Weber, and apparently also by Haddow, to march a body of 150 union men to the Stonega plant. This plan failed because of some accident. The court cannot close its eyes to the probable effect of such a demonstration. It would almost surely have resulted in intimidating men at Stonega who did not wish to join the union. Can the organizers of this intended demonstration be considered as innocent of knowledge that their confederates at Inman would adopt similar methods of intimidation? Under the rule of law as to conspiracy, each of these defendants is guilty of the above-mentioned illegal acts of the others done in pursuance of the common design.

So far the question has been discussed without particular reference to the order of October 26, 1901. This order specifically requires of Haddow and Weber that they "desist from any interference with the employés of the said receivers so as to effect the conduct of the busi-

ness of the receivers." Under attachment from this court, these defendants were arrested on the evening of March 12th inst. They had addressed a number of the employés on Sunday the 2d, and were when arrested on the cars at Appalachia, a depot near Inman, whence they had come for the purpose of again addressing the men. Between the 2d and 12th the works at Inman had been greatly crippled by the acts of the union. Upon being arrested, the defendant Weber, according to disinterested witnesses that cannot be disbelieved, put his head out of the car window, and, speaking to a crowd of union men there collected, advised them to "continue their work," and not to agree to anything until he and Haddow returned. The "work" the union was then engaged in, certainly in part at least, consisted of intimidating nonunion men who wished to work. Again, after having been brought to Lynchburg, a reporter of an afternoon Lynchburg paper interviewed the defendants. According to the printed interview, Weber said to the reporter, in substance, that he and Haddow had advised the men to quit work unless the men that had been discharged were reinstated. No satisfactory denial of the correctness of this interview was made. The witness Baldwin testified that Weber told him that he had violated the order of October 26, 1901, and intended to violate it. This witness had no interest to misstate the facts in this respect. The conclusion is forced upon the court that both Weber and Haddow knowingly and intentionally disobeyed the said order.

An order will be entered punishing the defendants for their contempt: Tom Braley, one month's imprisonment; Cass Braley, two months' imprisonment; David Clarkson, two months' imprisonment; John Haddow, six months' imprisonment; Wm. Weber, six months' imprisonment.

SIMONTON, Circuit Judge. Having carefully read the evidence in this case, I hereby fully concur in the reasoning of the district judge and in his conclusion.

Order.

This cause came on to be heard upon the petition of Henry K. McHarg and A. A. Phlegar, receivers of the Virginia Iron, Coal & Coke Company, on attachments against Wm. Weber and John Haddow; and on the rules to show cause issued against Thomas Braley, Cass Braley and David Clarkson, and the returns of the said respondents, hearing the same, and the testimony produced before the court, and considering the arguments of counsel thereon, it is adjudged, ordered, and decreed that the said attachments and the said rules issued against the said respondents Wm. Weber, John Haddow, Thomas Braley, Cass Braley, and David Clarkson be made absolute, and that the said respondents are in contempt of the orders of this court. It is further ordered that the said Wm. Weber and John Haddow be each imprisoned in the jail of the city of Lynchburg for the term of six months each; and Thomas Braley be imprisoned in the jail of Wise county, in the state of Virginia, for the term of one month; and that Cass Braley and David Clarkson be each imprisoned in the county jail of Wise county aforesaid for the term of two months each. It is further ordered that capias be issued for each of the respondents

Thomas Braley, Cass Braley, and David Clarkson; and that the terms of imprisonment herein provided for each of the said parties shall begin as to each of them, respectively, when he is lodged in the jail as provided in this order; that this order be signed in duplicate, one to be entered in the office of the clerk of this court at Abingdon, and the other to be placed in the hands of the marshal of this court for action thereon.

In re METZGER TOY & NOVELTY CO. et al.

(District Court, W. D. Arkansas, Ft. Smith Division. April 28, 1902.)

BANKRUPTCY—PREFERENCES.

Bankr. Act, § 60a, provides that "a person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Claimant recovered judgment against a bankrupt partner, and execution issued thereon. Thereafter the parties agreed that the sheriff should place a cashier in charge of a store belonging to the partnership, and that the proceeds of each day's sales should be paid to the sheriff, and applied on the execution, pursuant to which arrangement certain payments were made to claimant, who had no knowledge that the partner was bankrupt at the time. *Held* to constitute a preference within the act, which would have to be surrendered before the balance of the claim could be proved.

In Bankruptcy.

On the 31st of December, 1901, the Metzger Toy & Novelty Company, a partnership composed of Rudolph Metzger, Sr., Rudolph Metzger, Jr., and Mary Metzger, filed a petition in bankruptcy as such partnership, and also as individuals; and on January 3, 1902, the partnership, and each of said partners individually, were adjudicated bankrupts. In an adversary suit between the Bloch Queensware Company and Rudolph Metzger, Sr., the former on the 30th of November, 1901, in the supreme court of the state of Arkansas, recovered a personal judgment against the latter for $983.92, with interest on $902.22 at 6 per cent. from August 3, 1898; and on the 19th day of December, 1901, an execution was issued out of said court, directed to the sheriff of Sebastian county, and came to his hands on the following day. The sheriff immediately notified Rudolph Metzger, Sr., and the latter begged time from day to day, in order that he might borrow the money and pay off the execution. Failing in this, on the 23d of December Rudolph Metzger, Sr., agreed with the sheriff and the attorneys of the Bloch Queensware Company that a cashier might be placed in the store of the Metzger Toy & Novelty Company by the sheriff, and the proceeds of each day's sales be turned over by said cashier to the sheriff in satisfaction of said execution. This method was followed up, and it continued until and including Christmas day; and, as the result of that arrangement, $479.09 was paid to the sheriff on the execution. At the time the sheriff received the money under the arrangement heretofore stated, and up to and including the time when the execution was levied, the uncontradicted proof shows that the Bloch Queensware Company and its attorneys all believed that Rudolph Metzger, Sr., was solvent. On the 26th of December following, the sheriff levied upon the stock of goods of the Metzger Toy & Novelty Company, and also certain real estate, and on the same day paid to the attorneys of the execution creditor the sum of $472.70; retaining the sum of $6.29 for his costs and commissions. Upon a proper application, this court enjoined the sheriff, on January 3, 1902, from proceeding further under said execution, and the

unsold assets of the Metzger Toy & Novelty Company subsequently passed into the hands of the trustee in bankruptcy. It is agreed that the Metzger Toy & Novelty Company and Rudolph Metzger, Sr., were at the time the execution was issued, and the aforesaid payment made, insolvent. On the 31st of January, 1902, the Bloch Queensware Company filed its claim, probated in proper form for allowance, against the individual estate of Rudolph Metzger, Sr., for the sum of $738.37; retaining the $429.09 realized by the sheriff on said execution. To this claim A. A. McDonald, as trustee for the estate of the copartnership of the Metzger Toy & Novelty Company, and A. C. Cunkle, as attorney for several of the creditors of the Metzger Toy & Novelty Company, filed objections to the allowance of said claim, alleging that the Bloch Queensware Company had received the payment within four months next before the institution of the proceedings in bankruptcy, and while said Rudolph Metzger, Sr., was insolvent, and that said payment was made out of the assets of the Metzger Toy & Novelty Company, and constituted a preference, which should be surrendered before said claim was allowed. The referee in bankruptcy sustained the exceptions, holding that the payment referred to constituted a preference, and that the Bloch Queensware Company's claim should be disallowed, unless within five days it surrendered to the trustee of the Metzger Toy & Novelty Company the $472.70 received by said Bloch Queensware Company from the sheriff under the execution. From this order of the referee the Bloch Queensware Company appealed and the referee has certified the case to this court for review.

Mechem & Bryant, for Bloch Queensware Co.

A. A. McDonald and A. C. Cunkle, for the trustee and objecting creditors.

ROGERS, District Judge (after stating the facts as above). It is insisted by the attorneys for the claimants that the $472.70 having been received by the claimants under an execution, and in a strictly and purely adversary proceeding, and with no knowledge of the insolvency of Rudolph Metzer, Sr., upon the part of the claimant, said payment was not, therefore, such a payment as, under the bankrupt law, constituted a preference, which should be surrendered before the balance of the claim was allowed; and in support of this doctrine is cited the case of Wilson v. Bank, 17 Wall. 473, 21 L. Ed. 723, and other cases following and approving that decision, under the bankrupt law of 1867. In the opinion of the court, the question is settled in the following cases: Pirie v. Trust Co., 182 U. S. 439, 21 Sup. Ct. 906, 45 L. Ed. 1171; Wilson v. Nelson, 183 U. S. 191, 22 Sup. Ct. 74, 46 L. Ed. ——, 7 Am. Bankr. R. 142.

The question involved in this case turns upon the meaning of the words "procured or suffered," and the meaning of the word "transfer," as contained in section 60a of the bankrupt law of 1898; and Mr. Justice McKenna, in the former case, in considering the meaning of the word "transfer," as used in that section, has used this language:

" 'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.' "

But the question at bar is more fully and completely discussed in the second case cited, and to that little can be added. It points out

the distinction between the bankrupt law of 1867 and the bankrupt law of 1898, and specifically declines to follow Wilson v. Bank, 17 Wall. 473, 21 L. Ed. 723, and for reasons stated in the opinion. That authority is binding upon this court, and I am constrained to believe, by the force of its reasoning, announces the correct principle of construction of that section of the bankrupt law under consideration.

The action of the referee is therefore affirmed, and the order will be that unless the Bloch Queensware Company surrenders the sum of money received by it from the sheriff of Sebastian county, to wit, the sum of $472.70, to the trustee of the Metzger Toy & Novelty Company, within ten days, its claim be disallowed, and that, if the same be surrendered within 10 days from the date of this order, the referee enter an order allowing the Bloch Queensware Company's claim for the full amount.

Ex parte GREEN.

(Circuit Court, W. D. Kentucky. May 2, 1902.)

1. TAXATION—INTERSTATE COMMERCE.
   A city ordinance imposed a license tax of $5 per day on "each itinerant person or peddler traveling from residence to residence soliciting orders for, or selling directly or indirectly, goods, wares or merchandise to, the consumer," etc. Petitioner was agent for a party living in another state, and solicited orders for various goods from persons in the city, the goods ordered being shipped direct from the other state to the purchaser. *Held*, that petitioner was not liable for the tax, and could not be imprisoned for nonpayment thereof, as in so far as the ordinance applied to him it was a tax on interstate commerce, and invalid.[1]

2. HABEAS CORPUS—RIGHT TO DISCHARGE.
   Petitioner, having been imprisoned under a judgment of the police court for a violation of such ordinance, was entitled to his discharge on habeas corpus, though he had not taken an appeal.

Joel C. Clore and Edmund T. Clayton, for petitioner.
Augustus E. Willson, for respondent.

EVANS, District Judge. The petitioner, Chester Green, a citizen of Kentucky, was an agent of A. J. Conroy, who, under the name of A. J. Conroy & Co., carried on business in the city of Cincinnati, in the state of Ohio. The method of conducting business in this state by the petitioner as agent for Conroy was this: He, traveling from residence to residence, solicited orders for goods, wares, and merchandise of various sorts, including lace curtains, clocks, silverware, etc., belonging to Conroy, from persons in Lebanon, Ky., and when orders therefor thus taken by him were accepted by Conroy the merchandise was then shipped by the latter from the state of Ohio direct to the purchaser in Kentucky, and was not shipped in any instance to the petitioner, nor were any of the goods shipped from any point in Kentucky, nor were any of them manufactured in Kentucky. Payments for the goods thus ordered and shipped were to be made in installments. The petitioner collected the first installment thus due, and

[1] See Commerce, vol. 10 Cent. Dig. § 111.

other agents of Conroy collected the balance of the agreed price. The city of Lebanon, in this state, attempted to impose a license tax on the business thus conducted and carried on by the petitioner. This attempt was made under an ordinance enacted by the board of council, the applicable provisions of which are in these words:

"Be it Ordained by the Board of Council of the City of Lebanon, Kentucky:

"Section 1. That from and after April 30, 1900, all companies, corporations and persons desiring to exercise any privilege, sell any article or engage in any business, hereinafter mentioned, in this city, shall before doing so procure a license therefor and pay a tax thereon as follows: * * * To each itinerant person or peddler traveling from residence to residence soliciting orders for, or selling, directly or indirectly, goods, wares, or merchandise to, the consumer, per day, $5.00. To each itinerant person or peddler traveling from residence to residence soliciting orders for, or selling, directly or indirectly, clocks, watches or plate ware to, the consumer, per day, $5.00."

The petitioner, having refused to pay the license or taxation thus imposed upon the business he thus conducted in Lebanon, was arrested, tried, and convicted in the police court of that city for a violation of the said ordinance, and a fine of $10 was imposed upon him therefor. Upon his refusal to pay the fine thus imposed by the court he was confined and imprisoned in the station house. Alleging in his petition for the writ of habeas corpus issued in this case that such imprisonment is in violation of his rights as a citizen and of the constitution and laws of the United States, he asks to be released, and, the causes of his imprisonment and detention being ascertained to be as stated, the court must determine the questions presented.

Since the decision of the cases of Brennan v. City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1, 32 L. Ed. 368; Lyng v. Michigan, 135 U. S. 161, 10 Sup. Ct. 725, 34 L. Ed. 150; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380, 32 L. Ed. 311; and Robbins v. Taxing Dist., 120 U. S. 490, 7 Sup. Ct. 592, 30 L. Ed. 694,—it has not been supposed that any possible question was left open for discussion in such cases. Those cases in their substantial features are precisely like the one before us, and they and many others of like character have left no room for doubt upon the subject. The lower courts of the United States have also many times passed upon such questions, but I shall refer to only one case, namely, In re Tinsman (C. C.) 95 Fed. 648. Indeed, if any propositions have been conclusively settled by the courts they are—First, that such attempted impositions, though under the guise of licenses and police regulations, constitute, nevertheless, nothing but taxation upon interstate commerce; and, second, that no state or municipality can tax such commerce at all. Why it should still occasionally be attempted in the face of such explicit rulings by the supreme court of the United States might be considered matter for curious speculation.

It is quite true that the terms of the ordinance in this instance are wide enough and general enough to cover cases of state commerce as well as those of interstate commerce, but with the former we have nothing to do; for, as indicated in many of the opinions of the supreme court, if a state or a local community desires to tax its own commerce it has a clear right to do it, and whether it is injurious or not to its in-

terests is a matter for that state or local community to determine for itself, but no state or municipality has the right, while taxing domestic commerce, also to tax interstate commerce. That taxation by any state or locality in any form is forbidden by the supreme law of the land. A tax upon interstate commerce is the only sort of tax sought to be enforced against the petitioner in this instance, and it makes no difference whether the petitioner is or is not called a "peddler." The result is the same. True, there are circumstances under which the police power of the state may be exercised in a way which involves impositions and exactions upon the citizen which are substantially equivalent to taxation; but the supreme court in the cases referred to has left no room for controversy that the case of this petitioner, and the attempted exertion of authority under which he is imprisoned, is not one which involves the mere exercise of the police power for the protection of the morals or health of the community, but is a direct tax upon interstate commerce itself.

It may be pertinent to remark that no clause of the federal constitution has been promotive of greater advantage and benefit to the country at large or of the general welfare than has that provision which gives to congress the exclusive right to regulate commerce between the states, and none has been more clearly and sedulously guarded by the courts of the United States against local encroachments of every character. This judicial course is so plainly demanded by every consideration of constitutional policy in our federal form of government that we need not enlarge upon the subject. The attempt to tax interstate commerce, even in a small way in this instance, must fail, as every other attempt to do so has heretofore failed.

It is insisted that the petitioner should be remanded to the station house, because there has been no appeal from the judgment of the police court. Ordinarily, such a contention, being addressed to the discretion of the court, might be a strong one; but in a case so palpable as this, and where the constitutional law governing it has been so conclusively adjudicated and determined by the highest court, and where the injustice and hardship (pending a perfectly unavailing and useless retrial in a state court of the law questions involved) of the petitioner's being for a time in prison, or being subjected to other practical inconveniences and expenses altogether disproportionate to the amount of the fine imposed or the money involved, are so plain and manifest, the discretion of the court should not be easily moved in the direction of delay in denying to the petitioner his unquestionable constitutional rights. Such rights in so plain a case should be vindicated at once, instead of waiting until an appeal could be prosecuted in the state courts, and especially where the right to such appeal might admit of doubt. It may possibly be true that such a case as that against the petitioner in the police court for the mere purpose of an appeal from that court to the state circuit court would come within section 3519 of the Kentucky Statutes, instead of section 3518 thereof, or section 362 of the Criminal Code of Practice, which deny appeals where the fine is less than $20, though it may not be entirely clear how much scope would be given to the phrase "testing the legality" of an ordinance under section 3519; but, at all events, the petitioner

being in custody, and being detained therein in plain and manifest violation of the constitution and laws of the United States, is entitled to be now discharged therefrom, and his discharge is accordingly ordered.

THE VICTORIA.

(District Court, E. D. New York. December 28, 1901.)

CARRIERS—INJURY TO FREIGHT.

A carrier, having received in good condition a large block of deeply veined marble, which, after notice to the officer of the ship in charge of the stowage "that it was a weak-looking block; that it wouldn't take much to break it,"—was stowed so that it supported overlying cargo, with no support for itself, except pieces of dunnage near each end, with one end resting unevenly on the dunnage,—is liable for the break at the end, extending partly through a vein.

Paul N. Turner, for libelant.

Wing, Putnam & Burlingham, for claimant.

THOMAS, District Judge. A piece of unfinished marble was found broken in New York, after transportation by the steamship Victoria from Leghorn. As the marble was received in apparently good condition, its delivery in an injured state raises a presumption of negligence on the part of the carrier. The evidence confirms this presumption. Garrow, the second officer (a witness called by the claimant), states that it was his duty "to look after the stowage, and see that they [the marbles] were properly stowed, and take the numbers and marks of the stones as they went aboard." He gave the following evidence:

"Q. Do you think that this break in this marble was caused by the fact that it had these veins in it? A. Oh, yes, sir; if it had been a solid block, without the veins, it would never have broken. Q. You realized that when you packed it? A. Yes, sir; I pointed it out to our agent in Leghorn. Q. Did you point it out to the man that testified before you? A. Yes, sir; pointed it out. We all admitted that it was a weak-looking block; that it wouldn't take much to break it. * * * Q. When you saw it there in Italy, did you think there was any danger in stowing marble above it? A. I did, myself. Q. Why? A. Because it was so thickly veined. Q. Have you had any experience with thickly veined marbles? Have you seen it break before? A. No; but you can tell by the look of the marble with the veins through it. It looks like cracks. Q. If you had thought there was danger, why didn't you report it? A. So I did. I reported to both the chief officer and to the agent. Q. When? There? A. Yes."

The marble was veined, as stated, and the break extended about one-third of its length through a vein, and two-thirds through the other portion of the block, although it does not appear where the break started. The upper side of the marble was level, but under the broken end the face was shelving in part, so that the dunnage placed under it, unless adjusted to the uneven surface, would give uneven support. There was dunnage at the opposite end of the block, but the block was 17 feet long, 5 feet wide, and 2 feet thick; some 14 feet of it having no central support. Above the block in question others were placed, with intermediate layers of dunnage. The

evidence tends to show that marble of this kind, on account of the veins in it, is more fragile, and subject to breakage. Hence the carrier, accustomed to such freight, stowed a deeply veined piece of marble, known to be subject to breakage on that account, and of unusual dimensions, after notice to the second officer in charge that "it was a weak-looking block; that it wouldn't take much to break it,"—so that it furnished the support for overlying cargo, and with no other support for itself than the piece of dunnage, placed at about two feet from each end, and with one end resting unevenly on the dunnage. This was not a sufficiently careful disposition of property committed to a carrier, and for the damage resulting from this negligence the libelant should recover.

In re LEWIS.

(Circuit Court, N. D. Florida. April 12, 1902.)

1. HABEAS CORPUS—PRACTICE.
   Where the cause of imprisonment fully appears in the application for habeas corpus and the exhibits thereto, it is proper to issue an order requiring the officer to show cause why the writ should not issue, and dispose of the case without first issuing the writ itself.

2. SAME—GROUNDS FOR DISCHARGE—TECHNICAL OBJECTIONS.
   Habeas corpus will not issue unless the court under whose warrant an accused is held is without jurisdiction; and mere objections to the indictment against him as too vague and general, and not sufficiently informing him of the offense charged, cannot be considered.[1]

3. PEONAGE—ACT ABOLISHING—CONSTRUCTION.
   Though the system of peonage in New Mexico was the moving cause for the enactment of the statute (14 Stat. 546; Rev. St. U. S. §§ 1990, 1991, 5526, 5527) abolishing and prohibiting peonage, its title and the senate debates showing that to be the fact, the act does more than merely abolish an existing system, and makes criminal certain acts which would tend to sustain or re-establish such a system, section 5526 providing for the punishment of any person who holds, arrests, returns, or causes to be returned, any person "to a condition of peonage."

4. SAME—CONSTITUTIONALITY.
   Under Const. Amend. 13, providing that "neither slavery nor involuntary servitude, except as a punishment for crime, * * * shall exist in the United States," and that "congress shall have power to enforce this article by appropriate legislation," congress has power to make laws against involuntary servitude in the form of peonage.

5. HABEAS CORPUS—GROUNDS FOR DISCHARGE.
   Objection that a system of peonage such as once existed in New Mexico must exist before the statute prohibiting peonage will apply goes to the sufficiency of the indictment or the evidence to be offered on the trial for violating the statute, and will not be determined on an application for habeas corpus.

6. SAME.
   Failure to make an indictment good against demurrer, even though it contains a statement of particular facts which is not sufficient, the indictment also using the words of the statute, will not entitle accused to discharge on habeas corpus, especially where at the conclusion of his trial he can avail himself of the defect by writ of error.

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[1] See Habeas Corpus, vol. 25, Cent. Dig. § 92; 1897 Dig. § 11 [k].

Habeas Corpus.

B. C. Tunison, for petitioner.

John Egan and William Wirt Howe, U. S. Attys.

SHELBY, Circuit Judge. At the March adjourned term, 1901, of this court, the grand jury indicted Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas for conspiring to return one George Walker to a condition of peonage. It is charged that in pursuance of the conspiracy Robert W. Lewis did assault, beat, and wound the said George Walker, and force him to return to his creditor's place of business, and that this was done for the purpose of compelling Walker to work for R. W. Lewis and others,—"to work out a debt claimed to be due them." The second count in the indictment charges that the same defendants did conspire to cause to be returned and aid in returning to a condition of peonage one George Walker, by forcibly and against his will returning him to work for R. W. Lewis and others, to be held by them to work out a debt claimed to be due them; and that in pursuance of the conspiracy the defendants Douglas and Thomas did, by threats and force, compel Walker, against his will, to accompany them to the place of business of Robert W. Lewis and others, and did assault and beat and wound the said Walker. At the same term the grand jury returned another indictment against the same defendants, charging that they did unlawfully and knowingly return one George Walker to a condition of peonage by forcibly and against his will returning him to work for R. W. Lewis and others, naming them, to be held by them to work out a debt claimed to be due to them by him, the said Walker. These indictments are copied in the margin.[1]

These cases coming on for trial in the circuit court, the defendants filed separate motions to quash each of the indictments, assigning, among other grounds, that the indictments charged no offense against the laws of the United States. It is also alleged in the motion as to the first indictment that the objects and purposes of the alleged conspiracy were not set forth; that the alleged conspiracy is not such as is prohibited by law; and that the defendant Robert W. Lewis is therein charged with two distinct, independent offenses. The circuit court (Judge Swayne presiding) overruled these motions to quash, and the defendant Lewis thereupon filed this petition for the writ of habeas corpus. It is averred in the petition that he is unjustly and unlawfully detained in prison at Pensacola by Thomas F. McGourin, United States marshal for the Northern district of Florida, by order of the circuit court of the United States for that district. It appears from the petition that the petitioner is held to answer the two indictments, which are made exhibits to the petition. The motions to quash and the court's ruling thereon are also shown by the petition. The petitioner prays for the writ of habeas corpus to be directed to the marshal, and he seeks to be discharged from custody because (1) neither of the two indictments shows any acts to have been committed by the petitioner which violate any law of the

[1] See note at end of case.

United States, and (2) the United States circuit court for the Northern district of Florida has no jurisdiction of any offense charged in the indictments.

This petition was presented to a judge of this court on March 15, 1902, and an order was made on that day that T. F. McGourin, United States marshal for the Northern district of Florida, show cause on April 1, 1902, why a writ of habeas corpus should not issue as prayed for in the petition. It was also ordered that a copy of the petition be served on the marshal and on the United States attorney for the Northern district of Florida. This order provided that it was not to prevent the circuit court's proceeding with the trial of the case. On April 1st, at the hearing, the marshal filed an answer to the petition and the rule showing that he held the petitioner under the indictments which were annexed to the petition; that the motions to quash the indictments were argued and considered by the court, and duly overruled, the court holding the indictments good and sufficient; and, the petitioner having been surrendered by his bondsman, it was ordered by the court that he be held for trial; and he was duly committed to the custody of the marshal, and is held by him under the regular process of the court issued on the indictments.

1. The usual course on the application for the writ of habeas corpus is to issue the writ, and, on its return, to hear and dispose of the case. But when, as in this case, the cause of the imprisonment fully appears by the petition and the exhibits thereto, the practice prevails for the court to determine whether, on the facts presented in the petition, the prisoner if brought before the court would be discharged. Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281. And where the hearing is had without issuing the writ an order may be made requiring the officer or person holding the prisoner to show cause why the writ should not issue. Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274. Where the return to the rule shows all the essential facts, the case may be disposed of as fully as if the writ had issued.

2. The question to be decided is one of jurisdiction. If the prisoner is charged with a misdemeanor or crime of which the United States circuit court for the Northern district of Florida has jurisdiction, he cannot be discharged on habeas corpus. The indictments are for acts alleged to have occurred in that district, so we have only to see if there are any statutes to support them.

If two or more persons conspire to commit any offense against the United States, and one or more of them do any act to effect the object of the conspiracy, all the parties to the conspiracy are liable to indictment and penalties. Rev. St. U. S. § 5440. Under section 5526, Id.:

"Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

In one of the indictments it is charged that the prisoner conspired with others to violate the provisions of the statute last quoted. A

learned argument is submitted in behalf of the petitioner to show that the indictment is defective; that it is too vague and general; that it does not inform the accused of the nature and cause of the accusation, and so forth. Objections of this kind cannot be considered on this application. The circuit court has overruled a motion to quash the indictment which raises those questions. If it be conceded that the court erred (a question not considered or decided), the error could not be corrected on this application. It has become a familiar general rule that habeas corpus will not issue unless the court under whose warrant the prisoner is held is without jurisdiction. In re Chapman, 156 U. S. 211, 215, 15 Sup. Ct. 331, 39 L. Ed. 401.

3. The learned attorney for the petitioner also contends that the circuit court has no jurisdiction of the case made by the indictment, because it is contended the purpose of the statute (14 Stat. 546; Rev. St. U. S. §§ 1990, 1991, 5526, 5527) was only to abolish the system of peonage in the territory of New Mexico and prevent its recurrence there or elsewhere. Section 5526 of the Revised Statutes, which is taken from the act cited, provides that every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return, of any person "to a condition of peonage," shall be punished as therein provided. This statute clearly makes the acts condemned a criminal offense. The existence of the system of peonage in New Mexico doubtless caused the passage of the act. Its title, as well as the debate in the senate on its passage (Cong. Globe 1866–67, Pt. 3, p. 1571), show that the system in New Mexico was the moving cause for the legislation. But the act does more than to merely abolish an existing system. It makes criminal certain acts which would tend to sustain or re-establish such a system. One of the indictments is for a conspiracy to violate the provisions of the statute and the other is for a violation of the statute. As has been shown, the question of the technical sufficiency of the indictments is not to be considered in this proceeding.

4. The thirteenth amendment to the constitution provides that "neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction," and that "congress shall have power to enforce this article by appropriate legislation." "Involuntary servitude" is forbidden as well as slavery. The supreme court said in the Slaughter-House Cases, 16 Wall. 36, 72, 21 L. Ed. 394, that, "while negro slavery alone was in the mind of the congress which proposed the 13th article, it forbids any kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void." The congress unquestionably has power to make laws against "involuntary servitude," whether it be peonage, vassalage, serfage, or villeinage. The statute in question makes it an offense to hold or return one to a condition of peonage. The word "peonage" as used in the statute includes cases of involuntary servitude to work out a debt. But every case of such servitude may

not be within the statute. A peon is "a species of serf, compelled to work for his creditor until his debts are paid." Cent. Dict. The statute contains words pointing to this definition, for it refers to the service or labor of persons "as peons in liquidation of any debt or obligation." 14 Stat. 546; Rev. St. U. S. § 1990.

It is contended that a system of peonage like that once in force in New Mexico must exist before the statute will apply. That question need not now be decided. The statute, by its terms, embraces the case of the return of a single person to "a condition of peonage." But whether the person held in, or returned to, such condition is within the statute, unless he and others are also held under a system, pretended law, or custom, is a question relating rather to the sufficiency of the indictments or the evidence to be offered on the trial, questions not involved on this application.

It is true, as claimed, that it is not always sufficient for an indictment to follow the words of a statute. Sometimes the pleader must do more,—descend to particulars. Without expressing any opinion as to the sufficiency, on demurrer, of the indictments in question, I may say that a failure to make an indictment technically good in that respect, even when there is a statement of particular facts that is not sufficient, the indictment also using the words of the statute, would not entitle the defendant to be discharged on habeas corpus; certainly not when, at the conclusion of his trial, he could avail himself of the defect by writ of error.

I think the circuit court has jurisdiction of the cases made by these indictments, and that the petitioner is not entitled to the writ of habeas corpus. An order will be made denying the writ.

Writ denied.

NOTE.

Omitting the captions, the indictments are as follows:

"The grand jurors of the United States, chosen, selected, and sworn in and for the Northern district of Florida, and Western division, upon their oaths present that heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and one, Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas, late of the Western division of the Northern district of Florida, did then and there unlawfully and feloniously conspire, confederate, and agree together to knowingly and willfully return to a condition of peonage one George Walker by forcibly and against the will of him, the said George Walker, returning him, the said George Walker, to work to and for R. W. Lewis, R. N. Lewis, and S. E. Lewis, copartners doing business under the firm name and style of Lewis Naval Stores Company, to be held by them, the said Lewis Naval Stores Company, to work out a debt claimed to be due them, the said Lewis Naval Stores Company, by the said George Walker, and afterwards, to wit, on the day aforesaid, in pursuance of and for the purpose of effecting the object of said conspiracy, the aforesaid Benjamin J. Douglas and Joseph Thomas did, by threats and force, compel the said George Walker, against his consent and will, to accompany them to the place of business of said Lewis Naval Stores Company, and the said Robert W. Lewis did assault, beat, and wound him, the said George Walker, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States. (2) And the said grand jurors aforesaid, upon their oath aforesaid, do further find and present that one Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas, heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and one, in and within the district aforesaid, and within the jurisdiction of this

court, then and there did unlawfully and feloniously conspire, confederate, and agree together to knowingly and willfully cause to be returned and aided in returning to a condition of peonage one George Walker, by forcibly and against the will of him, the said George Walker, returning him, the said George Walker, to work to and for R. W. Lewis, R. N. Lewis, and S. E. Lewis, copartners doing business under firm name and style of Lewis Naval Stores Company, to be held by them, the said Lewis Naval Stores Company, to work out a debt claimed to be due them, the said Naval Stores Company, by the said George Walker; and afterwards, to wit, on the day aforesaid, in pursuance of and for the purpose of effecting the object of said conspiracy, the aforesaid Benjamin J. Douglas and Joseph Thomas did, by threats and force, compel the said George Walker, against his consent and will, to accompany them to the place of business of said Lewis Naval Stores Company, and the said Robert W. Lewis did assault, beat, and wound him, the said George Walker, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

The second indictment:

"The grand jurors of the United States, chosen, selected, and sworn in and for the Western division of the Northern district of Florida, upon their oaths present that heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and one, Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas, late of the said Western division of the Northern district of Florida, did then and there unlawfully and knowingly return one George Walker to a condition of peonage by forcibly and against the will of him, the said George Walker, returning him, the said George Walker, to work to and for R. W. Lewis, R. N. Lewis, and S. E. Lewis, copartners doing business under the firm name and style of Lewis Naval Stores Company, to be held by them, the said Lewis Naval Stores Company, to work out a debt claimed to be due to them, the said Lewis Naval Stores Company, by him, the said George Walker, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States. (2) And the grand jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the twenty-seventh day of June, in the year of our Lord one thousand nine hundred and one, Robert W. Lewis, Benjamin J. Douglas, and Joseph Thomas, late of the said Western division of the Northern district of Florida, did then and there, unlawfully and knowingly, cause and aid to be returned one George Walker to a condition of peonage, by forcibly and against the will of him, the said George Walker, causing and aiding him, the said George Walker, to be returned to work to and for R. W. Lewis, R. N. Lewis, and S. E. Lewis, copartners doing business under the firm name and style of Lewis Naval Stores Company, to be held by them, the said Lewis Naval Stores Company, to work out a debt claimed to be due to them, the said Lewis Naval Stores Company, by him, the said George Walker, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

In re HENSCHEL.

(District Court, S. D. New York. May 6, 1902.)

1. APPEAL—DECISION OF APPELLATE COURT—EFFECT.

   Where the circuit court of appeals on an appeal in bankruptcy proceedings directed costs and disbursements to be taxed against the respondents, such decision is not reviewable by the district court on a subsequent motion to amend the order directing the entry of judgment.

2. PARTNERSHIP—PROOF.

   Where a firm appeared in bankruptcy proceedings, and filed proof of debt, in which a sworn declaration of the persons composing the firm was made by it, such declaration was sufficient proof of the persons

composing the firm to sustain a judgment directing such persons to pay costs and disbursements of an appeal.

8. BANKRUPTCY COURT—JURISDICTION—TERMS—EFFECT OF TERMINATION.
A federal court sitting as a court of bankruptcy is regarded as always open, and does not, therefore, lose jurisdiction to alter or modify interlocutory orders by reason of the termination of the term at which they were entered.

In Bankruptcy. Amendment of order after expiration of term of district court.

See 109 Fed. 861.

Joseph Fried (F. M. Czaki, of counsel), and Black, Olcott, Gruber & Bonynge, for the motions.

Myers, Goldsmith & Bronner, opposed.

ADAMS, District Judge. These are motions on behalf of certain petitioning creditors to amend an order entered herein on the 14th day of February, 1902, by directing the clerk to enter a judgment against Orrill H. Hayes and Lambert Huntington, composing the firm of O. H. Hayes & Co., for the respective sums of $203.03 and $32.95, and that the petitioners have execution therefor, etc.

It appears that the petitioning creditors successfully prosecuted an appeal to the circuit court of appeals from a decree entered in this court on the 3d day of August, 1901, confirming the appointment of a trustee by the referee. In re Henschel (C. C. A.) 113 Fed. 443. In the proceedings in the appellate court costs were taxed against the respondents in favor of the appellants, respectively, in the sum of $203.03 and $32.95. Upon the mandates from the appellate court the costs were accordingly taxed in this court. Subsequently a motion was made in the appellate court on behalf of Hayes & Co. for a resettlement of the orders upon which the mandates were issued, asking that the costs and disbursements of the parties be borne by and paid out of the estate, and that O. H. Hayes & Co. be relieved from any liability therefor, on the ground that they did not participate in any of the proceedings beyond voting in common with many other creditors, and that, if they were obliged to pay the costs and disbursements, their dividend in the estate would be extinguished. It was shown in the opposing affidavits on this motion that O. H. Hayes & Co. were the parties supporting the action of the referee and the court in the appointment of the trustee, and the real respondents in the appeal. The motion for resettlement was accordingly denied.

The purpose of the present motion is to supply an omission of the proper direction to the clerk relative to the judgment entered on the mandates so that the successful creditors can have the benefit of the decisions in the appellate court. The motion is opposed on three grounds: (1) That it is inequitable to compel these creditors to pay the costs of the litigation; (2) that it does not appear on the record who composed the firm of O. H. Hayes & Co., and that such a fact cannot be determined in this motion; and (3) that, as the term of this court during which the order sought to be amended was made ended

the Monday preceding the first Tuesday of March, the court is without power to grant the relief.

1. The question as to the propriety of taxing the costs and disbursements on the respondents in the case has been determined by the appellate court, and its decision is binding here.

2. It appears in the records of this court by the proof of debt filed before the referee on the 14th of May, 1901, that O. H. Hayes and Lambert Huntington composed the firm of O. H. Hayes & Co. No more complete and conclusive proof could be furnished than the sworn declaration of the parties.

3. The question respecting the power of the court, in view of the lapse of time, is more serious. There can be no doubt that courts lose control of their final decrees after the expiration of the term during which they were rendered, unless steps be taken during the term, by motion or otherwise, to set aside, modify, or correct them. Phillips v. Negley, 117 U. S. 665, 673, 6 Sup. Ct. 901, 29 L. Ed. 1013. It is there said:

"In this country all courts have terms and vacations. The time of the commencement of every term, if there be a half a dozen in a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all courts of the United States." 117 U. S. 672, 6 Sup. Ct. 904, 29 L. Ed. 1013.

The terms of this court as a district court of the United States are fixed by statute. It is provided:

"Sec. 572. The regular terms of the district courts shall be held at the times and places following: * * * In the Southern district of New York, in the city of New York, on the first Tuesday in every month." Rev. St. pp. 98, 100.

In the bankruptcy act of 1867 it was provided:

"Sec. 4973. The district courts shall always be open for the transaction of business in the exercise of their jurisdiction as courts of bankruptcy; and their power and jurisdiction as such courts shall be exercised as well in vacation as in term time." Rev. St. p. 962.

In construing this section, the supreme court held in Sandusky v. Bank, 23 Wall. 289, 292, 293, 23 L. Ed. 155:

"A proceeding in bankruptcy, from the time of its commencement by the filing of a petition to obtain the benefit of the act until the final settlement of the estate of the bankrupt, is but one suit. The district court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

In the present act the explicit language used in the act of 1867, to the effect that the court shall always be open, is not employed, but I regard the quoted language of Sandusky v. Bank entirely applicable. The present act, in establishing the district courts as courts of bankruptcy, provides that they shall exercise their jurisdiction "in vacation, in chambers and during their respective terms" (section 2); "close estates * * * and reopen them whenever it appears that they were closed before being fully administered" (sec-

tion 2, cl. 8); "set aside discharges and reinstate the cases" (section 2, cl. 12); "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act" (section 2, cl. 15). And it is further provided that "nothing in this section shall be construed to deprive a court of bankruptcy of any power it would possess, were certain specific powers not herein enumerated" (end of section 2), and that compositions may be set aside within six months (section 13), discharges revoked within a year after they have been granted (section 15), allowed claims reconsidered before the closing of the estate (section 57k), and, generally, the powers of the court are such to secure justice, that none other than an imperative, unmistakable, and governing rule should be permitted to operate as a bar to equitable relief. The parties here are actually in the midst of a hotly-contested bankruptcy proceeding, which will doubtless only finally terminate with the distribution of the estate, though the particular phase of the controverted matter relative to the appointment of a certain trustee is finally disposed of. The case of In re Ives (D. C.) 111 Fed. 495, has been cited as an authority for the contention that this court has lost jurisdiction of the matter by reason of the expiration of the term. The question involved there was one of setting aside an adjudication several terms after it was filed, and I do not think the decision affects the matter in hand. This court is in session practically all the time, and I am not prepared to hold that control is lost of its orders with the termination of the first Monday of every month, unless such orders are beyond question the final orders or decrees in the whole case, and thus within the rule which has been invoked.

Motion granted.

Since preparing the foregoing, my attention has been called to the disapproval of In re Ives, supra, by the circuit court of appeals for the Sixth circuit, with respect to this point. 113 Fed. 911.

THE EAGLE POINT.

(District Court, E. D. Pennsylvania. March 7, 1902.)

No. 73.

1. COLLISION—STEAMERS CROSSING—EXCESSIVE SPEED IN FOG.

In a suit for a collision in the night between the Atlantic steamships Biela and Eagle Point, 150 miles east of Sandy Hook, while on crossing courses, the evidence and surrounding circumstances considered, and *held* to sustain the contention of the Eagle Point that there was a fog at the time and place of collision so dense that the two vessels could not see each other until within 250 yards, and that the Biela was therefore in fault for maintaining full speed and failing to give fog signals.

2. SAME—SPEED PERMISSIBLE IN FOG—"MODERATE SPEED."

Under article 16 of the international navigation rules, which provides that "every vessel shall, in a fog, mist, falling snow or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions," the term "moderate speed" is a relative one and

the time and place and all other circumstances and conditions must be taken into account before judgment can be pronounced on a given rate. Where a vessel with a normal full speed of 12 knots reduced to 8 knots or less in a fog, it will be held a moderate speed, where it is shown without contradiction that, owing to her having little cargo and being very light, she could not be properly controlled at a lower rate of speed.

In Admiralty. Suit for collision.

Wing, Putnam & Burlingham, for libelant.
Butler, Notman, Joline & Mynderse, for respondents.

J. B. McPHERSON, District Judge. This is a libel against the British steamship Eagle Point, wherein damages are claimed for a collision that occurred in the early morning of October 1, 1900; the result being that the steamship Biela was sunk, and her cargo was lost. The facts are as follows: The collision took place on the Atlantic Ocean, about 150 miles east of Sandy Hook. The Eagle Point was bound westward from London to Philadelphia. She is a steamship of 5,222 gross tons, 3,307 net tons, 410 feet in length, 51 feet in breadth, and 31 feet deep. Her cargo capacity is 7,700 tons dead weight, but upon this voyage she was carrying only 300 tons. After leaving port she had taken in some water ballast, but most of this had been discharged shortly before the collision took place, and at that time she was drawing about 16 feet. The Biela was a British steamship of 2,182 gross tons, 1,344 net tons, 316 feet in length, nearly 35 feet in breadth, and about 29 feet in depth. She was bound eastward on a voyage from New York to Liverpool, loaded with a general cargo. Both vessels were properly manned, equipped, and supplied. The Biela left New York Sunday morning, September 30th, passing Sandy Hook at 8:45 a. m., and reaching Fire Island light-ship at 1:10 p. m., New York time. The Eagle Point passed Nantucket Shoals light-ship on Sunday evening about 6:30 or 7 o'clock. The light-ship was not seen because of a dense fog, but her whistle was heard off the starboard beam, distant apparently about two miles. The collision took place shortly before, or shortly after, 1 o'clock on Monday morning, October 1st, and the injury to the Biela was so serious that she sank in less than half an hour; her crew and passengers escaping by the boats, and reaching the Eagle Point in safety. The bow of the Eagle Point was severely damaged, but she was able to proceed upon the voyage, and reached Philadelphia in due course.

There is no substantial dispute concerning the place upon the high seas where the collision occurred, the hour of the collision, nor the courses upon which the vessels were sailing. It is agreed, also, that the night was dark, wet, and overcast, and that the sea was smooth. Upon essential matters, however, the respective accounts given by those on board the two vessels are, as might be anticipated, wholly irreconcilable. These accounts are outlined accurately in the brief of counsel for the claimant:

"The Biela asserts in her libel that the night was 'dark and wet,' but so that lights were readily visible; some of her witnesses claiming that it was starlight and moonlight, and perfectly clear to the southward. She claims that ten minutes before the collision she discerned the masthead light of

the Eagle Point about three points on the port bow, distant three or four miles; that in about two minutes the green light on the Eagle Point appeared; that the approaching steamer made no change in her course, and that when she was distant about two lengths the Biela, which had been proceeding at full speed, making between nine and ten knots per hour, stopped and reversed her engines, and gave a signal of three blasts, which was answered by the Eagle Point; that while the engines of the Biela were still backing she was struck a terrific blow on her port side by the Eagle Point. The witnesses indicate that the blow was at nearly a right angle.

"The Eagle Point, on her part, asserts that at the time of the collision there was a dense fog, through which she had been running for several hours before the collision, the entire voyage from London having been more or less foggy; that she had reduced her speed to between seven and eight knots, her full speed being nearly twelve knots per hour, and was giving fog signals regularly; that while proceeding through this dense fog the Biela's masthead light was dimly discerned about a point on the starboard bow of the Eagle Point; that the officer in charge of the Eagle Point, then being in the act of sounding the fog signal, gave such signal; that immediately thereupon the red side light of the Biela came into view, distant probably not more than 250 yards, the light being discovered as soon as the character of the light and the density of the fog permitted; that, immediately the wheel of the Eagle Point was put hard a-port, a signal to that effect being given by whistle, the engines of the Eagle Point were reversed full speed, and a signal of three blasts blown; that there was no apparent effort on the part of the Biela to avoid the collision; and that the vessels came into contact at an angle of between three and four points between the port sides of the two steamers."

It is apparent from this quotation that the decision of the case depends upon the answer to the question, whether there was a fog at the time and place of collision so dense that the vessels could not see each other farther away than, say, 250 yards, or whether the night, although dark and overcast, was nevertheless clear enough to permit the lights of each vessel to be seen from the other at a distance of several miles. It would be amazing, if collision cases did not continually present the same state of affairs, to find that, without exception, every witness on board the Eagle Point—more than 30 in number—declares that the fog was dense, and that the steamship was continuously giving the proper fog signals; while, with equal unanimity, every witness from the Biela—only a few less than the other company—declares that the night was clear enough to permit the lights of the Eagle Point to be seen for several miles, and that no fog signals whatever were blown. It would be both wearisome and profitless to give even a brief summary of the voluminous testimony. It is sufficient to say that I have considered it with care, and have come to the conclusion that the foregoing account given by the Eagle Point is the more probable of the two. I adopt it as the finding of the court, and I also find as a fact that the Biela was steaming at full speed through the fog, without giving the signals required by the international rules. It follows, therefore, that the Biela must be held to have been in fault.

Upon this question of fog, I have not disregarded, but have taken into account, the testimony of two witnesses to which the libelant asks the court to give much weight. They were the captain and second officer of the Elise Marie, a German tank steamship which left New York in company with the Biela, and is alleged to have been near the place of collision about 1 o'clock. If it appeared

satisfactorily that the Elise Marie had been in the neighborhood at the time of the accident, it is, no doubt, true that the testimony of disinterested witnesses concerning this material point would receive much attention. But I think it is clear that the Biela, which was much the faster vessel, was more than 15 miles ahead of the Elise Marie at midnight,—out of sight, as the second officer testified,—and that it would be unsafe to assume that both vessels were encountering the same weather at the same moment of time. Besides, both these witnesses testify that about midnight they began to meet fog,—"showers of fog," as they describe it,—which continued until Monday at noon, and that these showers were dense enough to require fog signals to be given. This would seem to indicate plainly that the Biela must have found the fog an hour or two before, and throws serious discredit upon many of her witnesses who swore positively that there had been no fog at all up to the instant of the collision.

It remains to inquire whether the Eagle Point was also negligent, and upon this point nothing is still to be considered except the admitted speed at which she was going. Her full speed is about 12 knots, but several hours before the collision she had reduced this rate to 8 knots, or somewhat less. It is argued by the Biela that this was too high, assuming that the fog was dense, and considering the fact that the Eagle Point was approaching a frequented part of the Atlantic Ocean. Whether this speed was proper or not depends upon the surrounding circumstances, for it is manifest from the international regulation upon this subject that no hard and fast rule can be laid down. Article 16 is, in part, as follows:

"Every vessel shall in a fog, mist, falling snow or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

Under this article, "moderate speed" is clearly a relative term. Time, place, and all other circumstances and conditions, must be taken into account before judgment can be pronounced upon a given rate. In the present case the undisputed evidence proves that the Eagle Point was very light, carrying only about 300 tons of cargo, and that such a ship, carrying so small a load, could not be properly controlled at a lower rate of speed than the rate at which she was proceeding. Positive testimony to this effect was given on behalf of the Eagle Point, and no witness was offered in denial. This is, in effect, an admission that the testimony on this point is true; and I find, therefore, that the speed at which the Eagle Point was steaming was a moderate speed,—not greater than was proper under the surrounding circumstances. I see no ground upon which it can be held that she was guilty of negligence that contributed to the collision. The remaining questions raised by the claimant need not be discussed.

The libel will be dismissed, with costs.

OLDS et al. v. CITY TRUST, SAFE DEPOSIT & SURETY CO. OF PHILADELPHIA.

(Circuit Court, D. Massachusetts. April 25, 1902.)

No. 1,197.

REMOVAL OF CAUSES — TIME FOR FILING PETITION — PLEA TO JURISDICTION — EFFECT.

The time within which a petition for the removal of a cause from a state to a federal court may be filed is not extended by the filing of a plea to the jurisdiction of the state court.

John B. O'Donnell, for plaintiffs.
William G. Bassett, for defendant.

LOWELL, District Judge. The plaintiff is a citizen of Connecticut. The defendant is an insurance company incorporated under the laws of Pennsylvania, and it has created the insurance commissioner of Massachusetts its agent to accept service of process, as required by Pub. St. Mass. c. 119, § 202. The plaintiff sued the defendant in the superior court for Hampshire county on a writ which set out that the defendant had its usual place of business in that county. The writ was entered April 1st. On April 5th the defendant appeared specially and pleaded in abatement that "the plaintiffs are nonresident, and defendant neither lives nor has a place of business in said county of Hampshire; that no property of defendant has been attached; and that, if defendant can be held to answer plaintiffs in an action in this commonwealth,—which it does not admit, but denies,—it is in the county of Suffolk, and not elsewhere." On May 13th the defendant filed a petition for removal to this court, which petition was allowed, and the case was duly entered here. Exceptions were taken by the plaintiff to the order of removal made by the superior court, which exceptions were argued before the supreme court of Massachusetts, and by it were sustained. Olds v. Surety Co., 61 N. E. 223. The plaintiff has now filed a petition in this court to remand the case to the superior court. The argument in this court is not precisely that addressed to the supreme court of the commonwealth. The defendant now admits that the petition for removal was filed too late, unless the fact set up in its answer in abatement, viz., that no proper service was made upon it, extended the time for filing the petition for removal. Defendant's contention is now substantially this: No sufficient service was ever made upon it, because it was not suable in Hampshire county; hence the time within which it was required to answer or plead never began to run, and consequently had not expired when its petition for removal was filed. If the defendant's contention is correct, it could have filed a valid petition for removal at any time during the progress of the suit, or even after judgment. The defendant thus contends that, in order to determine if this action has been properly removed to this court, this court must first hear and determine the plea in abatement. If the plea is sustained, the case has been properly removed, because in that case the time within which the

defendant was required to answer in the state court never began to run. If, on the other hand, the plea in abatement is overruled, and the service is held sufficient, it follows that the action must be remanded to the state court, because, in that event, this court will have determined that the defendant was properly served, and that its time to answer or plead began to run at the time the writ was entered. Moreover, it would seem to follow, under the defendant's contention, that it could await a decision by the state court on the plea in abatement, and accept the decision, if that was favorable, but remove the case to this court if the decision was unfavorable. This cannot be. The defendant is entitled, by a seasonable removal, to take the decision of this court on its plea in abatement, but the fact that its plea is to the jurisdiction does not enable it to experiment with the state court first and with the federal court afterwards.

The defendant's contention is supposed to be supported by the case of Tortat v. Manufacturing Co. (C. C.) 111 Fed. 426. Without admitting that the defendant is right in supposing that the case just cited supports its contention, this court is of opinion, after consideration of that case, that the contention is inadmissible. The case of Railway Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431, decided that a defendant, by filing a petition for removal, did not bar himself from setting up in the circuit court, after removal, an original want of jurisdiction in the state court. That case did not decide that the time for filing the petition for removal was indefinitely extended by a plea to the jurisdiction.

For these reasons, and without attempting to pass upon numerous other difficulties which beset the defendant's contention here, the case must be remanded to the state court.

THE DRUMMOND (two cases).

(District Court, E. D. Pennsylvania. April 14, 1902.)

INJURY TO STEVEDORE—DEFECTIVE CHAIN—INSPECTION.

A chain used for unloading a ship, and which broke, injuring a stevedore, while a load weighing a ton was being raised, its capacity in good condition being from three to four tons, and which had been used for several years, without needing repair, except that shortly before a link broke and was replaced with a new one, was inspected, so as to relieve the ship from negligence; two of the ship's officers having, just before it was used, examined it link by link, and the break being at the side of a link, and due to imperfect welding, and the defect not being discoverable without the application of strain by a testing machine, or the use of acid and a microscope, which was not required by the facts known about the chain.

John Cadwalader and Charles Sinkler, for libelant Gallagher.
Francis C. Adler and John L. Lewis, for libelant McCormick.
Henry R. Edmunds and N. Dubois Miller, for The Drummond.

J. B. McPHERSON, District Judge. These two actions grow out of the same accident and need not be considered separately. The libelants were stevedores, and on August 8, 1901, were helping to unload a

cargo of iron ore from the steamship Drummond, then lying in the port of Philadelphia. They were at work in the hold; their duty being to fill the iron buckets that were successively lowered at the end of a chain that was rigged in the usual way. About eight hours after they had gone to work, the chain broke about 50 feet from the bucket, and fell through the hatch into the hold, striking the libelants and doing the injuries of which they complain. The chain was large and strong, eleven-sixteenths of an inch in diameter, and had been in use upon the ship for several years without needing repairs, except upon one occasion shortly before the accident now being considered. Upon that occasion also a link broke, but a new link was at once substituted, and the present break was at a different place. The link now in question was slightly worn at each end; but the break occurred, not at the end, but at the side,—there being first a jagged break upon one side, and then a clean fracture upon the other. The load that the chain was carrying was about a ton; but there is no doubt that the capacity of such a chain in good condition is from three to four tons, so that the load under which it broke was clearly not excessive under ordinary circumstances. I think the break was due to imperfect welding. So it was testified by several witnesses, and I accept this explanation as the most likely. The ship, which furnished and rigged the chain, is claimed to have been negligent in using an insufficient appliance, and in failing to properly inspect it before it was put up. I am clearly of opinion that the testimony does not sustain this charge. Before the chain was rigged to the winch, it was laid out upon the deck, and was examined link by link by two of the ship's officers. It was afterwards gone over again by a seaman, who was ordered to grease it, and it therefore passed through the hands and under the eyes of three persons, two of whom examined it with care, link by link, for the express purpose of discovering whether it was fit for use. This, I think, was all that could be required of the ship under the circumstances. No other test was called for. The former break had been repaired, and the chain had done its work satisfactorily since that time. Moreover, I am satisfied that, if there was any external imperfection in the link at the point where it afterwards broke, the defect could not have been discovered without the application of strain by a testing machine, or the use of acids and a microscope. Such an examination was not required by the facts that were known about the chain, and I therefore think that the full duty of the ship was performed by the inspection that I have described. As there was no negligence on the part of the ship, it follows that the injury done to the libelants was the result of an unavoidable accident, which is much to be regretted, but gives them no right to shift the consequences to other shoulders than their own.

In each case the libel will be dismissed, but without costs.

THE THYRA.

(District Court, D. Oregon. April 29, 1902.)

No. 4,577.

SHIPPING—WORKMEN ENGAGED IN REPAIRING—OPEN HATCH—LIABILITY OF VESSEL.

The act of a master and a crew of a vessel in failing to provide artificial light, and in permitting a hatch to remain open, will not subject the vessel to libel by the administrator of a person who was employed in repairing the vessel by one having charge of the work, and who fell through the hatch and was injured.

H. M. Cake, for claimant.
Dan J. Malarkey, for libelant.

BELLINGER, District Judge. The deceased was injured while making certain repairs on the steamer by stepping or falling through a small hatch in the way, or near it, along which he was required to pass, the forward cover of which had been removed. It is alleged that the master and crew of the vessel negligently suffered and permitted this cover to be and remain off the hatch, and negligently failed to provide artificial light, the place being insufficiently lighted. These are the acts of negligence charged. It is alleged that the deceased was employed by the person who had charge of the work of repairs to assist therein. The rule is well established that a vessel in charge of charterers, stevedores, or other contractors is not liable to the employés of such persons for injuries, unless the vessel has relation by contract to the injured person, or owes him a duty arising out of the fact that it is being navigated; and I believe the rule of liability is extended to all cases where the injured person is engaged in some work that requires his presence where he is at the time, and the injury results from the neglect of some maritime duty on the part of the officers or crew, such as a duty necessary to be performed to enable the ship to receive her cargo, or to carry it in safety, or when the injury is the result of faulty navigation. But there is no duty on the part of the ship to provide light for the convenience of employés of contractors, nor to guard them against the risk resulting from an open hatch, referred to by Judge Benedict in Gerrity v. The Bark Kate Cann (D. C.) 2 Fed. 241, as "that common, and at most times necessary, feature of a ship deck while in port."

The exceptions to the libel are allowed.

GLENCOVE GRANITE CO. v. CITY TRUST, SAFE DEPOSIT & SURETY CO.

(Circuit Court, E. D. Pennsylvania. April 21, 1902.)

No. 65.

FORMER JUDGMENT—CONCLUSIVENESS.

Where, in an action in a state court to recover on a lien bond, plaintiff, a foreign corporation, was defeated because of its failure to produce the evidence required by statute of its right to do business and sue in such state, the judgment in such action is a bar to a recovery for the same

cause of action in a federal court, though the plaintiff there produces evidence that it had the right to do business and sue in such state at the time the former action was tried, which evidence was in its possession at the time of the trial in the state court.[1]

Motion by Defendant for Judgment on Reserved Point Notwithstanding the Verdict.

Horace L. Cheyney and James J. Macklin, for plaintiff.
Lincoln L. Eyre, for defendant.

J. B. McPHERSON, District Judge. The questions presented upon the trial of this case were (with one exception) precisely those that were passed upon by the circuit court of appeals in the opinion reported in 113 Fed., at page 177. The defendant added nothing essential to the record that was then before the court of appeals, and the plaintiff offered one additional paper only, about which I shall speak in a moment. Since, therefore, the court of appeals has decided that the record then presented to that court disclosed a prima facie defense, and since the recent trial of the case before me did not explain or remove the apparent obstacle to recovery which the decision declared to exist, it seems to me to follow inevitably that the prima facies must prevail, and that the defendant is entitled to judgment. My own opinion was different, and, if I may say so respectfully, still is different; but, of course, I obey cheerfully the ruling of the appellate tribunal.

The defendant, therefore, is entitled to judgment on the reserved point, unless the paper to which I have referred as having been offered in evidence by the plaintiff ought to lead to a contrary conclusion. This was a certificate, dated February 18, 1897, from the office of the secretary of state of New York, and is as follows:

"State of New York, Office of the Secretary of State, Albany.

"It is hereby certified, that Glencove Granite Company, which appears from the papers filed in this office on the 18th day of February, 1897, to be a foreign stock corporation organized and existing under the laws of the state of Maine, has complied with all the requirements of law to authorize it to do business in this state, and that the business of such corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business.

"Witness my hand and the seal of the office of the secretary of state, at the city of Albany, this 18th day of February, 1897.

"[Seal of New York.] J. M. Palmer, Secretary of State."

As is shown by its date, this certificate was in existence at the time of the trial in New York on December 7, 1899, and it was for failing to prove that such a certificate had been issued that the New York court decided that the granite company could not recover against the trust company upon the bond now in suit. Why the certificate was not produced at that trial does not appear in proof, nor is the reason material. In the view I take of the matter, the first point for consideration is not, what effect, if any, should the certificate be allowed to have in the present action? but, can the certificate be considered at all? Under well-settled principles of the law of res judicata, if the trial in

[1] See Judgment, vol. 30, Cent. Dig. § 1241.

New York was upon the merits, the judgment rendered there is conclusive, and nothing that was then in controversy, or that might have been put in controversy, can ever be re-examined in another suit between the same parties. As was said in Dowell v. Applegate, 152 U. S. 345, 14 Sup. Ct. 618, 38 L. Ed. 463:

"The judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented."

And in The Haytian Republic, 154 U. S. 129, 14 Sup. Ct. 995, 38 L. Ed. 930, the following statement of the rule was approved:

"An adjudication is final and conclusive, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense."

See, also, Dimock v. Copper Co., 117 U. S. 566, 6 Sup. Ct. 855, 29 L. Ed. 994, and Harshman v. Knox Co., 122 U. S. 317, 318, 7 Sup. Ct. 1171, 30 L. Ed. 1152.

Now, that the trial in New York was upon the merits is expressly declared by the circuit court of appeals, as will appear by the following quotation from the opinion:

"The finding that the plaintiff, a foreign corporation, had failed to show that it had procured the certificate required by law to authorize it to do business in the state of New York undoubtedly was a finding responsive to an issue tendered by the pleadings as between the Glencove Granite Company and the City Trust, Safe Deposit & Surety Company. Moreover, that finding went to the merits of the case. It related to a substantial matter. It sustained a defense which involved the rights of the parties. It went to the plaintiff's right of action."

This being so, I am of opinion that the certificate now under consideration, which undoubtedly might have been given in evidence at the trial in New York, and, if offered, would, with the other evidence, have required the court to enter judgment in favor of the plaintiff against the trust company, cannot be considered, or, if considered, be allowed now to have any effect whatever. It was a defense that might have been taken then, and is therefore now irrevocably gone. This particular paper is said to have been mislaid, and therefore unavailable at the trial in New York, but no reason is perceived or has been suggested why a duplicate could not have been obtained.

It is true that the court of appeals, in the concluding portion of its opinion, uses the following language:

"Again, if the statutory inhibition against doing business operates only on the remedy, and may be lifted if the delinquent corporation is able to procure, out of time, the issuance by the secretary of state of the required certificate, it may be competent for the plaintiff to show here that it obtained such a certificate since the former trial, or even before. Upon these questions we intimate no opinion."

This may be thought to intimate that such a certificate might still be admissible in spite of the New York judgment, but I do not so understand the court. Such an intimation would directly conflict with the previous declaration that the judgment was upon the merits, for

the effect of such a judgment must, of course, have been well known, and the express reservation of the court's opinion shows, I think, that something else must have been in mind. I see no escape from the conclusion I have just stated, namely, that, since the finding in New York was upon the merits of the case, no further inquiry concerning that subject can be had in the present suit.

It is therefore ordered that judgment be entered for the defendant on the reserved point, notwithstanding the verdict.

ERNST et al. v. AMERICAN SPIRITS MFG. CO. et al.

(Circuit Court, S. D. New York. April 28, 1902.)

REMAND—SEPARABLE CONTROVERSY.

Where it is doubtful whether or not there is a separable controversy, and citizens of the state are on both sides of the cause, it will be remanded.

Motion to Remand.

A. J. Dittenhoofer, for the motion.
Alexander & Greene, opposed.

LACOMBE, Circuit Judge. Waiving all consideration of the presence of Reeves as a plaintiff,—and this court does not find in the cases cited any sufficient ground for disregarding his presence,—we nevertheless have citizens of New York on both sides of the controversy. As was intimated upon the argument, it is a doubtful question whether or not there is a separable controversy. That being so, the proper course is to remand the cause.

DUDLEY et al. v. SANDERS MFG. CO.

(Circuit Court, S. D. New York. May 3, 1902.)

ATTORNEY AND CLIENT—ACTION FOR SERVICES.

In an action by an attorney to recover for services rendered under an express contract, where the evidence showed that defendant employed an attorney to perform services, and he deputed his partner to take the matter up, and he employed another attorney, and promised to pay him as remuneration one-half of the compensation he should receive, but there was no agreement shown between defendant and any of the parties to pay a specified compensation, the cause of action was not established.

James L. Bennett, for plaintiff.
Nichols & Bacon, for defendants.

WALLACE, Circuit Judge. In May, 1898, the defendant, being desirous of securing contracts or orders from the government of the United States for supplies required by the war department, employed Mr. Wilson, a son-in-law of its president, to assist in procuring them. Mr. Wilson was the law partner of Mr. Chadsey, and deputed him to take the matter up. Mr. Chadsey employed Mr. Mich-

ener, an attorney at law at Washington, and one of the law firm of Dudley & Michener, the plaintiffs, and promised to pay him as remuneration for his services one-half of any compensation he should himself receive from the defendant. Michener interested himself in behalf of the defendant, and interviewed the officers of the war department, and partly through his assistance the defendant was enabled to obtain contracts and orders for supplies during the summer and fall of 1898 aggregating in amount about $97,000. There was no agreement between Chadsey and the defendant, or between Michener and the defendant, whereby the defendant was to pay a commission of 10 per cent. upon the amount of supplies furnished to the government, or for the payment of any specified commission or compensation. Chadsey may have expected to receive a 10 per cent. commission from the defendant, or an equivalent compensation, and may have so represented to Michener; but the evidence does not authorize the finding that he ever promised Michener that the latter's compensation should be one-half of a 10 per cent. commission, or any other specified amount. The defendant understood that Chadsey had employed Michener, and that Michener was acting in its behalf from time to time, pursuant to instructions from Chadsey; and also understood that Chadsey was to compensate Michener out of any fee or remuneration he should himself receive for the services rendered.

As the complaint proceeds upon the theory of an express contract by which the defendant undertook to pay to the plaintiffs one-half of a commission of 10 per cent., and not upon a quantum meruit, the cause of action is not established, and there must be a judgment for the defendant.

It is accordingly so ordered.

REVANS v. SOUTHERN MISSOURI & A. R. CO. et al.

(Circuit Court, S. D. New York. February 5, 1902.)

CORPORATIONS—SERVICE OF PROCESS.

Where the president of a foreign railroad corporation was resident in the state, and had an office therein, in which he performed his duties as such president, and had done so for many years past, the service in an action against the corporation arising without the state on complainant within the state was properly made upon such president.

Wilmot & Gage (Mr. Vanderpoel, of counsel), for complainant.

Dittenhoefer, Gerber & James (I. M. Dittenhoefer, of counsel), for one of the defendants.

THOMAS, District Judge. The bill is filed by a resident of the state of New York against the defendant the Southern Missouri & Arkansas Railroad Company for certain relief respecting its railroad, which is exclusively within the state of Missouri. The service of the bill was made upon Newman Erb, the president of such railroad company, who is a resident of the state of New York, and who has an office in such state, where he performs his duties as

president of such company, other than such duties as take him without the state. It is apparent that for some years past he has continuously acted as the president of such company within this state, and that he has an office in this state for that purpose. The cause of action arose without the state, the complainant resides within this state, and its president has an office and acts as the president of such company within this state. Under such state of facts, service was properly made upon the president, and so far forth the jurisdiction was properly acquired. Steamship Co. v. Kane, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. Ed. 964. The question now is not whether the suit may be finally maintained, for reasons not at this time presented, but whether a proper service has been made to bring in the single company that now disputes the jurisdiction.

THE WILLIAM P. HOOD.

(District Court, D. Rhode Island. March 29, 1902.)

No. 1,083.

SALVAGE—AMOUNT OF AWARD.

Libelant's tug towed a schooner from a pier, near which coal pockets were burning, out into the stream. The service occupied but a few minutes, and was attended with no danger. There was evidence tending to show that the schooner was not in serious peril, and, having an engine, could have moved out by her own power. *Held*, that while the service was a salvage service, and the tug was entitled to better pay than for mere towage, an award of $50 was sufficient compensation.[1]

In Admiralty. Suit to recover for salvage services.

Matteson & Healy, for libelant.
Dexter B. Potter, for claimant.

BROWN, District Judge. This libel is for salvage services of the tug Carrie A. Ramsey to the three-masted schooner William P. Hood, in towing her into the stream from the Wilkesbarre pier, and from the vicinity of burning coal pockets, on the morning of December 18, 1900. The service occupied probably not more than 10 or 15 minutes, and was without the slightest risk, or even discomfort. The tug and her crew did nothing more meritorious or perilous than in the ordinary course of work in moving a schooner from the dock to the stream. The only question is as to the peril of the Hood, and whether, but for the assistance of the Ramsey, she would have been seriously damaged. I am of the opinion that the libelant has failed to show by a preponderance of evidence that the Hood was in serious peril, which was averted by the Ramsey. Had she remained where she was, the Hood would have been seriously damaged; but the claimant produced seven witnesses (two from the Hood, and five from the Alice Maude, which lay near the Hood, on the same side of the dock) who swore positively that the Hood, which was provided with an engine, moved under her own power. This evidence

[1] Salvage awards in federal courts, see note to 30 C. C. A. 280.

I cannot disregard, though there is direct evidence, with some circumstances, to the contrary. The master and crew of the Alice Maude had the better opportunity for observation, and some of them testified not only that the Hood moved, but that they assisted in moving her by shifting her lines. If the Hood moved once, she could move again, and escape the fire. The Alice Maude, however, was between her and the end of the dock; and, while it probably was not absolutely necessary for the Hood to get out into the stream, that it was the judgment of the mate in charge that she should be towed out is evident from his request to the master of the tug. Though he testifies that he thought it was simply a case of ordinary towage, I think the present case is of the general class of cases represented by The Carondelet (D. C.) 36 Fed. 714, wherein $50 was allowed, and The Bessie Whiting (D. C.) 35 Fed. 79, wherein $25 was allowed. While services of this character are entitled to better pay than ordinary towage, double or treble towage would ordinarily be sufficient, and extravagant claims for salvage in cases of this character should be discouraged.

I am of the opinion that the sum of $50 is a liberal compensation in this case, upon the view which must be taken as to the preponderance of proof. However, as there was reasonable ground for the contention that the Hood had not moved, and was unable to move, and as no tender appears to have been made, I think the libelant is entitled to its costs. A decree may be presented accordingly.

JONES v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. May 8, 1902.)

No. 15.

INJURY TO EMPLOYE — NEGLIGENCE — EVIDENCE — JUDGMENT NON OBSTANTE VEREDICTO.

Where, in an action against a railroad company for negligence resulting in the death of an employé, the evidence disclosed the general conditions and surroundings of the place of the accident to be such as to reasonably admit of the inference that due care was not exercised by the company to provide for the safety of its employés at that point, and the question as to whether the deceased had knowledge of the situation, and appreciated the hazard he incurred in consequence, was fairly open to controversy, and no complaint was made of the instructions, defendant's motion for judgment notwithstanding a verdict for plaintiff should be denied.

S. Morris Waln and J. W. Westcott, for plaintiff.
John Hampton Barnes, for defendant.

DALLAS, Circuit Judge. The only questions which were raised in defense of this action were referred to the jury, with instructions which, if they should have been submitted at all, are not complained of. But it is insisted that a verdict for the defendant ought to have been directed. I cannot assent to this. The evidence upon the subject of defendant's negligence disclosed the general condition and surroundings of the place of the accident, including the means pro-

vided for stopping cars at the end of the trestle, to be such as to reasonably admit of the inference that due care was not exercised by the defendant company to provide for the safety of its train hands at that point; and the question whether Jones, who was killed, had knowledge of the situation, and appreciated the hazard he incurred in consequence, was fairly open to controversy upon the evidence, and was therefore for the jury's determination.

The amount of the damages, if any, to be awarded, was left to the jury, and it is not asserted that it was in any manner misled by the court. I do not think that its assessment should be disturbed.

The defendant's motion for judgment non obstante veredicto is denied. The plaintiff's rule for a new trial is discharged. Judgment for plaintiff will be entered upon the verdict.

TWEEDIE TRADING CO. v. JAMES P. McDONALD CO.

JAMES P. McDONALD CO. v. TWEEDIE TRADING CO.

(District Court, S. D. New York. March 29, 1902.)

CONTRACT—IMPOSSIBILITY OF PERFORMANCE—ACTS OF FOREIGN GOVERNMENT. Libelant and defendant entered into a contract in the United States by which libelant agreed to make four trips with its steamship from Barbadoes to Colon, to transport laborers for defendant, which contracted to pay a stated sum for each trip. The contract, when made, was legal and valid where made, and also at the places of performance; but after two trips had been made a regulation of the colonial government of Barbadoes was promulgated forbidding the future embarkation of laborers, by reason of which defendant was unable to furnish any more for transportation. *Held*, that such fact, which did not affect the legality of the contract where made, did not constitute a defense to an action to recover the hire of the ship for the remaining voyages at the contract price.

In Admiralty. Action for breach of contract, and cross action to recover money paid thereunder.

Wheeler & Cortis, for the Tweedie Company.
Cary & Whitridge, for the McDonald Company.

ADAMS, District Judge. The first of these actions is for the recovery of $8,400 as damages for breach of contract to furnish certain laborers to be carried from Barbadoes to Colon on the last of four consecutive trips, and for $731.62 demurrage at Colon. The second action is for the recovery back of $8,400, the amount paid in advance by the McDonald Company to the Tweedie Company to carry laborers by the third trip, for which it is claimed no services were rendered.

The controversies arose out of a contract made between the parties on the 23d day of April, 1901, the material parts of which are as follows:

"Second. The contractors hereby contract for the passage of about twenty-eight hundred (2,800) laborers to be taken from some safe port in Barbadoes where the steamer can always lie safely afloat, by the steamer Catania, to Colon; to be carried on four consecutive trips, with a minimum of seven hundred (700) passengers upon each trip."

"Sixth. The contractors shall be allowed a total period of twenty-four (24) hours at all ports in which to embark the laborers, at one or more ports of embarkation, on each trip; and at the port of destination the laborers are to go ashore, on arrival, in such manner as the authorities may direct."

"Ninth. The time allowed for debarkation shall be six hours after the arrival of the vessel at dock, or twenty-four hours after arrival if landed by lighters. The contractors shall not be liable for any demurrage which may be caused at any port of embarkation or destination after notification given to the agent, or after the arrival of the steamship at the port of embarkation, by reason of the fact that the condition of the sea may be such that the laborers can neither be embarked or disembarked, or by reason of the fact that the local authorities may fail to deliver to the contractors the necessary permits for embarkation or debarkation.

"Tenth. In full payment for the services so to be rendered, the contractors will pay the carrier eighty-four hundred dollars ($8,400) per trip, and at the rate of twelve dollars ($12) per capita for any excess over seven hundred (700) laborers carried, if the contractors desire to ship in excess of that number, and the carrier is lawfully empowered to carry such excess; such payment by the contractors to cover all charges whatsoever.

"Eleventh. Payments are to be made as follows: Eighty-four hundred dollars ($8,400) upon the arrival of the Catania at Colon on her present trip, and eighty-four hundred dollars ($8,400) upon her arrival at Barbadoes on each trip thereafter, until four trips have been paid for; the final service to be rendered without further payment, except for such laborers in excess of seven hundred (700) as may be carried upon any such trips. All payments to be made by the contractors at the office of the carrier in New York, on notification to the contractors by the carrier that the steamer has arrived at Colon or Barbadoes, as the case may be, and is in readiness to embark laborers.

"Twelfth. Demurrage, if any is incurred under this contract, shall be fifty (50) pounds British sterling for each day or fraction thereof.

"Thirteenth. The contractors are not to be liable for any expense for port, dock, navigation, or landing charges; and the contractors agree to hold the carrier free from any capitation or other tax upon the exportation or importation of laborers."

"Fifteenth. The carrier is to obtain any certificates or authority required by the law of Barbadoes in relation to the carriage of laborers or otherwise to fulfill the obligations of the carrier under this agreement."

"Seventeenth. Should the steamer at any time be quarantined at Barbadoes, the contractors, when notified that steamer is ready to receive them there, are to send the laborers out to the quarantine station, and there put them on board the steamer, thus avoiding any detention in quarantine; and for any such detention in quarantine over the agreed lay days, contractors to pay demurrage."

The facts in the case have been agreed upon in writing as follows:

"First. The Tweedie Trading Company (hereinafter called the 'Tweedie Company') is a New Jersey corporation, with an office in New York City.

"Second. The James P. McDonald Company (hereinafter called the 'McDonald Company') is a West Virginia corporation, with an office in New York City.

"Third. The Tweedie Company entered into an agreement with the McDonald Company, on the 23d day of April, 1901, at New York City, of which a copy is annexed to the pleadings.

"Fourth. At the time this agreement was entered into, the Catania, the vessel therein mentioned, was on the way from Puerto Rico to Colon, on the second of four intended consecutive trips, under an agreement between the same parties of earlier date, which was superseded and rescinded by the agreement of April 23d, as set forth in the recital of the said agreement.

"Fifth. The Catania sailed from Colon on the first voyage, under said agreement of April 23d, on April 25, 1901, and arrived at Bridgetown, Barbadoes, on the 3d day of May. According to the terms of the contract, the first payment of $8,400 was made by the McDonald Company, at New York,

on April 26th, on being informed by the Tweedie Trading Company that the vessel had started on said first voyage; and the second payment of $8,400 was likewise made on the 4th day of May, at New York, by the McDonald Company, on being informed by the Tweedie Company that the vessel had arrived at Barbadoes.

"Sixth. On arriving at Barbadoes, the captain at once sent a registered letter to the McDonald Company agent, informing him of the arrival of the vessel, and a note by messenger to the same effect, which reached him about 11 o'clock on May 3d. The Catania sailed at 6:30 a. m. on May 8th, and arrived at Colon on May 14th at about 11:30 a. m., and all passengers were disembarked at 2 p. m. of the same day. A copy of the statement of the McDonald Company's agent, dated May 7, 1901, is annexed and marked 'Exhibit 1.'

"Seventh. The vessel started from Colon on her second trip at about 11 a. m. on May 16th, having been delayed by lack of orders from McDonald Company, and reached the Barbadoes at about 1:30 p. m. on May 23d. The captain of the Catania served notice of his arrival on the McDonald Company's agent that afternoon, and at five o'clock on the following day, May 24th, the vessel started on its return trip to Colon. The third payment of $8,400 was made on May 23d, at New York, by the McDonald Company, according to the contract, on notice that the vessel had arrived at the Barbadoes the second time. The Catania arrived at Colon at 6:35 in the evening of May 30th, and at once reported on shore that she was ready to unload. The McDonald agent, however, was not then at Colon. The Panama Railroad Company refused to allow the vessel to unload until the McDonald Company agent had arrived. He came to Colon as soon as possible, and reached there at eleven o'clock on May 31st, and at 2 o'clock on that day the passengers were all unloaded.

"Eighth. In the meantime a regulation of the colonial authorities in Barbadoes, acting under instructions of the foreign office of the British government, had been put in force, by which the British foreign office had forbidden future embarkation of laborers from the Barbadoes, by a decree published in the Barbadoes on the 24th day of May, before the sailing of the Catania; such decree to take effect on the following day. This decree was known to the captain of the Catania and to the McDonald Company agent, and materially hastened the sailing of the vessel, which went off on its second voyage with only 73 passengers. The agent of the McDonald Company did everything in his power to obtain a reversal of this decree, but was unsuccessful, and on the 31st day of May the order was confirmed and reaffirmed by a second telegram from the foreign office of Great Britain to the colonial authorities of the Barbadoes. The regulation is still in force in Barbadoes.

"Ninth. The McDonald Company agent cabled its New York office on the 31st day of May that the enactment of the above regulation had been confirmed, whereupon the McDonald Company on the same day wrote the Tweedie Company that the above-mentioned embargo had been confirmed. This notice was read over the telephone to the Tweedie Company, and then mailed to them, and was received on the 1st of June. Later a demand was made that the third payment of $8,400 be returned.

"Tenth. The Catania remained at Colon until June 4th. She then proceeded to the Barbadoes, by order of the Tweedie Trading Company, where she arrived on June 12th, and gave the regular notice of arrival to the McDonald Company's agent. The Catania remained at Barbadoes until July 12th, when the vessel sailed to Puerto Rico to take on board a load of sugar for New York, after having notified the McDonald Company, in New York, that she was about to do so.

"Eleventh. No objection was ever made by the colonial authorities to the use of the Catania for carrying passengers on the ground of the vessel's lack of fitness for that purpose. Acting upon the letter of May 31, 1901, from Messrs. Cary & Whitridge, requiring the Tweedie Trading Company to provide the certificate 'required by the law of Barbadoes in relation to the carriage of laborers,' the latter company cabled the captain of the Catania to obtain such a certificate. Application was made for the same, and the cap-

tain informed that no such certificates were given, and a certified copy of an extract of the Barbadoes passenger act (1891) was furnished by the authorities. Said extract is annexed, marked 'T, Ex. 12.'

"Twelfth. The right is reserved to both parties to put in formal proof of the reason for the enactment of the British regulation above mentioned, provided a resubmission of the case with this additional evidence is desired by the Tweedie Trading Company. Should the court require any additional facts for a proper determination of the rights of the parties, they shall be stipulated, or, if not agreed upon, proved by evidence in the ordinary way.

"Thirteenth. Copies of correspondence are annexed, and admitted correct.

"Fourteenth. The British law, which is also the law of Barbadoes, is a fact in the case, which may be proved by reference to reports, and the submission of briefs by counsel.

The exhibits and correspondence alluded to in the agreement, where relevant, and the facts shown by them are not covered by the agreement, bear principally upon the question of demurrage; and it is not necessary to further allude to them in connection with the principal question, which is whether the facts in the case excuse performance on the part of the McDonald Company.

The contract was valid in its inception, both at the place of making and the place of performance, and was capable of being performed until an event intervened which was not in the contemplation of the parties when the contract was made. It seems to be settled that an impossibility of performance, arising from natural causes, in a case of this kind, cannot be recognized as a defense, but that one arising from a governmental act which would render performance illegal would be an excuse. It is contended here by the Tweedie Company, however, that the excuse cannot prevail, because, though performance was prevented by the law, such law, being foreign, was merely a fact, and the case should for that reason fall within the general rule. On the other hand, it is urged by the McDonald Company that the law of the place of performance governed the contract, and, as such law made fulfillment impossible, the contract was dissolved. The question really is, do the legal acts of the agents of a foreign government, which prevent the full performance of a contract of this character, control the rights of the parties? Contracting parties are subject to the contingencies of changes in their own law, and liable to have the execution of their contracts prevented thereby; but it is on the ground of illegality, not of impossibility. Prevention by the law of a foreign country is not usually deemed an excuse, when the act which was contemplated by the contract was valid in view of the law of the place where it was made,—Pol. Cont. 363; Abb. Shipp. (13th London Ed.) 755; Carv. Carr. by Sea (3d Ed.) § 255; Clifford v. Watts, L. R. 5 C. P. 577, 586; Duff v. Lawrence, 3 Johns. Cas. 162, 172; Spence v. Chadwick, 10 Q. B. 517, 530; Jacobs v. Credit Lyonnais, 12 Q. B. Div. 589,—and a fortiori when it was also then valid at the place of performance. It was intended that this contract should be performed. The law of the place of performance, in the absence of evidence of a contrary intention, ordinarily governs the incidents of a performance; but I do not think that the principle can be successfully invoked to relieve a party, otherwise liable, from the effect of such an interruption of performance as happened here. The McDonald Company urges that, by the terms of the contract,—referring to the ninth and fifteenth claus-

es,—the parties had the Barbadoes law in view, and that it should control in all respects. It is evident that the existing law there was in view so far as it affected the performance of the contract in the necessity for the obtainment by the vessel of the mentioned permits and certificates, but those clauses do not tend to establish that the parties intended that the shipowner should take the risk of a change in the law which would prevent any embarkation or carriage of the laborers whatever. The difficulty did not arise from the absence of the permits and certificates, which would, in the ordinary course, have been obtained by the steamer, if necessary.

The determination of the question involved adversely to the McDonald Company disposes of its claim for a return of the third payment.

It appears that some demurrage is due to the Tweedie Company by reason of the default of the McDonald Company to give the vessel the dispatch it was entitled to at Colon.

Decree for the Tweedie Company, with a reference to ascertain the amount of damages and demurrage. The libel of the McDonald Company is dismissed.

BARRY v. FRIEL.

(Circuit Court, D. Nebraska. April 30, 1902.)

No. 435t.

1. BUILDING AND LOAN ASSOCIATION—LOAN—COMPUTATION OF AMOUNT DUE—PAYMENTS ON STOCK, ETC.
   In ascertaining the amount due on a mortgage to an insolvent building and loan association, executed by one of its stockholders, the mortgagor's stock, or what he has paid thereon, either as payments, or as fines, dues, or penalties, should not be considered.[1]

2. SAME—PREMIUMS.
   Premiums paid by the mortgagor on account of his loan should be credited thereon, but without allowing him interest on the premiums.

3. DECREES—CONCLUSIVENESS.
   A decree canceling a mortgage executed to an Illinois building and loan association by one of its stockholders, obtained in an action brought against the association and its receiver in a Nebraska state court,—notice of the suit being by publication, and neither the association nor the receiver having knowledge thereof, and no permission being given to make the receiver a party,—was not an adjudication, and did not bind a federal court in a subsequent action to foreclose the mortgage, brought by the receiver.

In Equity.

Greene, Breckenridge & Kinsler, for complainant.
L. E. Kirkpatrick, for defendant.

McPHERSON, District Judge. The Interstate Building & Loan Association of Bloomington, Ill., was incorporated under the laws of that state. In the circuit court of McLean county, Ill., at the suit of the state auditor against the corporation, a decree was rendered declaring the corporation insolvent, and appointing complainant herein the receiver, who by due proceedings was later on appointed by this court

[1] See Building and Loan Associations, vol. 8, Cent. Dig. §§ 62, 63, 66 [f, i].

as receiver. Defendant is both a stockholder, on account of which he paid dues, fines, and penalties, and a mortgagor or borrower, on account of which loan he has paid premiums and interest. This is a bill in equity to foreclose the mortgage, after ascertaining the amount due. What is the amount due? is the principal question in the case. And that is readily ascertained when the basis for making the computation is established. That the authorities are in conflict need only be stated; and it is no purpose of mine to discuss them, or to attempt to work out the differences, and show why the one rule is to control, and not the other.

I do not think defendant's stock, or what he has paid thereon, either as payments, or as fines, dues, or penalties, is entitled to enter into consideration of any question in this case. The capital stock is a trust fund. It is contributed by the stockholders on account of their holdings as stock. This trust fund is used, in whole or in part, for the payment of the debts of the corporation. After the debts are paid, then the stockholders are creditors of the corporation; and they will participate in the division of such trust fund according to their holdings, and the payments on account of stock. But such division of the trust fund or capital stock will be when the corporate debts are paid, and will be done under the supervision of the courts in Illinois. And in no event can defendant now and in this court participate in sharing of the trust fund created by the capital stock. This cannot be allowed. But a very different question arises as to defendant now and here being credited with the premiums he has paid on account of his loan. The agreement was that defendant have certain money. This he received. He agreed to pay a stipulated rate of interest. In addition, he agreed to pay a premium for this money. This was done by making a bid therefor, which was accepted. The money thus borrowed was to be, and was, secured in part by a real estate mortgage, and also by pledging his corporate stock. Taking defendant's bond and his mortgage and his stock and the by-laws of the corporation all together, and it is reasonably plain that the premium on the loan was to be met, or nearly so, by the increase in value of the stock. So that if the concern had been kept going, and the management anything like honest, the stock, in a given time, would have matured, and, when matured, would have been surrendered to the company, and defendant's bond and mortgage delivered to him as canceled. At least, this is the theory, and it is said by experts that it will work out. Of course, as every one knows, and as many admit, it does not generally work out. A few years ago this craze broke out, and took hold of the ignorant people from one end of the country to the other. And many apparently (and otherwise) intelligent people were made to believe that both the stockholder and the borrower could easily get rich; that immense profits could be made by taking money from the left-hand pocket and putting it in the right-hand pocket. And such fallacies were, no doubt, believed by defendant herein. But that it was a fallacy does not, of itself, entitle defendant to relief. But I find that the spirit of the agreement was that defendant's premium was to be met by the growth of his interest in his stock. The corporation being insolvent, his stock will never mature. Whatever his stock is worth, if anything, will be paid to him.

But this is no reason why he should not be credited with his premiums on his loan. I think the recent case by the circuit court of appeals for the Fourth circuit, of Coltrane v. Blake, 113 Fed. 785, is sound, and, as much as any other case, leads me to the conclusion I adopt.

But I cannot agree, as the special master finds, that defendant should be allowed interest on the premiums thus paid. My conclusions are that the defendant should be charged with the following sums: (1) The amount of his bond; (2) the interest thereon for the full time. But not with any fines. He will be credited: (1) With all interest by him paid; (2) the premiums by him paid. These payments will be applied according to the principle of partial payments. An attorney's fee will be allowed, according to the contract. Complainant brings this action as though a trustee. Dodge v. Tulleys, 144 U. S. 451–456, 12 Sup. Ct. 728, 36 L. Ed. 501.

After the insolvency of the corporation, and the appointment of the receiver by the Illinois court, the defendant herein, as plaintiff, brought an action in a Nebraska state court against the corporation and the receiver, resulting in a decree canceling the mortgage now in suit. Notice of the suit was by publication, and neither the corporation nor the receiver had any knowledge of the suit, and neither appeared. And there was no permission given to make the receiver a party. That decree was not an adjudication, and is not binding on this court in this action.

There will be a decree for the plaintiff on the basis of this opinion.

COPPER KING, Limited, v. WABASH MIN. CO. et al.

(Circuit Court, S. D. California, N. D. April 10, 1902.)

No. 36.

1. MINES—WATERS—RIGHT TO DIVERT.
   Where a mining company has acquired the exclusive right to the use of the water of a certain creek in working its mines, another company has not the right, in developing its mine by means of a shaft near the creek, to cut off and divert the waters flowing into it.
2. SAME—SHAFT—NOTICE OF CONSEQUENCES.
   Where a mine owner, at the time of commencing a shaft which cut off the waters flowing into a creek which another mine owner had acquired the exclusive right to use, was cautioned by the latter against cutting off such water, he is bound with notice of the consequences of his acts.
3. SAME—TEMPORARY INJUNCTION—WHEN GRANTED.
   Where, in an action to restrain defendants from diverting water from a creek which plaintiff has acquired the exclusive right to use, the rights of the parties are in dispute, and a temporary injunction will work less hardship than its refusal, it should be granted.

In Equity. On application for temporary injunction.

Myrick & Deering, F. P. Deering, M. K. Harris, and William A. Harris, for complainant.

F. H. Short and W. E. Dunn, for defendants.

WELLBORN, District Judge. The bill alleges, in substance, among other things, that complainant is the owner of the Copper King mine,

situated on a natural water course known as "Dog Creek," in the county of Fresno, state of California, and for a number of years has been and now is engaged in the business of developing and working said mine and extracting ores therefrom, and for more than five years has diverted and appropriated for said business and domestic purposes all of the water of said creek, and by virtue of said appropriation has acquired an exclusive right to the use of said water, and that the whole of it is necessary for the business and purposes aforesaid, and, if complainant should be deprived thereof, its said business would be ruined and destroyed; that one of the defendants, the Wabash Mining Company, about June 20, 1901, commenced to sink a vertical shaft in the ground, about 50 feet from the channel of said creek, and that said shaft is 5 feet wide, 7 feet long, and 60 feet deep, and that by means thereof defendants have diverted and are diverting the water of said creek, and, unless restrained by this court, will continue to divert the same, and thereby cause the complainant great and irreparable injury. The prayer of the bill is that defendants be enjoined from maintaining said shaft, or otherwise diverting said water, etc. Defendants have filed an answer, denying all of said allegations, except as to the sinking of a shaft, and concerning that matter they admit that said Wabash Mining Company, at the time alleged in the bill, did sink a shaft of the dimensions therein stated, about 130 feet from the channel of said Dog creek, but claim that said shaft was sunk in the development of a mining property of said company, situate across the channel of said Dog creek, and deny that by means of said shaft, or at all, respondents have diverted any of the waters of said creek. Various affidavits have been filed, in support of both the bill and answer, by the respective parties. I shall not undertake to review in detail these affidavits, but will simply state, so far as may be necessary to the pending hearing, the conclusions which I have drawn therefrom.

A temporary injunction in this suit would probably work less hardship than its refusal, and, where the title to property is in dispute, such a circumstance is often, on preliminary hearing, determinative in favor of the complainant. 1 Beach, Inj. §§ 307, 308; High, Inj. (3d Ed.) § 1508; Hicks v. Compton, 18 Cal. 206; Real Del Monte Consol. Gold & Silver Min. Co. v. Pond Gold & Silver Min. Co., 23 Cal. 83; Hunt v. Steese, 75 Cal. 620, 17 Pac. 920; Paige v. Akins, 112 Cal. 401, 44 Pac. 666. Defendants, however, contend, among other things, that the shaft complained of was sunk, by the Wabash Mining Company, one of the defendants, in good faith, for the lawful development of its mining claim, without knowledge, actual or constructive when begun, that it would encounter subterranean water, and therefore, if they were to concede all the other matters in dispute, the sinking of said shaft was not, nor will its maintenance be, an actionable injury,—citing Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299; Cross v. Kitts, 69 Cal. 217, 10 Pac. 409, 58 Am. Rep. 558; Ditch Co. v. Crane, 80 Cal. 184, 22 Pac. 76; Painter v. Water Co., 91 Cal. 82, 27 Pac. 539; Railroad Co. v. Dufour, 95 Cal. 616, 30 Pac. 783, 19 L. R. A. 92; Sullivan v. Zeiner, 98 Cal. 351, 33 Pac. 209, 20 L. R. A. 730; Hargrove v. Cook, 108 Cal. 79, 41 Pac. 18, 30 L. R. A. 390;

Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201; Ocean Grove v. Asbury Park, 40 N. J. Eq. 450, 3 Atl. 168; Trustees v. Youmans, 50 Barb. 319; Haldeman v. Bruckhardt, 45 Pa. 521, 84 Am. Dec. 511; Appeal of Lybe, 106 Pa. 634, 51 Am. Rep. 542; People's Gas Co. v. Tyner, 131 Ind. 280, 31 N. E. 59, 31 Am. St. Rep. 435; and Wheatley v. Baugh, 64 Am. Dec. 721.

This contention requires present settlement, because, if true in fact and sound in law, it forbids a temporary injunction. Is the contention true in fact? W. H. Daily, who for three years has been complainant's managing agent, states in his affidavit that, about the time the shaft was begun, he cautioned the superintendent in charge of said work not to cut the complainant's water flowing in Dog creek. This statement is uncontradicted, and, if the sinking of the shaft has produced the consequences against which the defendants, as shown by said statement, were cautioned, they are chargeable, I think, with prior notice of said consequences. With reference to the law of said contention, two things are to be observed:

First. It is a singular coincidence that, in Trustees v. Youmans, supra, strongly relied on by defendants, the court announces a doctrine subversive of their contention, namely:

"If the defendant's excavation or ditch drew the water from the plaintiff's spring, instead of stopping the flow of water from the defendant's land to such spring, then the defendant would be liable in this action." Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72; Dickinson v. Canal Co., 7 Exch. 282; Cooper v. Barber, 3 Taunt. 99.

Second. While the diversion of water from a well or spring owned by one person, through its percolation into a shaft sunk on the land of another person, may be damnum absque injuria, such is not the case where, to the prejudice of antecedent rights, a like diversion is made from a natural water course. This distinction seems to be recognized in the following extract:

"This is, in fact, the pioneer case of its kind, so far as this court is concerned. There have been cases here in which injunctions were sought to prevent owners of land from digging or trenching or tunneling in their own premises, upon the ground that they were cutting off the subterranean sources of springs and streams, and they have been uniformly decided in accordance with the accepted doctrine as to rights in percolating waters,—the doctrine which defendants contend is applicable here. Those most nearly in point and most relied on are Hanson v. McCue, 43 Cal. 178, Railroad Co. v. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, and Gould v. Eaton, 111 Cal. 639, 44 Pac. 319, 52 Am. St. Rep. 201. But in none of these cases was there any evidence comparable to the evidence here of an underground stream. Gould v. Eaton, supra, comes nearer to this case than either of the others; but in that case it was found by the lower court that the portion of the water as to which there was any controversy was merely feeding the stream by percolation. And even in that case, which went as far as any case has ever gone in favor of the doctrine that percolating waters are a part of the soil and belong to the owner of the land, it was conceded, if not decided, that no water can be abstracted from a surface stream by tunneling beneath it, notwithstanding the water must pass from stream to tunnel by percolation or filtration through the soil. In this case there is a great amount of evidence tending to prove that the defendants could not take any material quantity of water out of their land without abstracting an equivalent amount from the surface stream; the reason being that the water of the surface stream would necessarily sink into the loose porous material underneath to

fill the voids occasioned by the drawing off of the water from below." City of Los Angeles v. Pomeroy, 124 Cal. 634, 57 Pac. 585.

The reason for the distinction probably is that the waters of a spring or well supplied by percolation are not subject to statutory appropriation or adverse user, while those of a water course may be acquired in either way.

In Railroad Co. v. Dufour, supra, the court holds, quoting from the syllabus:

"Where a spring is fed solely by percolating waters, which seep into it from swamp or wet land surrounding the same, and not by any running stream of water, there is no water at such spring to which the right of use can be acquired, either by statutory appropriation or by adverse user, and no action will lie in favor of one who has collected the water at the spring in a reservoir, and transmitted it by a pipe for use, against one who has diverted the water from the reservoir on his own land for irrigation and domestic use."

In Trustees v. Youmans, supra, the court says:

"The evidence tends to show that some of the plaintiffs had used the water in question for a period of more than 20 years, so that the plaintiffs to that extent claim a prescriptive right to its continued use in the same manner they have heretofore enjoyed such use. But reason and authority are alike hostile to such a claim as applied to this case. There can be no prescription where there is no adverse user, and there can be no adverse user without creating a right of action. Now, the use of the plaintiffs in this case was in no sense adverse or hostile to the defendant. It took nothing which he had any right to use or enjoy. It gave him no right of action. He was in no respect injured, nor was any right of his encroached upon. The defendant could not prevent the plaintiffs from using the waters that ran from the springs. Consequently no grant could be presumed from his silence or acquiescence. Chasemore v. Richards, 2 Hurl. & N. 183; Dexter v. Aqueduct Co., 1 Story, 393, Fed. Cas. No. 3,864; Dickinson v. Canal Co., 7 Exch. 282; Roath v. Driscoll, 20 Conn. 533, 52 Am. Dec. 352; Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721; Frasier v. Brown, 12 Ohio, 311; Haldeman v. Bruckhardt, 45 Pa. 519, 84 Am. Dec. 511."

Most, if not all, of the cases cited by defendants relate to wells or springs, although in Chasemore v. Richards, supra, a leading English case, the diversion was of percolating waters supplying a river. That decision, however, cannot be followed here, since the supreme court of California has declared the law differently, and as follows, quoting from the syllabus:

"The owners of the soil cannot divert any part of the underflow of subterranean water forming part of the stream, whether such water would or would not reach the surface stream of the river; nor can he divert percolating water, if the effect would be to cause the water of the stream to leave its bed to fill the void caused by such diversion." City of Los Angeles v. Pomeroy, supra.

A temporary injunction against the acts covered by the restraining order previously made herein will be issued upon complainant's giving a bond in the sum of $2,500, with good security, to be approved by the clerk of this court.

In re NACHMAN et al.

(District Court, D. South Carolina. May 5, 1902.)

BANKRUPTCY—EXAMINATION—CRIMINATING TESTIMONY.

The provision of Const. U. S. Amend. 5, that no person shall be compelled in any criminal case to be a witness against himself, may be invoked by a witness under examination in bankruptcy proceedings; Bankr. Act 1898, § 7, providing that no testimony given by bankrupt on examination concerning conduct of his business shall be offered in evidence against him in any criminal proceeding, being a protection only against use of his testimony in a prosecution in a federal court.[1]

In Bankruptcy.

Mitchell & Smith, for petitioning creditors.
Holman & Legare, for bankrupt.

BRAWLEY, District Judge. G. H. Nachman, a member of the firm of Nachman Bros., which firm had been adjudicated as a bankrupt in involuntary proceedings, being under examination as a witness, certain questions were asked him to which the counsel for said witness objected, on the ground that the answers thereto might tend to incriminate the witness. The referee overruled the objection, and upon request of counsel has certified the same to me for settlement, the reference having been adjourned awaiting an opinion on the question submitted.

Upon the part of the creditors it is contended that, under section 7 of the bankrupt act, it is the duty of the bankrupt to submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, and that the provision contained in said section that "no testimony given by him shall be offered in evidence against him in any criminal proceeding" is a sufficient protection against any prosecution and penalty, if under such examination, and under the compulsion of this section, he should give criminating testimony. The case of Mackel v. Rochester, 4 Am. Bankr. R. 1, 42 C. C. A. 427, 102 Fed. 314, is relied upon in support of this view. This case, which was decided in the circuit court of appeals for the Ninth circuit, would seem to be entitled to more weight than the conflicting views of several of the district courts, but, inasmuch as it is not of controlling authority, I feel compelled to examine the question, and to decide it according to my own views. The witness relies on that portion of the fifth amendment of the constitution which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself." In Counselman v. Hitchcock, 142 U. S. 562, 12 Sup. Ct. 198, 35 L. Ed. 1110, it is said: "It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, in acting as a

[1] See Bankruptcy, vol. 6, Cent. Dig. § 400.

witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard," and the principle is well established that this constitutional provision, which has long been regarded as one of the safeguards of civil liberty, should be applied in a broad spirit, to secure to the citizen immunity from every kind of self-accusation. A literal construction would deprive it of its efficacy. I am compelled to conclude, therefore, that the constitutional provision may be invoked by witnesses under examination in bankruptcy proceedings, and the only question for decision is whether the proviso that "no testimony given by him shall be offered in evidence against him in any criminal proceeding" deprives him of his constitutional right. This proviso can have no other effect than to protect him against the use of his testimony in any prosecution in the courts of the United States. It would be no answer to a prosecution which might be instituted in the state courts, which are not created by acts of congress, and which prescribe their own rules of proceedings independently of congress. Testimony thus given under compulsion might be used to search out other testimony which could be used against him, a clue to which might not otherwise be obtained, and the immunity provided by the constitution would thus be frittered away. No act of congress can deprive a citizen of the privilege afforded by the constitution unless it supplies a complete protection from all perils against which the constitution was intended to provide. Section 7 of the bankrupt act, cited above, does not provide such complete protection. The supreme court of the United States in Counselman v. Hitchcock, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, held that the provision of the interstate commerce act which was in the following words, "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding," did not afford complete immunity, and hence did not take away the privilege of the witness to refuse to answer questions which would tend to incriminate. This interstate commerce act was thereafter amended, it is supposed, in consequence of this decision, and it was provided in the amended act that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify or produce evidence, documentary or otherwise, before said commission"; and the case of Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, arose under this amended act. This case is cited by the circuit court of appeals of the Ninth circuit in the support of its conclusion that the witness should be compelled to answer. It will be found upon examination that the provision of the bankrupt act is almost identical with that provision of the interstate commerce act which was under review in the case of Counselman v. Hitchcock, and that case seems to be of more controlling authority than Mackel v. Rochester, which relied upon the later case of Brown v. Walker. It may be well contended that the object designed to be accomplished by section 7 of the bankrupt act, which requires the bankrupt to

submit to an examination concerning the conduct of his business, will be defeated, if the witness is thus permitted to refuse to testify concerning his dealings with his creditors and others, and such undoubtedly is the unfortunate result; but it is for the congress to provide, if it can, against such contingencies. It might well provide that a witness who refused to answer questions concerning his business should be deprived of his right to a discharge. That would be within its right. The courts cannot deprive a citizen of the constitutional right invoked by him for his protection upon any consideration of inconvenience or for the purpose of administering what it may regard as a salutary and useful law.

My conclusion, therefore, is that a witness, under examination before a referee in bankruptcy, cannot be compelled to answer a question the answer to which he claims will tend to criminate him, and the case will be remanded to the referee, with directions to conduct the examination in conformity with this opinion.

In examining the testimony sent up by the referee, it appears that the witness Nachman was examined concerning the contract made with the Virginia-Carolina Chemical Company, a copy of which was offered in evidence and admitted, and to the question, "Did you send them a list of the notes and collaterals up to the 1st of May, 1901?" objection was made by counsel for the bankrupt on the ground that this contract makes it a breach of trust, practically, for Mr. Nachman not to have sent in his funds to the Virginia-Carolina Chemical Company. It does not appear that the witness objected to answering this question on the ground that it would tend to criminate him, and the witness answered that he "sent them a list of the parties to whom he had sold the fertilizers"; and to the further question, "Did you say this list is the correct list sent by you?" counsel for bankrupt likewise objected on the ground that the answer to the question would tend to incriminate the witness. The court does not perceive that the answer to this question would have the effect to incriminate the witness. It would infer from the general course of the examination that the counsel for the bankrupt apprehended that the tendency of these questions might lead to an inquiry as to what the witness had done with funds collected upon these notes, and as the conversion of such funds would be a breach of trust on the part of the witness, and subject him to a prosecution for larceny under the state law, counsel endeavored to prevent any inquiry whatever concerning the conduct of the witness in his relation to the Virginia-Carolina Chemical Company. Under the provisions of section 7, the witness is compelled to give testimony concerning his business, and he cannot interpose objections which will shut out all light whatever from his creditors. The constitutional immunity can only be invoked to protect him from answering a question the answer to which might subject him to prosecution. In the further conduct of the examination the referee is directed, whenever a question is propounded, to notify the witness that he is not required to answer it if the answer would tend to criminate himself. It is only questions of that nature that he may refuse to answer. He is not to be permitted to interpose his constitutional

immunity as a shield to every inquiry concerning his business, nor is his counsel to be permitted to delay or obstruct inquiry by making objections for him. If he claims that the answer to any question propounded would tend to criminate him, he cannot be compelled to answer. This claim, to be effective, should be made by the witness himself, but the referee should notify him that a statement that such answer would tend to criminate him would, if false, subject him to a prosecution for perjury, as would any other false oath.

In re MINER.

(District Court, D. Oregon. May 6, 1902.)

No. 267.

1. BANKRUPTCY—ASSIGNED CLAIMS.
   Assignment of a claim against bankrupts entitles the assignee to share in the bankrupt estate, if the assignor is estopped from making the same claim.

2. SAME—RIGHT TO DISCHARGE—FALSE STATEMENTS.
   Discharge will not be denied a bankrupt because he made oath that he had no money deposited anywhere, when he did have $8 deposited with one to whom he was indebted.

3. SAME.
   Bad faith, depriving a bankrupt of right to discharge, will not be inferred because of slight understatements and overstatements of debts, counteracting each other.

4. SAME.
   A bankrupt does not lose right to discharge because stating that he has no interest in real estate and no policies of insurance, though he has a contract to purchase land, on which a payment equal only to accrued interest has been made, and which a vendor has a right to cancel for nonperformance, and though he has a life policy on which he has made one payment, it not appearing to have any surrender value.

In Bankruptcy.

Cotton, Teal & Minor and W. C. Bristol, for creditors.
Lionel R. Webster, for Mrs. Miner.

BELLINGER, District Judge. Mrs. Miner presents a claim against her husband's estate for $2,000. This claim is made up of money loaned by claimant's father, Smith, to the bankrupt, merchandise furnished, and a note of the bankrupt to a third party paid by said Smith, upon which an account was stated in 1898, showing $2,000 due Smith, which claim and account was assigned to the claimant. The existence of these items of account, and the settlement between Smith and the bankrupt, two years prior to the proceedings in bankruptcy, are substantially proved. The creditors now object to the allowance of this claim—

"Because it affirmatively appears from the affidavit and papers composing the proof of said claim that the same are contradictory as between themselves, and that such moneys as were received by the said Miner were not received from the claimant, but from one G. W. Smith, though as to such parts of said claim as proved which are not moneys, that those parts were also received from one G. W. Smith; because it appears from Exhibit A, at-

tached to said claim, that $500 thereof is for a note to one Mrs. Uerling, and which as appears from said proof was paid by G. W. Smith, and there is no showing by said proof by the said Jennie Miner how title to this item of the claim passed to her; because there is nothing to show in said proof the relation of debtor and creditor between the bankrupt and his wife, Jennie Miner; because there is nothing to show in respect of said claim any agreement upon the part of the bankrupt to repay the moneys, the subject of claim, to Jennie Miner, his wife; because it affirmatively appears that certain items of said claim are made up of negotiable notes which the said Miner had given to third persons, or had become liable thereon, and the title to his said note to a third person, paid by said Smith, has not passed to Jennie Miner by sale or gift and indorsement; because there is no proof that the bankrupt received the money in trust for his wife, or in any other manner than for the use and benefit of either or both of them; because it appears from the testimony heretofore taken in this cause and given by the bankrupt that such moneys as are now the subject of said claim were moneys obtained and used by the bankrupt in his business for the joint use of both himself and his wife."

These objections are technical in their character. It is immaterial that the money payments entering into the claim were made by Smith, or that notes included in it were paid by Smith. If Smith had a claim, it was his to bestow upon his daughter if he saw fit. Nor is the assignment from Smith to the claimant required to be of technical strictness. All that need be shown as to that is such a state of facts as will estop Smith from making the same claim made by his daughter. Smith does not himself make any claim on account of these items, and his assignment to the claimant of the demand due him on the account stated is in the record. As to the proof that the relation of debtor and creditor existed between claimant and the bankrupt, that relation is shown by the proof of the particular demand, nor is it necessary that an agreement to pay by the bankrupt should be shown. The law implies such agreement, and, furthermore, the statement of account is sufficient proof of it. It is not required to be proved that the bankrupt received the money in trust for his wife. What he received, he received from Smith. He was Smith's debtor in the amount claimed, and this debt Smith gave to the claimant in a distribution he was making of property among certain of his children. If Smith had not made this gift, but had presented his claim on the statement of account between himself and the bankrupt, none of these objections would have been made. The condition of the estate and the rights of the other creditors are not in the least affected by the fact that the claimant, and not her father, is permitted to prove this debt. The findings and decision of the referee expunging this claim are reversed and set aside, and the claim is allowed.

Various objections are made to the bankrupt's discharge, involving charges against him of perjury, failure to keep books, and of concealing property. It is specified that in the bankruptcy proceedings he made a false oath in alleging that he had no money on deposit in any banking institutions or elsewhere, save the sum of $52 in the hands of the sheriff of Klamath county; the fact being that he had $7.76 in the hands of A. Schilling & Co. in San Francisco. Among the creditors making this objection are A. Schilling & Co., whom the bankrupt could not have hoped to deceive by the alleged false oath,

and in whose hands he could not have hoped to conceal this money. The bankrupt, being indebted to the firm, may have thought, as is argued in his behalf, that their right to apply the balance on deposit on their debt left him nothing there. These circumstances and the amount in question preclude even a suspicion of a sinister purpose on the bankrupt's part in omitting to mention this $7.76 in the alleged false oath. It is also specified that the bankrupt made a false oath before the referee that he kept a check book showing the amounts of money kept by him with said A. Schilling & Co., etc.; that he made false oaths as to his indebtedness to various persons, omitting to schedule a debt of $532.70 and one of $60; that he stated that he owed one Henry Hilp $167, whereas in truth he owed him only $121.83; that he stated his liability to Rosenthal, Feeder & Co. to be $143.93, whereas it was in fact greater than this sum by $88.46; that he gave his liability to Adams-Booth Company at $124.23, while the debt was $159.97; that he stated that he owed Anna Uerling $500, when he owed her nothing. Where the bankrupt stated his indebtedness to be less than it in fact was or omitted to schedule a debt it is charged that this was done to conceal his true financial condition from his creditors; where the statement complained of overstated the debt or included what was not a debt no motive is assigned for the alleged false oath. Where there are understatements and overstatements of debts counteracting each other, no inference is warranted that the bankrupt was trying to misrepresent the condition of his estate. There could be no adequate motive in concealing obligations which the bankrupt owed. This could not smooth his way through bankruptcy, and would, if the deception was successful, prevent his discharge as to the omitted creditors. Moreover, a debt, however scheduled, would necessarily be proved at the amount actually due. No possible advantage could be gained by misstating the amount of the debt listed, and there is nothing in the facts stated to warrant an inference of bad faith against the bankrupt.

With reference to the check book, it is explained in the bankrupt's behalf that instead of a check book he kept some blank checks, with which he preserved a memorandum of the checks drawn. The discrepancy between the averment and the fact is not material.

It is charged against the bankrupt that in his petition and schedule he stated that he had no right, title, or interest in any real estate, whereas he had an interest in real estate to the extent of $265, and that he stated he had no policies of insurance, except a policy on the merchandise in the store, although he has a policy in a life insurance company payable to his estate. As to the real estate, it seems that he had a contract of purchase of a house and lot upon which he had paid $265, being not much more than the accrued interest on the purchase price. The bankrupt testifies that in his opinion the property was not his, since it was not paid for, and it was at the option of the party with whom he had contracted to cancel the contract of purchase for nonfulfillment on the bankrupt's part. This seems to be the fact. In any event, such an opinion would not be unnatural under the circumstances, and it is a sufficient explanation of the omission complained of, when taken with the fact that the

contract of purchase was left by the bankrupt with his papers. As to the life insurance policy the bankrupt testifies that only one year's premium had been paid, and he did not know whether it had any surrender value or not. In order to justify an inference of fraud from this omission, it ought to be shown that there was reasonable ground for the belief that the policy had a surrender value, and it does not appear that in fact it had such value.

It is charged that the bankrupt valued his merchandise at $3,500, and that there is merchandise of the value of $1,614.14 unaccounted for. No other goods are found or traced than what was turned over to the trustee. The conclusion that merchandise has not been accounted for is reached by figuring up the merchandise account from different ledgers. It is one of the specifications against the bankrupt that he failed to keep books of account of the amounts of merchandise purchased and sold by him. If he did so fail to keep books, then the conclusion reached from the books as to a definite amount of merchandise unaccounted for is of no value. It seems that he did keep books of merchandise bought and sold. As to the reliableness of these books, that is another question. From these books the objecting creditors figure goods unaccounted for as stated, amounting to above $1,600, upon the basis of the invoice taken, while the bankrupt's attorney figures from the same books that the goods accounted for are of a value more than $1,700 greater than the estimate given by the bankrupt.

Upon such consideration of these objections as I have been able to give them, and of the other objections not specifically referred to, I conclude that the facts and circumstances relied upon by the objecting creditors are not sufficient to justify an inference of purpose on the part of the bankrupt to misrepresent the true condition of his affairs or to secrete any of his property. In my opinion, the objections are not sustained by the evidence, and the findings and order herein will conform to this opinion.

SWARTS v. SIEGEL et al.

(Circuit Court, E. D. Missouri, E. D. May 3, 1902.)

No. 4,426.

1. BANKRUPTS—WHO ARE CREDITORS—ACCOMMODATION MAKERS OF NOTES—PREFERENCES.

Bankr. Act, § 60a, provides that "a person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors." *Held*, that an accommodation maker on a note executed by a bankrupt was not in any sense a creditor of the bankrupt, where he had not been called on to pay the note, or any part thereof, and could not be deemed to have received a preference merely because the bankrupt had, within four months of the adjudication, paid the amount of the note to the payee.

2. SAME—PREFERENCES—RECOVERY BACK—PERSONS LIABLE.

Bankr. Act. § 60b, providing that "if a bankrupt shall have given a preference within four months before the filing of the petition * * *

and the person receiving it or to be benefited thereby, 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," does not authorize the recovery from an accommodation maker on a note executed by the bankrupt of a payment made thereon by the bankrupt of his own accord, and not at the instigation or with the knowledge of such accommodation maker, though the payment was made within four months of the adjudication.

Sale & Sale, for plaintiff.
Stewart, Cunningham & Eliot, for defendants.

ADAMS, District Judge. This is a demurrer to a complaint in an action at law instituted by the plaintiff, as trustee of the estate of Siegel-Hillman Dry Goods Company, in bankruptcy, against Ferdinand Siegel and Joseph Siegel. The demurrer is addressed to the second and third counts of the complaint, but, as all the legal questions raised can be determined by consideration of one of them, attention will be confined to the demurrer to the second count. The count charges, in substance, that the bankrupt corporation was indebted to the Corn Exchange Bank of New York upon divers notes, aggregating the sum of $20,000; that these notes were signed by the bankrupt and by the defendants as co-makers, and, so signed, were delivered to the Corn Exchange Bank in settlement of the indebtedness of the bankrupt corporation; that the defendants were mere accommodation makers for the bankrupt; that, within four months before filing of a petition in bankruptcy against the corporation, it, while insolvent, paid the Corn Exchange Bank the amount due on the notes. There is no allegation that the bank knew of the insolvency of its debtor at the time it received the money, or that it had any cause to believe that it was intended by such payment to give any preference, within the meaning of the bankruptcy act. Neither is there any allegation showing that the defendants had any participation in, or knowledge of, the payments, as and when they were made to the bank. There is, however, an allegation that the bankrupt, at the time of making the payments to the bank, intended that the same should operate as a preference to the defendants. The legal conclusion is then pleaded that the payments so made were made for the benefit of the defendants, and operated to give them a preference, and were so intended by the bankrupt, and that the defendants at the time of receiving such preference had reasonable cause to believe that by such payments to the bank it was intended to give them a preference, within the meaning of section 60b of the bankruptcy act. This suit was accordingly brought to recover from the defendants the amount so paid by the bankrupt to the Corn Exchange Bank.

Stripped of verbiage, the question presented, as I understand it, is whether the payment by an insolvent debtor, within four months of bankruptcy, of notes on which the debtor is liable as principal, entitled the trustee of his estate in bankruptcy to recover the amount of payments so made to the creditor, from an accommodation maker of the notes, who was jointly liable to the creditor for their pay-

ment, but who neither participated in, nor knew of, the payment when made to the creditor, on the sole ground that the necessary result of such payment was to relieve the accommodation maker from his obligation to pay the same.

Section 60a of the bankruptcy act defines a preference thus:

"A person shall be deemed to have given a preference if, being insolvent, he has * * * made a transfer of any of his property and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The important and essential element of a preference is that a creditor of the bankrupt must have obtained a greater percentage of his debt than any other of such creditors.

Subdivision "b" of section 60 provides for recovering preferences from the persons who have received them. It is as follows:

"If a bankrupt shall have given a preference within four months before the filing of the petition * * * and the person receiving it, or to be benefited thereby, 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."

It is not contended in this case that the person actually receiving the preference, or his agent acting therein, is liable for the same; but it is contended that the persons "benefited thereby," namely, the accommodation makers, have received a preference, and are therefore liable to restore the same to the trustee in bankruptcy. I am unable to agree with plaintiff's counsel in their contention that the accommodation maker of a note, before he is called upon to pay the same, is in any sense a creditor of the principal debtor, within the meaning of the bankruptcy act, until he has paid the obligation, or some part of it, for which he has become surety for the debtor. He has no claim or demand against the principal in the note, and certainly he has none provable in bankruptcy. This, I think, is the necessary meaning of section 57, subd. "i," of the bankruptcy act. It is as follows:

"Whenever a creditor whose claim against a bankrupt estate is secured by the 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."

In other words, an accommodation maker must discharge the undertaking, in whole or in part, before he can be subrogated to the rights of the creditor. Until he discharges such undertaking in whole or in part, the principal debtor owes him nothing; and he cannot, within the purview of the bankruptcy act, occupy the attitude or assert any rights of a creditor against the estate of the bankrupt. If such is the case, he clearly ought not to be subjected to the obligations imposed upon creditors, as such, in other provisions of the act.

From the foregoing legislative construction, as well as from common learning with respect to the nature of the contract and obliga-

tion of a surety, I conclude that no liability can rest against these defendants on the ground that they, as creditors of the bankrupt corporation, have received a preference from the corporation.

The foregoing conclusion might dispose of the demurrer under consideration, as the theory of the complaint undoubtedly is that the defendants occupied such a position with respect to the bankrupt that they, as creditors of the bankrupt, had received a preference, within the meaning of section 60, supra, by reason of the payment made to the Corn Exchange Bank But the argument took wider scope, and was based largely upon the following proposition: That a transfer of property to "any one" of the creditors might be recovered back, not alone from the creditor who received the transfer, but from any other person who might have been incidentally "benefited thereby." This contention necessarily requires a construction to be placed upon the language employed in section 60, subd. "b." As I understand the provisions of the bankruptcy act (section 60a, supra), it is only a creditor of the bankrupt who may receive any preference. The act, in all its provisions, clearly contemplates this. Section 60a, in defining what a preference is, in substance says that it must enable one creditor to get a greater percentage of his debt than any other creditor of the same class. Section 57, subd. "g," dealing with the same subject, provides as follows: "The claims of creditors who have received preferences shall not be allowed," etc. Section 60, subd. "c," in language, provides "that if a creditor has been preferred, and afterwards in good faith gives the debtor further credit," etc. All of these sections, taken together, to my mind clearly indicate that congress intended to limit the class of persons to whom preferences might be made to creditors of a bankrupt only. Section 60, subd. "b," neither changes the elements of a preference as defined by subd. "a," nor does it enlarge the class which may be preferred. It simply provides for the recovery of the preferential payments from a person who may have been preferred, and is predicated upon the existence of a preference as defined in the preceding subdivision. It superadds, however, as a condition to the right of recovery, knowledge, or, rather, reasonable cause to believe, on the part of the recipient of a preference, that the payment to him was intended by the bankrupt to be such a preference. The language relied upon by plaintiff's counsel as enlarging the class of recipients of preferences so as to include accommodation makers or indorsers of the bankrupt's paper, before legal liability is fixed against them, is as follows:

"If a bankrupt shall have given a preference [as defined in subdivision "a"], and the person receiving it or to be benefited thereby, 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."

The language thus employed does not in terms purport to enlarge the class which might be the recipients of unlawful preferences. That matter is fixed and determined in the preceding section. *"If * * * the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe," etc.* This language

seems to have been employed for the purpose of subjecting any creditor, who may have received or been benefited by a preference, to liability for return of preferential payments,—not if he who actually or manually received it alone had knowledge that a preference was intended, but if he or any one else acting for him had such knowledge. The words underscored above, instead of enlarging the class of recipients of unlawful preferences, seem to have been inserted, ex industria, to bind any creditor who may have received such preference to any knowledge which his agents had of the bankrupt's intention, and were intended to impute that knowledge to the benefited creditor himself. The final words of the section, which provide for recovering the amount of the preferential payment from "such person," obviously refer to such person as might, under the law, have received a preference, and who either actually received it, or was benefited thereby, namely, a creditor of the bankrupt.

The foregoing, in my opinion, presents a correct analysis, and shows the true meaning of the sections of the law in question. To hold that an accommodation maker of the commercial paper of a bankrupt, against whom no liability was fixed, and who was at the time of the institution of the proceedings in bankruptcy in no manner a creditor of the bankrupt, and who never became such, was so incidentally benefited by the payment of the notes by the principal debtor, with which he had nothing to do, and which he could not prevent, as to subject him to liability to the trustee because of such payment, would, in my opinion, be an unwarranted perversion of the provisions of the bankruptcy act. It would eliminate all those carefully inserted provisions qualifying and defining what is a preference within the meaning of the act, and would work a palpable injustice. The conclusion thus reached is, in my opinion, fortified by a consideration of the provisions of the bankruptcy act of 1867, and adjudications thereunder. Section 35 of that act provides as follows:

"If any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, * * * makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally,—the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, * * * having reasonable cause to believe such person is insolvent, and that * * * payment, pledge, assignment or conveyance is made in fraud of the provisions of this act,—the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited."

Section 39 of the act of 1867 is, in part, as follows:

"If any person who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money, or other property, estate, rights or credits, or give any warrant to confess judgment, or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are, or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent by such disposition of his property, to defeat or delay the operation of this act," shall be deemed to have committed an act of bankruptcy, "and if such person shall be adjudged a bankrupt, the assignee may recover back the money or other

property so paid, conveyed, sold, assigned, or transferred contrary to this act: provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended and that the debtor was insolvent."

Without analyzing the foregoing provisions of the act of 1867, it is at once observed that their scope with respect to preferences is much broader than is found in the act of 1898. The class who might have received a preference is not, in terms, limited to creditors, but specifically comprehends any person who is under any liability for the bankrupt. Any payment or transfer of money or property by an insolvent with the intent to give a preference to his creditors, or "to any person or persons who are or may be liable for him as indorsers, bail, sureties or otherwise," or with intent "to defeat or delay the operation of the act," was by section 39 made an act of bankruptcy, and, by the same section, entitled the assignee to recover the amount thereof. The particular features to which I wish to attract attention are those which contemplate, in direct and positive terms, the contingency of preferences being given to persons under any liability for the bankrupt, or to persons liable for him as indorsers, bail, sureties, or otherwise, and also to that provision permitting recovery from the persons receiving preferences when the same were made in fraud of the provisions of the act. There were certain adjudications under the act of 1867 holding, in substance and effect, that, even under the broad and comprehensive provisions of that act, recovery could not be had against an indorser or surety under facts and circumstances similar to those involved in the present case. In the case of Thomas v. Woodbury, Fed. Cas. No. 13,916, it was held by the United States district court of Maine (Fox, J.), that the payee and indorser of a note paid by the insolvent maker to the holder, in the usual course of business, within four months of bankruptcy of the maker, was not chargeable with taking or receiving a preference, where the indorser neither received the money, nor actually procured, suggested, or aided its payment, even though he knew the maker was insolvent. To the same effect, also, is the case of Singer v. Sloan, Fed. Cas. No. 12,899, decided by this court (Treat, J.). So far as I am aware, in all the cases decided by the district courts under the act of 1867, in which an indorser was held liable to restore money to the assignee in bankruptcy, it was because he had actively procured the payment to be made, or actively participated in the receipt of the money or property from the bankrupt's estate in such a way and manner as to constitute a fraud upon the provisions of the bankruptcy act. Such is the effect of the following cases: Ahl v. Thorner, Fed. Cas. No. 103; Sill v. Solberg (C. C.) 6 Fed. 468; Scammon v. Cole, Fed. Cas. No. 12,432; Id., 12,433; Cookingham v. Morgan, Fed. Cas. No. 3,183. Accordingly I think it may be safely said that even though the cases relied upon by plaintiff's counsel might have been authority for holding an indorser or surety to liability under the act of 1867, whereby a transfer to any person under liability for the bankrupt, as indorser, bail, surety, or otherwise, in known fraud of the act, might be recovered from the person receiving it or to be benefited by it, they afford no

authority for recovery against such person under the present bankruptcy act, which contains no provision in terms avoiding the preference to the person under liability for the bankrupt, such as indorser or surety, and which contains no provision for recovery of money paid in known fraud of the act. Moreover, I am persuaded that congress, by eliminating the provisions just referred to from the present act, and doing so with full knowledge of all the provisions of the act of 1867, manifested a clear intention not to subject indorsers or sureties to the liability now sought to be enforced against them under the facts of the present case. The present bankruptcy act, as is well known, was distinctly a compromise measure. For a long time before its enactment, congress had under consideration bills and amendments relating to bankruptcy legislation. They had for years received critical consideration in congress, and after much discussion there, and much general public debate, the present act became a law. Its provisions in relation to preferences, and the right of recovery of the same from a creditor only, must be treated, in the light of the former more drastic act, and in the light of the facts just alluded to, as the deliberate expression of the legislative will; and accordingly no interpretation should be put upon the same which would impute uncertainty to the legislative mind on this subject, and certainly no interpretation ought to be indulged which would embody in the present act any of the provisions of the act of 1867 industriously omitted by congress.

The foregoing observations are made with special reference to the case in hand, wherein it appears that the defendants, as sureties for the bankrupt, had no knowledge of, or participation in, the payment of the debt by the bankrupt to the creditor, and are not intended to express any opinion upon a question which might arise in case the surety had officiously interfered to procure the payment of the debt in order to secure his own immunity. Such facts might or might not create a liability against him on grounds unnecessary now to be discussed.

Attention is called by counsel for plaintiff to the case of Bartholow v. Bean, 18 Wall. 635, 21 L. Ed. 866, and it is claimed that that case is controlling of the one now before the court. A careful consideration of it, however, convinces me that it has no applicability. The point in judgment in that case was whether the fact that a creditor who received payment of his debt at a time and under circumstances constituting a preference, within the meaning of sections 35 and 39 of the act of 1867, could escape liability therefor on the sole ground that there was an indorser on his paper, against whom liability was fixed. It was contended by the defendant that he was compelled to receive payment when tendered by the principal debtor, or lose recourse over against the indorser, and for that reason that he was not liable to return the preference to the assignee in bankruptcy. The suit against Bartholow was based on the charge that he had received a preference, and had received money in fraud of the bankruptcy act. The court held that a refusal of payment by the creditor under such circumstances would not have discharged the indorser,

and that was the only question in judgment. In the opinion, however, the court took occasion to say:

"The statute, in express terms, forbids such preference, not only to an ordinary creditor of the bankrupt, but to any person who is under any liability for him; and it not only forbids payment, but it forbids any transfer or pledge of property as security to indemnify such persons. It is, therefore, very evident that the statute did not intend to place an indorser or other surety in any better position in this regard than the principal creditor, and that, if the payment in the case before us had been made to the indorser, it would have been recoverable by the assignee."

So far, it seems to me, the court based its observation upon that peculiar provision of the act of 1867 forbidding preferences to any person who is under any liability for the debtor; but the court goes on as follows:

"If the indorser had paid the note, as he was legally bound to do, when it fell due, or at any time afterwards, and then received the amount of the bankrupt, it could certainly have been recovered of him."

Such is undoubtedly true both under the old law and the present law, because, under such circumstances as are disclosed in the case, the indorser would have been the creditor of the bankrupt. The court then goes on as follows:

"Or if the money had been paid to him directly, instead of the holder of the note, it could have been recovered, or if the money or other property had been placed in his hand to meet the note, or to secure him, instead of paying it to the bankers, he would have been liable."

In the last-mentioned observation the court, in its hypothesis, makes the indorser an active participant in securing the payment of the debt in order to relieve him from liability; and accordingly, under the provision of the act of 1867, he was liable, because he was a person under liability for the bankrupt, who had received a preference by receiving an amount of money sufficient to exonerate him from liability. I fail to find in this decision anything whatever which disturbs the conclusion hereinbefore reached in the present case. The court there was dealing with a case under a different statute, invoking a different provision from the one now found in the present bankruptcy act, and, in its hypothetical cases, assuming a state of active participation by the indorser, resulting in a direct pecuniary benefit to him. The conclusion reached by the supreme court of Rhode Island in the recent case of Landry v. Andrews, 6 Am. Bankr. R. 281, 48 Atl. 1036, relied upon by plaintiff's counsel, was not the result of any independent reasoning by that court, but was based upon what it, in my opinion, improperly interpreted Bartholow v. Bean, supra, to teach, and therefore has no persuasive influence.

For the reasons hereinbefore given, the demurrer to the second and third counts of the petition must be sustained.

In re GUTMAN et al.

(District Court, S. D. New York. May 8, 1902.)

1. BANKRUPTCY—POSSESSION OF PROPERTY.
The trustee being vested with the title of bankrupt as of date of the adjudication (Bankr. Act 1898, § 70), and possession of his property being then constructively in the bankruptcy court, the mortgagee of bankrupt, who thereafter takes possession of the mortgaged property, does not get legal possession, and no right of his is invaded by the trustee taking possession.[1]

2. SAME—INJUNCTION AGAINST ACTION IN STATE COURT.
A court of bankruptcy, under the power given it by Bankr. Act, § 2 (15), and General Order 12, cl. 3 (32 C. C. A. xvi, 89 Fed. vii), to stay proceedings in a state court, will enjoin action against the trustee, where it is clear the taking by him of bankrupt's property from plaintiff was not wrongful, as alleged, and continuance of the action will embarrass the administration of the estate.[2]

In Bankruptcy. Motion by trustee for injunction against action in state court.

Blumenstiel & Hirsch, for the motion.
David E. Grossman, opposed.

ADAMS, District Judge. This is a motion upon a petition by Robert A. Inch, formerly receiver and now trustee of the bankrupt estate, to restrain the prosecution of an action brought against him in a state court by Morris D. Kopple. The action is for the recovery of $800, damages alleged to have been caused to the plaintiff by the wrongful taking and carrying away from his possession of certain chattels which the plaintiff alleges were mortgaged to him on the 27th day of December, 1901, to secure a loan, and thereafter duly taken possession of by him under the terms of the mortgage. The action was not brought against Inch in his official capacity, but merely demanded a personal judgment.

The defendant seeks the protection of this court upon the allegation that he took possession of the property by virtue of his appointment as receiver by this court, and that leave of this court has not been obtained to sue him. He also alleges that the alleged mortgagee consented that the receiver should take possession of the property and sell the same, provided that it realized more than the amount of the claim of $800, and the fund should be subject to a lien for that amount. The petitioner also alleges that the property realized more than the stipulated amount, was turned over by him as receiver, and now held by him as trustee subject to the order of the court. The plaintiff in the action opposes the motion, denying the consent as alleged.

The fact that the petitioner was a receiver of a court would not ordinarily afford him immunity for a tortious act, such as is alleged here (Curran v. Craig [C. C.] 22 Fed. 101; Barton v. Barbour, 104

[1] See Bankruptcy, vol. 6, Cent. Dig. § 193 [e].

[2] Restraining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575.

U. S. 126, 134, 26 L. Ed. 672; Beach, Rec. § 654); and even if he were sued for his official acts, being a federal receiver, his contention that leave of court should first have been obtained could not be sustained (24 Stat. 552, c. 373; 25 Stat. 433, 436, c. 866; Railway Co. v. Cox, 145 U. S. 593, 601, 602, 12 Sup. Ct. 905, 36 L. Ed. 829). But the statutes which permit such actions without leave of court provide that they should be subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as the same shall be necessary to the ends of justice. The question here is whether the petitioner is entitled to invoke the equity powers of a bankruptcy court upon the facts as presented.

It appears that Gutman and Wenk were adjudicated involuntary bankrupts on the 4th day of January, 1902. On the next day the plaintiff Kopple took possession of the mortgaged property. The loan was not due at the time, and the justification for the act was alleged to be found in a clause in the mortgage to the effect that the mortgagee might take possession of the property at any time if he should deem the security afforded by the mortgage unsafe or at any risk, and sell the property according to law. It is evident that Kopple did not obtain legal possession of the chattels by his act. At the time of the filing of the petition and the adjudication in bankruptcy, the possession was in the bankrupt, and the trustees, to be subsequently appointed, became vested with the title of the bankrupt as of the date of the adjudication (Bankr. Act 1898, § 70). The filing of the petition was in effect a caveat to all the world, and an attachment of all the bankrupt's property (In re Vogel, 7 Blatchf. 18, 20, Fed. Cas. No. 16,982; Bank v. Sherman, 101 U. S. 403, 406, 25 L. Ed. 866; Mueller v. Nugent, 7 Am. Bankr. R. 224, 22 Sup. Ct. 269, 46 L. Ed. ——; In re Krinsky [D. C.] 112 Fed. 972), and the property was constructively in the possession of the court when the plaintiff's alleged possession was obtained. It would seem clear that, as the plaintiff had no right of possession, there was no invasion of any of his legal rights, and that no cause of action really exists against the petitioner in the matter. It was the duty of the receiver to take possession of all the bankrupt's property, and it is now in the custody of this court, where such claim as the plaintiff may have upon the property will be enforced. Section 720 of the Revised Statutes, prohibiting the granting of injunctions to stay proceedings in any court of a state, expressly excepts "cases where such injunctions may be authorized by any law relating to proceedings in bankruptcy." Under the act of 1898, among the powers specifically given to the court of bankruptcy are (section 2): "(15) Make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." And by clause 3 of the twelfth general order (32 C. C. A. xvi, 89 Fed. vii) it is provided: "Applications * * * for an injunction to stay proceedings of a court or officer of the United States or of a state shall be heard and decided by the judge" (White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183); and it seems to be the clear intent of the act that the administration of the bankrupt estate by the bankruptcy courts should not be un-

duly interfered with. Ordinarily, where the receiver of the court has merely general directions to take into his possession the property of the bankrupt, and there is a claim that he has taken the property of a third person, the court, in conformity with general principles, would leave him to answer in any proper forum for his individual acts (Buck v. Colbath, 3 Wall. 334, 18 L. Ed. 257; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; McNulta v. Lochridge, 141 U. S. 327, 12 Sup. Ct. 11, 35 L. Ed. 796; Central Trust Co. v. East Tennessee, V. & G. Ry. Co. [C. C.] 59 Fed. 523; High, Inj. § 298; Hale v. Bugg [C. C.] 82 Fed. 33); but where it appears without dispute, as it does here, that the third party cannot possibly have any legal rights to be established by the litigation in the state court, and the result of permitting it to be continued would not only suffer an injustice to the receiver, but indirectly tend to embarrass this court in administering the estate, the equitable powers of the court should be exercised, both for the prevention of the injustice and to protect the court's full jurisdiction (Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497; Chapman v. Brewer, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83; Garner v. Bank, 16 C. C. A. 86, 67 Fed. 833; James v. Trust Co., 39 C. C. A. 126, 98 Fed. 489; Mueller v. Nugent, supra).

Motion granted.

In re ED. W. WRIGHT LUMBER CO.

(District Court, W. D. Arkansas, Texarkana Division. April 30, 1902.)

1. BANKRUPTCY—EXECUTION OF MORTGAGE.

A debtor who, knowing that he is insolvent, executes a deed of trust to secure a creditor on a pre-existing debt, commits an act of bankruptcy, within Bankr. Act, § 3a, par. 2, providing that acts of bankruptcy by a person shall consist of his having "transferred while insolvent any portion of his property to one or more creditors with intent to prefer such creditors over his other creditors," and this irrespective of whether the creditor knew, or had reasonable ground to know, that the bankrupt intended to prefer him.

2. SAME—PREFERENCES.

Bankr. Act, § 60a, provides that a person shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property the enforcement of which will enable any creditor to obtain a greater percentage of his debt than other creditors of the same class. A bankrupt owed a bank $1,945, and claimant $940. The bank was threatening suit, and the bankrupt's father procured claimant to execute to the bank a demand note for the amount of the bankrupt's debt to it, and also two accommodation notes for $1,000 each, to enable the bankrupt to take a trip to recuperate his failing health. To secure the bank debt of $1,945, and his debt to claimant for $940, and the accommodation notes, the bankrupt executed a deed of trust on his property for claimant's benefit. *Held*, that claimant had received a preference, and would have to surrender the mortgage.

Intervention of A. L. Alphin for $1,945 as a preferred claim.

Snead & Powell, for A. L. Alphin.

T. E. Webber, for the trustee.

ROGERS, District Judge. Prior to November 13, 1901, Ed. W. Wright, doing business under the firm name of the Ed. W. Wright Lumber Company, was insolvent. The Eldorado Bank held a claim against him, in the form of overdrafts, for $1,945. He was also indebted to the claimant, A. L. Alphin (who was a stockholder and director in said bank), in the sum of $940, which had been past due for several months. The Eldorado Bank, through counsel, was vigorously pressing its claim for collection and threatening suit. Ed. W. Wright himself was in ill health, and his father had come to his rescue in order to manage the business of the company. Ed. W. Wright made out a pencil statement of his condition, showing his solvency, and placed it in the hands of his father, John C. Wright, and requested him to go to Eldorado and see Mr. A. L. Alphin, and see if he could get the money. (This statement shows the liabilities to be about $7,500, and assets $12,000, whereas the liabilities were over $14,000.) This the father did, and the result of this interview was that Mr. Alphin executed to the bank his demand note for the amount of Ed. W. Wright's indebtedness, and delivered to him his accommodation notes at 60 and 90 days for a thousand dollars, which Ed. W. Wright, it is stated, expected to use in making a trip to Hot Springs in the effort to recuperate his health. The 60 and 90 day notes were given because Alphin could not spare that amount of cash from his business at that time, being engaged in buying cotton. To secure the bank debt of $1,945, and his own debt of $940, and the thousand dollar notes, Ed. W. Wright executed a deed of trust to E. O. Mahoney, as trustee for A. L. Alphin, upon all his personal property. Before the transaction was entered into, Ed. W. Wright's father informed the claimant, Alphin, that his son owed the bank the $1,945, and that the Ruston Bank had a mortgage on the machinery of E. W. Wright for $2,500. The deed of trust from E. W. Wright to E. O. Mahoney, in trust for Alphin, shows that all the personal property described in the mortgage was already incumbered. This mortgage the claimant, Alphin, did not demand as security, but it was offered by the bankrupt through his father.

It is now insisted that neither the bank nor Alphin had reason to believe that Ed. W. Wright was insolvent. I cannot assent to this view of the testimony. It is not reasonable to ask the court to believe that Ed. W. Wright had no more knowledge of his business than to suppose that his indebtedness was only one-half of what it really was. It may be, and it is probable, that the father of the bankrupt did not know that he was insolvent. For the purposes of this case it is immaterial whether he did or not. He was the agent of his son, and the representations that he made to the claimant, Alphin, were made at the request of his son. The court is of opinion that the son knew that the statement his father made was not approximately correct. Indeed, it is shown by the proof, by the father of the bankrupt, that, if he had failed to get the money to pay off the Eldorado Bank from the claimant, Alphin, the mill would have been immediately shut down; so that it is not altogether clear, by any means, that the father of the bankrupt did not himself know that his son was in failing circumstances. The bankrupt knew of his insol-

vency, and executed this mortgage to secure the pre-existing indebtedness of the Eldorado Bank which had been assumed by the claimant, Alphin, and also the pre-existing indebtedness of Alphin himself. The execution of this mortgage was therefore an act of bankruptcy, being in direct violation of section 3a, par. 2, of the bankrupt law, which is as follows:

"Sec. 3a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portions of his property to one or more of his creditors with intent to prefer such creditors over his other creditors. * * *"

If it be said that the testimony shows that the bankrupt did not intend to prefer claimant, the answer is that he was insolvent, and he knew it, and he must be held to have intended that which was the necessary consequence of his act. He cannot be heard to say that he did not intend to do a thing when the necessary and logical consequence of his act was to do that very thing. It is not necessary, therefore, in order that the execution of this mortgage be an act of bankruptcy, that the claimant, Alphin, knew, or had reasonable grounds to believe, when he accepted the mortgage, that the bankrupt intended to prefer him over other creditors. Section 60a of the bankrupt law is as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

The word "transfer" is defined in section 1, par. 25, as follows:

"Transfer shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

That section of the bankrupt law (60a) has been twice construed by the supreme court of the United States. In Pirie v. Trust Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, Mr. Justice McKenna made use of this language at page 444, 182 U. S., and page 908, 21 Sup. Ct., 45 L. Ed. 1171:

" 'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing of or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.' "

And this section (60a) was also construed in Wilson v. Nelson, 193 U. S. —, 22 Sup. Ct. 74, 46 L. Ed. —, 7 Am. Bankr. Rep. 142, in which Mr. Justice Gray discusses the proper construction of this statute, and discriminates between the bankrupt law of 1898 and the previous bankruptcy acts, and specifically holds that it is not necessary that the bankrupt should intend to give a preference; it is sufficient

if the effect of the enforcement of the transfer will be to enable any one of the bankrupt's creditors to obtain a greater percentage of his debt than any other of his creditors of the same class; and he expressly declines to follow Wilson v. Bank, 17 Wall. 473, 21 L. Ed. 723, Clark v. Iselin, 21 Wall. 360, 22 L. Ed. 568, and Bank v. Warren, 96 U. S. 539, 24 L. Ed. 640, which, in effect, held that intent to prefer was necessary under the bankrupt act of 1867, because, he says, they have no application under section 60a of the bankrupt act of 1898. It is clear to my mind, therefore, that the transaction between Alphin and Wright operated as a preference to Alphin, and that his claim cannot be probated against the estate until the preference is surrendered; that is to say, he must surrender his mortgage in order to become a general creditor.

The action of the referee in this case is affirmed, and an order will be entered to the effect that if the said A. L. Alphin shall surrender the deed of trust hereinbefore referred to within 10 days his claim be allowed for the full amount, $3,880.62, and if he refuse to surrender the mortgage within the time above specified his claim be disallowed in toto.

KIBLER v. BROWN.

(Circuit Court, W. D. Missouri, C. D. March 21, 1902.)

No. 2,251.

BILL BY ASSIGNEE—ALLEGATIONS AS TO ASSIGNMENT—VARIANCE.

A bill averring that "E. G. Church & Co." sold to plaintiff all their right of action, claim, and demand against third parties was not supported by an assignment executed by E. G. Church alone.

James T. Montgomery, for complainant.
William S. Shirk, for defendant.

PHILIPS, District Judge. The theory of the complainant's bill in this case is that, as the assignee of E. G. Church & Co., he is entitled to an accounting against the defendant, receiver of the First National Bank of Sedalia, Mo., on account of certain tax bills pledged by Church & Co. to said bank as security for moneys to be advanced to Church & Co. to prosecute and carry out their contract with the city of Sedalia for paving certain streets. It is not alleged what amount of money was thus advanced by the bank to Church & Co. under this agreement, but it is alleged that the aggregate amount of such tax bills so turned over to the bank was $62,718.91, face value. It is quite inferable from the bill itself, as well as from the evidence in the case and the conduct of the parties themselves, that it was understood that the pledgee was authorized to collect and use the tax bills in payment of the indebtedness of the pledgor to the bank. The bill contains this allegation:

"And he charges and avers that the said defendant now has in his possession a large sum of money, besides many tax bills in process of collection, arising out of the collection of said tax bills, over and above the amount required to pay off and discharge all sums of money and the interest thereon.

advanced to the said E. G. Church & Co. as aforesaid, to wit, the sum of eight thousand dollars."

The prayer of the bill is:

"That the defendant pay over to this plaintiff all sums of money, and for whatever sum may be found due, owing, and not paid to the said E. G. Church & Co., and that he may have a further judgment that the said Deweese [who has been succeeded in the receivership of said bank by the above defendant, Brown] deliver to this plaintiff all tax bills in his hands remaining yet uncollected, and received by him as receiver of such bank, and for all sums of money which may have been received by the said W. A. Latimer [who was the receiver prior to Deweese, and prior to July or August, 1898] and the defendant on account of said tax bills since the same came into his hands."

The bill, as showing a right of action in this complainant, alleges that:

"On the 28th day of September, 1900, the said E. G. Church & Co., for a valuable consideration, transferred, set over, and sold to this plaintiff all their right of action, claim, and demand against the First National Bank, and against the receiver thereof, for whatever sum might be due, owing, and unpaid them by said bank by said Latimer, or by Deweese as receiver, and also whatever tax bills which they, or either of them, had received, and yet remained uncollected."

This allegation was denied by the answer. To support the right of action in this complainant, he offered and read in evidence the following instrument of writing:

"For value received, I hereby sell, assign, and transfer to Louis Kibler, of Sedalia, Missouri, all the special Third and Seventh and Fifth street paving tax bills remaining in the hands of the receiver of the First National Bank of Sedalia, Missouri, after paying all indebtedness due said bank from Church and Company on account of said paving.

"[Signed] E. G. Church.

"Signed and dated at Tatahuicapa, Republic of Mexico, this 28th day of Sept., 1900."

This proof does not support the allegation of the bill that the complainant is the assignee of E. G. Church & Co. It is only an assignment by E. G. Church, and would only have, as between the parties litigant, the effect of vesting in the complainant the individual interest of E. G. Church. It is nowhere alleged in the bill that E. G. Church & Co. was composed solely of E. G. Church. It is true that the witness Meyers, on the part of the complainant, in response to the question as to who he represented in his conversations with the cashier of the bank and the receivers, and by whose authority he went to see those parties, testified that when he went to see Mr. Thompson, the cashier, and Mr. Latimer, the receiver, of the bank, he represented E. G. Church & Co., at their request, and that in his other visits to Mr. Latimer and to Mr. Deweese, receivers, he went at the request of Mr. Kibler, the complainant; and he then volunteered the statement that the contracts for paving the streets were let by the city to E. G. Church, J. Peavey, and E. A. Berry, and that, before the work was completed, Peavey and Berry sold out their interest in the contracts to Church, who was authorized by them to continue the business of the firm of E. G. Church & Co. But Peavey and Berry, the admitted members of

the firm of E. G. Church & Co., are not parties to this suit, and are not before this court, and would not be concluded by any decree this court might make in this suit. There is nothing on the face of the bill to conclude them, and nothing to prevent Peavey and Berry from asserting their interest and rights in the contract in question. In other words, under the written assignment, which is the muniment of the complainant's right, and which is a clear departure from the allegations of the bill, he represents nothing but the individual interest of E. G. Church in the contract and tax bills. The court could give him no decree turning over to him any tax bills pledged by E. G. Church & Co., without splitting up the cause of action, and undertaking, in the absence of the other members of the firm of E. G. Church & Co., to determine what aliquot proportion the complainant, as an assignee of Church alone, has in the entire property. It is evident, therefore, that there is an entire failure of proof under the allegations of the bill to entitle this complainant to the relief sought.

For this reason the bill will be dismissed without prejudice.

BLOOMINGDALE v. EMPIRE RUBBER MFG. CO.

(District Court, E. D. New York. February 18, 1902.)

BANKRUPTCY—GOODS OBTAINED BY FRAUD.

One from whom a bankrupt obtains goods on time, on false representation that they were to fill an order, when the bankrupt had no order, the goods being turned over to secure a bondsman of the bankrupt in another matter, and being secreted, is entitled thereto, the whole transaction being a fraud.

Hamilton Anderson, for trustee.
Lyon & Smith, for respondent.

THOMAS, District Judge. The bankrupt bought of the Empire Rubber Manufacturing Company, respondent, rubber hose, usable for fire purposes, invoiced at $2,950, and procured credit for 60 days, upon the representation that it was to fill a bid "with a corporation that requires sixty days"; that he had "succeeded in getting contract on the basis of your [respondent's] samples." This was about the middle of March, 1900. Before the hose was delivered, the bankrupt, or his authorized agent, advised respondent over the telephone that the hose was for the department of parks. In fact the bankrupt had made no bid, had received no contract, and there is no competent evidence that any person in association with him had. On the other hand, the bankrupt turned the hose over to secure a bondsman in another matter, and thereafter it was kept secreted from every person, until the respondent, at much expense, succeeded in unearthing it. Even the bankrupt's schedules, filed in proceedings begun May 28, 1900, made no mention of it. The whole transaction was a palpable fraud, by which the bankrupt's creditors may not and should not profit. The hose belongs to the respondent.

in law and equity. The trustee was right in pursuing the matter, ascertaining the facts and laying them before the court, but the history revealed demands that the property should remain with the respondent.

MEMORANDUM DECISIONS.

THE BARNSTABLE. (Circuit Court of Appeals. First Circuit. April 22, 1902.) No. 423. Appeal from the District Court of the United States for the District of Massachusetts. John L. Thorndike (Charles T. Russell and Arthur H. Russell, on the brief), for appellant. J. Parker Kirlin, for appellee Northern Transport, Limited. Eugene P. Carver and Edward E. Blodgett, for appellees A. G. Hall and others. Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is the same case reported in 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954. In accordance with the order there found on page 473, 181 U. S., page 688, 21 Sup. Ct., 45 L. Ed. 954, the opinion was made a part of the mandate to the district court. Therefore every part of that opinion was conclusive on the district court, and is conclusive on us. After the mandate came down, the Boston Fruit Company undertook in the district court, by a petition, and by an amendment to its answer referred to in 181 U. S. 465, 21 Sup. Ct. 685, 45 L. Ed. 954, to introduce certain new propositions, based on a claim that the Turret Steamshipping Company had in fact secured policies covering some, if not all, of the risks explained in the opinion of the supreme court. The new matter thus offered by it was not accepted by the district court, and the amendment was refused, on the ground that, under the mandate of the supreme court, that court had no power in reference thereto. Thereupon an appeal was taken to us. It is not necessary that we should state at length the new matter which was thus sought to be introduced. We ought to observe, in view of the fact that the decrees of the district court and of this court, which were reversed by the supreme court, were in favor of the Boston Fruit Company, that it cannot be charged with laches with reference to any matter now pending before us; and therefore, while we are of the opinion that the decree of the district court now appealed from must be affirmed, we rest our conclusion on the single proposition that, according to our understanding of the mandate from the supreme court, no substantial question was reserved therein except as to the effect of some payment that might have been actually made by underwriters with reference to the losses involved in the case. Inasmuch as the new matter now offered by the Boston Fruit Company is substantial, and yet is not based on any claim of any payment actually made by underwriters, we conceive that the mandate precludes its consideration, and for that reason the decree now appealed from must stand. The decree of the district court is affirmed, with interest, and the Northern Transport, Limited, will recover against the Boston Fruit Company the costs of this appeal.

BIERING v. SONNENTHAL. (Circuit Court of Appeals, Fifth Circuit. April 22, 1902.) No. 1,119. Appeal from the District Court of the United States for the Eastern District of Texas. Wm. T. Austin, for appellant. Maco Stewart, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The motion of appellant to set aside the sales made in the bankruptcy of E. J. Biering does not state sufficient facts to warrant the

vacation of said sales, in that it is not alleged that there was any fraud, accident, or mistake, nor sufficiently alleged that the property was sold at such an inferior price that injury to the estate of the bankrupt or to the creditors can be predicated thereon. The demurrer to said motion was properly sustained, and the decree appealed from is affirmed.

CENTRAL OHIO R. CO. et al. v. MAHONEY. (Circuit Court of Appeals, Sixth Circuit. April 8, 1902.) No. 765. In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio. For former opinion, see 114 Fed. 732. J. H. Collins, for plaintiff in error. Emmett Tompkins and Thomas Steele, for defendant in error. Before LURTON and DAY, Circuit Judges, and CLARK, District Judge.

PER CURIAM. There arises in this case a question of law upon which this court desires the instruction of the supreme court for its proper decision. It is therefore ordered that the statement and question here following be certified to the supreme court, as provided by the sixth section of the act of March 3, 1891: The plaintiff, a citizen of the state of Ohio, brought suit in a common pleas court of the state of Ohio to recover damages for a personal injury sustained by him against the Central Ohio Railroad Company, as reorganized, a corporation of the state of Ohio, and against John K. Cowen and Oscar G. Murrey, as receivers for the Baltimore & Ohio Railroad Company, a corporation of the state of Maryland. The petition averred that the injuries suffered by him were sustained in consequence of his wrongful and violent ejection from a moving passenger train, which he had boarded for the purpose of becoming a passenger thereon. The petition avers that the railroad owned by the defendant the Central Ohio Railroad Company had been long under a lease to the Baltimore & Ohio Railroad Company; that said Cowen and Murrey had been appointed receivers of the property of the Baltimore & Ohio Railroad Company and as such placed in possession of same, including its leasehold interest in said Central Ohio Railroad Company, under a decree of the United States circuit court. The train from which the plaintiff was so ejected was a train operated by the said receivers on the railroad of the said Central Ohio Railroad Company. The joint liability of the said Central Ohio Railroad Company, as reorganized, and the said receivers, to the plaintiff, is based upon section 3305 of the Revised Statutes of Ohio, which provides that "the company to whom any railroad is leased if a corporation of any other state, shall be subject to all the restrictions, disabilities, and duties of a railroad company incorporated within this state; and notwithstanding such lease the corporation of this state, lessor therein, shall remain liable as if it operated the road itself, and both the lessor and lessee shall be jointly liable upon all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, or in anywise connected therewith, and may be jointly sued in any of the courts of this state of proper jurisdiction, and prosecuted to final judgment therein as in other cases of joint liability; and provided that service may be had upon said companies, or either of them, by the service of process upon any officer or agent of either of said companies." The ad damnum clause of the petition laid the damage sustained at $20,000. Upon the petition of the said receivers alone, the said suit was seasonably removed into the circuit court of the United States for the proper district. The petition, as ground for removal, averred that "this cause is a suit of a civil nature, between Daniel J. Mahoney, as plaintiff, who was at the time of the institution of this suit, and still is, a citizen of the state of Ohio, residing at ——, and your petitioners, John K. Cowen and Oscar G. Murrey, as receivers of the Baltimore & Ohio Railroad Company, and the Central Ohio Railroad Company, as reorganized, as defendants, but the defendant herein, the Central Ohio Railroad Company, as reorganized, has no interest or liability jointly with the said receivers of the Baltimore & Ohio Railroad Company; that the said John K. Cowen and Oscar G. Murrey, as such receivers, were at the time of the institution of this suit, and still are, citizens

of the state of Maryland, residing at Baltimore city, in said state." The Central Ohio Railroad Company, as reorganized, did not join in this petition for removal, and there was no averment or facts showing any separable controversy wholly between the said receivers and the said plaintiff; but, upon the contrary, the suit was against the Central Ohio Railroad Company and the receivers as jointly liable for the tort by which the plaintiff had suffered. The defendant in error entered a motion in the circuit court to remove the cause to the circuit court for want of jurisdiction, but this motion was never acted upon. There was a jury, and verdict, and a joint judgment against the said Central Ohio Railroad Company, as reorganized, and the said Cowen and Murrey, as receivers of the Baltimore & Ohio Railroad Company for $4,500. Errors were assigned going to the merits of the case, but none in respect to the jurisdiction of the court. Upon the argument of the case in this court the plaintiffs in error raised the point that the suit had been improperly removed from the state court, and moved this court to reverse the judgment and direct that the cause be remanded to the state court, as improperly removed. The court, entertaining grave doubt as to the jurisdiction of the circuit court, certifies to the supreme court for its instruction this question: "(1) Is a suit removable from a state court to a United States court upon the petition of the receivers alone, when the action is against receivers, appointed by a United States court and also against a corporation created under the laws of the state of which the plaintiff is a citizen, when the action is a single action against both defendants for a joint tort."

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. GIBSON. (Circuit Court of Appeals, Fifth Circuit. April 22, 1902.) No. 1,089. In Error to the Circuit Court of the United States for the Southern District of Mississippi. W. E. Baskin, for plaintiff in error. W. N. Etheridge and John W. Fewell for defendant in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. There was no error in sustaining the demurrer of the plaintiff to the defendant's second plea, in which said plea the defendant set up that at the time of the alleged injury complained of in the declaration it had been and was enjoined from operating and repairing its plant and poles and wires, because said plea does not aver that at the time of the alleged injury the defendant was not in fact operating and managing said plant, poles, and wires. We find no error in the rulings of the court, in the admissions of evidence, nor in the instructions to the jury as to the measure of damages. The judgment is affirmed.

ERIE R. CO. v. KEYSTONE COAL CO. (Circuit Court of Appeals, Third Circuit. March 4, 1902.) No. 3. Appeal from the District Court of the United States for the Western District of Pennsylvania. E. N. Willard, for appellant. S. J. Strauss, for appellee. Case dismissed, at cost of appellant.

FRICK CO. v. BLISS. (Circuit Court of Appeals, Third Circuit. March 4, 1902.) No. 1. Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania. J. H. Whitaker, for appellant. Case dismissed, at cost of appellant.

HASTORF v. HUDSON RIVER STONE SUPPLY CO. et al. (Circuit Court of Appeals, Second Circuit. April 22, 1902.) No. 141. Appeal from the District Court of the United States for the Southern District of New

York. L. B. Adams, for appellant. A. J. Rose, for appellees. Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. The decree in this case is affirmed upon the opinion of the district judge (110 Fed. 669) who decided the case in the court below. We fully agree with his findings of fact and law as therein expressed, and are satisfied that the decree was in all respects correct. Affirmed, with costs.

In re MAINS. (Circuit Court of Appeals, Ninth Circuit. March 7, 1902.) No. 804. Application for writ of habeas corpus was docketed on the 7th day of March, 1902. Application denied.

In re MAINS. (Circuit Court of Appeals, Ninth Circuit. March 12, 1902.) No. 805. Application for a writ of certiorari and habeas corpus was docketed on the 10th day of March, 1902. Application denied.

MATTHEWS v. McCALLUM et al. (Circuit Court of Appeals. Third Circuit. March 4, 1902.) No. 5. Appeal from the District Court of the United States for the Eastern District of Pennsylvania. Alex Simpson, Jr., for appellant. J. G. Johnson, for appellees. Case dismissed, at cost of appellant.

MOORE, Collector of Internal Revenue, v. RUCKGAHER. (Circuit Court of Appeals, Second Circuit. April 25, 1902.) No. 143. In Error to the Circuit Court of the United States for the Southern District of New York. For opinion below, see 104 Fed. 947. George H. Pettitt, U. S. Atty., for plaintiff in error. A. E. Henrichs, for defendant in error. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Judgment of circuit court affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. EWING et al. (Circuit Court of Appeals, Fifth Circuit. February 25, 1902.) No. 1,086. In Error to the Circuit Court of the United States for the Northern District of Texas. John L. Henry (W. T. Henry, on the brief), for plaintiff in error. Frank P. Poston, for defendant in error Southern Ry. Co. Rhodes S. Baker, W. A. Rhea, Jr., and George H. Plowman, for defendants in error Ewing. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that there is no reversible error in the record, and the judgment of the circuit court is therefore affirmed.

PARDEE, Circuit Judge (dissenting). This case shows that prior to removal and after taking nonsuit in the state court, the plaintiffs below so amended their petition as to conform strictly to the contract of transportation as embodied in the ticket signed by Mrs. L. S. Ewing, changing their declaration from one against all the defendants upon a joint obligation to transport over the entire distance from Dallas, Texas, to La Grange, Tennessee, to a declaration against each of the defendants separately for a violation of contract of transportation over the respective lines of each.

It seems to be settled general law that, unless a carrier whose line constitutes a portion of the entire route contracts otherwise, its obligation for transportation and its liability for damage extends only to its own line. Myrick v. Railroad Co., 107 U. S. 102, 107, 1 Sup. Ct. 425, 27 L. Ed. 325; Railroad Co. v. Jones, 155 U. S. 339, 15 Sup. Ct. 136, 39 L. Ed. 176. This rule has been

recognized and declared in the supreme court of Texas in McCarn v. Railway Co., 84 Tex. 352, 19 S. W. 547, 16 L. R. A. 39, 31 Am. St. Rep. 51; Railway Co. v. Looney, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787.

Therefore, in my opinion, the court below committed reversible error in overruling the exception of the St. Louis, Iron Mountain & Southern Railway Company to the fourth original petition of the plaintiff, which excepted to the said petition on account of a misjoinder of parties defendant and causes of action apparent upon the face thereof; and the court below also committed reversible error in instructing the jury over the objections of the plaintiff in error that the plaintiff below was a passenger on the line of the St. Louis, Iron Mountain & Southern Railway Company from the time she entered its custody at Fair Oaks until she was delivered by it to the Southern Railway Company at Memphis. This instruction gives the jury to understand that the St. Louis, Iron Mountain & Southern Railway Company was under an obligation to deliver the plaintiff below to the Southern Railway Company at Memphis, whereas the real contract between the parties sued on was to deliver the plaintiff at Memphis. This error becomes particularly important when it is considered that most of the damages suffered by the plaintiff were after the delivery at Memphis and before the plaintiff actually entered in the cars of the Southern Railway.

This statement sufficiently indicates the grounds why I cannot agree to the affirmance of the judgment below.

BROOKFIELD et al. v. HECKER et al. (Circuit Court, S. D. New York. February 17, 1902.) Motion for preliminary injunction. William V. Rowe, for the motion. Hamilton Wallis, opposed.

LACOMBE, Circuit Judge. The court, on the argument, gathered the impression that, as to the use of the trade-name "Can't be Beat," defendants conceded that they had no right to use it and agreed to desist. As to all other relief now asked for, application for injunction in advance of final hearing must be denied.

CORTELYOU et al. v. LOWE et al. (Circuit Court, S. D. New York. February 6, 1902.) In Equity. Samuel Owen Edmonds, for plaintiffs. Joab H. Banton, for defendants.

WHEELER, District Judge. This demurrer to the bill cannot be sustained without disregarding the decision of Judge Thomas granting a preliminary injunction thereon, and that of the circuit court of appeals affirming the same. 49 C. C. A. 671, 111 Fed. 1005. Demurrer overruled; defendants to answer order by March rule day.

GEORGE FROST CO. v. FRANKENSTEIN et al. (Circuit Court, S. D. New York. February 17, 1902.) A. D. Salinger and Charles Neave, for the motion. Edmund Wetmore, opposed.

LACOMBE, Circuit Judge. The defendants have satisfactorily explained the presence of the patent mark on the metal work of some of their goods. Having brought all of these into court, the bits of metal may be removed from the supporters and kept in the clerk's office, to be disposed of at final hearing. Following Judge Coxe's decision (112 Fed. 1009), preliminary injunction may issue.

GEORGE FROST CO. v. STEIN et al. (Circuit Court, S. D. New York. February 17, 1902.) A. D. Salinger and Charles Neave, for the motion. Edmund Wetmore, opposed.

LACOMBE, Circuit Judge. Preliminary injunction may issue, following decision of Judge Coxe. 112 Fed. 1009.

GILLESPIE BROS. v. UNITED STATES. (Circuit Court, S. D. New York. February 3, 1902.) No. 2,847. Appeal by the importers from a decision of the board of general appraisers, which sustained the assessment of duty by the collector of customs upon the merchandise in question. W. Wickham Smith, for importers. D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, Circuit Judge. The merchandise in question comprises certain shooks imported into the port of New York, and claimed to be free of duty under the provisions of paragraph 483 of the act of 1897. The board of general appraisers held that the shooks were dutiable, on the ground that the treasury regulations had not been complied with. Subsequently, however, under order of court, evidence was introduced by the importers, showing that they had complied in every essential particular with the regulations of the treasury relating to such matters, but that this evidence had not been presented to the board when it made its original finding. The decision of the board of general appraisers is reversed.

ITHACA WALL PAPER MILLS v. POTTER WALL PAPER MILLS. (Circuit Court, S. D. New York. April 30, 1902.) Walter D. Edmunds, for the motion. William W. Ewing, opposed.

LACOMBE, Circuit Judge. Complainant may take a preliminary injunction, as prayed, against paper of the patterns originally offered for sale,—side wall, ceiling, and border. As to the substituted side wall paper, the question of infringement is reserved for final hearing.

LAMB v. MUTUAL RESERVE FUND ASS'N. (Circuit Court, E. D. Pennsylvania. May 8, 1902.) No. 53. George Thorn Hunsicker, for plaintiff. John G. Johnson, for defendant.

DALLAS, Circuit Judge. If the policies to which this bill of complaint relates are in force, as is alleged, I perceive no reason for supposing that they might not be adjudged to be so, and any sums due upon them be recovered, in a common-law action; and the argument which has been submitted on behalf of the complainant, apparently on the assumption that this is a suit for the reformation of a contract, is without pertinence. The bill contains no specific prayer for reformation of a contract, and if such relief should in any case be granted upon a prayer for general relief, which is at least doubtful, it could not be granted in this instance, because the case stated in the bill would not justify it. Story, Eq. 42; Fulton v. Colwell, 50 C. C. A. 537, 112 Fed. 831; Baldwin v. Fence Co. (C. C.) 67 Fed. 853. The defendant's demurrer is allowed, and the bill of complaint is dismissed, with costs.

MARVEL CO. v. PEARL et al. (Circuit Court, S. D. New York. March 15, 1902.) Bryan & Edwards, for the motion. Henry B. Brownell, opposed.

LACOMBE, Circuit Judge. The injunction heretofore granted in this action has been disobeyed, but a sufficient punishment for the defendants will be a denial of the motion to withdraw general appearance.

MIERS v. COLUMBIA MUT. BUILDING & LOAN ASS'N. (Circuit Court, S. D. New York. April 29, 1902.) Application for Decree and Appointment of Receiver. Wm. H. Russell, for the motion. F. J. Moissen, opposed.

LACOMBE, Circuit Judge. That this court has jurisdiction to marshal the assets and administer the estate of this insolvent corporation, when requi-

site diversity of citizenship exists, is clear. Inasmuch as the answer admits all the allegations of the complaint, and no opposition is suggested, save from two stockholders, who have given notice of withdrawal, a decree will be entered in the usual form, appointing John Hanson Kennard, Esq., and John J. Townsend, Esq., receivers of the estate of defendant, with instructions to proceed to marshal the assets, pay the creditors, and administer the same. Intervention on the part of any stockholders seems unnecessary; but notice of the investigation and passing of receivers' accounts must be given to all counsel who appeared on the hearing. Arthur H. Masten, Esq., one of the standing masters of this court, is designated to take testimony and report as to any disputed claims, and as to said receivers' accounts, when the same may be presented.

MULLER v. HAAS et al. (Circuit Court, S. D. New York. April 8, 1902.) Motion for Preliminary Injunction. Arthur v. Briesen, for the motion. Allan D. Kenyon, opposed.

LACOMBE, Circuit Judge. Conceding that the additional prior patents introduced in evidence in this case make it necessary to restrict the patent closely to the details of cut shown in the specifications, nevertheless the first claim seems to be infringed. Whatever may be the patterns according to which defendants generally make riding habits, the particular habit produced here, when taken apart, shows so close a resemblance to the parts A and D of the patent as to warrant issue of preliminary injunction.

PAYNE v. L. H. PARKE & CO. (Circuit Court, E. D. Pennsylvania. May 6, 1902.) No. 60. C. H. Edmunds and John Sparhawk, Jr., for plaintiff. Samuel M. Clement, Jr., and P. F. Rothermel, Jr., for defendant.

DALLAS, Circuit Judge. The only controversy in this case was upon a question of fact, as to which the evidence was conflicting. It was therefore rightly submitted to the jury. I do not think that the communication in writing which the jurors made to the court disclosed that they failed to consider any part of the evidence, and it is certain that both in the general charge and by the reply which was made to that communication they were distinctly instructed that it was their duty to consider the whole of it. The defendant's rule for new trial is discharged.

RICORDI et al. v. JOHN CHURCH CO. et al. (Circuit Court, S. D. New York. April 3, 1902.) Motion for Preliminary Injunction. Irving Dittenhoefer, for the motion. Bryan & Edwards, opposed.

LACOMBE, Circuit Judge. I cannot see that the law as to jurisdiction is any better settled than it was when this court decided National Button Works v. Wade (C. C.) 72 Fed. 298. Whatever qualification of the broad statements of the opinion in Re Hohorst, 150 U. S. 659, 14 Sup. Ct. 221, 37 L. Ed. 1211, was supposed to be found in Railroad Co. v. Gonzales, 151 U. S. 496, 14 Sup. Ct. 401, 38 L. Ed. 248, cannot any longer be accepted as settled, since In re Keasbey & Mattison Co., 160 U. S. 229, 16 Sup. Ct. 273, 40 L. Ed. 402. Within the language of the Hohorst opinion, this court has jurisdiction. Motion for preliminary injunction is granted.

ROBERT RECKER CO. v. WINDSOR MUSIC CO. (Circuit Court, S. D. New York. February 24, 1902.) J. Lohman, for the motion. Strahl & Dreyer, opposed.

LACOMBE, Circuit Judge. The bars in defendant's chorus which it is contended were taken from complainant's constitute so small a portion of the complete song and chorus that a preliminary injunction against the entire musical composition of defendant should not be granted, especially in view of the total dissimilarity of words and title and the delay in making this application. What measure of relief, if any, complainant may be entitled to touching these two or three bars may be best determined at final hearing, when the question of originality may be more fully inquired into and the respective equities of the parties better ascertained.

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§ 1. Another action pending.

The pendency of mandamus proceedings may be pleaded in abatement to a second mandamus proceeding instituted in the same jurisdiction, wherein the parties and the questions involved are the same.—United States v. Norfolk & W. Ry. Co. (C. C.) 682.

Where a final judgment has been rendered in mandamus proceedings, but an appeal has been taken, and the judgment suspended, and the pendency of such appeal is pleaded in abatement to a second mandamus proceeding, the court may look to the pleadings, the evidence, and the opinion of the court to determine whether the issue is the same.—United States v. Norfolk & W. Ry. Co. (C. C.) 682.

Relator instituted mandamus proceedings against a railway company under Act Cong. March 2, 1889, alleging unjust discrimination against him, and the court refused the writ, and relator took a writ of error, and while the writ was pending instituted another mandamus proceeding, alleging the same unjust discrimination. *Held* that, the parties and the subject-matter being the same, the second writ should be abated.—United States v. Norfolk & W. Ry. Co. (C. C.) 682.

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Co-tenants, see "Partition," § 1.

Actions by or against particular classes of parties.

See "Carriers," §§ 1–3; "Principal and Agent," § 3; "United States," § 3; "United States Marshals."

Assignees, see "Assignments," § 2.
Corporate officers, see "Corporations," § 2.
Foreign corporations, see "Corporations," § 7.
Stockholders, see "Corporations," § 1.
Trustees in bankruptcy, see "Bankruptcy," § 7.

Particular causes or grounds of action.

See "Account Stated"; "Collision," § 7; "Death," § 1; "Insurance," § 7; "Libel and Slander," § 2; "Malicious Prosecution," § 4; "Negligence," § 4.

Breach of contract, see "Contracts," § 5.
Compensation for physician's services, see "Physicians and Surgeons."
Discharge from employment, see "Master and Servant," § 1.
Infringement of patent, see "Patents," § 3.
Personal injuries, see "Carriers," § 3; "Master and Servant," § 7; "Railroads," § 3.
Price of land, see "Vendor and Purchaser," § 1.

Particular forms of special relief.

See "Injunction"; "Interpleader"; "Marshaling Assets and Securities"; "Partition," § 1; "Specific Performance."

Cancellation of written instrument, see "Cancellation of Instruments."
Dissolution of corporation, see "Corporations," § 6.
Dissolution of partnership, see "Partnership," § 1.
Foreclosure of mortgage, see "Mortgages," § 1; "Railroads," § 1.
Reformation of written instrument, see "Reformation of Instruments."
Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

Particular proceedings in actions.

See "Damages"; "Evidence"; "Judgment"; "Limitation of Actions"; "Pleading"; "Removal of Causes"; "Trial."

Verdict, see "Trial," § 4.

Particular remedies in or incident to actions.

See "Attachment"; "Injunction"; "Receivers."

Proceedings in exercise of special jurisdictions.

Criminal prosecutions, see "Criminal Law."
Suits in admiralty, see "Admiralty"; "Collision," § 7; "Shipping," § 6.
Suits in equity, see "Equity."
Review of proceedings, see "Appeal and Error"; "Justices of the Peace," § 1.

ACTS OF BANKRUPTCY.

See "Bankruptcy," § 2.

ADEQUATE REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.

ADJUDICATION.

In bankruptcy, see "Bankruptcy," § 2.
Operation and effect of former adjudication, see "Judgment," § 1.

ADMINISTRATION.

Of estate of bankrupt, see "Bankruptcy," § 6.
Of estate of decedent, see "Executors and Administrators."
Of property by receiver, see "Receivers," § 2.

ADMIRALTY.

See "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Shipping"; "Towage."

§ 1. Jurisdiction.

A court of admiralty of the United States cannot refuse to take jurisdiction of a suit by an American citizen against a foreign ship, to determine rights under a maritime contract, and remit the controversy to the determination of the consular representative of the country to which the ship belongs.—The Falls of Keltie (D. C.) 357.

Where one of a number of seamen, libelants, is a citizen of the United States, and the court is obliged to take jurisdiction to determine his rights against a foreign ship under shipping articles, it will also incidentally determine those of his co-libelants, although they are foreigners.—The Falls of Keltie (D. C.) 357.

§ 2. Pleading, petitions, and motions.

A libel in rem should state the nationality of the vessel proceeded against; but such allegation is not indispensable when jurisdiction is invoked by a libelant who alleges that he is a citizen of the United States.—The Falls of Keltie (D. C.) 357.

A claim by seamen for damages on account of alleged assaults by the master cannot be litigated in a suit in rem; but, where the libel contains other allegations stating a cause of action in rem, those relating to such claim may be disregarded as surplusage, and the misjoinder will not be fatal.—The Falls of Keltie (D. C.) 357.

§ 3. Hearing or trial, and decision.

Where various proceedings are pending in the circuit and district courts, growing out of a disaster at sea involving the rights and interests of a number of parties, it is within the power of the circuit court, which has acquired jurisdiction of the property and parties, to consolidate all the suits and determine and adjust the rights of all parties in a single proceeding.—The Eliza Lines (C. C. A.) 307.

§ 4. Appeal.

Where objections to computations of a commissioner in admiralty are not made by proper exceptions to his report, they cannot be considered by the appellate court.—The Eliza Lines (C. C. A.) 307.

ADMISSIONS.

As evidence, see "Evidence," § 2.

ADVERSE POSSESSION.

See "Limitation of Actions."

AFFIDAVITS.

Verification of pleading, see "Pleading," § 2.

AFFREIGHTMENT.

Contracts, see "Shipping," § 3.

AGENCY.

See "Principal and Agent."

AGREEMENT.

See "Contracts."

ALIENS.

See "Indians."

§ 1. Exclusion or expulsion.

A person born in the United States of alien Chinese parents permanently domiciled here is a citizen of the United States, and cannot be excluded therefrom or denied the right of entry.—United States v. Leung Sam (D. C.) 702; Same v. Lee Yee, Id.; Same v. Leung Foo, Id.

Evidence examined, and *held*, that order of United States commissioner deporting a Chinaman would not be disturbed.—United States v. Leung Sam (D. C.) 702; Same v. Lee Yee, Id.; Same v. Leung Foo, Id.

A finding of the United States commissioner that a Chinese person is not lawfully in the United States will not be disturbed, unless clearly against the weight of evidence.—United States v. Leung Sam (D. C.) 702; Same v. Lee Yee, Id.; Same v. Leung Foo, Id.

ALTERATION OF INSTRUMENTS.

See "Reformation of Instruments."

Where, in an action on county warrants, in an attempt to show that they were issued for illegal transactions, the county record is introduced, and it shows erasures and substitutions, and such alterations are unexplained, and other entries necessary to show identity are carried forward out of consecutive order, and are not signed by the proper officers, such part of the record should be disregarded.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

AMENDMENT.

Of pleading, see "Equity," § 2.

AMOUNT IN CONTROVERSY.

Jurisdictional amount, see "Removal of Causes," § 2.

ANIMALS.

Carriage of live stock, see "Carriers," § 2.

APPEAL AND ERROR.

Review of criminal prosecutions, see "Criminal Law," § 2.
Review of proceedings in admiralty, see "Admiralty," § 4.
—— in justices' courts, see "Justices of the Peace," § 1.

§ 1. Decisions reviewable.

A bill to vacate a judgment for fraud, although filed in the same court, is an original bill, and a decree granting the relief and restoring the parties to their former situation in the original cause terminates the litigation on such bill, and is therefore final and appealable.—Hendryx v. Perkins (C. C. A.) 801.

A bill to vacate a decree for fraud, which, although filed in the same court and in the nature of a bill of review, may be filed as a matter of right, without leave of court, is not addressed to the absolute discretion of the court of primary jurisdiction, but to its judicial discretion, and a decree granting or denying the relief prayed for is reviewable on appeal.—Hendryx v. Perkins (C. C. A.) 801.

§ 2. Right of review.

One not restrained from the performance of any act by an injunction is not aggrieved by the order granting it.—Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 939; Portland Gold Min. Co. v. Same, Id.

§ 2½. Presentation and reservation in lower court of grounds of review.

One who tries his case upon one theory may not reverse the judgment against him upon an inconsistent theory, which was not presented or urged at the trial.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

Questions which were not presented to the court below cannot be reviewed by the appellate court.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

§ 3. Requisites and proceedings for transfer of cause.

On an appeal to the circuit court of appeals, citation need be served only on those parties whose interests are affected by the decree or order appealed from.—Coler v. Allen (C. C. A.) 609.

§ 4. Record and proceedings not in record.

The statement of facts in a bill of exceptions is conclusive, unless excepted to and the exceptions are recorded when the bill is settled.—Purple v. Union Pac. R. Co. (C. C. A.) 123.

Where plaintiff in error would attack the instructions for insufficiency of the evidence, he must either present all the evidence or that relative to the subject treated in the part of the charge challenged, with a certificate that the bill of exceptions contains such evidence.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

Assignments of error, based on the charge of the court or rulings on the admission of evidence, present no question which can be considered by the appellate court, unless the charge and the evidence adduced have been brought into the record by bills of exception, duly certified and sealed by the trial judge.—Dubois v. Decker (C. C. A.) 267.

Where an action at law is tried by stipulation to the court, which makes only a general finding for plaintiff, where no exceptions were taken to any ruling, there is no bill of exceptions, and the complaint states a cause of action, there is nothing which can be reviewed on a writ of error.—Gardner v. Lake (C. C. A.) 306.

Where defendant pleaded a release which plaintiff admitted having signed, but the validity of which he denied, and the record does not show that it was brought to the attention of the trial court or offered in evidence, the failure to direct a verdict for defendant thereon cannot be assigned as error.—Mexican Cent. Ry. Co. v. Wilder (C. C. A.) 708.

It is not necessary in all cases that a bill of exceptions should expressly declare that it contains all the evidence, or the whole case, in order to repel the presumption that other facts may have been proven or other evidence given. —Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.) 918.

§ 5. Dismissal, withdrawal, or abandonment.

A motion to dismiss a writ of error on the ground that it was filed before the assignments of error, in violation of rule 11 of the circuit court of appeals, should be denied, when the application of plaintiff in error to correct the proceedings was opposed by the defendant in error.—Alaska United Gold Min. Co. v. Muset (C. C. A.) 66.

§ 6. Review.

Appellate courts will not interfere with the discretion of the courts below in fixing the compensation of receivers and their counsel, unless it has been abused.—Braman v. Farmers' Loan & Trust Co. (C. C. A.) 18.

The opinion of the court upon the facts expressed in the instructions is not reviewable on error, so long as no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the jury.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

The refusal of a trial judge to direct a verdict for defendant on the ground that a part of the plaintiff's testimony was improbable is not a ground for reversal of the judgment by an appellate court.—Texas & P. Ry. Co. v. Gardner (C. C. A.) 186.

Where an action at law tried to the court without a jury is submitted on an agreed statement of facts, which is filed and made a part of the record, such statement is equivalent to a special verdict, and the court's conclusion of law based thereon is subject to review.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

It is settled law in the federal courts that, where an action at law is tried to the court, its findings upon questions of fact are conclusive, and that the only matters reviewable in the appellate court are the rulings on questions of law, when properly presented by bill of exceptions, and, when special findings are made, whether the facts found are sufficient to sustain the judgment.—Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C. A.) 417.

The court cannot reverse a judgment because of insufficient evidence to support a finding of fact, based on the evidence and an ocular inspection of machinery, the knowledge of the defects of which is in issue.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

Where the court rightly charges that on the conceded facts the master was negligent as a matter of law, an erroneous charge as to the degree of care required of the master is harmless error.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

It is only when it appears beyond all doubt that the error complained of could not have been prejudicial that the rule that error without prejudice is no ground for reversal is applicable.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

The admission of evidence *held* not prejudicial, even if erroneous, where evidence on the same subject had been previously introduced by both parties without objection.—Mexican Cent. Ry. Co. v. Wilder (C. C. A.) 708.

The right to exercise a sound judicial discretion in granting or refusing a temporary injunction will not be disturbed on appeal, unless the orders are violative of the rules of equity.—Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 939; Portland Gold Min. Co. v. Same, Id.

Where by consent the issues in an action at law are referred to an auditor, his findings of fact are entitled to the same weight as the verdict of a jury.—Alexander v. Louisville & N. R. Co. (C. C.) 774.

§ 7. Determination and disposition of cause.

Where determination of the question of infringement on an appeal from an order granting a temporary injunction will not be final, the appellate court will defer the decision of that question until after final hearing.—Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 939; Portland Gold Min. Co. v. Same, Id.

An order of the circuit court of appeals, directing respondents to pay costs and disbursements, *held* binding on the district court on a subsequent motion to correct the order for the entry of judgment.—In re Henschel (D. C.) 968.

APPLIANCES.

Liability of employer for defects, see "Master and Servant," § 3.

Of assets and securities in general, see "Marshaling Assets and Securities."

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.
Of trustee in bankruptcy, see "Bankruptcy," §§ 3–8.

APPRAISAL.

Of merchandise subject to duty, see "Customs Duties," § 3.

APPROPRIATION.

Of water rights in general, see "Waters and Water Courses," § 1.

ARMY AND NAVY.

One between 16 and 21 years old, enlisting in army without consent of parents, on representation that he is of age, becomes a soldier, subject to release only on application of his parents, who cannot prevent court-martial of him for past military offenses.—In re Miller (C. C. A.) 838.

ASSESSMENT.

Of loss on insured, see "Insurance," § 2.
Of tax, see "Taxation," § 1.

ASSETS.

Marshaling, see "Marshaling Assets and Securities."

ASSIGNMENTS.

Fraud as to creditors, see "Fraudulent Conveyances."
In bankruptcy, see "Bankruptcy," § 4.

Transfers of particular species of property, rights, or instruments.

See "Bonds," § 1; "Chattel Mortgages," § 3; "Patents," § 2.

§ 1. Requisites and validity.

An oral agreement to resign an office or agency is not a contract for the sale of "goods, chattels, or things in action," within the New York statute of frauds, so that the delivery of such resignation will constitute a part performance to bind the other party.—Colton v. Raymond (C. C. A.) 863.

§ 2. Actions.

A bill averring that "E. G. Church & Co." sold to plaintiff all their right of action, claim, and demand against third parties, was not supported by an assignment executed by E. G. Church alone.—Kibler v. Brown (C. C.) 1014.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," §§ 2–8.

ASSOCIATIONS.

See "Building and Loan Associations"; "Trade Unions."

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 5.

ATTACHMENT.

Exemptions, see "Homestead."

§ 1. Property subject to attachment.

Money in the registry of a federal court, pending litigation in regard thereto, remains in the court's custody until paid out by its order pursuant to law, and is not subject to attachment by any other court.—Corbitt v. Farmers' Bank (C. C.) 602.

§ 2. Quashing, vacating, dissolution, or abandonment.

Where an attaching creditor, under a stipulation protecting his rights, surrendered the property to a receiver, he does not lose his rights under the Connecticut statute by failing to issue and levy an execution within 60 days after judgment, since the possession of the receiver prevents such levy.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C.) 659.

ATTORNEY AND CLIENT.

Attorneys in fact, see "Principal and Agent."

AUTHORITY.

Of agent, see "Principal and Agent," § 2.

BAGGAGE.

Of passenger on vessel, see "Shipping," § 4.

BAILMENT.

See "Carriers," § 1.
Embezzlement or larceny by bailee, see "Embezzlement."

BANKRUPTCY.

§ 1. Constitutional and statutory provisions.

Motion to quash petition in bankruptcy against corporation, on ground that it had been previously dissolved by a state court and receivers appointed for its property, *held* properly denied.—In re Storck Lumber Co. (D. C.) 360.

§ 2. Petition, adjudication, warrant, and custody of property.

It is an act of bankruptcy for an insolvent debtor to sell all of his property to one not a creditor, and then to apply the proceeds to the full payment of a part of his creditors, leaving others unpaid.—Boyd v. Lemon & Gale Co. (C. C. A.) 647.

A debtor who makes a general assignment for the benefit of creditors may be declared an involuntary bankrupt, that being specified as an act of bankruptcy by Bankr. Act, § 3, and his actual solvency is no defense.—Day v. Beck & Gregg Hardware Co. (C. C. A.) 834.

Under 30 Stat. 544, § 19, a bankrupt is entitled to demand a trial by jury of the question whether he has made a general assignment for creditors, on proper demand.—Day v. Beck & Gregg Hardware Co. (C. C. A.) 834.

Under 30 Stat. 544, §§ 18b, 18e, 31, adjudication of bankruptcy *held* to have been prematurely made.—Day v. Beck & Gregg Hardware Co. (C. C. A.) 834.

A court of bankruptcy will not enjoin further proceeding in an action of replevin in a state court by a third person to recover property which was in possession of the bankrupt when the petition was filed against him, but which was taken by the state court on a writ of replevin before any action had been taken on such petition.—In re Wells (D. C.) 222.

The filing of a petition in involuntary bankruptcy does not of itself vest the court of bankruptcy with jurisdiction over all property then in the possession of the bankrupt, whether owned by him or not, to the exclusion of the jurisdiction of a state court to try the title to such property.—In re Wells (D. C.) 222.

Defendant *held* to be "engaged chiefly in farming," within Bankr. Act, § 4, and therefore not subject to involuntary bankruptcy.—In re Drake (D. C.) 229.

A person cannot become a voluntary bankrupt, where the only debt scheduled by him is a judgment rendered against him by a state court for a personal tort, from which an appeal is pending, and the effect of such appeal under the laws of the state is to supersede the judgment.—In re Yates (D. C.) 365.

Payments by a bankrupt to certain petitioning creditors, reducing the aggregate amount of claims below the statutory limit, could not defeat the jurisdiction of the bankruptcy court, where subsequently enough other creditors came in to raise the amount above the jurisdictional limit.—In re Ryan (D. C.) 373.

A carrier corporation is not engaged in trading or mercantile pursuits, so as to bring it within Bankr. Law 1898, subjecting thereto corporations "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits.—In re Philadelphia & Lewes Transp. Co. (D. C.) 403.

Federal court, sitting as a court of bankruptcy, *held* not deprived of jurisdiction to correct interlocutory orders by reason of the termination of the term at which they were entered.—In re Henschel (D. C.) 968.

A debtor who, knowing that he is insolvent, executes a deed of trust to secure a creditor on a pre-existing debt, commits an act of bankruptcy, within Bankr. Act, § 3a, par. 2.—In re Ed. W. Wright Lumber Co. (D. C.) 1011.

§ 3. Assignment, administration, and distribution of bankrupt's estate.

Where there is any question of collusion between certain creditors or their representative and the bankrupt in the election of a trustee, the referee should permit a full investigation, and, if any collusion appears, he should decline to receive the votes of such creditors or to approve the election.—In re Dayville Woolen Co. (D. C.) 674.

§ 4. —— Assignment, and title, rights, and remedies of trustee in general.

Insurance policies on the life of a husband, payable to his wife if she survived him, and to his personal representatives if he survived her, and having a cash surrender value, on the bankruptcy of both husband and wife, passed to their trustees as assets of their respective estates in accordance with the interests of each therein.—In re Holden (C. C. A.) 650.

Mortgagee of bankrupt *held* to have no right to take possession of the mortgaged property after adjudication in bankruptcy.—In re Gutman (D. C.) 1009.

Action against trustee in bankruptcy in state court will be enjoined; it being clear no right can thereby be established against him, and administration of the estate being embarrassed thereby.—In re Gutman (D. C.) 1009.

One from whom a bankrupt obtains goods on time, on false representation that they are to fill an order, *held* entitled thereto; the whole transaction being a fraud.—Bloomingdale v. Empire Rubber Mfg. Co. (D. C.) 1016.

§ 5. —— Preferences and transfers by bankrupt, and attachments and other liens.

The receipt by a creditor of payments on an account current, followed by new credits, for which the creditor is not paid, and which equals or exceeds in amount the payments, does not constitute a preference which the creditor must surrender, under Bankr. Act 1898, §§ 57g, 60a.—Kimball v. E. A. Rosenham Co. (C. C. A.) 85.

Under Bankr. Act, § 60c, a creditor who has been preferred, and afterwards in good faith gives a debtor further credit without security, may set off the amount of his new credits against the amount which would otherwise be recoverable from him as a preference, though he did not have reasonable ground to believe that the transfer of the property to him was intended as a preference, and though the property transferred is not recoverable by the trustee as a preference, under section 60b.—C. S. Morey Mercantile Co. v. Schiffer (C. C. A.) 447.

The receipt by a creditor of payments on an account current, followed by new credits for property delivered to the debtor, which becomes a part of his estate, for which the creditor is not paid, and which equals the value of the payment, is not a preference, under Bankr. Act, §§ 57g, 60a.—C. S. Morey Mercantile Co. v. Schiffer (C. C. A.) 447.

Under Bankr. Act, §§ 57g, 60a–60c, a creditor, who has received an innocent preference

and given subsequent credits without security for property which has become a part of the bankrupt estate, is required to return only the excess, if any, of such preference over such credits, as a condition precedent to proving his claim.—Gans v. Ellison (C. C. A.) 734.

Accommodation maker on a note executed by a bankrupt is not a creditor of the bankrupt, where he has not paid any part thereof, and does not receive a preference within Bankr. Act § 60a, where the bankrupt pays the note to the payee within four months of the adjudication.—Swarts v. Siegel (C. C.) 1001.

Bankr. Act, § 60b, does not authorize the recovery from an accommodation maker on a note executed by the bankrupt of a payment made thereon by the bankrupt of his own accord, and not at the instigation or with the knowledge of such accommodation maker, though the payment was made within four months of the adjudication.—Swarts v. Siegel (C. C.) 1001.

A payment on a note given to a solvent creditor and indorsed by him to a bank, made when the maker was insolvent and within four months prior to his bankruptcy, constitutes a preference to the indorser, which he is required to surrender before proving his claim.—In re Waterbury Furniture Co. (D. C.) 255.

Creditor of bankrupt *held* to have received a preference, which must be surrendered before his claim could be proved.—In re Lyon (D. C.) 326.

The dissolution of an insolvent firm within four months prior to its bankruptcy, and a division of its property between the partners, constitutes a transfer to defraud creditors, which is void, under Bankr. Act 1898, § 67e, and the property in the hands of both partners will be treated as firm assets.—In re Head (D. C.) 489.

A parol agreement between a chattel mortgagor and the mortgagee that the goods mortgaged should be delivered to and sold by a commission house, the net proceeds to be paid to the mortgagee, *held* not to invalidate the mortgage, or to constitute a transfer with intent and purpose to hinder and delay creditors, within the meaning of the bankruptcy act.—In re Durham (D. C.) 750.

Chattel mortgages given by a bankrupt to secure advances made by a bank, to enable him to carry on a canning business during the season and covering the product of such business, *held* valid under the bankruptcy law.—In re Durham (D. C.) 750.

Judgment creditor of bankrupt *held* to have received a preference, within Bankr. Act, § 60a, which would have to be surrendered before he could prove balance of claim.—In re Metzger Toy & Novelty Co. (D. C.) 957.

Bankrupt, giving deed of trust to secure creditor, *held* to have given him a preference, within Bankr. Act, § 60a.—In re Ed. W. Wright Lumber Co. (D. C.) 1011.

§ 6. —— Administration of estate.

A bankrupt, on examination under Bankr. Act 1898, § 7, subd. 9, relative to his property, while protected from his testimony being given against him in a criminal proceeding, will not be required to develop the whereabouts of papers which might be used against him in a criminal proceeding.—In re Franklyn Syndicate (D. C.) 205.

A bankrupt on his examination cannot be compelled to answer questions over his claim of privilege on the ground that the answer would tend to incriminate him, where the situation is such as seems to put him in hazard.—In re Shera (D. C.) 207.

Rules to be observed in proceedings for commitment of a bankrupt for failing to obey an order to produce assets stated.—In re De Gottardi (D. C.) 328.

A court of bankruptcy has power to order a bankrupt to produce assets found to be in his possession or under his control, and to enforce its order by commitment for contempt.—In re De Gottardi (D. C.) 328.

Where a bankrupt admits having had money or property which is not shown by his schedules, it is incumbent on him to clearly account for the same to the satisfaction of the court; otherwise, he must be held to still have it in his possession, and to be able to turn it over to his trustee.—In re De Gottardi (D. C.) 328.

In a proceeding against bankrupts to compel them to turn over money, where the issues are whether transactions by which they attempt to account for the loss of such money are real, or fictitious and fraudulent, the question of the bona fides of other transactions by them, occurring about the same time, is pertinent, and the court has power to investigate them.—In re De Gottardi (D. C.) 328.

Testimony of bankrupts, attempting to account for large sums of money admitted to have been in their possession a short time prior to the bankruptcy, which was not corroborated, but discredited by the circumstances shown and by their previous conduct, *held* insufficient, and an order of the referee requiring them to turn over such sums to the trustee warranted by the evidence.—In re De Gottardi (D. C.) 328.

A bankrupt should show a disposition to fairly and candidly answer all proper questions put to him with respect to his property and business, and whether he does so or not may be taken into consideration in determining the weight to be given to his testimony.—In re De Gottardi (D. C.) 328.

On a hearing before a referee, he should cause all testimony offered to be taken down and made a part of the record, at least in substance, although excluded by his rulings; and on a review of his decision the judge determines the issues de novo, on the competent evidence in the record, in accordance with the practice in equity.—In re De Gottardi (D. C.) 328.

Under Bankr. Act, § 21, trustee in bankruptcy *held* entitled to examine trustee in insolvency, appointed in Connecticut more than four months before the bankruptcy proceedings, concerning the disposition of the assets.—In re Pursell (D. C.) 371.

Under Bankr. Act, § 40, subd. "a," and Gen. Orders No. 35, par. 2, referee in bankruptcy *held* entitled to charge for expenses incurred in publication of notice of application for discharge and for stationery, but not for his own services in making copies of the petition for discharge.—In re Dixon (D. C.) 675.

A bankrupt, on examination concerning conduct of his business, cannot be compelled to give answer which would tend to criminate him.—In re Nachman (D. C.) 995.

§ 7. —— Actions by or against trustee.

Record examined, and *held* to show that creditor, who had obtained unlawful preference from bankrupt, had consented to litigation in the district court with respect thereto, within Bankr. Act, § 23b, and that the court had jurisdiction to enter an order requiring him to turn over the property.—Philips v. Turner (C. C. A.) 726.

Evidence *held* to sustain the claims of sellers to reclaim goods from the estate of the buyer in bankruptcy on the ground that by reason of fraud the title did not pass.—In re O'Connor (C. C.) 777; In re Globe Refinery Co., Id.

A chattel mortgage creditor of a bankrupt, who asks an extension of time to answer a petition by other creditors and the trustee attacking the validity of his mortgage, and thereafter answers and asks affirmative relief on his mortgage, thereby consents to the jurisdiction of the court, and cannot thereafter object to such jurisdiction.—In re Durham (D. C.) 750.

§ 8. —— Claims against and distribution of estate.

The claim of a creditor for a balance due on account current with the bankrupt is a single claim, and in determining its allowance and the existence of alleged preference it must be so considered.—Kimball v. E. A. Rosenham Co. (C. C. A.) 85.

The claim of the creditor for balance due on an account current, in determining existence of preferences, cannot be divided into two separated claims for that purpose.—C. S. Morey Mercantile Co. v. Schiffer (C. C. A.) 447.

Where, under a lease for five years, which provided that, if the tenant became bankrupt, the whole rent should be deemed due, the landlord, on the tenant's being adjudged bankrupt within a year, claims one year's rent as a preferred claim under the Pennsylvania act of 1836, and takes possession at the end of such time, he should be allowed only the rent during the occupancy by the bankrupt and trustee, and rent, if any, thereafter received from others.—Wilson v. Pennsylvania Trust Co. (C. C. A.) 742.

Bankr. Act, § 5b, providing that, if one partner only is adjudged bankrupt, the partnership property shall not be administered in bankruptcy, except by consent of the other partners, has no application to case where the other partners have sold out to the bankrupt and retired from the firm.—In re Denning (D. C.) 219.

Application of assets by trustee in bankruptcy of continuing partner, as between his separate and the firm's creditors, determined.—In re Denning (D. C.) 219.

Retiring partner *held* not entitled to prove certain claim against continuing partner on the latter afterwards filing petition in bankruptcy.—In re Denning (D. C.) 219.

Where net indebtedness of bankrupt stock brokers to customer was increased within four months prior to the adjudication, payments made to the customer within the four months need not be surrendered to entitle creditor to prove his claim.—In re Topliff (D. C.) 323.

Petitioners in involuntary bankruptcy *held* to have claims over $500, and that the court had jurisdiction.—In re Manhattan Ice Co. (D. C.) 399.

A corporation which by an ultra vires agreement became a partner in a firm did not thereby lose the right to prove a debt previously contracted by the firm, on its subsequent bankruptcy, where through a mutual mistake it was overlooked and remained unpaid.—In re R. T. Ervin & Co. (D. C.) 596.

Where an assignor is adjudged a bankrupt within four months after his assignment for the benefit of creditors, his assignee is not entitled to any allowance for his services.—In re Mays (D. C.) 600.

An assignee for benefit of creditors, on bankruptcy proceedings within four months, is entitled to an allowance for the actual and necessary expenses incurred in preserving the property while in his possession.—In re Mays (D. C.) 600.

The decision of a referee that, under a contract recognized by the previous course of dealing between a creditor and the bankrupt, the latter was entitled to a rebate on his purchases during the year, which should be deducted from the creditor's claim, affirmed.—In re B. H. Douglass & Sons Co. (D. C.) 772.

Assignment of a claim against bankrupts entitles the assignee to share in the bankrupt estate, if the assignor is estopped from making the same claim.—In re Miner (D. C.) 998.

§ 9. Rights, remedies, and discharge of bankrupt.

Omission of debts in schedule accompanying petition in bankruptcy *held* not ground for setting aside bankrupt's discharge.—In re Monroe (D. C.) 398.

A bankrupt's discharge will not release him from any debt omitted from the schedule, where the omitted creditor had no notice of the bankruptcy proceedings in time to prove his claim.—In re Monroe (D. C.) 398.

A bankrupt, shown to have paid alleged debts to relatives after his insolvency, which were not disclosed in a statement made shortly before for the purpose of obtaining credit, will be denied a discharge, unless he makes a satisfactory explanation and shows that the transactions were clearly entered on his books.—In re Greenberg (D. C.) 773.

§ 10. —— Exemptions.

Under Bankr. Act 1898, § 70a, cl. 5, an insurance policy, having a cash surrender value pay-

able to the bankrupt or his estate, passes to his trustee as assets, notwithstanding the fact that its proceeds are exempt by the laws of the state.—In re Holden (C. C. A.) 650.

A bankrupt *held* not free from fraud, so as to be entitled to exemption, under the Code of Georgia.—In re Williamson (D. C.) 190.

A bankrupt claiming an exemption *held* not to have sufficiently explained shrinkage in assets and increase of debts within a short time of bankruptcy to relieve him from presumption of fraudulent concealment.—In re Stephens (D. C.) 192.

Where by the laws of the state a partner cannot claim exemptions from firm property, the members of a bankrupt partnership cannot secure such exemptions by a dissolution of the firm while insolvent and within four months prior to the bankruptcy.—In re Head (D. C.) 489.

A bankrupt who has made way with the greater part of his assets and gotten them out of the jurisdiction cannot ask to have an exemption set apart to him out of what is in the court's possession.—In re Taylor (D. C.) 607.

A bankrupt will not be allowed exemptions from personal property, claimed under the law of Georgia, where he fails to answer questions in relation to his business which any man of ordinary intelligence should be able to answer, or to explain satisfactorily circumstances which indicate fraud or concealment of property.—In re Boorstin (D. C.) 696.

§ 11. —— Grounds for refusal of discharge.

On application by bankrupt firm for its discharge, evidence *held* insufficient to show that assets alleged to have been concealed ever existed and that a discharge was erroneously refused.—In re Lesser (C. C. A.) 83.

The failure of a bankrupt to schedule his interest in property which he had conveyed in trust for his own benefit after the termination of a life interest in another *held* ground for refusing him a discharge.—In re Stoddart (D. C.) 486.

An insolvent retail merchant, who, immediately on receipt of goods, sells them at wholesale, and turns the larger part of the proceeds over to a friend, and fails to enter the check on his check book, should be refused a discharge in bankruptcy for concealment of assets.—In re Holstein (D. C.) 794.

Facts *held* not to deprive bankrupt of right to discharge, on the ground of misrepresentation as to condition of his affairs or secreting of property.—In re Miner (D. C.) 998.

§ 12. Appeal and revision of proceedings.

Under Bankr. Act, § 57n, a court of bankruptcy is without jurisdiction to set aside a discharge, to reinstate a case, and to permit an addition of a creditor to the bankrupt's schedule, more than one year after the adjudication in bankruptcy, without notice to creditor.—In re Hawk (C. C. A.) 916.

§ 13. Offenses against bankrupt laws.

A bankrupt cannot be imprisoned indefinitely on the ground that he has concealed assets, especially when it is not known certainly that he has the assets which he is called on to surrender.—In re Taylor (D. C.) 607.

BANKS AND BANKING.

§ 1. Functions and dealings.

The Central Railroad & Banking Company of Georgia *held* to have had power under its charter to guaranty bonds of a railroad company in which it was chief stockholder, where such guaranty was made for its own benefit.—Central R. & Banking Co. of Georgia v. Farmers' Loan & Trust Co. (C. C. A.) 263; Farmers' Loan & Trust Co. v. Central R. & Banking Co. of Georgia, Id.

BENEFICIAL ASSOCIATIONS.

Building or loan associations, see "Building and Loan Associations."

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 1.

BILL OF EXCHANGE.

See "Bills and Notes."

BILLS AND NOTES.

§ 1. Requisites and validity.

An acceptor of drafts for the accommodation of the drawer cannot defend against the same in the hands of the payee or an indorsee, on the ground that he received no consideration, where full consideration was received by the drawer.—Levy & Cohn Mule Co. v. Kauffman (C. C. A.) 170; Kauffman v. Levy & Cohn Mule Co., Id.

The purpose inducing one to accept drafts as an accommodation to the drawer does not constitute the legal consideration for his contract, and the fact that such purpose was not accomplished cannot be pleaded as a failure of consideration.—Levy & Cohn Mule Co. v. Kauffman (C. C. A.) 170; Kauffman v. Levy & Cohn Mule Co., Id.

Acceptance of draft *held* on condition of delivery of genuine bills of lading, so that acceptor could recover payment made without knowledge that the bills of lading were forged.—Guaranty Trust Co. of New York v. Grotrian (C. C. A.) 433.

§ 2. Negotiability and transfer.

The cancellation of a pre-existing debt is equally as valid and sufficient consideration for the transfer to the creditor of a bill or note of a third party as a payment of cash therefor.—Levy & Cohn Mule Co. v. Kauffman (C. C. A.) 170; Kauffman v. Levy & Cohn Mule Co., Id.

BONA FIDE PURCHASERS.

Of bonds, see "Bonds," § 1.

BONDS.

Municipal bonds, see "Municipal Corporations," § 2.
Removal bond, see "Removal of Causes," § 3.
Subrogation of holders of invalid county bonds issued to pay warrants to rights of warrant holder, see "Subrogation."
Sureties on bonds, see "Principal and Surety."

§ 1. Negotiability and transfer.

The validity of negotiable bonds issued and sold to bona fide purchasers for value is not affected in the hands of a subsequent holder, because an intermediate owner could not have enforced the same.—Central R. & Banking Co. of Georgia v. Farmers' Loan & Trust Co. (C. C. A.) 263; Farmers' Loan & Trust Co. v. Central R. & Banking Co. of Georgia, Id.

BREACH.

Of condition, see "Insurance," § 3.
Of contract, see "Contracts," § 4.
Of covenant, see "Insurance," § 3.
Of warranty, see "Insurance," § 3.

BRIDGES.

Taxation of bridges, see "Taxation," § 1.

BROKERS.

See "Principal and Agent."

BUILDING AND LOAN ASSOCIATIONS.

A contract between a building and loan association and a borrowing stockholder construed, and *held* unconscionable and not enforceable in a court of equity.—Pacific States Sav. Loan & Building Co. v. Green (C. C.) 412.

In ascertaining the amount due on a mortgage to an insolvent building association, executed by one of its stockholders, the mortgagor's stock, or what he has paid thereon, either as payments, or as fines, dues, or penalties, should not be considered.—Barry v. Friel (C. C.) 989.

In ascertaining the amount due on a mortgage to an insolvent building association, executed by a stockholder, premiums paid by him on account of his loan should be credited thereon, but without allowing him interest on the premiums.—Barry v. Friel (C. C.) 989.

CANCELLATION OF INSTRUMENTS.

See "Reformation of Instruments."
Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

§ 1. Right of action and defenses.

Insurance company *held* entitled to sue in equity to cancel policy, because having no adequate remedy at law.—Mutual Life Ins. Co. v. Pearson (C. C.) 395.

CARGO.

See "Shipping."

CARRIERS.

Carriage of goods by vessels, see "Shipping," § 3.
Carriage of passengers by vessels, see "Shipping," § 4.

§ 1. Carriage of goods.

The interstate commerce act prescribes no limitation of time within which actions based thereon shall be instituted, and therefore such actions must be governed as to limitation by the statutes of the state wherein they are brought.—Ratican v. Terminal R. Ass'n of St. Louis (C. C.) 666; Kinnavey v. Same, Id.

§ 2. Carriage of live stock.

One who contracts to furnish cattle to be carried by a ship *held* entitled, without proof that he owns the cattle shipped, to recover stipulated damages for expense of feed, in case of delay in sailing.—Morris v. Wilson, Sons & Co. (C. C. A.) 74.

§ 3. Carriage of passengers.

Evidence *held* sufficient to go to jury on question whether a passenger's injury was caused by her fall, when thrown to the ground by the starting of the train when she was alighting.—Nicholson v. Northern Pac. Ry. Co. (C. C. A.) 89.

A railroad company, operating its trains over the railroad of another by permission, is liable to its passengers for negligence of the servant of the licensing corporation.—Brady v. Chicago & G. W. Ry. Co. (C. C. A.) 100.

It is negligence to start a railroad train from a station while a passenger is actually getting on board, regardless of the length of the stop.—Texas & P. Ry. Co. v. Gardner (C. C. A.) 186.

Evidence of a contract of carriage between plaintiff and defendant, and that plaintiff was injured while a passenger under such contract, casts the burden on defendant to show that it and its agents were without fault, or that plaintiff was guilty of contributory negligence.—Texas & P. Ry. Co. v. Gardner (C. C. A.) 186.

In an action against a railroad company to recover for an injury to plaintiff, alleged to have resulted from her being thrown down by the sudden starting of the train while she was going on board, evidence that plaintiff made a misstep is not necessarily even prima facie evidence of negligence, requiring a special instruction to the jury on the subject of contributory negligence.—Texas & P. Ry. Co. v. Gardner (C. C. A.) 186.

Conduct of freight conductor in ejecting from caboose party not lawfully on the train *held* wrongful, and company liable for resulting injuries.—Great Northern Ry. Co. v. Bruyere (C. C. A.) 540.

Question whether wrongful conduct of freight conductor in ejecting from caboose party not lawfully on the train was proximate cause of latter's injuries *held* for the jury.—Great Northern Ry. Co. v. Bruyere (C. C. A.) 540.

CASE ON APPEAL.

Making and settlement, see "Appeal and Error," § 4.

CAUSE OF ACTION.

See "Malicious Prosecution," § 2.

CERTIFICATE.

As evidence, see "Evidence," § 4.
Of acknowledgment of written instrument, see "Acknowledgment," § 1.

CHANCERY.

See "Equity."

CHARGE.

To jury in civil actions, see "Trial," § 3.

CHARTER PARTIES.

See "Shipping," § 1.

CHATTEL MORTGAGES.

§ 1. Requisites and validity.
A series of chattel mortgages, executed as a part of a continuous transaction, covering goods a part of which were to be acquired after the first mortgage was given, but all of which had been acquired at the date of the last mortgage, *held* not invalid, for insufficiency of description, under the Maryland statute.—In re Durham (D. C.) 750.

§ 2. Filing, recording, and registration.
A chattel mortgagee, who had knowledge that the mortgagor had taken the property into an adjoining county in another state, but permitted it to remain there for three years without taking any steps to enforce or give notice of his lien, *held* barred by laches from enforcing the mortgage as against one who had in the meantime purchased the property at execution sale in such state without either actual or constructive notice of the mortgage.—Greene v. Bentley (C. C. A.) 112.

§ 3. Assignment of mortgage or debt.
Assignment of note to bona fide holder before maturity carries with it mortgage executed as security, and assignee alone can thereafter discharge mortgage lien.—Swift v. Bank of Washington (C. C. A.) 643.

Provisions in chattel mortgage construed, and *held* not to authorize payment of debt to original mortgagee after it had been assigned by him to other party.—Swift v. Bank of Washington (C. C. A.) 643.

CHECKS.

See "Bills and Notes."

CHINESE.

Exclusion or expulsion, see "Aliens," § 1.

CHOSE IN ACTION.

Assignment, see "Assignments."

CIRCUIT COURTS OF APPEALS.

See "Courts," § 1.

CITATION.

On appeal, see "Appeal and Error," § 3.

CITIES.

See "Municipal Corporations."

CITIZENS.

See "Aliens"; "Indians."
Citizenship ground of jurisdiction of United States courts, see "Courts," § 1; "Removal of Causes," § 1.
Equal protection of laws, see "Constitutional Law," § 2.

CIVIL RIGHTS.

See "Constitutional Law," § 2.

CLAIMS.

Against estate of bankrupt, see "Bankruptcy," § 8.
Mining claims, see "Mines and Minerals," § 1.

CLERKS OF COURTS.

A federal clerk is entitled to charge for filing and marking depositions and exhibits in a criminal case, and for continuances; and this, though the date of each term at which such continuances were taken was not stated.—Marvin v. United States (D. C.) 225.

A charge for furnishing a list of witnesses cannot be allowed to a United States commissioner; the requirement being fulfilled by sending a copy of the subpœna with the officer's return.—Marvin v. United States (D. C.) 225.

Since the clerk is required to make duplicate copies of orders to pay jurors, which he is required to keep in his office for public inspection, and such duplicates should be authenticated by the clerk's certificate, the clerk is entitled to charge for such certificates in his fee bill.—Marvin v. United States (D. C.) 225.

United States commissioner in Connecticut *held* entitled to charge for copies of subpœnas, warrants of arrest, and complaints embodied

in his transcript of record sent up to court.—Marvin v. United States (D. C.) 225.

A clerk of a federal court is entitled to charge in his fee bill in a criminal case for copies of papers furnished to United States attorneys at their request, but he cannot charge for copies of an order excusing jurors, and for a copy of estimated costs furnished to a collector of internal revenue.—Marvin v. United States (D. C.) 225.

A charge for a copy of an indictment furnished by a federal clerk to accused at his request, but not shown to have been furnished to a United States marshal or under order of court, cannot be allowed.—Marvin v. United States (D. C.) 225.

Where the record of the proceedings in a criminal case shows that a mittimus was issued, a copy was unnecessary, and therefore the commissioner was not entitled to charge therefor.—Marvin v. United States (D. C.) 225.

Under Rev. St. § 1014, a commissioner *held* not entitled to charge for copies of recognizances of witnesses, as originals should go up.—Marvin v. United States (D. C.) 225.

A federal clerk is not entitled to charge in his fee bill for making copies of interrogatories in depositions in a criminal case.—Marvin v. United States (D. C.) 225.

Expenses paid for cartage of court dockets, files, and minute books cannot be allowed to the clerk of the federal court.—Marvin v. United States (D. C.) 225.

A federal clerk is not required to furnish an itemized statement of the entries in his minute book as to court business transacted and the hour of adjournment of court, as a condition to his right to the allowance of his fees for such entries.—Marvin v. United States (D. C.) 225.

Act June 27, 1898, and Act July 1, 1898, having no retroactive force, a federal clerk *held* not precluded from recovering fees in a suit begun before the passage of the act by reason of the fact that some of the charges included in the action had not been presented.—Marvin v. United States (D. C.) 225.

A clerk of a federal court is entitled to charge for a certified copy of a mittimus left with a jailer.—Marvin v. United States (D. C.) 225.

Where items of a clerk's fee bill are suspended "for explanation," the court will not interfere to enforce allowance thereof until final determination by the department.—Marvin v. United States (D. C.) 225.

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 5.

COLLECTION.

Of taxes, see "Taxation," § 2.

COLLISION.

§ 1. Steam vessels meeting or crossing.

Evidence *held* to place the fault for a collision between a steamer and a schooner at night in Chesapeake Bay solely on the steamer.—The Richmond (D. C.) 208.

§ 2. Steam vessels and sail vessels.

A collision between a steamer and sailboat *held*, under the findings and evidence, to have been due solely to the fault of the sailboat in changing her course and attempting to cross the steamer's bows.—Jacobsen v. Dalles, P. & A. Nav. Co. (C. C. A.) 705.

Under the rules, where it appears that a sailing vessel kept her course and speed, there is a presumption that a collision with a steamer resulted from the fault of the latter.—The Richmond (D. C.) 208.

Steam ferryboat, violating rules of navigation (Act Cong. Aug. 19, 1890, arts. 20-23), and causing a collision with a sloop, *held* liable for the resulting death of a passenger on the latter boat.—The Elizabeth (D. C.) 757.

§ 3. Overtaking vessels.

It is the duty of an overtaking vessel to see to it that she does not come so near the overtaken vessel as to cause danger of collision; and, if she does come within the line of danger, it is her duty to warn the other vessel by signals whether she intends to pass or not.—The Fleetwing (D. C.) 409; The Major Barrett, Id.

A steamship, which overtook, ran down and sank a small tug in the Schuylkill river in the daytime and without giving any signal of her approach, was in fault, and is liable for the damages, in the absence of evidence clearly showing that the collision was caused by some fault of the tug.—The Fleetwing (D. C.) 409; The Major Barrett, Id.

§ 4. Vessels in tow.

A tug, with two barges in tow in a single line, *held* solely in fault for a collision in lower New York Bay between the second tow and a meeting steamship.—The Sea King (C. C. A.) 535; The Buffalo, Id.

The law imposes upon a tug the duty of exercising reasonable care and caution, and maritime skill, in everything relating to the safe anchorage of its tow, and it is liable to any injured by its negligence in that respect.—The Alabama (D. C.) 214; The Curtin, Id.

The duty rests upon a steamer, having full control of its own movements, to keep out of the way of a tug with a tow, which occupies the position of an encumbered vessel.—The Alabama (D. C.) 214; The Curtin, Id.

A collision between a barge, constituting part of a tow, and a steamer, in a narrow channel, in the night, *held* to have been due to the joint fault of the steamer and tug, and without the fault of the barge.—The Alabama (D. C.) 214; The Curtin, Id.

While a tug with a tow has the right of way over an unencumbered vessel, it has no right to unduly or unnecessarily obstruct the path-

way of other vessels; and, in navigating a channel known to be constantly used by other vessels, it is its duty to take all proper and reasonable measures to have its tow under control and to lessen the danger of collision.—The Jamestown (D. C.) 593; The Norfolk, Id.

A steamship unencumbered will be presumed in fault for a collision with a tug or tow, unless fault in the latter is shown.—The Jamestown (D. C.) 593; The Norfolk, Id.

A steamship and a tug and tow each *held* in fault for a collision in Elizabeth river.—The Jamestown (D. C.) 593; The Norfolk, Id.

§ 5. Fog or thick weather.
Rule 16 of the international rules, as amended in 1897, requires steam vessels, on hearing a signal from another vessel in a fog, to stop in all cases of doubt.—The El Monte (D. C.) 796; The Rappahannock, Id.

Evidence *held* to show two steamships to be equally in fault for a collision in a fog while on crossing courses, because of the violation by each of the rules as to speed and requiring them to stop on hearing the other's fog signals.—The El Monte (D. C.) 796; The Rappahannock, Id.

Evidence considered in a suit for collision between two ocean steamships, and *held* to sustain the contention of one that the night was foggy, which placed the other in fault for proceeding at excessive speed and without giving fog signals.—The Eagle Point (D. C.) 971.

What constitutes "moderate speed" in a fog, within article 16 of the international rules, must be determined with reference to the time, place, and all other circumstances and conditions.—The Eagle Point (D. C.) 971.

§ 6. Special circumstances and errors in extremis.
Luffing on sloop in order to avoid collision with steam ferryboat, if constituting negligence, *held* "error in extremis" under the facts.—The Elizabeth (D. C.) 757.

§ 7. Suits for damages.
The failure of those in charge of one of two vessels to see or observe the lights of the other prior to collision does not disprove their existence, and cannot be accepted to outweigh the positive testimony of the officers and crew of the other vessel that the lights were properly set and were seen to be burning up to within five minutes before the collision.—The Richmond (D. C.) 208.

Evidence of experiments made by the adverse party alone, after a schooner has been shattered in a collision, to determine the position of her lights, is not entitled to great weight.—The Richmond (D. C.) 208.

Where it is shown that a vessel was equipped with lamps of an approved style, bought from a reputable dealer, the court will be slow to find that they were inefficient, or that those navigating the vessel failed to light and keep them burning on a dark and stormy night, when they were sailing in a locality where there was a probability of encountering other vessels.—The Richmond (D. C.) 208.

The claim of a steamer that a collision with a schooner was due to the failure of the latter to carry proper lights is materially weakened by the fact that such omission was not mentioned in the steamer's log, nor in the protest lodged against the schooner on the following day.—The Richmond (D. C.) 208.

COMBINATIONS.

See "Conspiracy."

COMMERCE.

Carriage of goods and passengers, see "Carriers"; "Shipping."

§ 1. Means and methods of regulation.
City ordinance, in so far as it imposes a license tax on petitioner, who as agent for a citizen of Ohio solicited orders for goods in the city, *held* void, as taxing interstate commerce.—Ex parte Green (C. C.) 959.

COMMISSIONERS.

See "United States Commissioners."

COMMISSIONS.

Of receiver, see "Receivers," § 3.

COMMON CARRIERS.

See "Carriers."

COMPENSATION.

For performance of contract, see "Contracts," § 2.
For property taken for public use, see "Eminent Domain," § 2.
For towage, see "Towage."
Of customs collector, see "Customs Duties," § 2.
Of receiver, see "Receivers," § 3.
Of United States commissioner, see "United States Commissioners."
Of United States marshal, see "United States Marshals."

COMPETENCY.

Of witnesses in general, see "Witnesses," § 1.
Unfair competition, see "Trade-Marks and Trade-Names," § 1.

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

COMPROMISE AND SETTLEMENT.

See "Payment."

Evidence *held* insufficient to impeach a settlement and release of a claim for a personal injury on the ground of fraud or incapacity of

the person injured.—Chicago & A. Ry. Co. v. Green (C. C.) 676.

A settlement of a disputed claim against a railroad company for a personal injury should be sustained where fairly made, and evidence of fraud or incapacity to impeach such settlement should be clear and persuasive.—Chicago & A. Ry. Co. v. Green (C. C.) 676.

COMPUTATION.

Of period of limitation, see "Limitation of Actions," § 2.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In insurance policies, see "Insurance," § 3.
Precedent to action for breach of contract, see "Contract," § 5.
Precedent to contract for construction of public improvement, see "Municipal Corporations," § 1.
Precedent to restraining collection of taxes, see "Taxation," § 2.

CONSIDERATION.

Of bill of exchange or promissory note, see "Bills and Notes," § 1.
Of contract, see "Contracts," § 1.

CONSOLIDATION.

Of corporations, see "Corporations," § 5.

CONSPIRACY.

§ 1. Civil liability.

If the object of a labor union is unlawful, or if the methods employed by it either to induce acquisitions to its ranks or to accomplish its ulterior purposes are unlawful, all persons who combine in such efforts are conspirators.—United States v. Weber (C. C.) 950.

CONSTITUTIONAL LAW.

See "Slaves"; "Taxation," § 1; "Waters and Water Courses," § 2.

§ 1. Obligation of contracts.

An ordinance of the city of Chicago regulating the price of gas *held* not in violation of the constitutional rights of a consolidated gas company.—People's Gaslight & Coke Co. v. City of Chicago (C. C.) 384.

§ 2. Equal protection of laws.

The Indiana employers' liability act is not in contravention of the fourteenth amendment to the federal constitution, as denying to corporations the equal protection of the laws, by discriminating between them and individual employers.—Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.) 918.

§ 3. Due process of law.

The lease by a corporation of its property, under a power given by the act under which it was created, does not deprive a dissenting stockholder of his property without due process of law.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

CONTEMPT.

Violation of injunction, see "Injunction," § 4.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."
Assignment, see "Assignments."
Cancellation, see "Cancellation of Instruments."
Damages for breach, see "Damages," § 3.
Impairing obligation, see "Constitutional Law," § 1.
Liquidated damages or penalties, see "Damages," § 2.
Parol or extrinsic evidence, see "Evidence," § 5.
Reformation, see "Reformation of Instruments."
Specific performance, see "Specific Performance."
Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Corporations," § 3; "Counties," § 1; "Master and Servant"; "Municipal Corporations," § 1; "United States," § 2.

Contracts relating to particular subjects.

See "Towage."

Particular classes of express contracts.

See "Bills and Notes"; "Bonds"; "Insurance"; "Partnership."
Affreightment, see "Shipping," § 3.
Agency, see "Principal and Agent."
Charter parties, see "Shipping," § 1.
Employment, see "Master and Servant."
Leases, see "Landlord and Tenant."
Sales of realty, see "Vendor and Purchaser."
Shipping articles, see "Seamen."
Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Account Stated."

Particular modes of discharging contracts.

See "Compromise and Settlement"; "Payment."

§ 1. Requisites and validity.

Accepted orders for goods under contracts for future delivery, void for want of consideration, constitute sales of the goods thus ordered on the terms of the contract, but do not validate the agreement as to articles which the one refuses to purchase or the other to deliver under the void contract.—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 77.

An accepted offer to sell and deliver articles at specified prices during a limited time in such quantities as the acceptor may desire in his busi-

ness, or without any statement of the amount or quantity, is without consideration, because the acceptor is not bound to desire any.—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 77.

An accepted offer to furnish such articles of personal property as may be required by the established business of the acceptor during a limited time is binding.—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 77.

A contract for future delivery of personal property is void, for want of a consideration, if the quantity to be delivered is conditioned by the will of one of the parties.—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 77.

Representations, made by party to induce execution of dredging contract, as to thickness of rock to be removed, *held* not mere expressions of opinion, but statements of facts.—Hingston v. L. P. & J. A. Smith Co. (C. C. A.) 294.

Party making contract to dredge harbor *held* entitled to rely on representations of other party as to the thickness of the rock to be removed, without investigating the facts himself.—Hingston v. L. P. & J. A. Smith Co. (C. C. A.) 294.

§ 2. Construction and operation.

Where the terms of a contract are plain and unambiguous, the intent of the parties cannot be incorporated into the contract, if not expressed therein.—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 77.

It is a legal presumption that words used in a contract were used with their customary meaning.—Fitzgerald v. First Nat. Bank (C. C. A.) 474.

The practical interpretation given a contract by the parties thereto before any controversy had arisen may be considered in determining their intent.—Fitzgerald v. First Nat. Bank (C. C. A.) 474.

Where a contractor was building a railroad by his own employés and by subcontractors, an agreement to furnish beef "to the men working for him" is limited to the contract to furnish it to his employés.—Fitzgerald v. First Nat. Bank (C. C. A.) 474.

A contractor who has been required to furnish materials and do work not within his contract is entitled to recover, in addition to the actual cost to him of such materials and work, a reasonable sum as profit.—Venable Const. Co. v. United States (C. C.) 763.

§ 3. Modification and merger.

Contract of steamship company for carriage on certain vessels, with right to substitute another vessel, *held* assumed by corporation, which purchases the property and assets of the company and thereafter notifies shipper of substitution of another vessel.—Morris v. Wilson, Sons & Co. (C. C. A.) 74.

§ 4. Performance or breach.

A substantial performance of a contract is sufficient to entitle the party so performing to recover thereon.—City of Elizabeth v. Fitzgerald (C. C. A.) 547.

The fact that a contract made in the United States, but to be performed elsewhere, which, when made, was legal and valid, both here and at the place of performance, becomes impossible of performance by one party by reason of the acts of a foreign government, constitutes no defense to an action by the other party for its breach.—Tweedie Trading Co. v. James P. McDonald (D. C.) 985; James P. McDonald v. Tweedie Trading Co., Id

§ 5. Actions for breach.

Evidence in action for services as attorney *held* insufficient to sustain judgment for plaintiff.—Dudley v. Sanders Mfg. Co. (C. C.) 981.

A letter from a customer to a broker, who held stocks bought for the customer on margin, written after the broker had made a general assignment, *held* a sufficient demand to give the customer an immediate right of action for breach of the contract.—In re Swift (D. C.) 947; Ex parte Harrigan, Id.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," § 3.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."

Conveyances by or to particular classes of parties.

Married women, see "Husband and Wife," § 1.

Conveyances of particular species of property.

See "Mines and Minerals," § 2.

Separate property of married women, see "Husband and Wife," § 1.

Particular classes of conveyances.

See "Assignments"; "Chattel Mortgages"; "Mortgages."

CORPORATIONS.

Injunctions affecting, see "Injunction," § 1.

Taxation of corporations and corporate property, see "Taxation," § 1.

Particular classes of corporations.

See "Building and Loan Associations"; "Municipal Corporations"; "Street Railroads," § 1.

Water companies, see "Waters and Water Courses," § 2.

§ 1. Members and stockholders.

Where an act of a corporation has been consummated, and by virtue thereof a third person has acquired rights, a stockholder can only maintain a suit to annul such action in right of the corporation, and, if in a federal court, by a compliance with the requirements of equity rule 94.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

Allegations of a bill by stockholders to annul a lease made by the corporation, and the proofs taken thereon, considered, and both

held insufficient to entitle complainants to maintain the suit.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

The facts required by equity rule 94 to be alleged in a bill by a stockholder founded on a right which may properly be asserted by the corporation are jurisdictional, aside from the requirement of the rule as to pleading, and must be both alleged and proved to give the court jurisdiction.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

A suit by a stockholder to annul a lease made by the directors with the approval of a majority of the stockholders *held* to be one in which he sued in right of the corporation, and subject to the requirements of equity rule 94.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

A corporation which, as permitted by the laws of the state, owns the common stock of a second corporation, is not deprived of the right to vote such stock in favor of dissolution, because, as a consideration for its stock, it guarantied the payment of dividends on the preferred stock of the second corporation so long as the latter should exist.—Windmuller v. Standard Distilling & Distributing Co. (C. C.) 491.

Stockholders of a corporation, unlike directors, are not trustees for the other stockholders; but each represents his own interest only in stockholders' meetings, and may vote on any measure, even though he has a personal interest therein separate from or adverse to that of other stockholders.—Windmuller v. Standard Distilling & Distributing Co. (C. C.) 491.

A proceeding to enforce the additional liability of a stockholder under the constitution or statutes of a state, whether at law or in equity, is based on a common-law, and not an equitable, right arising out of the stockholder's contract.—Hale v. Coffin (C. C.) 567.

§ 2. Officers and agents.

To charge directors of a corporation with personal liability for its debts, on the ground that they declared a dividend when it was insolvent, and permitted the creation of indebtedness to an amount exceeding its capital stock in violation of law, it must be shown that they had knowledge of the insolvency when the dividend was declared, and of the creation of the indebtedness, or in the exercise of reasonable diligence should have known such facts.—Chick v. Fuller (C. C. A.) 22.

Causes of action against president of corporation, under Sand. & H. Dig. Ark. § 1347, for debts of corporation contracted while he is neglecting to make annual certificates, *held* to accrue not later than maturity of note given by corporation for the debt, though it is renewed.—Continental Nat. Bank v. Buford (C. C. A.) 290.

§ 3. Corporate powers and liabilities.

Notice to an officer of a corporation, to affect the corporation, must have been received when he was acting on its behalf.—Levy & Cohn Mule Co. v. Kauffman (C. C. A.) 170; Kauffman v. Levy & Cohn Mule Co., Id.

A corporation which assumed the duties of a trustee of a sinking fund created by another corporation for the benefit of its bondholders, and received such fund, will not be permitted by a court of equity to withhold it from those to whom it belongs, or who have claims against it, on the ground that it had no power to act as trustee.—Central R. & Banking Co. of Georgia v. Farmers' Loan & Trust Co. (C. C. A.) 263; Farmers' Loan & Trust Co. v. Central R. & Banking Co. of Georgia, Id.

Power given to a corporation by its charter to lease its property enters as a condition into the contract between the stockholders, and where no particular mode of exercising it is prescribed it may be exercised in the same manner as other general powers of the corporation, by the vote of a majority of the stockholders or by the board of directors.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

§ 4. Insolvency and receivers.

A mortgage executed by an insolvent corporation to secure an indebtedness to banks in which its directors and stockholders were stockholders *held* valid, as having been given in good faith while the company was a going concern.—Chick v. Fuller (C. C. A.) 22.

A corporation, so long as it is a going concern and engaged in the active prosecution of its business, may lawfully execute a mortgage on its property, if done in good faith, to secure an extension of a prior indebtedness and further advances to be used in its business, although it is at the time financially embarrassed, or even insolvent.—Coler v. Allen (C. C. A.) 609.

The fact that the bondholders of a corporation owning coal lands permitted the interest to become in arrears for 17 years before bringing suit to foreclose, with full knowledge of the operations of the company, during the last 2 years of which time it expended large sums in developing the property, may properly be considered in determining their equity to demand the appointment of a receiver.—Romare v. Broken Arrow Coal & Mining Co. (C. C.) 194.

Evidence considered, and *held* insufficient to warrant the appointment of a receiver to operate the property of a corporation, consisting of coal mines, pending the foreclosure of a mortgage thereon.—Romare v. Broken Arrow Coal & Mining Co. (C. C.) 194.

Bond or stock holder in corporation *held* not entitled to intervene in receivership proceedings against it.—Land Title & Trust Co. v. Asphalt Co. of America (C. C.) 484.

Under the statutes of Minnesota relating to the enforcement of the constitutional liability of stockholders in an insolvent corporation, the right to proceed against stockholders is vested in the creditors of the corporation, and not in any officer to be appointed by the court; and a receiver appointed by the court in a creditors' suit to enforce such liability, when there is no remaining property of the corporation to be administered, is vested with no legal right of action against a stockholder, though he may

be permitted to maintain such an action in another jurisdiction by virtue of a state statute or by a court of equity.—Hale v. Coffin (C. C.) 567.

§ 5. Consolidation.

A lease made by the directors of a corporation with the approval of a majority of the stockholders *held* not impeachable by a minority stockholder on the ground of fraud and conspiracy on the part of the directors.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

Where a corporation has leased its property with the consent of a majority of its stockholders, the lease has been executed, and the lessee has for months been in possession, and has issued and marketed a large amount of stock and bonds on the faith of the transaction, a court will not set such lease aside and decree a restoration of the property, at suit of a single stockholder of the lessor, unless a legal wrong has clearly been done to him or his corporation.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

§ 6. Dissolution and forfeiture of franchise.

A court of equity has no power, at suit of a minority stockholder, to enjoin the dissolution of the corporation by the majority under power given them by statute.—Windmuller v. Standard Distilling & Distributing Co. (C. C.) 491.

§ 7. Foreign corporations.

Service on resident president of a nonresident corporation *held* properly had.—Revans v. Southern Missouri & A. R. Co. (C. C.) 982.

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTIES.

See "Municipal Corporations."

Subrogation of holder of invalid county bonds issued to pay warrants to rights of warrant holders, see "Subrogation."

§ 1. Property, contracts, and liabilities.

Where the commissioners of a county purchase bridges which they cannot pay for, because they had not complied with the law, the vendor or his assignee may maintain an action for leave to remove the bridges.—Lee v. Board of Com'rs of Monroe County (C. C. A.) 744.

§ 2. Fiscal management, public debt, securities, and taxation.

Where a proposition accepted called for the delivery of bonds in installments of $1,000 on presentation of certificates of performance of work of the value of $1,000, a notice that the county would deliver the same in accordance with the terms of the proposition is a notice that the bonds will be issued when the certificates are presented.—Perkins County v. Graff (C. C. A.) 441.

Where a company agreed to construct a canal for bonds to be delivered, and work of the value of $25,000 was performed, and county bonds were delivered, but the work was not completed, the work performed was a valid consideration therefor.—Perkins County v. Graff (C. C. A.) 441.

A canal constructed for the purpose of irrigating lands in the state of Nebraska is an internal improvement, and bonds issued by the county in that state to aid it are issued for the public purpose, although its waters are drawn from sources without the state.—Perkins County v. Graff (C. C. A.) 441.

In an action on county warrants, where the defense was that they had been issued in excess of the statutory limitation as to current expenses for the given year, based on the assessed valuation, and there is an agreed statement of fact that in the county there had been no assessment for purpose of taxation before the issue of the warrants, such defense is not maintainable.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

Where a county issues bonds in place of warrants, and thereafter repudiates the bonds, in an action on the warrants the proof must identify the particular warrants in suit with any illegal transactions alleged.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

COURT COMMISSIONERS.

See "United States Commissioners."

COURTS.

Clerks, see "Clerks of Courts."
Commissioners, see "United States Commissioners."
Justices' courts, see "Justices of the Peace."
Removal of action from state court to United States court, see "Removal of Causes."
Review of decisions, see "Appeal and Error."
Trial by court without jury, see "Trial," § 5.

§ 1. United States courts.

Appellate jurisdiction of supreme court *held* exclusive, where suit involves construction of constitution of United States, and jurisdiction of circuit court is invoked on that ground alone.—City of Seattle v. Thompson (C. C. A.) 96.

A circuit court of appeals has no power to issue a writ of prohibition to stay proceedings in a circuit court in a case in which its appellate jurisdiction has not been invoked by appeal or writ of error.—In re Paquet (C. C. A.) 437.

An administrator, suing for the wrongful death of his intestate under the statute of Indiana, maintains the action in his official capacity, and as a trustee, and his citizenship, and not that of the beneficiaries, determines the jurisdiction of a federal court.—Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.) 918.

A federal court will not determine the power of a city to pass an ordinance, under the laws of the state, in a suit in which its jurisdiction is invoked on the ground that a federal question is involved, unless necessary to the decision

of such question.—People's Gaslight & Coke Co. v. City of Chicago (C. C.) 384.

The bar of limitation may be invoked by demurrer in a federal court in an action at law in all cases where it could be done under the statutes of the state, and where such is the practice the petition or complaint must contain a statement of any matter relied on to avoid the running of the statute.—Ratican v. Terminal R. Ass'n of St. Louis (C. C.) 666; Kinnavey v. Same, Id.

Act March 3, 1887 (24 Stat. 552), as corrected by Act Aug. 13, 1888 (25 Stat. 433), confers a mere personal privilege on a defendant in a federal court to be sued in a district where either he or the plaintiff resides, which he waives by a general appearance.—Fosha v. Western Union Tel. Co. (C. C.) 701.

A federal court is without jurisdiction of proceedings for the administration of the estate of a deceased person, either original or by removal.—Clark v. Guy (C. C.) 783; In re Coe's Estate, Id.

Rev. St. § 916, providing that the party recovering a judgment in any common-law cause in any circuit or district court is entitled to the same remedies as are provided in like causes by the law of the state, does not apply to judgments in criminal cases.—Clark v. Allen (D. C.) 374.

A federal court is not given jurisdiction of a suit merely because an Indian, who is a ward of the United States, is plaintiff, or his personal rights are involved.—In re Celestine (D. C.) 551.

There is no statute authorizing an Indian agent to sue in behalf of an Indian under his charge, so as to bring such a suit within the jurisdiction of a district court, as one brought by an officer of the United States "authorized by law to sue."—In re Celestine (D. C.) 551.

COURTS-MARTIAL.

See "Army and Navy."

COVENANTS.

In insurance policies, see "Insurance," § 3.

COVERTURE.

See "Husband and Wife."

CREDITORS.

See "Bankruptcy"; "Fraudulent Conveyances"; "Marshaling Assets and Securities."
Of testator, see "Wills," § 1.
Remedies against surety, see "Principal and Surety," § 3.
Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

Fines, see "Fines."

Particular offenses.

See "Embezzlement."
Offenses against bankrupt laws, see "Bankruptcy," § 13.
Offenses against customs laws, see "Customs Duties," § 5.

§ 1. Judgment, sentence, and final commitment.

A judgment in a criminal case must conform strictly to the act of congress, and any departure from the statute as to the extent or character of the punishment is a fatal error.—Whitworth v. United States (C. C. A.) 302.

§ 2. Appeal and error, and certiorari.

The circuit court of appeals has no jurisdiction to review an order of the district court in a criminal case refusing to set aside a judgment and to permit defendant to withdraw his plea of guilty, where no question of jurisdiction is raised; such order not being a final decision.—Whitworth v. United States (C. C. A.) 302.

An order denying a motion to set aside a judgment of conviction and permit defendant to withdraw his plea of guilty is addressed to the discretion of the trial court.—Whitworth v. United States (C. C. A.) 302.

Where error is discovered in a criminal case brought to the circuit court of appeals for review, the court can enter such judgment and impose such sentence as the law prescribes, or reverse the judgment and direct the court below to take further proceedings.—Whitworth v. United States (C. C. A.) 302.

CUSTODIA LEGIS.

Attachment of property in custody of the law, see "Attachment," § 1.

CUSTOMS DUTIES.

§ 1. Goods subject to duty, rate, and amount.

Tariff Act 1897, par. 313, imposes an additional duty on cotton cloth in which there is a separate and extra thread which does not in any way enter into the structural part of the goods, but which is used to form figures for ornamental purposes.—Mills v. United States (C. C. A.) 257.

Tariff Act 1897, par. 313, imposes an additional duty on cotton goods known as "Madras" or "damask" goods, which are "ornamental, with spots or figures woven in by independent threads," not forming an integral part of the fabric.—H. B. Claflin Co. v. United States (C. C. A.) 259.

Olive oil, containing an excess of free fatty acid, with a strong, offensive, and rancid odor, and unfit for human consumption, *held* free, under Act 1897, par. 626.—Oil Seeds Pressing Co. v. United States (C. C.) 793.

§ 2. Collection districts and officers.
Rev. St. § 2670, fixing the compensation of the collector of the Puget Sound customs collection district, was repealed, as to all of its provisions, by Act 1890, § 3, on the same subject.—Saunders v. United States (C. C. A.) 42.

§ 3. Entry and appraisal of goods, bonds, and warehouses.
The decision of the board of general appraisers that "lithophone" was assessable as "sulfid of zinc, white," within Tariff Act July 24, 1897, par. 57, where amply supported by evidence, will not be disturbed by the circuit court on appeal.—Gabriel v. United States (C. C.) 401.

§ 4. Recovery of duties paid.
Under the customs administrative act of 1890 an importer is not debarred from the right to relief from an erroneous classification and an excessive assessment of duty by the collector because he fails to correctly designate in his protest the provision under which the classification should have been made.—United States v. Shea, Smith & Co. (C. C. A.) 38.

§ 5. Violations of customs laws.
The provisions of Rev. St. § 3082, apply to dutiable merchandise brought into the United States in the baggage of a passenger, and such goods, when discovered after their entry, are subject to forfeiture thereunder.—United States v. Five Packages of Tapestry (D. C.) 496.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 2.

Damages for particular injuries.

See "Death," § 1; "Malicious Prosecution," § 4.

Breach of charter party, see "Shipping," § 1. Infringement of patent, see "Patents," § 3.

§ 1. Grounds and subjects of compensatory damages.
An instruction as to the rule of damages in an action by a servant for personal injury approved.—Swensen v. Bender (C. C. A.) 1.

Loss of expected profits sustained by a lessee of a railroad lease executed by a receiver, due to the termination of the lease prior to its natural term by order of court, is a proper element of damages to be awarded the lessee.—Farmers' Loan & Trust Co. v. Eaton (C. C. A.) 14.

§ 2. Liquidated damages and penalties.
Provision in contract of carriage of cattle *held* a liquidation of damages for expense of feeding cattle, in case of delay in sailing.—Morris v. Wilson, Sons & Co. (C. C. A.) 74.

A provision of a contract with a city to supply electric lights for public use, that if they were not furnished within the time agreed a sum deposited should be forfeited as liquidated damages, construed, and *held* valid as an agreement for liquidated damages, and not for a penalty.—Brooks v. City of Wichita (C. C. A.) 297.

A court of equity cannot, more than a court of law, relieve a party from his obligation to pay liquidated damages, where it has been determined that the damages are liquidated, and that the provision is not for a penalty.—Brooks v. City of Wichita (C. C. A.) 297.

A provision in a coal lease requiring the lessee to mine not less than a stated number of tons per year during the term, and to pay royalty on such number of tons whether mined or not, is one for liquidated damages in case of nonperformance by the lessee in whole or in part, and not for a penalty, and is binding on the parties.—Martin v. Berwind-White Coal Min. Co. (D. C.) 553.

§ 3. Measure of damages.
A child made a mental and physical wreck may recover of the one by whose negligence it was caused, not only for physical suffering, but for loss of earning capacity.—Delaware, L. & W. R. Co. v. Devore (C. C. A.) 155.

The measure of damages for the breach of a contract by a broker to deliver stocks on demand of a customer, for whom he had bought the same on a margin, is to be determined according to the highest intermediate value of the stocks between the default and a time, after the customer has notice thereof, reasonably sufficient to enable him to replace the stocks.—In re Swift (D. C.) 947; Ex parte Harrigan, Id.

DEATH.

Liability for wrongful death of person unloading ship, see "Shipping," § 2.

§ 1. Actions for causing death.
Under the common law of Hawaii, as established by judicial decision and recognized by statute, a widow may maintain an action to recover damages for the wrongful death of her husband, and such right may be enforced in a court of admiralty, as well as a court of law.—The Schooner Robert Lewers Co. v. Kekauoha (C. C. A.) 849.

An administrator appointed in Indiana, and vested by the statutes of that state with a right of action for the wrongful death of his intestate, may maintain an action therefor in Ohio, under the statute of that state.—Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.) 918.

$1,200 damages allowed for death of colored farm laborer, 23 years old, in a steamboat collision.—The Elizabeth (D. C.) 757.

DEBTOR AND CREDITOR.

See "Bankruptcy"; "Fraudulent Conveyances."

DECEDENTS.

Estates, see "Executors and Administrators." Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECREE.

In equity, see "Equity," § 3.

DEEDS.

Acknowledgment of execution, see "Acknowledgment."
In fraud of creditors, see "Fraudulent Conveyances."
Reformation, see "Reformation of Instruments."

Deeds by or to particular classes of parties.

Married women, see "Husband and Wife," § 1.

Deeds of particular species of property.

See "Mines and Minerals," § 2.
Separate property of married women, see "Husband and Wife," § 1.

Particular classes of deeds.

Of trust, see "Mortgages."

DEFAMATION.

See "Libel and Slander."

DEMURRAGE.

See "Shipping," § 5.

DESCENT AND DISTRIBUTION.

See "Executors and Administrators."

DESIGN PATENTS.

See "Patents," § 1.

DEVISES.

See "Wills."

DISABILITIES.

See "Slaves."

DISCHARGE.

From employment, see "Master and Servant," § 1.
From indebtedness, see "Bankruptcy," §§ 9–11; "Compromise and Settlement."

DISCRETION OF COURT.

Review in civil actions, see "Appeal and Error," § 6.

DISCRIMINATION.

By carrier, see "Carriers," § 1.

DISMISSAL AND NONSUIT.

Dismissal of appeal or writ of error, see "Appeal and Error," § 5; "Criminal Law," § 2.

DISSOLUTION.

Of attachment, see "Attachment," § 2.
Of corporation, see "Corporations," § 6.
Of partnership, see "Partnership," § 1.

DISTRIBUTION.

Of assets of partnership on dissolution, see "Partnership," § 1.
Of estate of bankrupt, see "Bankruptcy," § 8.
Of proceeds of foreclosure, see "Mortgages," § 1.

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Courts," § 1; "Removal of Causes," § 1.

DOCKS.

See "Wharves."

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 4.

DOMICILE.

Residence as ground of jurisdiction, see "Courts," § 1.

DUE PROCESS OF LAW.

See "Constitutional Law," § 3.

DUTIES.

Customs duties, see "Customs Duties."

EJECTION.

Of passenger, see "Carriers," § 3.

EMBEZZLEMENT.

Under Rev. St. U. S. § 4046, limiting the fine, on conviction of embezzlement, to the amount embezzled, a judgment imposing a fine for an amount equal to the amount embezzled and also the costs of the prosecution is erroneous.—Whitworth v. United States (C. C. A.) 302.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," § 1.

§ 1. Nature, extent, and delegation of power.

The provision of Gen. Pub. Laws N. J. 1893, c. 172, which authorizes a stockholder in a

street railroad corporation which has leased its property to another corporation created under the act, in case he objects to such lease, to institute a proceeding to have his damages and the value of his stock appraised, and requires the corporation to either purchase his stock or pay his damages, is not invalid, as authorizing a condemnation of his property for private use under the power of eminent domain, since it is optional with him to invoke such provision, and the leasing would be valid if it were omitted.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

Where a telegraph company has been duly organized in accordance with the laws of a state, its right to exercise the power of eminent domain, conferred on such companies by the statutes of the state, cannot be questioned by a private party on the ground that it was not organized in good faith.—Postal Tel. Cable Co. v. Oregon S. L. R. Co. (C. C.) 787.

A telegraph company is entitled, under the statutes of Montana, to condemn right of way for its line over the right of way of a railroad, where it will not interfere with the operation of the road.—Postal Tel. Cable Co. v. Oregon S. L. R. Co. (C. C.) 787.

A telegraph company which has brought itself within the provisions of Rev. St. §§ 5263–5269, may condemn right of way for its line over the right of way of a railroad which is a post road of the United States, where it will not interfere with the operation of such road, by having the damages assessed in appropriate proceedings therefor in any court of competent jurisdiction.—Postal Tel. Cable Co. v. Oregon S. L. R. Co. (C. C.) 787.

§ 2. Compensation.

Drainage commission of New Orleans cannot require removal of water mains and pipes belonging to New Orleans Waterworks Company without first making just and adequate compensation, as required by Const. La. art. 167.—Moore v. New Orleans Waterworks Co. (C. C.) 380.

Where the construction of a telegraph line over the right of way of a railroad will not appreciably diminish the value of the use of such right of way for railroad purposes, the telegraph company is required to pay only nominal damages on condemnation of right of way for its line.—Postal Tel. Cable Co. v. Oregon S. L. R. Co. (C. C.) 787.

EMPLOYES.

See "Master and Servant."

ENTRY.

Re-entry by landlord, see "Landlord and Tenant," § 2.

EQUALIZATION.

Of taxes, see "Taxation," § 1.

EQUITY.

Equitable estoppel, see "Estoppel," § 1.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Cancellation of Instruments"; "Fraudulent Conveyances"; "Injunction"; "Interpleader"; "Marshaling Assets and Securities"; "Partition," § 1; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Suits for infringement of patents, see "Patents," § 3.

§ 1. Jurisdiction. principles, and maxims.

Application of rule that equity will not take jurisdiction where there is adequate remedy at law rests in sound discretion of the court in each particular case.—Mutual Life Ins. Co. v. Pearson (C. C.) 395.

§ 2. Pleading.

A complainant, who had no cause of action at the time of the filing of his bill, cannot introduce one which accrued thereafter by an amended or supplemental bill.—Mellor v. Smither (C. C. A.) 116.

Where leave is given to file a supplemental bill to introduce matters arising subsequent to the filing of the original bill, the court will permit other matters to be incorporated therein, which might have been brought into the original bill by amendment.—Mellor v. Smither (C. C. A.) 116.

Jurisdiction must affirmatively appear at every stage of a case, and the court is without authority to permit amendments to supply essential jurisdictional averments in the bill.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

§ 3. Decree and enforcement thereof.

A final decree dismissing a bill to set aside a former decree *held* erroneous, on the ground that complainants had complied with the terms of a prior interlocutory decree vacating such former decree conditionally, the effect of which was to reopen the original suit.—Dewey v. Stratton (C. C. A.) 179.

Although an interlocutory decree, conditionally vacating and setting aside a former decree on the ground of accident, mistake, and surprise, was irregularly entered, and therefore erroneous, where it has been acquiesced in by defendants and the court had jurisdiction, it will be held binding on the parties on an appeal by complainants from a final decree dismissing the bill.—Dewey v. Stratton (C. C. A.) 179.

A circuit court may entertain a bill to set aside a decree on the ground of accident, mistake, or surprise, although the time for an appeal or for filing a bill of review has expired.—Dewey v. Stratton (C. C. A.) 179.

A bill for the vacation of a prior decree of the same court, which charges fraud and error on the face of the record as the only grounds for the relief asked, will not sustain a decree

granting such relief on the ground of mistake of fact.—Hendryx v. Perkins (C. C. A.) 801.

Neither a bill to vacate a decree for fraud nor a bill of review can be maintained after a lapse of nine years, during all of which time the complainant had knowledge of the decree, and where no sufficient facts in excuse of the delay are alleged.—Hendryx v. Perkins (C. C. A.) 801.

ERROR, WRIT OF.

See "Appeal and Error."

ESTABLISHMENT.

Of railroads, see "Street Railroads," § 1.

ESTATES.

Decedents' estates, see "Executors and Administrators."
Estates for years, see "Landlord and Tenant."

ESTOPPEL.

By judgment, see "Judgment," § 1.
Of patentee to assert invalidity of assigned patent, see "Patents," § 2.
To deny correctness of account stated, see "Account Stated."

§ 1. Equitable estoppel.

Where the sole stockholder of a corporation, by his statement as to its resources, and by his silence as to any liability of the corporation to him, induced a purchase of his stock in the belief that it was not so indebted, he is estopped from enforcing any indebtedness as against the purchaser of the stock.—Given v. Times-Republican Printing Co. (C. C. A.) 92.

One who by his acts or representations, or his silence, either intentionally or through negligence, induces another to believe certain facts to exist, where the latter rightfully acts on such belief and is prejudiced, cannot deny the existence of such facts.—Given v. Times-Republican Printing Co. (C. C. A.) 92.

The vendor of stock may, by his representations or silence, estop himself from asserting against a purchaser an indebtedness of the corporation to him.—Given v. Times-Republican Printing Co. (C. C. A.) 92.

EVIDENCE.

See "Witnesses."
Admissibility of instrument containing unexplained alterations, see "Alteration of Instruments."
Questions of fact for jury, see "Trial," § 2.
Reception at trial, see "Trial," § 1.
Review on appeal or writ of error, see "Appeal and Error," § 6.

As to particular facts or issues.

See "Payment," § 1.
Cause of injury to barge at wharf, see "Wharves."

In actions by or against particular classes of parties.

See "Carriers," § 3; "Physicians and Surgeons"; "Railroads," § 3; "United States," § 3.
Trustees in bankruptcy, see "Bankruptcy," § 7.

In particular civil actions or proceedings.

See "Libel and Slander," § 2; "Malicious Prosecution," § 4; "Negligence," § 4.
Admiralty, see "Collision," § 7.
By physician for compensation, see "Physicians and Surgeons."
For injuries by fire resulting from operation of railroad, see "Railroads," § 3.
For injuries to passenger, see "Carriers," § 3.

§ 1. Best and secondary evidence.

A memorandum of totals of weight of cattle, taken from slips on which the weights were separately entered, without testimony of person making original entries, is not competent evidence of the weight.—Morris v. Wilson, Sons & Co. (C. C. A.) 74.

§ 2. Admissions.

Sworn statement of a firm creditor in bankruptcy proceedings, setting forth the names of the parties composing the firm, *held* sufficient evidence of the identity of such persons as members of the firm to sustain a judgment against them for costs.—In re Henschel (D. C.) 968.

§ 3. Hearsay.

Rulings of a referee admitting evidence on a hearing before him considered.—In re De Gottardi (D. C.) 328.

§ 4. Documentary evidence.

A "stub book," introduced to identify the warrants sued on by the stubs, such book not being required to be kept by the county, and which appeared to have been in possession of one other than the custodian of the county records, and not identified by the proper officer as the record, is inadmissible in evidence.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

A certificate by an enumerator appointed by the governor to report the minimum number of inhabitants and the taxable property in the county, for the information of the governor, before the issue of the proclamation designating the territory as an organized county, is inadmissible to show the assessed valuation of the taxable property in the county, in an action on its warrants.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

In an action on county warrants, a compilation of the taxable property in the published reports of the county auditor, and a certificate of the clerk of the county in the state auditor's office, giving the valuation of the property claimed to have been furnished when bonds issued by the county were presented for registration, *held* inadmissible to show taxable value of the property.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

§ 5. Parol or extrinsic evidence affecting writings.
Evidence of a parol agreement made before, or at the time of, the acceptance of drafts, is inadmissible to vary the absolute terms of the written contract made by the acceptance, by showing that the acceptance was conditional.—Levy & Cohn Mule Co. v. Kauffman (C. C. A.) 170; Kauffman v. Levy & Cohn Mule Co., Id.

§ 6. Opinion evidence.
It is proper to permit a witness, testifying as an expert, to answer a hypothetical question stating only facts which there is evidence fairly tending to prove; and it is not necessary, as a general rule, that such question should embrace all the facts of the case.—Swensen v. Bender (C. C. A.) 1.

§ 7. Weight and sufficiency.
The positive testimony of credible witnesses, who were in a position to see, that the lights were set and burning on a vessel at the time of a collision, is entitled to greater weight than the negative testimony of other witnesses that they did not observe such lights.—The Alabama (D. C.) 214; The Curtin, Id.

EXAMINATION.

In bankruptcy, see "Bankruptcy," § 6.
Of expert witnesses, see "Evidence," § 6.

EXECUTION.

See "Attachment."
Exemptions, see "Homestead."

EXECUTORS AND ADMINISTRATORS.

See "Wills."

§ 1. Appointment, qualification, and tenure.
The appointment of an administrator by a probate court of Indiana *held* valid.—Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.) 918.

EXEMPTIONS.

See "Homestead."
Allowed bankrupt, see "Bankruptcy," § 10.

EXPERT TESTIMONY.

In civil actions, see "Evidence," § 6.

FACTORS.

See "Principal and Agent."

FALSE IMPRISONMENT.

See "Malicious Prosecution."

FEDERAL COURTS.

See "Courts," § 1.

FEES.

See "Clerks of Courts"; "United States Commissioners"; "United States Marshals."

FELLOW SERVANTS.

See "Master and Servant," § 4.

FILING.

Chattel mortgage, see "Chattel Mortgages," § 2.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 1.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 6.
Special findings by court, see "Trial," § 5.
Special findings by jury, see "Trial," § 4.

FINES.

Rev. St. § 1041, construed, and *held* to mean merely that the United States government, in enforcing judgments for fines and penalties, is not limited to imprisonment, but may proceed also by execution against the defendant's property, and not to authorize it to enforce such judgments as provided in like cases by the state laws.—Clark v. Allen (D. C.) 374.

FIRES.

Caused by operation of railroad, see "Railroads," § 3.

FOG.

Collision of vessels, see "Collision," § 5.

FORECLOSURE.

Of mortgage, see "Mortgages," § 1; "Railroads," § 1.

FOREIGN CORPORATIONS.

See "Corporations," § 7.

FORFEITURES.

Of insurance, see "Insurance," § 3.
Of smuggled goods, see "Customs Duties," § 5.

FORMER ADJUDICATION.

See "Judgment," § 1.

FRANCHISES.

Of banks, see "Banks and Banking," § 1.

FRAUD.

See "Fraudulent Conveyances."

FRAUDS, STATUTE OF.

Oral agreement to resign an agency, as within statute of frauds, see "Assignments," § 1.

§ 1. Sales of goods.

An oral contract for the sale of goods *held* void under the New York statute of frauds, on the ground that no part of the price was paid "at the time."—Colton v. Raymond (C. C. A.) 863.

§ 2. Operation and effect of statute.

Stockholders *held* to have received no benefit of money advanced a corporation, so as to allow recovery thereof of them, on their avoiding a contract under the statute of frauds.—Gazzam v. Simpson (C. C. A.) 71.

Plaintiff in an action to recover on a contract cannot recover on an implied assumpsit, defendant having set up the statute of frauds, as against the contract.—Gazzam v. Simpson (C. C. A.) 71.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 5.

§ 1. Transfers and transactions invalid.

Slight circumstances, or circumstances of an equivocal tendency, or circumstances of mere suspicion leading to no certain results, are not sufficient to establish fraud; but they must not be, when taken together and aggregated, consistent with an honest intent. If they are, the proof of fraud is wanting.—Foster v. McAlester (C. C. A.) 145.

The law will not deduce fraud from any number of acts, each of which is lawful and innocent in itself; but one who seeks to attach a fraudulent character to such acts must go further, and show that they were in fact done with a fraudulent intent and for a fraudulent purpose.—Foster v. McAlester (C. C. A.) 145.

An agreement between a wholesale mercantile firm and a customer that the latter will give a mortgage on his stock when demanded to secure his indebtedness to the firm is entirely legal, and, unless fraudulent in fact, such an agreement cannot be held to constitute a fraud in law, or a badge of fraud, to affect the validity of a mortgage subsequently requested and voluntarily given by the debtor.—Foster v. McAlester (C. C. A.) 145.

A chattel mortgage, valid on its face, taken by a bona fide creditor for the purpose of securing his debt, and not for the purpose or with the intent of shielding his debtor and assisting him to hinder and delay his other creditors, is valid, and impervious to attack from any quarter, in the absence of a bankruptcy law which renders it invalid as a preference.—Foster v. McAlester (C. C. A.) 145.

An instruction, in an action by a chattel mortgagee against attaching creditors who had seized the property, that the failure of plaintiff to record a prior mortgage securing in part the same debt, in the territory to which the property had been removed, was a badge of fraud, *held* erroneous.—Foster v. McAlester (C. C. A.) 145.

A wholesale mercantile firm, in answer to a general inquiry from another house for information "regarding the credit, promptness, and financial standing" of a customer, is not bound to disclose its own business relations or the state of its account with such customer.—Foster v. McAlester (C. C. A.) 145.

False statements as to financial condition, made by a debtor, cannot affect the validity of a mortgage afterwards given to a creditor on the debtor's stock of goods, in the absence of any evidence that the creditor had knowledge of such statements and was in some manner connected with them.—Foster v. McAlester (C. C. A.) 145.

§ 2. Remedies of creditors and purchasers.

Instructions, in an action involving the validity of a chattel mortgage by which an insolvent debtor secured one creditor, as to the effect of secrecy and haste in taking the mortgage as a badge of fraud, *held* misleading and erroneous.—Foster v. McAlester (C. C. A.) 145.

GARNISHMENT.

See "Attachment."

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

Banking corporation as guarantor, see "Banks and Banking," § 1.

HABEAS CORPUS.

§ 1. Nature and grounds of remedy.

Petitioner *held* entitled to discharge on habeas corpus, though he had not appealed from judgment of conviction.—Ex parte Green (C. C.) 959.

Habeas corpus will not issue unless the court under whose warrant an accused is held is without jurisdiction, and mere objections going to the sufficiency on the indictment, etc., will not avail.—In re Lewis (C. C.) 963.

§ 2. Jurisdiction, proceedings, and relief.

Where the cause of imprisonment fully appears in the application for habeas corpus and the exhibits thereto, it is proper to issue an order requiring the officer to show cause why the writ should not issue, and dispose of the case without first issuing the writ itself.—In re Lewis (C. C.) 963.

A district court will not make an order permitting the United States to be substituted as

petitioner for a writ of habeas corpus in a proceeding of which, as instituted, the court is without jurisdiction, at least unless such anomalous action is shown to be necessary to prevent a failure of justice.—In re Celestine (D. C.) 551.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 6.

HEARING.

In admiralty, see "Admiralty," § 3.
On appeal or writ of error, see "Criminal Law," § 2.

HEARSAY.

In civil actions, see "Evidence," § 3.

HIGHWAYS.

Accidents at railroad crossings, see "Railroads," § 3.

HOMESTEAD.

§ 1. Nature, acquisition, and extent.
Under Rev. St. § 1042 et seq., a homestead exemption may be asserted in Virginia against a fine imposed by the United States government.—Clark v. Allen (D. C.) 374.

HUSBAND AND WIFE.

§ 1. Wife's separate estate.
Under the laws of Florida, a conveyance by a married woman of her separate statutory property, acknowledged before a notary, who had no power to take such acknowledgment, is void.—Evans v. Dickenson (C. C. A.) 284.

A married woman cannot ratify a mortgage of her separate property, void because of defective acknowledgment, except by a reacknowledgment or a second instrument expressly given for the purpose.—Evans v. Dickenson (C. C. A.) 284.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 1.

IMPEACHMENT.

Of settlement, see "Compromise and Settlement."

IMPORTS.

Duties, see "Customs Duties."

IMPRISONMENT.

Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Public improvements, see "Municipal Corporations," § 1.

IMPUTED NEGLIGENCE.

See "Negligence," § 3.

INCLOSURE.

Of public lands, see "Public Lands," § 1.

INCUMBRANCES.

On property devised or bequeathed, see "Wills," § 1.

INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.
Of testator, see "Wills," § 1.

INDEMNITY.

See "Principal and Surety."

INDIANS.

An Indian to whom land has been allotted in severalty becomes a citizen of the United States, with all the rights, privileges, and immunities of such, including the right to sue in any proper forum, federal or state; and the government is no longer under the duty of representing him in such suits.—In re Celestine (D. C.) 551.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

INFRINGEMENT.

Of patent, see "Patents," § 3.
Of trade-mark, see "Trade-Marks and Trade-Names," § 1.

INJUNCTION.

Restraining particular acts or proceedings.

Collection of taxes, see "Taxation," § 2.
Diversion of water, see "Waters and Water Courses," § 1.
Infringement of patent, see "Patents," § 3.
Unfair competition, see "Trade-Marks and Trade-Names," § 1.

§ 1. Subjects of protection and relief.
A stockholder of a corporation who has been induced by the representations or negligence of a vendor to buy his stock, in the belief that the corporation is not indebted to him, may sue to restrain the vendor from prosecuting an action of debt against the corporation.—Given v. Times-Republican Printing Co. (C. C. A.) 92.

§ 2. Preliminary and interlocutory injunctions.
Where it appears on an application for a preliminary injunction that doubtful questions

both of fact and law are involved in the case, the court will not enter upon the merits, but will grant the injunction, if necessary to preserve the status of the parties until the final hearing.—Cartersville Light & Power Co. v. City of Cartersville (C. C.) 699.

§ 3. Writ, order, or decree, service and enforcement.

Rev. St. § 719, was intended to limit the life of injunctions issued by district judges, acting as judges of the circuit court, only when issued in vacation.—United States v. Weber (C. C.) 950.

§ 4. Violation and punishment.

Action on the part of a union composed of mining employés in ordering persons employed by receivers of a particular mining corporation to quit work is in itself a direct violation of the order of court directing the receivers to operate the plant.—United States v. Weber (C. C.) 950.

Order of court requiring certain named parties to "desist from any interference with the employés of the said receivers" *held* to have been violated.—United States v. Weber (C. C.) 950.

IN PAIS.

Estoppel, see "Estoppel," § 1.

INSOLVENCY.

See "Bankruptcy."
Of corporation, see "Corporations," § 4.
Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

INSPECTION.

Duty of master to inspect appliances and places for work, see "Master and Servant," § 3.

INSTRUCTIONS.

In civil actions, see "Trial," § 3.

INSURANCE.

§ 1. The contract in general.

An accident insurance company *held* to have waived the right to insist on conditions of the application by issuing a policy and accepting the premium therefor with knowledge that a different state of facts existed from that stated in the formal application.—Ætna Life Ins. Co. v. Frierson (C. C. A.) 56.

A letter from a soliciting agent, sent in to an insurance company with an application for an accident policy, explaining a contemplated journey by the applicant, the risks of which he desired to have covered by the policy issued, *held* to constitute a part of the application.—Ætna Life Ins. Co. v. Frierson (C. C. A.) 56.

In the provision of Code Iowa 1897, § 1782, that no life insurance company shall make any contract of insurance other than is "plainly expressed in the policy issued thereon," the word "policy" must be construed to include the application, where that is in terms made a part of the policy.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

An insured under a life policy and all claiming under him are estopped from repudiating the application as a part of the contract, because the policy is not made payable to the beneficiary designated in the application, where it was accepted with knowledge of such fact and subsequently assigned to such beneficiary.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

Where the representations and agreements in an application for life insurance are in terms "offered to the company as a consideration of the contract," and the policy expressly refers to the application and makes it a part of the contract, the agreements found in the application, as well as those in the policy, properly enter into and form a part of the contract.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

§ 2. Premiums, dues, and assessments.

A life insurance policy issued by a mutual company construed, and *held* entitled to dividends under its terms notwithstanding the failure of the insured to pay all of the ten annual premiums required to secure to the beneficiary payment of the full amount insured.—Hogue v. Northwestern Mut. Life Ins. Co. (C. C.) 778.

§ 3. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

The fact that an insured, at the time of his death by accident, was on his way to Alaska for the purpose of prospecting for gold, did not constitute a change of occupation to that of a prospecting miner.—Ætna Life Ins. Co. v. Frierson (C. C. A.) 56.

§ 4. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

An insurance company may waive conditions which are for its own benefit by its conduct, notwithstanding a further provision of the policy or application that no waiver shall be effective, unless made in a prescribed way and by certain officers.—Ætna Life Ins. Co. v. Frierson (C. C. A.) 56.

Where a general agent of an accident insurance company is fully advised by a letter accompanying an application that the applicant contemplates a journey not mentioned in the formal application, the company will be presumed to have been advised of all the facts shown by the letter, and its subsequent action *held* a waiver of the right to invoke the provisions of the formal application to avoid the policy on account of such journey.—Ætna Life Ins. Co. v. Frierson (C. C. A.) 56.

A life insurance company is not required to return the premiums paid on a policy as a prerequisite to its right to contest its liability thereon, on the ground that the insured committed suicide, which was a risk it did not assume, where it admits the validity of the policy.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

§ 5. Risks and causes of loss.

An accident policy *held* not to have been avoided on the ground that the insured at the time of his death was engaged in adventures into wild and uninhabited or uncivilized regions.—Ætna Life Ins. Co. v. Frierson (C. C. A.) 56.

A covenant by an insured that he would not die by his own act, made as a part consideration of the contract, is binding on the beneficiary named in the policy, who accepts it subject to such condition.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

An agreement by an applicant for life insurance that he will not commit suicide, made as a part consideration of the contract, and the covenant of the insurer to pay the amount of the policy on the death of the insured, are dependent covenants.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

A policy of life insurance construed in connection with the application, and *held* to except the risk of death from suicide from those assumed by the insurer.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

A covenant in a contract of life insurance that the insured will not die by his own act while insane is not void, as one known by the parties to be impossible of performance, but is valid as creating an excepted risk.—Mutual Life Ins. Co. v. Kelly (C. C. A.) 268.

§ 6. Extent of loss and liability of insurer.

An insured *held* to have been a passenger on a steam vessel at the time of his death, within the terms of his policy.—Ætna Life Ins. Co. v. Frierson (C. C. A.) 56.

§ 7. Actions on policies.

An answer pleading the lapse of a life insurance policy for failure of the insured to pay an assessment *held* insufficient.—Murphy v. Mutual Reserve Fund Life Ass'n (C. C.) 404.

INTENT.

Fraudulent, see "Fraudulent Conveyances," § 1.

INTEREST.

Liability of United States officer for interest on funds abstracted without his knowledge, see "United States," § 1.

INTERNATIONAL LAW.

See "Aliens."

INTERPLEADER.

§ 1. Right to interpleader.

The fact that there was a premium due on a life policy, which the company deducted from the face of the policy according to the conditions thereof, on depositing the amount due in court, did not make the company an interested party, so as to deprive it of the right to file a pure bill of interpleader.—McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.) 910.

§ 2. Proceedings and relief.

Where a bill is good as in the nature of a bill of interpleader, and shows equities in favor of complainant entitling it to relief, a demurrer thereto should be overruled, even though it be not good as a pure bill of interpleader.—McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.) 910.

A cross bill in an interpleader suit is not necessary to sustain a decree for a successful defendant as against defendants who have defaulted.—McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.) 910.

Where one defendant in a bill of interpleader establishes his title, and the other makes default, the court will decree payment of the fund, less plaintiff's costs, to the former, and a perpetual injunction against the latter, and also that he pay the costs of the former, together with the costs paid plaintiff.—McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.) 910.

An unnecessary recital, in a decree on bill of interpleader, that "no demurrer, plea, disclaimer, or answer has been filed," except by the answering defendant, after the demurrer of another defendant had been overruled, if erroneous at all, was harmless error.—McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.) 910.

Defendants in an interpleader suit, who have defaulted, are not in a position to complain of a decree in favor of a successful defendant.—McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.) 910.

Where a life insurance company files a bill of interpleader against two adverse claimants under the policy, and deposits the amount due thereunder in court, it should be allowed a solicitor's fee, to be paid in the first instance by the prevailing defendant.—McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.) 910.

INTERROGATORIES.

To jury, see "Trial," § 4.

INTERSTATE COMMERCE.

Regulation, see "Carriers," § 1; "Commerce."

INVENTION.

See "Patents."

JUDGES.

See "Courts"; "Justices of the Peace."

JUDGMENT.

Review, see "Appeal and Error."

In particular civil actions or proceedings.

See "Injunction," § 3.
Decree in equity, see "Equity," § 3.

In criminal prosecutions.

See "Criminal Law," § 1.

§ 1. Conclusiveness of adjudication.

A judgment notwithstanding a verdict, taken subject to a point reserved, is as conclusive as an adjudication on the merits as one entered upon a directed verdict.—Casey v. Pennsylvania Asphalt Pav. Co. (C. C. A.) 189.

A decree in a suit under Ballinger's Ann. Codes & St. § 5500, to remove a cloud on title, *held* a bar to a subsequent suit between the same parties concerning the same subject-matter, regardless of whether the grounds relied on in the second suit were presented in the former.—Union Savings & Loan Ass'n v. Byrne (C. C. A.) 831.

Where plaintiff, a foreign corporation, was defeated in an action on a lien bond because it failed to produce the statutory evidence of its right to sue, such judgment is conclusive in another suit on the bond, though plaintiff then produced evidence that it had the right to sue when the former action was tried.—Glencove Granite Co. v. City Trust, Safe Deposit & Surety Co. (C. C.) 978.

Decree canceling mortgage executed to Illinois building association by one of its stockholders, obtained in a Nebraska state court in a suit against the association and its receiver, *held* not binding.—Barry v. Friel (C. C.) 989.

JURISDICTION.

Amount in controversy, see "Removal of Causes," § 2.

Special jurisdictions.

See "Admiralty," § 1; "Bankruptcy," §§ 2, 7.
Appellate jurisdiction, see "Criminal Law," § 2.
Particular courts, see "Courts."

JURY.

Instructions in civil actions, see "Trial," § 3.
Questions for jury in civil actions, see "Trial," § 2.
Verdict in civil actions, see "Trial," § 4.

JUSTICES OF THE PEACE.

§ 1. Review of proceedings.

Under Act Cong. June 28, 1898 (30 Stat. 499, c. 517, § 14), there is a right of appeal from decision of a mayor in the Indian Territory.—Dennee v. Cromer (C. C. A.) 623.

KNOWLEDGE.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.
Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 2.

LACHES.

In prosecution of patent infringers, see "Patents," § 3.

LANDLORD AND TENANT.

§ 1. Terms for years.

Resumption of possession by the lessor of the thing leased operates as a surrender of the lease, and puts an end to the lessee's liability for future installments of rent, unless otherwise plainly provided.—Lamson Consol. Store Service Co. v. Bowland (C. C. A.) 639.

Lease of "store service apparatus" construed, and resumption of possession by the lessor *held*, under the circumstances, to have operated as a surrender of the lease, and to have released lessee from liability for future rent.—Lamson Consol. Store Service Co. v. Bowland (C. C. A.) 639.

§ 2. Re-entry and recovery of possession by landlord.

Default in rent *held* not to entitle lessor to retake possession of thing leased, where no demand was made on the day it was due.—Lamson Consol. Store Service Co. v. Bowland (C. C. A.) 639.

LANDS.

See "Public Lands."

LARCENY.

See "Embezzlement."

LEASES.

See "Landlord and Tenant."
Of street railroads, see "Street Railroads," § 1.

LEGACIES.

See "Wills."

LETTERS PATENT.

For inventions, see "Patents."
For public lands, see "Mines and Minerals," § 1.

LIBEL.

In admiralty, see "Admiralty," § 2.

LIBEL AND SLANDER.

§ 1. Privileged communications, and malice therein.

A mercantile agency, reporting party as having made an assignment for creditors, when the

report sent them was that he had made an assignment to secure the assignee for indorsing a note, was not liable if mistake was made in the exercise of due care.—Douglass v. Daisley (C. C. A.) 628.

Communication of mercantile agency *held* not privileged as matter of law because of variance from information received.—Douglass v. Daisley (C. C. A.) 628.

§ 2. Actions.

Plaintiff in action for libel *held* entitled to recover for loss of business and credit, where he averred and proved a general diminution thereof, without showing particular instances.—Douglass v. Daisley (C. C. A.) 628.

Question whether mistake made by mercantile agency in reporting plaintiff's standing was due to carelessness, so as to destroy the privilege of the communication, *held* one of fact for the jury.—Douglass v. Daisley (C. C. A.) 628.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 5.
On vessel for loss of baggage, see "Shipping," § 4.

Particular classes of liens.

See "Maritime Liens"; "Railroads," § 1.
For towage, see "Towage."

LIFE INSURANCE.

See "Insurance," §§ 3, 5.

LIMITATION OF ACTIONS.

Particular actions or proceedings.

Against corporate officers, see "Corporations," § 2.
To recover against heir or devisee for debts of estate, see "Wills," § 1.
To subject property conveyed by debtor to secure surety, see "Principal and Surety," § 3.

§ 1. Statutes of limitation.

Where a suit in equity is based on a legal demand, the court is bound by the statute of limitation which would govern an action at law thereon.—Hale v. Coffin (C. C.) 567.

The provision of Rev. St. Mo. 1899, § 4290, extending the time for bringing an action when the same has been prevented by some improper act of defendant, has no application to an action on a statute to recover a penalty, which is governed by section 2425.—Ratican v. Terminal R. Ass'n of St. Louis (C. C.) 666; Kinnavey v. Same, Id.

The interstate commerce act is a penal statute, and an action to recover damages for a violation of section 2, prohibiting discrimination in rates, is one to recover money in the nature of a penalty, and, when brought in Missouri, is governed as to limitation by Rev. St. Mo. 1899, § 2425.—Ratican v. Terminal R. Ass'n of St. Louis (C. C.) 666; Kinnavey v. Same, Id.

§ 2. Computation of period of limitation.

Mere ignorance of the facts cannot take a case out of the statute of limitations, but diligence to discover the facts must also be shown.—Darnold v. Simpson (C. C.) 368.

§ 3. Acknowledgment, new promise, and part payment.

The action of county commissioners in adopting a resolution recognizing the obligation of the county on certain warrants, and directing the funding of the debt into bonds, is an acknowledgment of the liability on the warrant sufficient to stop the running of the statute of limitations.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

Limitations do not begin to run against a suit on warrants, for which bonds are issued by the county, until denial by the county of its obligation on such bonds.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

§ 4. Pleading, evidence, trial, and review.

Allegations in a petition *held* insufficient to avoid the running of limitation under the Missouri statute.—Ratican v. Terminal R. Ass'n of St. Louis (C. C.) 666; Kinnavey v. Same, Id.

LIMITATION OF LIABILITY.

Of owner of vessel, see "Shipping," § 6.

LIQUIDATED DAMAGES.

See "Damages," § 2.

LIS PENDENS.

Pendency of other action ground for abatement, see "Abatement and Revival," § 1.

LIVE STOCK.

Carriage of, see "Carriers," § 2.

LOAN COMPANIES.

See "Building and Loan Associations."

LOCATION.

Of mining claim, see "Mines and Minerals," § 1.

MALICE.

See "Malicious Prosecution," § 3.

MALICIOUS PROSECUTION.

§ 1. Nature and commencement of prosecution.

The fact that the statute under which accused was prosecuted did not afford an authority for his punishment would not alone render the complaining party liable for malicious prosecution.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

Action will lie to recover for injuries to reputation and business caused by malicious prosecution of a civil action without probable cause, in which a complaint was filed containing false and defamatory matter.—Wade v. National Bank of Commerce (C. C.) 377.

§ 2. Want of probable cause.

"Probable cause," as an element in malicious prosecution, defined.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

In action for malicious prosecution, magistrate's judgment, finding that there was probable cause, *held* prima facie evidence of such fact.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

If defendant, sued for malicious prosecution, acted under advice of prosecuting attorney, he would not be liable.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

In action for malicious prosecution, fact that grand jury ignored bill against plaintiff was prima facie evidence of want of probable cause.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

§ 3. Malice.

If defendant, sued for malicious prosecution, had probable cause, the fact that he acted with malice would not make him liable.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

Malice, in malicious prosecution, may be inferred from the absence of probable cause.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

§ 4. Actions.

In an action for malicious prosecution, plaintiff has the burden of showing both that defendant did not have probable cause and that it acted with malice.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

Measure of damages in action for malicious prosecution defined.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

MARITIME LIENS.

§ 1. Nature, grounds, and subject-matter in general.

Libelant, repairing scows in a foreign port, *held* entitled to a lien thereon, where the captain directing the repairs was without funds.—The No. 6 (C. C. A.) 115; The No. 7, Id.

§ 2. Creation, operation, and effect.

A joint lien cannot be enforced against a dredge and a number of scows used in connection therewith for towage services rendered to all the vessels, although they were rendered under a single contract.—The Newport (C. C. A.) 713.

Vessels which went from Boston to Scituate, where they were employed for two weeks, left the port of Boston, within the meaning of Pub. St. Mass. c. 192, § 14 et seq., giving a lien for supplies where a statement is filed within four days after the vessel departs from the port where the supplies were furnished.—The William E. Cleary (D. C.) 756; The Viva, Id.

MARRIAGE.

See "Husband and Wife."

MARRIED WOMEN.

See "Husband and Wife."

MARSHALING ASSETS AND SECURITIES.

A demand by the holder of an inferior lien on the holder of a superior lien thereon that he exhaust his lien on the other property covered thereby, given before his lien on such property is relinquished, is necessary to the enforcement of the right of the holder of the inferior lien.—First Nat. Bank v. Roder (C. C. A.) 451.

One who has a lien on a single fund or property may compel one who has a superior lien on the same fund or property, and on another fund or property, to first resort to the fund or property which is not incumbered for the satisfaction of his claim.—First Nat. Bank v. Roder (C. C. A.) 451.

MARSHALS.

Of United States, see "United States Marshals."

MASTER AND SERVANT.

See "Slaves."
Trade unions, see "Trade Unions."

§ 1. The relation.

The ordinary contracts between a depot company corporation and several railroad companies for the use of its depot and yards do not establish a partnership between the companies, nor make the depot corporation the servant of the railroad companies, so that they become liable for the negligence of its servants.—Brady v. Chicago & G. W. Ry. Co. (C. C. A.) 100.

§ 2. Master's liability for injuries to servant—Nature and extent in general.

A railway company, running its trains over another road, is not liable to its servant for the negligence of the employé of the licensing company in the discharge of their duties as servants.—Brady v. Chicago & G. W. Ry. Co. (C. C. A.) 100.

The duty of so operating a safely constructed railroad subject to the rules of the master as to keep it reasonably safe for those employed upon it is not a positive duty of the master, but a primary duty of the servant.—Brady v. Chicago & G. W. Ry. Co. (C. C. A.) 100.

A railway company, running its trains over another road by permission, is liable to its employés for the negligence of the servant of the licensing corporation in the discharge of the absolute duties of the master.—Brady v. Chicago & G. W. Ry. Co. (C. C. A.) 100.

Where the night was dark and foggy, but by the use of reasonable care it was possible to run a train without accident, the fact that a collision occurred because of the fog, whereby an employé was injured, does not show that such injury was caused by the act of God.—Southern Pac. Co. v. Schoer (C. C. A.) 466.

The states have the right to regulate the relations between employers and employés within their borders, and to fix the liability of the former for the acts and negligence of the latter.—Southern Pac. Co. v. Schoer (C. C. A.) 466.

One giving voluntary assistance to a servant without the knowledge or authority of the master *held* not to thereby become a servant, so as to charge the master with liability for his death through a defect in the machinery at the place where he was working.—Langan v. Tyler (C. C. A.) 716.

One who renders temporary service in assisting a servant in his work at the latter's request, without expectation of pay, and where the master had no knowledge of the performance of the services and the servant no authority to employ help, does not thereby become a servant of the master, so as to charge the latter with the active duty of providing him with a safe place in which to work.—Langan v. Tyler (C. C. A.) 716.

§ 3. —— Tools, machinery, appliances, and places for work.

Evidence considered, and *held*, that a mine owner was negligent in failing to supply adequate means of escape to an employé who was killed by a blast at the bottom of a shaft.—Alaska United Gold Min. Co. v. Muset (C. C. A.) 66.

A telegraph company cannot avoid responsibility for the failure to perform the positive duty of making proper inspection of poles upon which its linemen are required to work by delegating such duty to another, however competent.—Western Union Tel. Co. v. Tracy (C. C. A.) 282.

Instruction as to the duty of inspection approved in an action by a lineman against a telegraph company to recover for an injury resulting from the breaking of a pole on which he was working.—Western Union Tel. Co. v. Tracy (C. C. A.) 282.

Accidents may be reasonably anticipated as the natural and probable consequence of failure to provide brakes to control the movements of the engines.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

Failure to provide an ordinary engine with brakes, in the absence of evidence excusing it, is as a matter of law evidence of the want of reasonable care to provide a reasonably safe engine.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

The limit of the duty of a master is to exercise ordinary and reasonable care to provide reasonably safe appliances and working places, and to keep them in a reasonably safe condition.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

§ 4. —— Fellow servants.

Negligent acts of fellow servants cannot be relied on as a defense to an action by a servant for a personal injury, where it is clearly shown that such acts were done under the direct orders of the master.—Swensen v. Bender (C. C. A.) 1.

A mine foreman, who superintends and controls the entire conduct and operations of the mine, hiring and discharging all employés, and giving all directions to them, *held* to be a vice principal, for whose acts and negligence the mine owner is responsible.—Alaska United Gold Min. Co. v. Muset (C. C. A.) 66.

Switchmen of a depot company *held* not the fellow servant of the employés of the railway company using the depot, nor were they the servants of those companies, within the meaning of the fellow servant statute of Minnesota (Gen. St. 1894, § 2701).—Brady v. Chicago & G. W. Ry. Co. (C. C. A.) 100.

Under Rev. St. Utah, §§ 1342, 1343, making all servants of the master doing business in the state, who are intrusted by him with authority over the other servants, vice principals, charging the master with liability for their negligence, he is liable, whether or not it was committed in the discharge of the positive duties of the master, while exercising authority to command or superintend others or not.—Southern Pac. Co. v. Schoer (C. C. A.) 466.

Under the law of Mexico the doctrine of the common law as to the liability of employers to an employé for the negligence of a fellow servant is not in force, and a railroad company is liable for all injuries occurring through the negligence of its employés, whether the person injured be an employé or a stranger.—Mexican Cent. Ry. Co. v. Sprague (C. C. A.) 544.

A foreman of a gang of men engaged in repairing the tracks of a railroad company is within the protection of Acts Tex. 1897, p. 14, § 1, and the fact that by section 2 he is made a vice principal does not preclude his recovery for injuries resulting from the negligence of the men under him.—Texas & P. Ry. Co. v. Smith (C. C. A.) 728.

A hand car is within the meaning of Acts Tex. 1897, p. 14, § 1, making railroads liable for injuries sustained by employés engaged in operating "cars, locomotives, or trains," and providing that negligence of fellow servants should not be a defense.—Texas & P. Ry. Co. v. Smith (C. C. A.) 728.

Under Sand. & H. Dig. Ark. § 6248, a railway fireman, who was injured by a collision of trains caused by the failure of a telegraph operator to deliver orders received by him from the train dispatcher, was not a fellow servant with such telegraph operator.—St. Louis & S. F. R. Co. v. Furry (C. C. A.) 898.

Under the employers' liability act of Indiana a railroad engineer, injured without negligence on his part while in charge of his engine at a time and place when and where he had a right to be with his train, through the negligence of those in charge of another engine, must be presumed to have been at the time

"obeying or conforming to the order of some superior * * * having authority to direct," and the employer is liable for the injury.—Cincinnati, H. & D. R. Co. v. Thiebaud (C. C. A.) 918.

§ 5. —— Risks assumed by servant.

A servant does not assume the risk of injury from the negligence of the master in failing to exercise ordinary care to make the place where the servant works reasonably safe, considering the nature of the employment.—Swensen v. Bender (C. C. A.) 1.

Under the laws of the republic of Mexico an employé does not assume the risk of injury through the negligence of a co-employé; but the company is liable for such an injury, in the absence of contributory negligence.—Mexican Cent. Ry. Co. v. Knox (C. C. A.) 73.

That a servant assumed the risk of running the engine backward in the night constituted no defense to an action against the master for negligence in failing to supply the engine with brakes.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

A servant is chargeable with the knowledge and assumption of the risk of all such defects which are known to him, or which could have been known by the exercise of ordinary care by a person of reasonable prudence and diligence.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

§ 6. —— Contributory negligence of servant.

A servant, injured while working in a tunnel, *held* under the evidence not chargeable with contributory negligence as a matter of law.—Swensen v. Bender (C. C. A.) 1.

In an action for death of a brakeman, evidence *held* to show that he was guilty of contributory negligence, precluding a recovery.—Dawson v. Chicago, R. I. & P. Ry. Co. (C. C. A.) 870.

§ 7. —— Actions.

Evidence considered, and *held*, that the question of contributory negligence of a miner, who was killed by a blast at the bottom of a shaft, where the only means of escape was cut off, was for the jury.—Alaska United Gold Min. Co. v. Muset (C. C. A.) 66.

In an action by a servant against the master to recover for an injury, where the negligence of the master is established, evidence of contributory negligence must be undisputed and conclusive to warrant the court in directing a verdict for defendant.—Texas & P. Ry. Co. v. Parks (C. C. A.) 161.

An instruction, defining the inspection required to be made by a railroad company to exonerate it from liability for an injury to a brakeman resulting from a defective handhold on a freight car, considered and approved.—Texas & P. Ry. Co. v. Allen (C. C. A.) 177.

In an action by a brakeman to recover for injuries from falling from a car, caused by the breaking of a running board, *held* error to direct a verdict for plaintiff.—Mexican Cent. Ry Co. v. Townsend (C. C. A.) 737.

In an action for injuries to an engineer caused by a defective engine, the refusal of an instruction relating to the engineer's duty to inspect the engine, on the ground that it practically withdrew the case from the jury, *held* erroneous.—Mexican Cent. Ry. Co. v. Henderson (C. C. A.) 892.

In an action against a railroad company for negligence resulting in the death of an employé, evidence considered, and *held*, that defendant's motion for judgment non obstante veredicto should be denied.—Jones v. Pennsylvania R. Co. (C. C.) 984.

§ 8. Liabilities for injuries to third persons.

The power of an alleged master to command the alleged servant is a test of the liability of the former for the acts of the latter under the maxim, "respondeat superior."—Brady v. Chicago & G. W. Ry. Co. (C. C. A.) 100.

MATERIALITY

Of alteration of written instrument, see "Alteration of Instruments."

MEASURE OF DAMAGES.

See "Damages," § 3.

MEETINGS.

Of stockholders, see "Corporations," § 1.

MERCANTILE AGENCIES.

Liability for libel, see "Libel and Slander."

MINES AND MINERALS.

§ 1. Public mineral lands.

Where a ledge or lode is of such width that its outcroppings extend beyond the side line of a claim located thereon, another may be located thereon adjoining, which will carry all surface rights within its boundaries and all underground extralateral rights, subject to those of the senior claim.—Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C. A.) 417.

Issuance of a patent after due notice for a mining claim conclusively determines its priority, as to the surface and the incident extralateral rights, over claims whose surface lines conflict therewith.—Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (C. C. A.) 420.

The fact that defendant had contracted to purchase a mining claim from plaintiff, conditioned upon the obtaining of a patent therefor, did not deprive him of the right to contest the allowance of such patent as to a portion of the claim which overlapped a prior claim owned by himself.—Griffin v. American Gold Min. Co. (C. C. A.) 887.

§ 2. Title, conveyances, and contracts.
A deed conveying coal in place, to be mined and removed by a date fixed, construed, and *held* to convey title only to so much as the grantee should mine and remove prior to such date.—Butler v. McGorrisk (C. C. A.) 300.

MODIFICATION.

Of contract, see "Contracts," § 3.

MORTGAGES.

Removal of trustee in mortgage, see "Trusts," § 1.

Mortgages of particular species of property.
Personal property, see "Chattel Mortgages."
Railroads, see "Railroads," § 1.

§ 1. Foreclosure by action.
Mortgagee *held* not entitled to have rentals collected by receiver of the premises applied on his deficiency judgment.—Southern Building & Loan Ass'n v. Carey (C. C. A.) 288.

Expenses in caring for and selling property, claimed both by a receiver in a foreclosure suit and attaching creditors, and sold under stipulation, apportioned.—American Surety Co. v. Worcester Cycle Mfg. Co. (C. C.) 658.

An order appointing a receiver in a suit to foreclose a mortgage, although broad in its terms and purporting to extend to all the property of the mortgagor which was claimed to be covered by the mortgage should not be construed to cover property not in fact included in the mortgage, so as to affect rights which were paramount to the mortgage.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C.) 659.

The provision of the Connecticut statute that attachments against a corporation shall be dissolved by the appointment of a receiver within 60 days are intended to apply only to general receivers, and not to a case in which a receiver is appointed for mortgaged property in a foreclosure suit.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C.) 659.

MUNICIPAL CORPORATIONS.

See "Counties."
Street railroads, see "Street Railroads."
Water supply, see "Waters and Water Courses," § 2.

§ 1. Public improvements.
A city cannot escape liability for work done in substantial conformity to the contract, because its officers have refused to certify and approve the same as required by the contract, before payment, where such refusal was arbitrary or unreasonable.—City of Elizabeth v. Fitzgerald (C. C. A.) 547.

Questions *held* properly submitted to the jury.—City of Elizabeth v. Fitzgerald (C. C. A.) 547.

A city of Pennsylvania *held* to have no power to contract for the construction of a portion of a contemplated public improvement without the council's having first obtained from the proper department an estimate of the cost of the entire improvement.—Edgar v. City of Pittsburg (C. C.) 586.

§ 2. Fiscal management, public debt, securities, and taxation.
Where a city has issued bonds to an amount in excess of its constitutional authority, all of which were created by the same ordinance and sold at the same time, each bond is valid to the extent of its proportionate share of the debt lawfully contracted.—City of Columbus v. Woonsocket Inst. of Savings (C. C. A.) 162.

A bond issue made by a city in Texas *held* valid only to the extent that a tax levy to pay the interest on the same and create a sinking fund was made at the same time, as required by the state constitution.—City of Columbus v. Woonsocket Inst. of Savings (C. C. A.) 162.

A city *held*, under McClain's Code Iowa, § 641, to have power to contract for water in excess of the special tax of five mills provided by section 643 for paying therefor.—City of Ft. Madison v. Ft. Madison Water Co. (C. C. A.) 292.

In a statute providing for the issue of municipal bonds, the word "issue" is confined to the delivery of bonds, and does not embrace the preliminary acts of signing and dating.—Perkins County v. Graff (C. C. A.) 441.

In an election to determine whether or not bonds shall be issued for a municipal improvement, an offer in the proposition to employ bona fide residents on the work is not an offer of an unlawful inducement, invalidating the bonds.—Perkins County v. Graff (C. C. A.) 441.

NAMES.

See "Trade-Marks and Trade-Names."

NAVIGABLE WATERS.

See "Waters and Water Courses"; "Wharves."

NAVY.

See "Army and Navy."

NEGLIGENCE.

By particular classes of parties.

See "Carriers," § 3.
Employers, see "Master and Servant," §§ 2–7.
Railroad companies, see "Railroads," § 3.

Condition or use of particular species of property, works, or machinery.

See "Railroads," § 3.

Contributory negligence.

Of passenger, see "Carriers," § 3.
Of person killed while unloading ship, see "Shipping," § 2.
Of servant, see "Master and Servant," § 6.

§ 1. Acts or omissions constituting negligence.

There is no such legal degree of negligence as "gross" negligence, and it is not error to refuse an instruction that a defendant is guilty of gross negligence, as distinguished from ordinary negligence and willful negligence.—Purple v. Union Pac. R. Co. (C. C. A.) 123.

Mining company, which erects dwelling houses on tract of land owned by it, extends implied invitation to the public to visit the tract, and must use ordinary care to keep the premises in safe condition.—Foster v. Portland Gold Min. Co. (C. C. A.) 613.

§ 2. Proximate cause of injury.

One is liable for an injury caused by the concurrent negligence of himself and a third party to the same extent as if it was caused by his own negligence.—Choctaw, O. & G. R. Co. v. Holloway (C. C. A.) 458.

§ 3. Contributory negligence.

Negligence of the father, as well as of the mother, in not discovering a train, is imputable to a child, held in the arms of his mother, who was sitting by the side of the father, who was driving, as the father is not acting as a driver merely.—Delaware, L. & W. R. Co. v. Devore (C. C. A.) 155.

§ 4. Actions.

Complaint in action for injuries received while on private property need not aver in terms that defendant invited plaintiff onto the premises, but is sufficient if it avers the facts disclosing the invitation.—Foster v. Portland Gold Min. Co. (C. C. A.) 613.

Complaint in action for injuries received on private property need not aver that plaintiff went onto the property for a lawful purpose.—Foster v. Portland Gold Min. Co. (C. C. A.) 613.

Where, in an action to recover for personal injury, all the material facts touching the negligence of the person injured are undisputed, and admit of no rational inference but that of his negligence, the question of contributory negligence becomes matter of law only, and the court should direct a verdict.—Hemingway v. Illinois Cent. R. Co. (C. C. A.) 843.

Where, in an action to recover for personal injury, the defendant alleges contributory negligence, it is the rule of the United States courts, irrespective of the decisions of the state courts, that the burden is on defendant to prove that the injured person was negligent, and that such negligence contributed to the injury.—Hemingway v. Illinois Cent. R. Co. (C. C. A.) 843.

Where, in an action to recover for personal injury, the negligence of defendant is shown, and there is conflict in the material evidence as to whether the person injured observed ordinary care, or, where there is no such conflict, the facts are such that reasonable men might fairly draw different conclusions from them, the question of contributory negligence is for the jury.—Hemingway v. Illinois Cent. R. Co. (C. C. A.) 843.

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes"; "Bonds," § 1.

NOTARIES.

Extraterritorial authority, see "Acknowledgment," § 1.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Of appeal, see "Appeal and Error," § 3.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 1.

OFFER.

Proposals for contract, see "Contracts," § 1.

OFFICERS.

Embezzlement, see "Embezzlement."

Particular classes of officers.

See "Clerks of Courts"; "Justices of the Peace"; "Receivers"; "United States Commissioners"; "United States Marshals."

Corporate officers, see "Corporations," §§ 2, 3.
Customs officers, see "Customs Duties," § 2.
United States officers, see "United States," § 1.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 6.

ORDER OF PROOF.

At trial, see "Trial," § 1.

ORDERS.

Review of appealable orders, see "Appeal and Error."

PAROL EVIDENCE.

In civil actions, see "Evidence," § 5.

PARTIES.

Character ground of jurisdiction, see "Courts," § 1.
Interpleading, see "Interpleader."
Persons affected by estoppel, see "Estoppel," § 1.

In particular actions or proceedings.

See "Habeas Corpus," § 2.
For causing death, see "Death," § 1.
On appeal or writ of error, see "Appeal and Error," § 2.

To particular classes of conveyances, contracts, or transactions.

See "Contracts," § 2.

PARTITION.

§ 1. Actions for partition.

A purchaser at partition sale *held* not entitled to recover his deposit on the ground that the title to the land sold was unmarketable.—Boyle v. Boyle (C. C.) 517.

PARTNERSHIP.

§ 1. Dissolution, settlement, and accounting.

An ineffectual effort by one partner to state and assign an account against the other partner does not defeat the right of the former to maintain a suit against the latter for an accounting.—Mellor v. Smither (C. C. A.) 116.

A supplemental bill *held* not to state a new or different cause of action, but to supply pertinent facts occurring after the filing of the original bill.—Mellor v. Smither (C. C. A.) 116.

PART PAYMENT.

Within statute of frauds, see "Frauds, Statute of," § 1.

PASSENGERS.

See "Carriers," § 3.

PATENTS.

For public lands, see "Mines and Minerals," § 1.

§ 1. Patentability.

The fundamental question in determining the validity of a design patent is whether the inventive faculty has been exercised to produce something which is original and pleasing to the eye.—Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co. (C. C.) 362.

§ 2. Title, conveyances, and contracts.

A patentee, and likewise a corporation which he organizes and controls, is estopped to assert the invalidity of the patent, as against his assignee thereof.—Marvel Co. v. Pearl (C. C.) 946.

§ 3. Infringement.

A temporary injunction should not be granted on ex parte affidavits in a suit for infringement of a patent, where the question of infringement is grave and it is not clear that defendant is guilty.—Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 939; Portland Gold Min. Co. v. Same, Id.

An order granting a temporary injunction in an action for infringement will not be reversed, where the court below required complainant to give bond and a final determination of the question of infringement cannot be had until final hearing.—Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 939; Portland Gold Min. Co. v. Same, Id.

Mere delay by the owner of the patent will not deprive him of his right to a preliminary injunction, or any other relief to which he would be entitled.—Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 939; Portland Gold Min. Co. v. Same, Id.

Delay in prosecuting other infringers while the validity of the patent is in active litigation does not constitute laches.—Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 939; Portland Gold Min. Co. v. Same, Id.

A continuing infringement on complainant's monopoly is a ground for a preliminary injunction.—Stearns-Roger Mfg. Co. v. Brown (C. C. A.) 939; Portland Gold Min. Co. v. Same, Id.

In design patents, the test of identity on questions of anticipation and infringement is the eye of the ordinary observer, and in determining such questions the court may avail itself of such common knowledge as is possessed by the general public.—Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co. (C. C.) 362.

A court will not entertain a motion to modify an interlocutory decree, which determined the validity of a patent and directed an accounting for infringement, for the purpose of advising the defendant whether a particular article is within the terms of the decree.—Thomas & Sons Co. v. Electric Porcelain Co. (C. C.) 407.

Where it appears that, in infringing complainant's patent, defendant acted with full knowledge, and in wanton and willful disregard of complainant's rights, every question of doubt on an accounting for damages should be resolved against the infringer.—Regina Music Box Co. v. F. G. Otto & Sons (C. C.) 505.

Rule of damages for sale of infringing instruments applied.—Regina Music Box Co. v. F. G. Otto & Sons (C. C.) 505.

A plea to a bill for infringement of patents for mail-marking and stamp-canceling machines sustained, on the ground of want of jurisdiction; the plea showing that defendant was a postmaster, and that the alleged infringing machines were furnished by the post office department of the United States, and used solely in its service and for its benefit.—International Postal Supply Co. v. Bruce (C. C.) 509.

The test of infringement of a design patent is the similarity apparent to an ordinary observer of intelligence, and infringement is not avoided by minute differences, which may be discovered by expert examiners, but which do not affect the general contour of the article.—Hutter v. Broome (C. C.) 655.

There being dispute as to the equities, preliminary injunction in suit for infringement of patent will not issue; defendants giving a bond to respond for profits or damages ultimately found, and filing statements of sales.—Marvel Co. v. Pearl (C. C.) 946.

§ 4. Decisions on the validity, construction, and infringement of particular patents.

The Driggs & Shroeder patent, No. 360,798, for breech-loading ordnance, claim 1, *held* not anticipated, valid, and infringed. — American Ordnance Co. v. Driggs-Seabury Gun & Ammunition Co. (C. C. A.) 936.

The Keller patent, No. 403,939, for a combined cabinet and cutter's size tickets, *held* valid and infringed.—Keller v. Piesen (C. C.) 608.

The Hall patent, No. 423,558, claim 1, for a process for making imitation press-copied letters, is void for lack of invention.—Hall v. Ahrend (C. C. A.) 747.

The Knowles & Tatham patent, No. 464,029, for a device for grinding the flats used in carding engines, construed, and *held* not infringed by machines made in accordance with the Penney patents, Nos. 544,441 and 620,353.—Lowell Mach. Shop v. Saco & Pettee Mach. Shops (C. C.) 497; Same v. Pettee Iron Works, Id.

The Hutter patent, No. 491.113, for a bottle stopper, construed, and *held* not anticipated and to disclose patentable invention; also *held* infringed.—Hutter v. Broome (C. C.) 655.

A plea alleging prior invention of the device of the Stikeman patent, No. 541,395, for improvements in library shelving, *held* not sustained by the proof.—Westervelt v. Library Bureau (C. C.) 487.

The Davidsen patent, No. 548,115, for improvements in tubular ball mills for pulverization of various materials, is void for anticipation by the British patent to Redfern.—F. L. Smidth & Co. v. Bonneville Cement Co. (C. C. A.) 262.

The Edison patent, No. 589,168, for a kinetographic camera, claims 1, 2, and 3, *held* void, as broader than the actual intention of the patentee which is not described. Claim 5 also *held* void for lack of invention. — Edison v. American Mutoscope (C. C. A.) 926.

The Parramore patent, No. 629,391, for a new stocking supporter, *held* infringed.—Parramore v. Taylor (C. C. A.) 97.

The Pynchon patent, No. 662,656, for a trousers hanger, claims 1 and 5, construed, and *held* not infringed.—Pynchon v. De Blois (C. C.) 653.

The Hutter design patent, No. 25,435, for a design for a bottle stopper, *held* valid and infringed.—Hutter v. Broome (C. C.) 655.

The Scranton design patent, No. 33,142, for a design for a bell, is void for lack of patentable novelty; also *held* not infringed.—Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co. (C. C.) 362.

PATENTS ENUMERATED.

ENGLISH.

1874.

623. Grinding flats of Carding engine. 499

1878.

1,601. Swing stopper 656

1885.

3,615. Breech-block mechanism 936

1887.

2,642. Grinding flats of Carding engines 499
16,157. Grinding flats of Carding engines 499

UNITED STATES.

DESIGN.

25,435. Bottle stopper.....655, 657
33,142. Bell 362

ORIGINAL.

132,740. Breech loading ordnance..... 936
224,187. Grinding flats of Carding engines 504
242,225. Rein holder 653
284,523. Stopper fastener 656
289,983. Copying press 749
343,505. Copying press 749
360,798. Breech loading ordnance....936, 937
370,502. Grinding flats of Carding engines 505
399,552. Exhibitor for boot and shoe laces 653
403,939. Cabinet and cutter's size ticket.. 608
423,558. Method of producing imitation press-copied letters.....747, 748
464,029. Device for grinding flats of Carding engines 497, 498
491,113. Bottle stopper 655
493,426. Kinetographic camera 927
541,395. Library shelving 487, 488
544,441. Carding engine 497, 500
548,115. Tubular ball mills 262
589,168. Kinetographic camera 926, 927
613,195. Breech loading ordnance..... 937
617,130. Trousers hanger 653
620,353. Carding engine 497, 500
629,391. Stocking supporter 97
662,656. Trousers hanger 653

PAYMENT.

See "Compromise and Settlement."

Part payment within statute of frauds, see "Frauds, Statute of," § 1.

§ 1. Pleading, evidence, trial, and review.

In action by physician for services, certain instruction as to effect of receipt given by him *held* properly refused, as misleading, if not erroneous.—Corbus v. Leonhardt (C. C. A.) 10.

PENALTIES.

For violation of shipping regulations, see "Shipping," § 3.

Under contracts, see "Damages," § 2.

PEONAGE.

See "Slaves."

PERSONAL INJURIES.

See "Negligence."

Measure of damages, see "Damages," § 3.

To employé, see "Master and Servant," §§ 2–7.

To passenger, see "Carriers," § 3.

To person on or near railroad tracks, see "Railroads," § 3.
To persons on railroad trains, see "Railroads," § 3.
To seaman, see "Seamen."
To traveler on highway crossing railroad, see "Railroads," § 3.
To trespasser, see "Railroads," § 3.
To workman on vessels, see "Shipping," § 2.

PETITION.

In admiralty, see "Admiralty," § 2.

PHYSICIANS AND SURGEONS.

In action by physician for services rendered decedent, defense that services were rendered by him under contract with hospital *held* not sustained by the evidence.—Corbus v. Leonhardt (C. C. A.) 10.

PIERS.

See "Wharves."

PLEA.

In civil actions, see "Pleading," § 1.

PLEADING.

Allegations as to particular facts, acts, or transactions.

Statute of limitations, see "Limitation of Actions," § 4.

In actions by or against particular classes of parties.

Assignees, see "Assignments," § 2.

In particular actions or proceedings.

See "Admiralty," § 2; "Equity," § 2; "Interpleader," § 2; "Negligence," § 4.
For breach of contract, see "Contracts," § 5.
For dissolution of partnership, see "Partnership," § 1.
On life insurance policy, see "Insurance," § 7.

§ 1. Plea or answer, cross complaint, and affidavit of defense.

Answer in replevin *held* insufficient as a plea in abatement for nonjoinder of proper parties.—Swift v. Bank of Washington (C. C. A.) 643.

§ 2. Signature and verification.

Under Gen. St. Kan. 1897, c. 95, § 108, a verified account must be taken as true against a denial and a set-off pleaded in an unverified answer.—Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co. (C. C. A.) 77.

POLICY.

Of insurance, see "Insurance."

POSSESSION.

Of demised premises, see "Landlord and Tenant," § 2.

POWERS.

Of attorney, see "Principal and Agent."

PRACTICE.

Adoption by United States courts of practice of state courts, see "Courts," § 1.
Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Habeas Corpus," § 2; "Interpleader."

Particular proceedings in actions.

See "Abatement and Revival"; "Evidence"; "Judgment"; "Limitation of Actions"; "Pleading"; "Removal of Causes"; "Trial."
Verdict, see "Trial," § 4.

Particular remedies in or incident to actions.

See "Attachment"; "Injunction"; "Receivers."

Procedure in criminal prosecutions.

See "Criminal Law."

Procedure in exercise of special jurisdictions.

In admiralty, see "Admiralty"; "Collision," § 7; "Shipping," § 6.
In bankruptcy, see "Bankruptcy," § 2.
In equity, see "Equity."

Procedure on review.

See "Appeal and Error"; "Justices of the Peace," § 1.

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 5.

PRELIMINARY INJUNCTION.

See "Injunction," § 2.

PRESUMPTIONS.

As to fault causing collision, see "Collision," § 2.

PRINCIPAL AND AGENT.

Corporate agents, see "Corporations," § 3.

§ 1. The relation.

A subagency created by a general agent of an insurance company *held* to create no contract of agency between the subagent and the company which could be enforced against the latter after the removal of the general agent.—Union Casualty & Surety Co. v. Gray (C. C. A.) 422.

§ 2. Mutual rights, duties, and liabilities.

A principal cannot be made liable to a subagent appointed by his general agent, where such principal in the contract with his general agent has expressly stipulated that the general agent is to be responsible to the principal for the acts and conduct of his subagents, and that in no case and under no circumstances shall the

principal be liable for commissions or compensation to such subagents.—Union Casualty & Surety Co. v. Gray (C. C. A.) 422.

§ 3. Rights and liabilities as to third persons.

An admission in an affidavit of defense *held* not inconsistent with the defense subsequently pleaded.—Union Casualty & Surety Co. v. Gray (C. C. A.) 422.

PRINCIPAL AND SURETY.

See "Bonds."

§ 1. Creation and existence of relation.

A surety on the bond of a contractor with a city for public work, who assumes and completes the work after its abandonment by his principal, is subrogated, so far as necessary to protect him from loss, to all rights which the city might have enforced against the contractor, if it had declared the contract forfeited and completed the work itself.—First Nat. Bank v. City Trust, Safe Deposit & Surety Co. (C. C. A.) 529.

The surety on the bond of a contractor with a city for paving, which completed the contract on its abandonment by the contractor, *held* entitled by subrogation to a sum due from the city at the time of the abandonment as against an assignee of such sum from the contractor.—First Nat. Bank v. City Trust, Safe Deposit & Surety Co. (C. C. A.) 529.

§ 2. Nature and extent of liability of surety.

In computing the pro rata to be paid creditors of a defaulting contractor by the surety on his bond, claims which have been acquired by a third party who has contracted to indemnify the surety should be considered.—Thomas Laughlin Co. v. American Surety Co. (C. C. A.) 627; Blake v. Same, Id.; Boyd v. Same, Id.; Cleaves v. Same, Id.; Post v. Same, Id.; Johnson v. Same, Id.

A surety's liability does not ordinarily extend beyond the penal sum of the bond, unless he has in some way resisted or obstructed the recovery of the claim against him.—Thomas Laughlin Co. v. American Surety Co. (C. C. A.) 627; Blake v. Same, Id.; Boyd v. Same, Id.; Cleaves v. Same, Id.; Post v. Same, Id.; Johnson v. Same, Id.

§ 3. Remedies of creditors.

Laches on the part of creditors in suing to subject to their claims property conveyed by the debtor to secure his sureties may defeat the right.—Darnold v. Simpson (C. C.) 368.

Creditors, wishing to subject to their debt property conveyed by their debtor to secure his sureties, must bring their action within the statutory period of 10 years.—Darnold v. Simpson (C. C.) 368.

PRIORITIES.

Between liens and mortgage on railroad, see "Railroads," § 1.
Of claims against estate of bankrupt, see "Bankruptcy," § 8.

PRIVILEGED COMMUNICATIONS.

Defamatory communications, see "Libel and Slander," § 1.

PROBABLE CAUSE.

For prosecution, see "Malicious Prosecution," § 2.

PROCESS.

In actions against particular classes of parties.

Foreign corporation, see "Corporations," § 7.

In particular actions or proceedings.

On appeal, see "Appeal and Error," § 3.

Particular forms of writs or other process.

See "Injunction."

PROMISSORY NOTES.

See "Bills and Notes."

PROPERTY.

See "Mines and Minerals"; "Shipping"; "Trade-Marks and Trade-Names."
Constitutional guaranties of rights of property, see "Constitutional Law," § 3.
Taking for public use, see "Eminent Domain."

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 1.
Of injury, see "Negligence," § 2.

PUBLIC DEBT.

See "Counties," § 2; "Municipal Corporations," § 2.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 1.

PUBLIC LANDS.

Mineral lands, see "Mines and Minerals," § 1.

§ 1. Government ownership.

Under Act Cong. Feb. 25, 1885 (23 Stat. 321), the fencing of land by the owner in good faith is not unlawful, though, in conjunction with other fences, unclaimed public lands are thereby enclosed.—Potts v. United States (C. C. A.) 52.

Timber cut off land at a distance from a railroad of from 17 to 23 miles by air line, 20 to 25 miles by wagon road, and 22 to 26 miles by a river, *held* to be cut from "adjacent" lands, within the permission granted to railroads by Act March 3, 1875, § 1.—United States v. St. Anthony R. Co. (C. C. A.) 722.

In Act March 3, 1875, § 1, the meaning of the word "adjacent," as applied to public lands, should be determined by the evidence in each particular case.—United States v. St. Anthony R. Co. (C. C. A.) 722.

PUBLIC USE.

Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 2.

PUNISHMENT.

Fines, see "Fines."
For violation of bankrupt act, see "Bankruptcy," § 13.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 2.

RAILROADS.

See "Street Railroads."
As employers, see "Master and Servant."
Carriage of goods and passengers, see "Carriers."
Taxation of railroad property, see "Taxation," § 1.

§ 1. Indebtedness, securities, liens, and mortgages.

To a suit by a creditor of a railroad company to enforce his claim to property which was sold under foreclosure against such company and has become the property of a new company, the trustee for bondholders of the new company, as well as a corporation owning its stock, should be made parties.—Wenger v. Chicago & E. R. Co. (C. C. A.) 34.

A sale of railroad property, on foreclosure proceedings instituted in regular course and for the honest purpose of enforcing the rights of the bondholders, and its purchase by a reorganization committee, is not fraudulent per se merely because, under the plan of reorganization, the stockholders of the old company may be given some interest in securities of the new in exchange for their stock; but actual fraud by which general creditors were affected must be shown.—Wenger v. Chicago & E. R. Co. (C. C. A.) 34.

A judgment obtained against a railroad company, after its property has been placed in the hands of receivers in a suit to foreclose a mortgage thereon, for a tort committed by the company prior to the receivership, is not entitled to priority of payment over claims of the mortgage bondholders from the earnings of the receivership.—Fidelity Ins., Trust & Safe Deposit Co. v. Norfolk & W. R. Co. (C. C.) 389.

The statute of North Carolina, giving priority to a judgment in tort over any mortgage executed by a corporation, as against the property or earnings of the corporation, can operate only on property within the state, and has no application to a case where, prior to the rendition of a judgment against a railroad company for a tort, all its property within the state had been sold in foreclosure proceedings.—Fidelity Ins., Trust & Safe Deposit Co. v. Norfolk & W. R. Co. (C. C.) 389.

§ 2. Receivers.

A railroad corporation does not go out of existence because of the appointment of receivers of its property, and may be sued and a judgment obtained against it notwithstanding the receivership; but, where the cause of action arose before the appointment of the receivers, such judgment does not constitute a debt of the receivership, whether the receivers were parties to it or not.—Fidelity Ins., Trust & Safe Deposit Co. v. Norfolk & W. R. Co. (C. C.) 389.

§ 3. Operation.

One who, knowing that a conductor has no authority to grant free transportation, enters a train with the intention not to pay his fare, under an understanding with the conductor, *held* a trespasser, to whom the only duty of the company is to abstain from willful or reckless injury.—Purple v. Union Pac. R. Co. (C. C. A.) 123.

One who rides on a train which he knows, or with diligence would know, is prohibited from carrying passengers, is a trespasser, and not a passenger.—Purple v. Union Pac. R. Co. (C. C. A.) 123.

In the absence of any rule permitting freight trains to carry passengers, the presumption is that one riding for his own convenience on such train is a trespasser.—Purple v. Union Pac. R. Co. (C. C. A.) 123.

One about to board a train, who has knowledge of facts which would put a prudent person on inquiry as to whether the train is allowed to carry passengers, is charged with knowledge of the facts which diligent inquiry would disclose.—Purple v. Union Pac. R. Co. (C. C. A.) 123.

A railroad company must exercise reasonable care to provide the most effective contrivances in known use to prevent escape of sparks and coals, but it is not an insurer of their completeness or perfection.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

Where the engine which alone could have set fire is identified, testimony that other engines set fires or threw sparks is incompetent, in the absence of proof of similar conditions.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

Where the engine which alone could have set the fire is identified, and its spark arrester is without holes punched in it, evidence that engineers were accustomed to punch such holes is inadmissible.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

Where the engine is not identified, and the issue is whether or not some unknown engine set the fire, testimony that other engines, at other near times and places, set fire or threw

sparks, is competent.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

In an action by a father to recover for the death of his minor son, caused by the negligence of a railroad company at a crossing, evidence considered, and *held*, that the question of contributory negligence of the deceased should have been submitted to the jury.—Hemingway v. Illinois Cent. R. Co. (C. C. A.) 843.

The fact that persons were accustomed to walk along the railroad tracks at the place where an accident occurred, with the knowledge of and without objection from the railroad company and its servants, did not relieve such persons from the exercise of ordinary care while on the tracks.—King v. Illinois Cent. R. Co. (C. C. A.) 855.

Under Code Miss. 1892, § 3549, the limit within which a backing railroad train is required to be preceded by a walking employé is not exceeding 300 feet from the building a part of which is used as a passenger depot.—King v. Illinois Cent. R. Co. (C. C. A.) 855.

Where a man in vigorous bodily and mental health, with good hearing and sight, with nothing to obstruct the vision, stepped on and walked along a railroad track on which part of a freight train was backing at a rate of eight miles an hour, and was overtaken and killed, he was guilty of contributory negligence.—King v. Illinois Cent. R. Co. (C. C. A.) 855.

In an action against a railroad company for running over a man walking on the track, evidence considered, and *held* not to show such wanton recklessness or gross negligence as to shut out the defense of contributory negligence.—King v. Illinois Cent. R. Co. (C. C. A.) 855.

Evidence considered, and *held* to support a finding that plaintiff, who was caught between a railroad train and a station platform, and injured, was guilty of contributory negligence in attempting to cross the track ahead of the train after he saw it approaching.—Alexander v. Louisville & N. R. Co. (C. C.) 774.

RATIFICATION.

Of mortgage of married woman's separate estate, see "Husband and Wife," § 1.

RECEIVERS.

In action to foreclose mortgage, see "Mortgages," § 1.
Of corporations in general, see "Corporations," § 4.
Of railroad companies, see "Railroads," § 2.

§ 1. Title to and possession of property.

A federal court will see that the rights of an attaching creditor in a state court, who surrenders the property to its receiver, are protected in accordance with the stipulation under which such surrender is made.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C.) 659.

Where an attaching creditor surrenders the attached property to a receiver appointed in a suit against the debtor, who claims the same, under a stipulation that such surrender shall be without prejudice to his legal rights, which is approved by the court, it does not operate to terminate the attachment; but the possession of the receiver is his possession, as against all other claimants.—Central Trust Co. of New York v. Worcester Cycle Mfg. Co. (C. C.) 659.

§ 2. Management and disposition of property.

A court, having possession of property through its receiver, may authorize him to lease the same.—Farmers' Loan & Trust Co. v. Eaton (C. C. A.) 14.

Receiver's lease should not be given for too long a term, and, if necessary, right to cancel it before its expiration should be reserved.—Farmers' Loan & Trust Co. v. Eaton (C. C. A.) 14.

Lessee under receiver's lease *held* entitled to damages, where ousted by order of court prior to its expiration.—Farmers' Loan & Trust Co. v. Eaton (C. C. A.) 14.

A receiver of a small Kansas railroad had no right to rent offices in New York without the court's express sanction.—Braman v. Farmers' Loan & Trust Co. (C. C. A.) 18.

Agreement made by New Orleans Waterworks Company with drainage commission respecting removal of water mains and pipes at former's expense *held* not binding on receiver afterwards appointed for the company on behalf of bondholders.—Moore v. New Orleans Waterworks Co. (C. C.) 380.

§ 3. Accounting and compensation.

Claim for $2,952 for hotel bills in New York, incurred by receiver of small Kansas railroad, *held* properly disallowed.—Braman v. Farmers' Loan & Trust Co. (C. C. A.) 18.

$12,000 *held* a reasonable compensation for two years' services as receiver of a railroad 60 miles in length.—Braman v. Farmers' Loan & Trust Co. (C. C. A.) 18.

RECORDS.

As evidence, see "Evidence," § 4.
Failure to record mortgage as badge of fraud, see "Fraudulent Conveyances," § 1.

Of judicial proceedings.

Transcript on appeal or writ of error, see "Appeal and Error," § 4.

Of particular instruments.

See "Chattel Mortgages," § 2.

REFERENCE.

In bankruptcy proceedings, see "Bankruptcy," § 6.

REFORMATION OF INSTRUMENTS.

§ 1. Right of action and defenses.

A court of equity has jurisdiction to reform a release in which through a mutual mistake

the name of the party paying the consideration was erroneously stated, and by inserting therein a part of the consideration which in fact entered into the settlement, whether the same was omitted through mistake of fact or of law.—Chicago & A. Ry. Co. v. Green (C. C.) 676.

REGISTRATION.

Of chattel mortgage, see "Chattel Mortgages," § 2.

RELEASE.

See "Compromise and Settlement"; "Payment."

REMAND.

Of cause removed from state court, see "Removal of Causes," § 4.

REMEDY AT LAW.

Effect on jurisdiction of equity, see "Equity," § 1.

REMOVAL OF CAUSES.

§ 1. Citizenship or alienage of parties.
Under Rev. St. Ohio, § 3305, an action by a citizen of the state, brought in the state courts, for a joint tort against the lessor of a railroad, a state corporation, and the receivers of the lessee, citizens of another state, *held* improperly removed to a federal court on the petition of the receivers.—Central Ohio R. Co. v. Mahoney (C. C. A.) 732.

§ 2. Amount or value in controversy.
In a suit to recover excessive premiums paid to a life insurance company, interest on the same cannot be added and treated as principal to make the amount sufficient to give a federal court jurisdiction.—Simmons v. Mutual Reserve Fund Life Ass'n (C. C.) 785.

In an action to recover the present value of a life insurance policy, the amount in controversy, for the purpose of determining whether the cause is removable, is the present value of the policy as alleged in the declaration.—Simmons v. Mutual Reserve Fund Life Ass'n (C. C.) 785.

§ 3. Proceedings to procure and effect of removal.
A circuit court of the United States cannot entertain a cause on removal from a state court, unless the removal bond required by statute has been duly executed by the principal and surety.—Clark v. Guy (C. C.) 783; In re Coe's Estate, Id.

The time within which a petition for the removal of a cause from a state to a federal court may be filed is not extended by the filing of a plea to the jurisdiction.—Olds v. City Trust, Safe Deposit & Surety Co. (C. C.) 975.

§ 4. Remand or dismissal of cause.
Where it is doubtful whether or not there is a separable controversy, and citizens of the state are on both sides of the same, the cause will be remanded.—Ernst v. American Spirits Mfg. Co. (C. C.) 981.

§ 5. Proceedings in cause after removal.
The removal of a cause from a state to a federal court does not admit that it was rightfully pending in the state court, nor deprive the defendant of the right to move for the abatement of an attachment by which that court acquired jurisdiction.—Corbitt v. Farmers' Bank (C. C.) 602.

REQUESTS.

For instructions to jury in civil actions, see "Trial," § 3.

RESCISSION.

Cancellation of written instrument, see "Cancellation of Instruments."

RES JUDICATA.

See "Judgment," § 1.

REVENUE.

See "Customs Duties"; "Taxation."

REVIEW.

See "Appeal and Error"; "Criminal Law," § 2; "Justices of the Peace," § 1.
Of appraisal of goods subject to duty, see "Customs Duties," § 3.

REVOCATION.

Of discharge of bankrupt, see "Bankruptcy," § 9.

RISKS.

Assumed by employé, see "Master and Servant," § 5.
Within insurance policy, see "Insurance," § 5.

SALES.

See "Vendor and Purchaser."
Requirements of statute of frauds, see "Frauds, Statute of," § 1.

SALVAGE.

§ 1. Amount and apportionment.
A tug awarded $50 as salvage compensation for towing a schooner from a pier, near which was a fire, where the schooner was not in serious peril.—The William P. Hood (D. C.) 983.

SATISFACTION.

See "Compromise and Settlement"; "Payment."

SEAMEN.

Shipping articles construed, and *held* to create a contract for the voyage, and not for a term of years.—The Falls of Keltie (D. C.) 357.

Vessel *held* liable to seaman, compelled by master to continue work after his arm had been broken.—The Eva B. Hall (D. C.) 755.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 1.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 1.

SET-OFF AND COUNTERCLAIM.

Against claim of creditor by bankrupt, see "Bankruptcy," § 8.
Set-off of new credit by preferred creditor, see "Bankruptcy," § 5.

§ 1. Operation and effect.

In an action to recover the contract price of lighthouse lanterns constructed for the United States, where defendant failed to sustain defense set up and withdrew its counterclaim, plaintiff was entitled to judgment for the amount claimed.—Atlanta Mach. Works v. United States (C. C.) 364.

SETTLEMENT.

See "Account Stated"; "Compromise and Settlement"; "Payment."
By partners, see "Partnership," § 1.

SHERIFFS AND CONSTABLES.

See "United States Marshals."

SHIPPING.

See "Admiralty"; "Collision"; "Maritime Liens"; "Salvage"; "Seamen"; "Towage"; "Wharves."

§ 1. Charters.

The owner is entitled to recover from a charterer the amount necessarily expended by the master in trimming a cargo after loading, made necessary by the fact that the cargo was not in proper condition, or that the ship was loaded at a place where she could not "always lie afloat," as required by the charter.—Carbon Slate Co. v. Ennis (C. C. A.) 260; Bacon v. Same, Id.

A charterer *held* liable for dead freight under a charter requiring him to furnish a full cargo.—Carbon Slate Co. v. Ennis (C. C. A.) 260; Bacon v. Same, Id.

§ 2. Liabilities of vessels and owners in general.

A drayman, killed while assisting to unload a heavy article from a ship by reason of the breaking of the ship's tackle, *held* not guilty of contributory negligence.—The Schooner Robert Lewers Co. v. Kekauoha (C. C. A.) 849.

The breaking of a chain furnished and used by the officers of a ship in unloading a heavy article, of which removal they had sole charge, if unexplained, is prima facie evidence of negligence, which authorizes a judgment against the owners of the ship for damages for the death of a person caused thereby, in the absence of proof of contributory negligence.—The Schooner Robert Lewers Co. v. Kekauoha (C. C. A.) 849.

A ship is not liable for injury to a stevedore in unloading the ship, through negligence of the winchmen, though they were members of the ship's crew; they at the time being under a special contract of hire, either for the consignee or the head stevedore.—The Turquoise (D. C.) 402.

Inspection of chain by ship's officers, which broke, injuring a stevedore, *held* sufficient to relieve it from negligence. — The Drummond (D. C.) 976.

A vessel *held* not subject to libel by administrator of workman engaged in repairing, and who was injured by falling into an open hatch in a place insufficiently lighted.—The Thyra (D. C.) 978.

§ 3. Carriage of goods.

The involuntary abandonment of a vessel by her master and crew under stress of weather, without any actual intention to renounce the contract of affreightment between the ship and cargo owners, does not terminate such contract.—The Eliza Lines (C. C. A.) 307.

The proceeds of a cargo sold by order of court *held* properly taken as determining its value, for the purpose of adjusting the respective rights of ship and cargo.—The Eliza Lines (C. C. A.) 307.

Where the resumption of a voyage after a disaster at sea is prevented by the unwarranted action of the cargo owners, the ship is entitled to recover the net freight she would have earned, less the net amount she actually earned, or should reasonably have earned during the time it would have taken her to complete the voyage.—The Eliza Lines (C. C. A.) 307.

An action to recover the penalty for a violation of the Harter act (Act Cong. Feb. 13, 1893), requiring owners and agents of vessels to issue bills of lading to shippers, could not be maintained by party himself having no interest in the lumber shipped, but put forward by association of lumber exporters merely to make test case.—The Minnehaha (D. C.) 672.

A carrier *held* liable for breaking a piece of marble; it having been stowed without proper support under it, and with cargo supported by it.—The Victoria (D. C.) 962.

§ 4. Carriage of passengers.

One who sent baggage to the agent of a steamship company at its pier, intending to

purchase a ticket on one of the company's vessels, which he did, but not until after the baggage had been lost, has no lien upon the vessel for such loss which will support an action in rem in a court of admiralty.—The Priscilla (C. C. A.) 836.

No lien upon a vessel arises for loss of a passenger's baggage, unless at the time of such loss either the passenger has been received on board, or his baggage has been put into the custody or control of the vessel.—The Priscilla (C. C. A.) 836.

§ 5. **Demurrage.**

A charter construed with respect to the provision fixing the time for the commencement of lay days for loading, and the charterer *held* liable for dispatch money thereunder.—Carbon Slate Co. v. Ennis (C. C. A.) 260; Bacon v. Same, Id.

Provision of a bill of lading that the vessel should be discharged in her turn, or be compensated in demurrage, construed.—Evans v. Blair (C. C. A.) 616.

Where one of two cargoes of coal, both to be discharged by a railroad company, is its own property, while the other is merely consigned to its care, to be forwarded over its road, such fact does not justify giving the latter precedence in discharging, when by her bill of lading the former is entitled to be discharged in her turn.—Evans v. Blair (C. C. A.) 616.

Under the custom of Atlantic ports, in the absence of provision in the bill of lading, the consignee has the privilege of designating the place of discharging, subject to the limitation that the vessel shall not thereby be delayed by an arbitrary exercise of such right.—Evans v. Blair (C. C. A.) 616.

§ 6. **Limitation of owner's liability.**

To secure the statutory limitation of liability, the owner of a stranded vessel, which is not surrendered, must pay her value as she lay on the rocks, without addition of the increase in value by salvage operations.—Pacific Coast Co. v. Reynolds (C. C. A.) 877.

Pending freight, which must be surrendered by the owner of a wrecked vessel to secure the statutory limitation of liability, is the freight earned; and, where the voyage is broken up before reaching the port of destination, there is ordinarily no freight earned, even though prepaid.—Pacific Coast Co. v. Reynolds (C. C. A.) 877.

In proceedings by a shipowner for limitation of liability on account of the wrecking of the ship, passage money prepaid by passengers for the voyage, under contracts providing that it shall not be refunded in case of wreck, must be treated as freight earned and surrendered by the petitioner.—Pacific Coast Co. v. Reynolds (C. C. A.) 877.

SLANDER.

See "Libel and Slander."

SLAVES.

Though the system of peonage in New Mexico was the moving cause for the enactment of the statute (14 Stat. 546; Rev. St. U. S. §§ 1990, 1991, 5526, 5527) abolishing and prohibiting peonage, its title and the senate debates showing that to be the fact, the act does more than merely abolish an existing system, and makes criminal certain acts which would tend to sustain or re-establish the system.—In re Lewis (C. C.) 963.

Under Const. Amend. art. 13, congress has the power to pass laws prohibiting involuntary servitude in the form of peonage.—In re Lewis (C. C.) 963.

SMUGGLING.

See "Customs Duties," § 5.

SPECIFIC PERFORMANCE.

§ 1. **Contracts enforceable.**

Before a street railroad company can complain, in a court of equity, of the violation by a city of its contract rights, it must show that it has a contract which is free from fraud and enforceable at law, and one which is fair and reasonable in all its parts and within the power of the city lawfully to enter into.—Logansport Ry. Co. v. City of Logansport (C. C.) 688.

SPEED.

Of vessels in fog, see "Collision," § 5.

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Of case of facts for purpose of review, see "Appeal and Error," § 4.

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STOCKHOLDERS.

Of corporations, see "Corporations," § 1.

STREET RAILROADS.

§ 1. Establishment, construction, and maintenance.

A traction company, organized under the law of New Jersey (Gen. Pub. Laws 1893, c. 172), *held* to have power to lease its property and franchises to another corporation organized under the same act.—Dickinson v. Consolidated Traction Co. (C. C.) 232.

Under the statute of Indiana, a general consent given by a city council to a street railroad

company to occupy any street in the city does not obviate the necessity of a special consent to the location and construction of the road upon any particular street selected before the company acquires any vested right therein.—Logansport Ry. Co. v. City of Logansport (C. C.) 688.

A grant by a city council to a company of the right to build and operate railroads on any or all streets of the city as it may from time to time elect, even if valid, is merely an offer which may be withdrawn as to any particular street at any time before it has been accepted and acted upon as to such street.—Logansport Ry. Co. v. City of Logansport (C. C.) 688.

The common council of a city in Indiana, vested by statute with exclusive authority, jurisdiction, and power over the streets of the city, cannot alienate such power by a grant to a street railroad company in perpetuity of the right to build and operate railroads through such streets as it may from time to time elect to use and occupy.—Logansport Ry. Co. v. City of Logansport (C. C.) 688.

The statutes of Indiana do not confer on the common council of a city the power to grant to a street railroad company either an exclusive or a perpetuated right to use its streets for railway purposes.—Logansport Ry. Co. v. City of Logansport (C. C.) 688.

Under the law of Indiana authority to lay tracks and operate a street railroad on a public street can only be conferred by statute in express words, or by language from which such power must be necessarily implied.—Logansport Ry. Co. v. City of Logansport (C. C.) 688.

SUBROGATION.

Where a county funds its outstanding debts, and issues bonds, and destroys the warrants evidencing such debts, and the bonds are bought in the open market, and afterwards held void by the courts, the purchaser of the bonds *held* entitled to be subrogated to the rights of the original warrant holders.—Coffin v. Board of Com'rs of Kearney County (C. C.) 518.

SUICIDE.

By insured, see "Insurance," § 5.

SUMMARY PROCEEDINGS.

Recovery of possession by landlord, see "Landlord and Tenant," § 2.

SUPPLEMENTAL PLEADING.

See "Equity," § 2.

SURETYSHIP.

See "Principal and Surety."

SURRENDER.

Of term, see "Landlord and Tenant," § 1.

TARIFF.

See "Customs Duties."

TAXATION.

See "Customs Duties."

§ 1. Levy and assessment.

The approach to a bridge across the Ohio river, built on the right of way of a leased road, but owned by the lessee, *held* taxable under the statutes of Ohio as a "structure," the property of the lessee, separate from the property of the lessor.—Cowen v. Aldridge (C. C. A.) 44.

The value of the capital stock of a corporation and its franchise, for purpose of taxation, *held* to be the net earnings capitalized at the rate of 6 per cent. and equalized to the assessment of the other property of the state.—Chicago Union Traction Co. v. State Board of Equalization (C. C.) 557; Chicago Consol. Traction Co. v. Same, Id.; South Chicago City Ry. Co. v. Baird, Id.; Chicago Edison Co. v. Raymond, Id.; Chicago City Ry. Co. v. Same, Id.; People's Gaslight & Coke Co. v. Same, Id.; Chicago Tel. Co. v. Same, Id.

Under Const. Ill. art. 9, § 1, and Hurd's Rev. St. 1899, c. 120, §§ 3, 4, relating to taxation, the state board of equalization *held* required, not only to assess the capital stock of corporations, but also to equalize such assessment with the assessment of other property.—Chicago Union Traction Co. v. State Board of Equalization (C. C.) 557; Chicago Consol. Traction Co. v. Same, Id.; South Chicago City Ry. Co. v. Baird, Id.; Chicago Edison Co. v. Raymond, Id.; Chicago City Ry. Co. v. Same, Id.; People's Gaslight & Coke Co. v. Same, Id.; Chicago Tel. Co. v. Same, Id.

§ 2. Collection and enforcement against persons or personal property.

The reassessment of certain corporations for 1900 by the state board of equalization *held* not to be the independent quasi judicial judgment of the board.—Chicago Union Traction Co. v. State Board of Equalization (C. C.) 557; Chicago Consol. Traction Co. v. Same, Id.; South Chicago City Ry. Co. v. Baird, Id.; Chicago Edison Co. v. Raymond, Id.; Chicago City Ry. Co. v. Same, Id.; People's Gaslight & Coke Co. v. Same, Id.; Chicago Tel. Co. v. Same, Id.

Equity will enjoin the collection of taxes levied on assessments of corporate capital stock not made by the state board's independent judgment.—Chicago Union Traction Co. v. State Board of Equalization (C. C.) 557; Chicago Consol. Traction Co. v. Same, Id.; South Chicago City Ry. Co. v. Baird, Id.; Chicago Edison Co. v. Raymond, Id.; Chicago City Ry. Co. v. Same, Id.; People's Gaslight & Coke Co. v. Same, Id.; Chicago Tel. Co. v. Same, Id.

The court will require the corporations to pay their proper taxes as a condition for the issuance of an injunction restraining the collection of taxes on assessments of corporate capital

stock not made by the state board's independent judgment.—Chicago Union Traction Co. v. State Board of Equalization (C. C.) 557; Chicago Consol. Traction Co. v. Same, Id.; South Chicago City Ry. Co. v. Baird, Id.; Chicago Edison Co. v. Raymond, Id.; Chicago City Ry. Co. v. Same, Id.; People's Gaslight & Coke Co. v. Same, Id.; Chicago Tel. Co. v. Same, Id.

TERMS.

Of leases, see "Landlord and Tenant," § 1.

TERRITORIES.

Rev. St. U. S. § 858, relating to competency of witnesses as to transactions with decedents, does not apply to territorial courts.—Corbus v. Leonhardt (C. C. A.) 10.

TESTAMENT.

See "Wills."

TIMBER.

On public lands, see "Public Lands," § 1.

TIME.

Of taking proceedings for removal of cause, see "Removal of Causes," § 3.

TORTS.

By particular classes of parties.

Employés, see "Master and Servant," § 8.

Particular torts.

See "Conspiracy," § 1; "Libel and Slander"; "Malicious Prosecution"; "Negligence."

Maritime torts, see "Collision."

TOWAGE.

Collisions with tugs and vessels in tow, see "Collision," § 4.

Evidence *held* to sustain a finding that there was a common understanding and intention, between the parties to a contract for towage services to be rendered to a dredge and scows, that the services were rendered upon the credit of the vessels, and not of the owner.—The Newport (C. C. A.) 713.

An admiralty lien for towage is inferior to a statutory lien for repairs; the towage having been performed more than six months before, without effort to collect therefor till after, the repairs.—The Sleepy Hollow (D. C.) 367.

A contract for towing a vessel into port *held* not invalid, as extortionate, in view of the peril of the tow, which rendered the service in the nature of a salvage.—The Atkins Hughes (D. C.) 410; The Alsenborn, Id.

TOWNS.

See "Counties"; "Municipal Corporations."

TRADE-MARKS AND TRADE-NAMES.

§ 1. Infringement and unfair competition.

Swift & Co. *held* entitled to a preliminary injunction, on the ground of unfair competition, to restrain the use of the name "Swift" to designate competing products.—Swift & Co. v. Groff (C. C.) 605.

TRADE UNIONS.

Rights of employés to join labor unions and induce others to do so considered.—United States v. Weber (C. C.) 950.

TRESPASS.

Ejection of trespasser, see "Carriers," § 3.

Injuries to trespassers, see "Railroads," § 3.

TRIAL.

See "Witnesses."

By jury in bankruptcy proceedings, see "Bankruptcy," § 2.

Trial of particular civil actions or proceedings.

See "Libel and Slander," § 2; "Negligence," § 4.

For injuries to passenger, see "Carriers," § 3.

For personal injuries, see "Master and Servant," § 7; "Railroads," § 3.

For United States marshal's fees, see "United States Marshals."

Suits in admiralty, see "Admiralty," § 3.

Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

§ 1. Reception of evidence.

The order of proof is largely within the discretion of the court, and the admission of evidence without the requisite preliminary or connecting proof is not prejudicial error, when such proof is subsequently introduced.—Swensen v. Bender (C. C. A.) 1.

Evidence of the character of the timbering in a tunnel, by the caving in of which a workman was injured, *held* admissible in an action for the injury, where there was evidence tending to show that it was defective and known to be so by the master.—Swensen v. Bender (C. C. A.) 1.

A writing which contains competent evidence on a material issue cannot be rejected because it also contains irrelevant evidence.—Southern Pac. Co. v. Schoer (C. C. A.) 466.

§ 2. Taking case or question from jury.

Where there is substantial evidence to establish each contention over an issue of fact, the issue is for the jury.—Goldsmith v. Thuringia Ins. Co. (C. C. A.) 914.

In action for malicious prosecution, question as to which of two prima facie cases was of greater weight *held* for the jury.—Ambs v. Atchison, T. & S. F. Ry. Co. (C. C.) 317.

§ 3. Instructions to jury.

If the charge of the court, in its own language, embraces all the points of law arising

in the case, it is not error to refuse further instructions requested, although they correctly state the law.—Swensen v. Bender (C. C. A.) 1.

A requested charge is properly refused, where covered by charges given.—Corbus v. Leonhardt (C. C. A.) 10.

It is not error to refuse to insert in a charge matters of common knowledge and experience of all men who have arrived at years of discretion, though it is not error to insert such statements.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

Where a rule of law has been fairly submitted in the general charge, it is not error to refuse to repeat it in the words of a request.—Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 133.

Instruction that positive testimony of witnesses that a whistle was blown is entitled to more weight than testimony of other witnesses that they did not hear it *held* too broad, without reference to credibility.—Delaware, L. & W. R. Co. v. Devore (C. C. A.) 155.

§ 4. Verdict.

A circuit court has power in a proper case to make a special submission of questions of fact to the jury as a preliminary to the general submission of the case or the direction of a verdict.—City of Elizabeth v. Fitzgerald (C. C. A.) 547.

§ 5. Trial by court.

Where a jury was waived in the circuit court, and, with the judgment for plaintiff, the court filed findings of fact, referring to a certain case as identical, and such case contained no specific findings of fact, but the opinion gave facts intermingled with conclusions of law, the case cannot be reviewed on appeal.—Olcott v. Ennis-Calvert Compress Co. (C. C. A.) 907.

TRUSTS.

Trust deeds, see "Chattel Mortgages"; "Mortgages."

§ 1. Appointment, qualification, and tenure of trustee.

While a trustee may be removed by a majority of the cestuis que trustent, when given power by the instrument creating the trust, notwithstanding the pendency of a suit by him to enforce the trust, in such case the removal is subject to the approval of the court which has acquired jurisdiction over the trust.—March v. Romare (C. C.) 200.

Where a trustee in a mortgage has brought suit to foreclose on demand of a minority of the bondholders, as required by the terms of the instrument, the majority will not be permitted to remove him without cause, and to substitute another as complainant, merely because they oppose the foreclosure, which is a matter of right in the minority, although the majority are given the right of removal and appointment by the mortgage.—March v. Romare (C. C.) 200.

TUGS.

See "Towage."

UNDERTAKINGS.

See "Bonds."

UNFAIR COMPETITION.

See "Trade-Marks and Trade-Names," § 1.

UNIONS.

See "Trade Unions."

UNITED STATES.

See "Army and Navy"; "Customs Duties"; "Territories,"§ 2: "United States Commissioners"; "United States Marshals."
Courts, see "Courts," § 1; "Removal of Causes."
Indians, see "Indians."

§ 1. Government and officers.

In an action by the United States against a disbursing officer to recover public funds which were abstracted from defendant's possession without his knowledge, and from which he received no benefit, where no demand is proved, interest is not recoverable prior to the date of the writ.—United States v. Butler (C. C.) 582.

§ 2. Property, contracts, and liabilities.

A contractor, who agreed to construct government work in accordance with detail drawings to be thereafter furnished, cannot recover for extra work because the drawings first furnished were changed before the work was done, so as to require additional work.—Venable Const. Co. v. United States (C. C.) 763.

A contractor for the construction of a government fortification, who on the request of the engineer in charge and without objection erects a more expensive building to be used for testing cement than required under his contract, is not entitled to recover the extra cost from the United States.—Venable Const. Co. v. United States (C. C.) 763.

A contractor for government work who is required to use a quantity of sand in the work different from that agreed upon at the time the contract was made with the engineer in charge, who made the same on behalf of the government, is entitled to recover the extra cost to him of such sand.—Venable Const. Co. v. United States (C. C.) 763.

A contractor for government work is entitled to recover for extra work and materials, not fairly within his contract, which are required of him by the engineer in charge, who has authority to act for the government in the matter, notwithstanding a provision of his contract that no claim for extras shall be made or allowed unless previously agreed upon in writing.—Venable Const. Co. v. United States (C. C.) 763.

§ 3. **Actions.**
Evidence considered, in an action by the United States to charge a disbursing officer of the army with sums stolen by a clerk, and *held* insufficient to warrant a recovery.—United States v. Butler (C. C.) 582.

Where the accounts of a disbursing officer of the army, which were duly audited and allowed, were restated by the treasury department nearly 10 years later, and a claim made against the officer for a sum shown to be due from him by the restatement, the burden rests upon the United States to falsify the accounts previously allowed by clear and satisfactory proofs.—United States v. Butler (C. C.) 582.

UNITED STATES COMMISSIONERS.

Where an accused was indicted in a federal court in Texas, and was apprehended in Connecticut and brought before the clerk as United States commissioner, but the question of his removal was referred to the district judge, who admitted accused to bail and thereafter ordered his removal, the clerk was entitled to charge docket, final record, and transcript fees.—Marvin v. United States (D. C.) 225.

UNITED STATES MARSHALS.

Marshal *held* entitled to actual expenses for attempting to make an arrest, not exceeding $2 for each day actually spent.—United States v. Tisdale (C. C. A.) 883.

Marshal traveling into adjoining district to make arrest *held* entitled to mileage for distance traveled in such district, if deputized by the marshal of such district; the latter disclaiming fees.—United States v. Tisdale (C. C. A.) 883.

United States marshal, serving warrant and subpœnas on same trip, *held* entitled to mileage to furthest point traveled or actual expenses.—United States v. Tisdale (C. C. A.) 883.

Finding of facts in action by United States marshal against United States for fees *held* not sufficiently specific to comply with Act Cong. March 3, 1887.—United States v. Tisdale (C. C. A.) 883.

VALUE.

Limits of jurisdiction, see "Removal of Causes," § 2.

VENDOR AND PURCHASER.

§ 1. Remedies of vendor.
A plaintiff who contracted to sell a mining claim, to be paid for after he obtained a final receipt therefor, but who obtained such receipt only as to about half the quantity described in his location and contract, cannot maintain an action to recover the purchase money.—Griffin v. American Gold Min. Co. (C. C. A.) 887.

VERDICT.

In civil actions, see "Trial," § 4.

VERIFICATION.

Of pleading, see "Pleading," § 2.

VICE PRINCIPALS.

See "Master and Servant," § 4.

VILLAGES.

See "Municipal Corporations."

WAIVER.

See "Estoppel"; "Insurance," §§ 1, 4.

WAR.

See "Army and Navy."

WARRANTY.

By insured, see "Insurance," § 3.

WATERS AND WATER COURSES.

§ 1. Appropriation and prescription.
Where a mine owner, at the time of commencing a shaft which cut off the waters flowing into a creek which another mine owner had acquired the exclusive right to use, was cautioned by the latter against cutting off such water, he is bound with notice of the consequences of his acts.—Copper King v. Wabash Min. Co. (C. C.) 991.

Where a mining company has acquired the exclusive right to the use of the water of a certain creek in working its mines, another company has not the right, in developing its mine, by means of a shaft near such creek, to cut off and divert the waters flowing into it.—Copper King v. Wabash Min. Co. (C. C.) 991.

Where, in an action to restrain defendants from diverting water from a creek which plaintiff has acquired the exclusive right to use, the rights of the parties are in dispute, and a tempory injunction will work less hardship than its refusal, it should be granted.—Copper King v. Wabash Min. Co. (C. C.) 991.

§ 2. Public water supply.
Drawing water from a canal from one state into another to irrigate lands in the latter state is not necessarily a violation of the constitution or laws of the former state, though it reserved all its waters for itself and its citizens, so far as necessary.—Perkins County v. Graff (C. C. A.) 441.

Both the drainage commission of New Orleans and the New Orleans Waterworks Company are agencies of the state and city in providing for the public health and safety, and both are entitled to the support and protection

of the police power.—Moore v. New Orleans Waterworks Co. (C. C.) 380.

The water mains and pipes, as laid in the public streets of New Orleans and forming part of the waterworks system, are property of the New Orleans Waterworks Company.—Moore v. New Orleans Waterworks Co. (C. C.) 380.

WHARVES.

A company at whose wharf a vessel was unloading cargo for it *held* liable for injury to her by its superintendent removing her to a dangerous place, without knowledge of her master.—Smith v. Yellow Pine Co. (C. C. A.) 99.

Evidence considered, and *held* not to sustain the claim that an injury to the bottom of libelant's barge was received through the defective condition of the bottom of the river at defendant's wharf, but to show that it was due to a previous grounding of the barge on some rocks.—Fahy v. Society for Reformation of Juvenile Delinquents (D. C.) 760.

WILLS.

See "Executors and Administrators."

§ 1. Rights and liabilities of devisees and legatees.

Assets distributed to legatees remain ordinarily impressed with a trust in favor of unpaid creditors of the estate, and may be subjected by a suit in equity in any court of competent jurisdiction within the period permitted by the statute of limitations.—Hale v. Coffin (C. C.) 567.

After an estate has been fully administered and distributed, and thus passed out of the jurisdiction of the probate court, a federal court may entertain a suit to charge property in the hands of a distributee with a debt of the estate.—Hale v. Coffin (C. C.) 567.

The provision of Rev. St. Me. c. 87, limiting the time for bringing an action against an heir or devisee of a decedent to recover on a debt of the estate to one year after the right of action accrues, is a general limitation, applicable to all actions for that purpose, and is not limited to the special remedy provided by such chapter.—Hale v. Coffin (C. C.) 567.

In Rev. St. Me. c. 87, § 16, providing for suits against "heirs and devisees" to charge them with debts of the estate, and limiting the same, such words must be construed to include next of kin or legatees receiving personal property of an estate.—Hale v. Coffin (C. C.) 567.

A suit in equity by a Minnesota receiver against a legatee of a stockholder in an insolvent Minnesota corporation to recover an assessment made against the testatrix *held* barred by limitation under the statute of Maine.—Hale v. Coffin (C. C.) 567.

WITNESSES.

See "Evidence."

Application of United States statutes relating to competency of witnesses to territorial courts, see "Territories."

Experts, see "Evidence," § 6.

Opinions, see "Evidence," § 6.

§ 1. Competency.

Under Act May 17, 1884 (23 Stat. 24), the laws of Oregon in force at the time govern the competency of witnesses in the federal courts of Alaska.—Corbus v. Leonhardt (C. C. A.) 10.

In action by physician for services rendered decedent, certain testimony by plaintiff *held* not to relate to any transaction with or statement of decedent, and to be admissible.—Corbus v. Leonhardt (C. C. A.) 10.

WRITS.

Particular writs.

See "Habeas Corpus"; "Injunction."

Writ of error, see "Appeal and Error."

WRONGFUL ENFORCEMENT OF TAX.

See "Taxation," § 2.

YEAR.

Estates for years, see "Landlord and Tenant."

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.